OPINION OF ADVOCATE GENERAL TIZZANO

delivered on 5 February 2002 [1]

1. By order of 3 May 2000, which was received at the Registry of the Court on 19 May, the Arbeitsgericht Hamburg (Labour Court, Hamburg, Federal Republic of Germany) submitted two questions for a preliminary ruling under Article 234 EC regarding the interpretation of Directives 76/207/EEC [2] and 79/7/EEC [3] in the context of a dispute between a female employee who has reached pensionable age (60 years) and her public sector employer. In particular, the employee in question complains that for reasons of age she was not admitted to the German pre-retirement scheme, whereas male employees of the same age would have the right to participate in that scheme.

I — Legal background

A — *Community law*

2. Under Article 1 of Directive 76/207:

'1. The purpose of this Directive is to put into effect in the Member States the principle of equal treatment for men and women as regards access to employment, including promotion, and to vocational training and as regards working conditions and, on the conditions referred to in paragraph 2, social security. This principle is hereinafter referred to as "the principle of equal treatment."

2. With a view to ensuring the progressive implementation of the principle of equal treatment in matters of social security, the Council, acting on a proposal from the Commission, will adopt provisions defining its substance, its scope and the arrangements for its application.'

1 — Original language: Italian.

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

3 — Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security (OJ 1978 L 6, p. 24, hereinafter 'Directive 79/7').

3. Article 2 of Directive 76/207 provides that:

'1. For the purposes of the following provisions, the principle of equal treatment shall mean that there shall be no discrimination whatsoever on grounds of sex either directly or indirectly by reference in particular to marital or family status.

2. This Directive shall be without prejudice to the right of Member States to exclude from its field of application those occupational activities and, where appropriate, the training leading thereto, for which, by reason of their nature or the context in which they are carried out, the sex of the worker constitutes a determining factor.

3. This Directive shall be without prejudice to provisions concerning the protection of women, particularly as regards pregnancy and maternity.

4. This Directive shall be without prejudice to measures to promote equal opportunity for men and women, in particular by removing existing inequalities which affect women's opportunities in the areas referred to in Article 1(1).'

4. Pursuant to Article 5 of Directive 76/207:

'1. Application of the principle of equal treatment with regard to working conditions, including the conditions governing dismissal, means that men and women shall be guaranteed the same conditions without discrimination on grounds of sex.

2. To this end, Member States shall take the measures necessary to ensure that:

(a) any laws, regulations and administrative provisions contrary to the principle of equal treatment shall be abolished;

(b) any provisions contrary to the principle of equal treatment which are included in collective agreements, individual contracts of employment, internal rules of undertakings or in rules governing the independent occupations and professions shall be, or may be declared, null and void or may be amended;

(c) those laws, regulations and administrative provisions contrary to the principle of equal treatment when the concern for protection which originally inspired them is no longer well founded shall be revised; and that where similar provisions are included in collective agreements labour and management shall be requested to undertake the desired revision.'

5. Under Article 6 of Directive 76/207:

'Member States shall introduce into their national legal systems such measures as are necessary to enable all persons who consider themselves wronged by failure to apply to them the principle of equal treatment within the meaning of Articles 3, 4 and 5 to pursue their claims by judicial process after possible recourse to other competent authorities.'

6. Directive 79/7 was adopted on the basis of Article 1(2) of Directive 76/207 [4] with a view to ensuring the progressive implementation of the principle of equal treatment in matters of social security.

7. Article 3(1) of Directive 79/7 provides that:

'1. This Directive shall apply to:

(a) statutory schemes which provide protection against the following risks:

— sickness,

— invalidity,

— old age,

— accidents at work and occupational diseases,

— unemployment;

4 — See the first recital of Directive 79/7.

(b) social assistance, in so far as it is intended to supplement or replace the schemes referred to in (a).'

2. The principle of equal treatment shall be without prejudice to the provisions relating to the protection of women on the grounds of maternity.'

8. Under Article 4 of Directive 79/7:

9. By virtue of Article 5 of Directive 79/7:

'1. The principle of equal treatment means that there shall be no discrimination whatsoever on grounds of sex either directly, or indirectly by reference in particular to marital or family status, in particular as concerns:

'Member States shall take the measures necessary to ensure that any laws, regulations and administrative provisions contrary to the principle of equal treatment are abolished.'

— the scope of the schemes and the conditions of access thereto,

10. Article 6 of Directive 79/7 provides that:

— the obligation to contribute and the calculation of contributions,

— the calculation of benefits including increases due in respect of a spouse and for dependants and the conditions governing the duration and retention of entitlement to benefits.

'Member States shall introduce into their national legal systems such measures as are necessary to enable all persons who consider themselves wronged by failure to apply the principle of equal treatment to pursue their claims by judicial process, possibly after recourse to other competent authorities.'

11. Article 7(1)(a) of Directive 79/7 provides that:

'1. This Directive shall be without prejudice to the right of Member States to exclude from its scope:

(a) the determination of pensionable age for the purposes of granting old-age and retirement pensions and the possible consequences thereof for other benefits.'

B — *National law*

12. The conditions for entitlement to old-age pension are laid down in the Sozialgesetzbuch der Bundesrepublik Deutschland, 6. Buch (Social Code of the Federal Republic of Germany, Vol. 6; hereinafter 'SGB VI'), which on the basis of a series of variables [5] lays down various possible pensionable ages, all of which, however, are between 60 and 65 years (Paragraphs 35 to 40). In particular, it provides that employees of both sexes acquire entitlement at the latest upon completion of their 65th year of age (Paragraph 35 of the SGB VI), but at the age of 63 if they have a minimum contribution period of 35 years (Paragraph 36 of the SGB VI) or as early as 60 if for 24 months they have benefited from the pre-retirement scheme, which I shall describe in detail below (Paragraph 38 of the SGB VI). Pension entitlement may also be acquired at the age of 60, but only by female employees, if they meet other conditions that are particularly advantageous for the persons concerned (for example, a minimum period of insurance cover of only 15 years; Paragraph 39 of the SGB IV). [6] Naturally, early retirement has to be applied for by the person concerned, who could therefore also decide to continue working. In this regard, it emerged in the course of the proceedings that once pensionable age has been reached, female employees in the Federal Republic of Germany who have completed their 60th year of age and meet the conditions laid down in Paragraph 39 of the SGB VI may, as an alternative to drawing the old-age pension, continue to work either full-time or part-time, but in the latter case obviously on pay proportionate to the actual number of hours worked.

13. As I have just said, the date of entitlement to pension may be brought forward if the employee has benefited from the scheme for part-time employment on grounds of age (the so-called pre-retirement scheme; Paragraph 38 of the SGB VI). That scheme is governed by the Altersteilzeitgesetz (Law on part-time employment for older employees; hereinafter the 'AltTZG')

5 — Such as the length of insurance cover, the payment of compulsory social security contributions for a certain number of years, certain psychological and physical conditions (sex, serious invalidity or occupational incapacity), unemployment, the performance of a particular occupational activity (in the case of miners).

6 — The same pensionable age is laid down for those with serious disabilities or an occupational incapacity, unemployed persons and miners, given the particularly wearing nature of their work (Articles 37, 38 and 40 of the SGB VI).

of 23 July 1996, which has the dual objective of enabling employees of a certain age to make a gradual transition from working life to retirement and helping to reduce the unemployment rate (Paragraph 1 of the AltTZG), given that the employer is required at the same time to engage an unemployed person to work alongside the employee working under the pre-retirement scheme (Paragraph 3(1)(2) of the AltTZG).[7] Admission to that scheme is subject to two conditions: that the employee has completed his or her 55th year of age and that there is a pre-retirement agreement (whether individual, collective or company) between the employer and the employee (Paragraph 2(1) of the AltTZG). Participation in the pre-retirement scheme is encouraged on the one hand by provision for a higher wage, equal to 70% of the full-time net salary even if the employee's working hours are reduced to one-half (See Paragraph 3(1)(1) of the AltTZG) and on the other by financial support from the Bundesanstalt für Arbeit (Federal Labour Office; hereinafter the 'Bundesanstalt') to reimburse the employer (out of public funds earmarked to combat unemployment)[8] for 20% of the net basic salary and related social security contributions (Paragraph 4 of the AltTZG). The funding from the Bundesanstalt is subject to certain limits, however: in particular, it cannot continue for more than 5 years (Paragraph 4(1) of the AltTZG) and ceases when the employee becomes entitled to a pension, and in any case at the latest when the employee reaches the age of 65 (Paragraph 5(1)(1) and (2) of the AltTZG). In addition, the parties may agree that the pre-retirement agreement shall also cease to apply when the employee becomes entitled to a pension (Paragraph 8(3) of the AltTZG).

14. Under the relevant collective agreement on pre-retirement employment in effect at the time of the events to which the main proceedings relate (the Tarif-vertrag zur Regelung der Altersteilzeitarbeit of 5 May 1995; hereinafter the 'collective agreement'), the employer may, on conditions similar to those laid down in the AltTZG, allow full-time employees of either sex who have reached the age of 55 to join the pre-retirement scheme (Paragraph 2(1) of the collective agreement). Those who have already completed their 60th year and meet the requirements of Paragraph 2(1) may participate in the scheme as of right (Paragraph 2(2)), provided that there are no serious impediments on account of service or company organisation. Pre-retirement working, which must last for at least two years (Paragraph 2(3)),[9] may consist of full-time employment for half of the normal period ('Blockmodell', or block model) or part-time employment for the duration of the arrangement ('Teilzeitmodell', or part-time model; Paragraph 3(2)).

15. Under Paragraph 9(1) of the collective agreement, the pre-retirement employment relationship terminates on the date agreed in each individual agreement. However,

7 — That obligation also applies if, as in the case of the applicant in the main proceedings, the employee opts for the 'block model' pre-retirement formula (full-time work for half of the period for which he would otherwise have worked part-time); in that case, the unemployed person must be engaged after the employee retires (Paragraph 3(3) of the AltTZG).

8 — According to the explanation given at the hearing by the German Government.

9 — This provision obviously depends on Paragraph 38 of the SGB VI, mentioned above, which permits early retirement on condition that the employee has participated in a pre-retirement arrangement for 24 months.

subparagraph 2(a) of the same paragraph lays down, inter alia, that the relationship shall terminate in any case at the end of the month preceding that in which the employee becomes entitled to an old-age pension. In this way, as the German Government and the defendant in the main proceedings illustrated, the relationship terminates when, under Paragraph 5(1)(2) of the AltTZG, public financing from the Bundesanstalt ceases. This is to ensure that the employer does not have to bear the increased cost of employing workers of pensionable age under a pre-retirement scheme.

16. This is the complex German framework of law and agreements, which I have attempted to reconstruct on the basis of the documents supplied by the parties. If it is correct, I believe it is possible to summarise further and deduce for present purposes that the pre-retirement scheme leads to early retirement for an employee intending to take advantage of the scheme after reaching the age of 55 and at the latest until becoming entitled to pension. It must be borne in mind that the pensionable age, although normally 60 for women and 65 for men, may in certain circumstances be reached as late as age 65 by women and as early as 60 by men. Moreover, the scheme in question is not an end in itself, but is linked, for the purpose of pursuing its objective of combating unemployment, to the employer's obligation to engage an unemployed person. Furthermore, I wish to emphasise that for entitlement to an early pension the minimum period in a pre-retirement scheme must be 24 months, with the consequence that if an employee, of either sex, opts for the scheme at around the age of 60 or after that age, after 24 months he or she will automatically retire because, as we have seen, the pre-retirement employment relationship comes to an end as soon as entitlement to pension is reached (see Paragraph 9(2)(a) of the collective agreement). Finally, I would point out that the collective agreement provides that when the employee becomes entitled to pension any employment contract in force terminates (Paragraph 9(2)(a), consistent with Paragraph 8(3) of the AltTZG), which means that an employee, of either sex, cannot participate in the pre-retirement scheme if he or she is already entitled to a pension.

II — Facts and questions for a preliminary ruling

17. Dr Helga Kutz-Bauer, the claimant in the main proceedings, was born on 21 August 1939. She works for the Freie und Hansestadt Hamburg, the defendant, as manager of the Landeszentrale für Politische Bildung (Political Education Centre). In the belief that she could increase her pension by paying additional contributions after reaching the age of 60, Dr Kutz-Bauer applied to her employer between October and November 1998 for a pre-retirement employment contract that would enable her to work on a part-time basis from 1 September 1999 (at the age of

60) until 31 August 2004 in accordance with the 'block model' formula, in other words to work full-time from 1 September 1999 until 28 February 2002 and then to abstain from any employment from 1 March 2002 until 31 August 2004.

18. On 21 December 1998 the defendant rejected the application, proposing instead ordinary part-time employment on a salary proportionate to the work performed, a form of employment that was, however, of no interest to Dr Kutz-Bauer. The defendant justified its refusal by pointing out that, although upon reaching the age of 60 Dr Kutz-Bauer was in principle entitled to a part-time employment agreement on grounds of age, [10] her contract of employment would in any case have to end immediately before commencement of the pre-retirement employment relationship in view of the limits imposed by Paragraph 9(2)(a) of the collective agreement. As the person concerned met the conditions laid down in Paragraph 39 of the SGB VI, cited above, she was already entitled to pension at the age of 60.

19. Considering herself to be a victim of unfair discrimination of grounds of sex, Dr Kutz-Bauer brought proceedings before the Arbeitsgericht Hamburg, complaining that she was denied the right to part-time employment on grounds of age during the period from her 60th to 65th years of age, whereas male employees of the same age enjoy that right, given that during that period they can choose the pre-retirement formula instead of continuing to work full-time. The reason for this, according to the claimant, is that the majority of women become entitled to pension at the age of 60, whereas for men the pensionable age is generally 65.

20. The national court expressed some understanding for the claimant's arguments and stated that employees affected by the limit set out in Paragraph 9(2)(a) of the collective agreement are, assuming equal age, almost exclusively women, and therefore submitted the following questions to the Court of Justice for a preliminary ruling:

'1. Does a provision of a collective agreement for the public service which allows male and female employees to take advantage of a scheme of part-time work for older employees infringe Articles 2(1) and 5(1) of Council Directive 76/207/EEC if under that provision the scheme of part-time work applied only until the time when the person concerned first becomes eligible for a full pension under the statutory old-age insurance scheme, and if the class of persons entitled to draw a full pension at the age of 60 consists almost exclusively of women, while the class entitled to draw a full pension only from the age of 65 consists almost exclusively of men?

10 — See Paragraph 2(2) of the collective agreement.

2. Are national courts empowered, where provisions of collective agreements and legislative provisions are in breach of Directive 76/207/EEC or Directive 79/7/EEC, to apply the corresponding provisions in favour of the disadvantaged class, disregarding the restrictions which are contrary to Community law, until non-discriminatory rules are created by the parties to the collective agreement and/or the legislature?'

III — Legal analysis

A — *The first question*

1. Arguments of the parties

21. Dr Kutz-Bauer and the Commission maintain first of all that the case falls within the scope of Directive 76/207 and in particular, in the view of the Commission, that of Article 5(1) of that directive, in that the pre-retirement scheme affects working conditions, which are the subject of that provision. [11] On that premiss, both contend that in the light of that provision the German law in question, and hence the collective agreement as well, is to be considered discriminatory because it differentiates in the granting of pre-retirement employment on the basis of pensionable age, which differs according to the sex of the employee. In particular, in the opinion of the Commission, it is 'indirect' discrimination against female employees, that is to say discrimination that 'although worded in neutral terms, work[s] to the disadvantage of a much higher percentage of women than men'. [12] As such, except that the conditions for the derogations permitted by the directive (Article 2(2) to (4)) [13] are not met, I would point out that discrimination could be justified by objective factors unrelated to any discrimination on grounds of sex. [14]

22. Dr Kutz-Bauer, by contrast, considers this to be a case of direct discrimination, albeit concealed or disguised. In her opinion, although it is true that the collective agreement contains neutral rules, it is equally true that it makes reference to provisions which clearly distinguish the pensionable age on the basis of the employee's sex. For this reason she holds that there is no need to make a statistical

11 — See the judgment in Case 152/84 *Marshall* [1986] ECR 723.

12 — Judgment in Case C-322/98 *Kachelmann* [2000] ECR I-7505, paragraph 23.

13 — Which the Commission considers inapplicable, however, in the present case.

14 — To that effect, see, for example, the judgments in Cases C-189/91 *Kirsammer-Hack* [1993] ECR I-6185, paragraph 32, C-1/95 *Gerster* [1997] ECR I-5253, paragraph 34 (which contains further references), C-100/95 *Kording* [1997] ECR I-5289, paragraph 25, C-226/98 *Jørgensen* [2000] ECR I-2447, paragraph 41 (which contains further references), and *Kachelmann*, paragraph 23. The same principle applies in cases of indirect discrimination in contravention of Article 4(1) of Directive 79/7, which corresponds to Article 5(1) of Directive 76/207 (see, for example, the judgments in Cases 30/85 *Teuling* [1987] ECR 2497, paragraph 13, C-102/88 *Ruzius-Wilbrink* [1989] ECR 4311, paragraph 17, C-229/89 *Commission* v *Belgium* [1991] ECR I-2205, paragraphs 19 and 26, C-343/92 *De Weerd, née Roks, and Others* [1994] ECR I-571, paragraph 33, and C-444/93 *Megner and Scheffel* [1995] ECR I-4741, paragraph 24).

comparison between groups of employees to determine the discriminatory nature of the provisions in question. For the same reason, according to the claimant in the main proceedings, discrimination also cannot be justified on the grounds that, first, the difference in pensionable age favours female employees and, secondly, that the difference is lawful on the basis of Article 7(1)(a) of Directive 79/7, which authorises the Member States to maintain different age-limits for entitlement to old-age and retirement pensions. As to possible objective justifications, the claimant maintains that they cannot be relevant here, as the case involves direct discrimination. In any event, Dr Kutz-Bauer excludes the possibility of objective factors unrelated to sex that can justify the discrimination in question. In particular, this applies to the argument based on the abovementioned difference in treatment between employees of one or other sex as regards the retirement age, given that that difference is based precisely on sex. Finally, the claimant objects that the discrimination in question was introduced in the collective agreement of 1995, and is therefore subsequent to Article 7(1)(a) of Directive 79/7, the provision which safeguards the right of the Member States to determine a different pensionable age.

23. I return now to the observations from the Commission summarised above and point out that these are the arguments submitted during the written stage of the procedure. As I have said, at that time the Commission was working on the premiss that the pre-retirement scheme relates to the working conditions of employees who have reached a certain age and hence comes within the scope of Directive 76/207. On the other hand, in the Commission's opinion, the scheme could not be considered a pension 'benefit' under the old-age insurance system, so that in the present case the conditions were not met for the application of Directive 79/7, whose field of application is limited to the social security sector.

24. During the hearing before the Court and in the light of further explanations provided on that occasion by the German Government, however, the Commission modified its position in this regard, maintaining that although the pre-retirement scheme is not part of the old-age insurance system it could nevertheless fall under the provisions of Directive 79/7 and, in particular, could be classified as an 'other benefit' within the meaning of Article 7(1)(a) of that directive, in that it is a social security benefit linked to the risk of unemployment (see Article 3(1)(a) of Directive 79/7). Consequently, the derogation under Article 7(1)(a) could also in principle be relied upon in the present case.

25. In concrete terms, however, the Commission also reached a negative conclusion on this point, in that it held that in the present case the conditions indicated by the

Court in the *Thomas* case [15] for applying the derogation in question are not met. I would recall that in that judgment the Court stated that 'forms of discrimination provided for in benefit schemes other than old-age and retirement pension schemes can be justified, as being the consequence of determining a different retirement age according to sex, only if such discrimination is objectively necessary in order to avoid disrupting the complex financial equilibrium of the social security system or to ensure consistency between retirement pension schemes and other benefit schemes' (paragraph 12). According to the Commission, however, the granting of pre-retirement employment arrangements to female employees who have reached the age of 60 would not have serious repercussions on the financial equilibrium of the pension scheme, nor on the consistency of the German social security system, because there is no necessary and indissoluble link between the various pensionable ages authorised by Article 7(1)(a), which favour women, and the pre-retirement scheme, which does not favour them. It is true that to admit a female employee of the age of Dr Kutz-Bauer to such a scheme could jeopardise the effectiveness of the system, in that a job that could otherwise be given to an unemployed person would continue to be occupied, albeit partially, but the fact remains, as both the defendant in the main proceedings and the German Government confirmed at the hearing, that in the Federal Republic of Germany female employees who are entitled to a pension at the age of 60 have the option, instead of retiring, to continue to work either full-time or part-time (although in the latter case on a salary that does not include any financial incentive from public funds). It is therefore not apparent how admitting such female employees to the pre-retirement scheme can seriously jeopardise the objective of reducing unemployment.

26. In conclusion, therefore, both Dr Kutz-Bauer and the Commission consider that the reply to the first question submitted by the national court should be in the affirmative.

27. The Freie und Hansestadt Hamburg, the defendant in the main proceedings, reposts that in the present case there is no discrimination against women, either direct or indirect, because, on the one hand it is not true that employees are treated differently according to sex, and, on the other hand, neither is it true that the linkage between the cessation of the pre-retirement scheme and the provisions on pension entitlement works to the disadvantage of female employees, because by permitting women to retire as early as 60 years of age those provisions are intended to favour their situation in the context of a legal framework intended precisely to protect women.

28. In particular, the defendant in the main proceedings states with regard to the first point that the order for reference does not contain facts or statistics showing that the

15 — Judgment in Case C-328/91 *Thomas and Others* [1993] ECR I-1247; in the same vein, see the judgment in Case C-196/98 *Hepple and Others* [2000] ECR I-3701.

employees affected by the limit under Paragraph 9(2)(a) of the collective agreement are primarily women. Furthermore, the defendant continues, the comparison of the situation of employees of each sex carried out by the national court was based solely on age as the determinant for acquiring entitlement to pension, whereas the Sozialgesetzbuch makes entitlement to a pension for women at the age of 60 conditional on other factors as well, such as a minimum contribution period. Moreover, the order for reference sets out from the premiss that the persons affected by the abovementioned limit imposed by the collective agreement are solely women, in other words without taking account either of all those employees would retire (early) at different ages owing to serious invalidity or occupational incapacity or of male workers who become entitled to a pension before the age of 65 under provisions that apply to employees of both sexes. [16] Lastly, according to the defendant, the assertion in the order for reference that employees entitled to a pension at the age of 60 are almost exclusively female while those who are not entitled to retire until 65 are almost exclusively male is incorrect. [17]

29. According to the defendant, the more favourable treatment accorded to women as a whole is also confirmed at the level of legislation by Article 2(3) of Directive 76/207 (see paragraph 3) and is explained by the dual role of women, as workers and as housewives, which leads to an earlier erosion of their energy and hence to earlier occupational incapacity.

30. However, if the Court were to conclude that there is discrimination in the present case, the defendant in the main proceedings points out that, in accordance with the case-law of the Court, it is for the Member States to determine whether and how to pursue an objective of social policy, such as combating unemployment; indeed, according to the Court, precisely because the Member States enjoy wide discretion in defining their social policy, Directive 79/7 does not preclude national legislation which, although indirectly discriminatory, is aimed at attaining the objectives of that policy and are necessary for that purpose. [18]

31. In conclusion, the Freie und Hansestadt Hamburg suggests that the reply to the first question should be in the negative, as the

16 — See Articles 36 to 38 of the SGB VI and paragraph 12 above.

17 — In order to show that there is no discrimination in the present case, the defendant also states that, if one disregards the special situation of *Land* Hamburg and considers instead Germany as a whole, the number of women who cannot take advantage of the pre-retirement scheme at the age of 60 is considerably smaller. In fact, in most cases female employees are indeed entitled to retire at age 60, but on a reduced pension. Under the interpretative declaration of Paragraph 9 of the collective agreement, in that situation they retain their right to join the pre-retirement scheme. The only exception is *Land* Hamburg, in view of the more favourable treatment accorded to women by the Hamburgisches Ruhegeldgesetz (Hamburg Pension Law). However, as stated above, this is a special situation which is diluted in the national figures.

18 — See the judgment in *De Weerd, née Roks, and Others* and in Case C-317/93 *Nolte* [1995] ECR I-4625.

German legislation appears to be justified by the derogation under Article 2(3) of Directive 76/207 and by the objectives of the pre-retirement scheme itself.

32. Finally, with regard to the arguments put forward by the German Government, I would point out first that in the opinion of that Government only Directive 79/7 is applicable to the present case in view of the purpose of the pre-retirement scheme and the way in which it is organised. On that premiss, the German Government recognises that the problem under discussion stems from the difference in pensionable age but points out that that difference is lawful pursuant to Article 7(1)(a) of Directive 79/7, as the Court has confirmed. [19] What is more, according to the German Government, the majority of women take a favourable view of the difference; moreover, if in the case of Dr Kutz-Bauer the difference turns into a disadvantage, it is because the person involved does not wish to avail herself of it so that she may benefit from the pre-retirement scheme. In balancing the various interests at stake, priority should therefore be given, according to the German Government, to the legitimate expectations of the majority of female employees, who count on being able to retire earlier than men.

33. Nevertheless, in order to provide justification for the discrimination at issue, the German Government lays emphasis primarily on the aforesaid objectives of the pre-retirement scheme, stressing in particular that of combating unemployment. For the purposes of that objective, according to the German Government, it seems entirely logical that public funding of part of the salary of the worker participating in a pre-retirement scheme ends when the worker becomes entitled to a pension because it is not possible to use resources intended to combat unemployment to encourage a worker who has already acquired that entitlement to continue working and occupying a post that would otherwise be available for an unemployed person. The present system, the German Government continues, ensures that the scheme for protecting against unemployment, which includes the pre-retirement employment arrangements (and the related financial support), is consistent with the old-age pension scheme, which sets the pensionable age. By preventing workers who are already entitled to a full old-age pension from benefiting from the funding from the Bundesanstalt, the system avoids an overlap between the various social security schemes directed towards the same social policy objectives.

34. In the opinion of the German Government, all this is fully consistent with the case-law developed by the Court with regard to Article 7(1)(a) of Directive 79/7 in the *Thomas* judgment, cited above, in particular where it states that the forms of discrimination under discussion can be justified, as being the consequence of

19 — See the judgment in Case C-9/91 *Equal Opportunities Commission* [1992] ECR I-4297. In order to resolve the problem of different pensionable ages, the intervening Government also states that the national legislature has now made provision for the difference between men and women to be gradually reduced and to reach a single pensionable age for all workers, and at the same time has laid down transitional arrangements that reconcile the ultimate objective of equal treatment with the legitimate expectation of the majority of female workers involved, on the basis of which women born before 1941 become entitled to pension upon completing their 60th year.

determining a different retirement age according to sex, only if such discrimination 'is objectively necessary in order to avoid disrupting the complex financial equilibrium of the social security system or to ensure consistency between retirement pension schemes and other benefit schemes'.[20] The German Government points out that in the *Graham* judgment,[21] in which the Court had to rule on the overlap between pension benefits and other State benefits, the Court also laid down that 'where, pursuant to Article 7(1)(a) of Directive 79/7, a Member State has set the pensionable age for women at 60 and that for men at 65, that provision also allows it, first, to provide that the rate of invalidity pension payable to persons becoming incapacitated for work before they reach pensionable age is to be limited to the actual rate of retirement pension from the age of 60 in the case of women and from the age of 65 in the case of men and, second, to reserve entitlement to invalidity allowance, paid in addition to invalidity pension, to those persons who are aged under 55, in the case of women, and under 60, in the case of men, at the time when they first become incapacitated for work' (paragraph 21).

35. Hence, while acknowledging the existence of a difference in treatment, the German Government argues that such a difference is fully justified in the light of the general considerations set out above, which affect the German social security system as a whole.

2. Assessment

36. By its first question the court of reference asks essentially whether the principle of equal treatment as defined in Directive 76/207 is infringed by a collective agreement which excludes from the pre-retirement scheme established under German law workers who have reached pensionable age, taking into account the fact that those who become entitled to a pension at the age of 60 are almost exclusively women whereas those who cannot retire until the age of 65 are almost exclusively men.

37. As I have already stated, even before entering into the merit of the question, the parties discussed at length whether in fact the present case came under Directive 76/207 on access to employment and working conditions or whether instead it is Directive 79/7 on social security that should be applied. I have to say, however, that despite the arguments put forward in this regard both in the written procedure and at the hearing it does not seem to me

20 — See paragraph 25 above. However, the German Government also cites the judgments in Cases C-137/94 *Richardson* [1995] ECR I-3407, paragraphs 18 and 19, and C-139/95 *Balestra* [1997] ECR I-549, paragraphs 33 and 35.

21 — Case C-92/94 *Graham and Others* [1995] ECR I-2521.

that the terms of the question have been fully clarified, both because the complex German legal framework was mostly explained verbally and hence in a necessarily summary form and because, as I pointed out earlier, the characteristics of the pre-retirement scheme under discussion here are truly unusual.

38. That said, I have to admit that before hearing the clarifications regarding the pre-retirement scheme that the German Government provided at the hearing I too was more convinced by the arguments put forward by the Commission in its written observations, which are referred to several times above (see point 21), for treating the case in point as concerning the concept of working conditions under Article 5(1) of Directive 76/207. The further information provided at the hearing by the German Government, especially regarding the objectives of the pre-retirement scheme in question and the financial involvement of the Bundesanstalt, lead me, as they have also led the Commission, to consider that the pre-retirement scheme is a benefit that could come under either the old-age or unemployment schemes, depending on the emphasis placed on one or other objective of the pre-retirement scheme and that therefore, either way, the scheme must be considered to fall within the scope of Directive 79/7 (see Article 3(1)(a)), which is also mentioned by the court of reference and is the express subject of the second question. Consequently, I too consider that the questions brought to our attention are to be examined from the point of view of the prohibition on discrimination contained in Article 4(1) of the latter directive (which moreover corresponds to Article 5(1) of Directive 76/207); I would point out that this article relates that prohibition, inter alia, to 'the scope of the [social security] schemes and the conditions of access thereto'.

39. As I have stated several times, the central issue in the present case stems from the fact that Paragraph 9(2)(a) of the collective agreement, in accordance with the provisions of the AltTZG, explicitly links the time-limit beyond which it is not possible to continue or commence a pre-retirement employment relationship to the date on which the worker becomes entitled to a pension. The court of reference and Dr Kutz-Bauer (and, when all is said and done, the Commission too) adopt the premiss that it is mainly women who become entitled to a pension at the age of 60 whereas for men pensionable age normally comes at the age of 65, and conclude therefrom that the reference in the collective agreement to pensionable age is discriminatory in that among workers aged between 60 and 65 it penalises almost exclusively women. On the other hand, that form of discrimination is contested in view of the fact that, as we have seen at point 12, the SGB VI sets the moment of

entitlement to pension at different ages on the basis of various factors, including sex but not only that.

40. Furthermore, the Freie und Hansestadt Hamburg adds that the order for reference contains no statistics or other factual information to support the assertion by the Arbeitsgericht that it is primarily female employees who, upon reaching the age of 60, are excluded from the pre-retirement scheme by Paragraph 9(2)(a) of the collective agreement. On this point, however, I wish merely to observe that in the context of a procedure under Article 234 EC it is not for the Court of Justice but for the national court to assess, on the basis of the information at its disposal, whether in point of fact the abovementioned provision of the collective agreement does or does not affect a considerably larger percentage of women than men. [22] On the other hand, the issue of interest in the present case is whether the reference in the collective agreement to pensionable age for determining the date beyond which it is not possible to take up the scheme in question has different repercussions depending on the sex of the employee, regardless of the (much) larger or (much) smaller number of persons in one or other class affected by the said provision.

41. That aspect aside, however, I am bound to note that there is no real disagreement among the parties about the different treatment of employees depending on their sex. The disagreement relates rather to other aspects of the question, which I shall now proceed to examine.

42. Above all, as we have seen, there was discussion among the parties on the question whether the discrimination in question was to be classified as direct or indirect. It seems obvious to me, however, that here we have a case of indirect discrimination because, as the Commission observes, although it is true that in setting the limits within which it is possible to conclude pre-retirement employment contracts the collective agreement refers explicitly to the different ages laid down in the SGB VI for pension entitlement, it does not make a direct distinction according to sex. I would add that in my view this solution is also consistent with the case-law of the Court, which recently described as indirect a case of discrimination in which the different treatment was not overtly based on the sex of the employees but the distinction was nevertheless based on criteria which in turn were closely and directly linked to that factor. [23]

22 — See, to this effect, the judgment in Case C-167/97 *Seymour-Smith and Perez* [1999] ECR I-623 with regard to the problem of determining whether indirect discrimination on grounds of sex exists or not; see also *Jørgensen*, paragraphs 33 to 35.

23 — I refer in particular to the recent *Schnorbus* judgment, in which the Court held that national legislation which made priority access to practical legal training conditional on the completion of compulsory military or civilian service (which in the case in point only men were required to perform) constituted indirect discrimination (judgment in Case C-79/99 *Schnorbus* [2000] ECR I-10997, paragraph 32).

43. Hence, given that the present case involves a form of indirect discrimination which is based on sex, and is thus in principle contrary to the prohibition laid down in Article 4(1) of Directive 79/7, it is now necessary to verify whether such discrimination can be justified by the reasons adduced by some of the parties intervening in the present proceedings.

44. In this connection, I note first that in the course of the case mention has been made of the derogations under Article 2(2) to (4) of Directive 76/207, which some parties have considered applicable, as we have seen. However, whereas both Dr Kutz-Bauer and the Commission cite the derogations under Article 2(2) to (4) but dismiss them as not relevant, albeit for different reasons, the Freie und Hansestadt Hamburg appears to consider that the derogation under paragraph 3 of that article is applicable, on the ground that the different pensionable age corresponds to the need to protect women that underlies that provision.

45. As I consider that it is Directive 79/7 and not Directive 76/207 that is applicable in the present case, I could refrain from discussing the applicability of the said derogations. I shall examine them as well, however, both in case the Court does not share my assessment and because the last-mentioned derogation has an obvious affinity with the derogation under Article 4(2) of Directive 79/7.

46. To me it is obvious that the derogations indicated in Article 2(2) and (4) of Directive 76/207 have no bearing on the case under examination, the first because it relates to occupational activities for which the sex of the worker constitutes a determining factor, and the second because it concerns measures to promote equal opportunity for men and women. Nor, in my opinion, is there any relevance in the derogation under Article 2(3) of Directive 76/207 (and hence the similar one contained in Article 4(2) of Directive 79/7). The case-law of the Court has made it plain that the said derogation has no connection, as the Freie und Hansestadt Hamburg claims, with social reasons linked to the condition of the woman, who is often called upon to perform a dual activity as a worker and as a housewife; it is aimed instead at protecting a woman's biological condition during and after pregnancy and protecting the special relationship between a woman and her child. [24]

24 — Among the many judgments, see those in Case 184/83 *Hofmann* [1984] ECR 3047, paragraphs 25 and 26, Case 312/86 *Commission* v *France* [1988] ECR 6315, paragraph 13, Case C-345/89 *Stoeckel* [1991] ECR I-4047, paragraph 13, Case C-136/95 *Thibault* [1998] ECR I-2011, paragraph 25, and Case C-66/96 *Høj Pedersen and Others* [1998] ECR I-7327, paragraph 54.

47. Moving on to the derogations under Directive 79/7, I recall that all the parties intervening in the present proceedings rightly focus their attention on Article 7(1)(a) of that directive, which, as we have seen, establishes a derogation from the principle of equal treatment as regards 'the determination of pensionable age for the purposes of granting old-age and retirement pensions and the possible consequences thereof for other benefits'.

48. In this connection, I consider it necessary first to refute Dr Kutz-Bauer's assertion that the cited derogation is not applicable in the present case because the collective agreement was not signed until 1995 and therefore after the passage of the legislation which, on the basis of precisely that derogation, sets different ages for entitlement to old-age pension on the basis of sex. If in fact the pre-retirement scheme is regarded as a social benefit coming under one of the social security headings mentioned in Article 3 of Directive 79/7, Article 7(1)(a) provides that the reservation regarding the different pensionable ages can also be applied, in principle, to the consequences thereof for other benefits. Moreover, the fact that the collective agreement was introduced after the provisions setting those age-limits were created and, in particular, after the directive entered into force is of no relevance in itself. According to the case-law of the Court, the 'maintenance of different retirement ages according to sex may necessitate the *subsequent adoption, after expiry of the period prescribed for transposition of the Directive*, of measures indissociable from that derogation and also amendments to such measures', [25] even if such measures do not form part of the system for insurance against old age. [26] The Court explained that 'to prohibit a Member State which has set different retirement ages for men and women from adopting or subsequently amending, after expiry of the period prescribed for transposition of the Directive, measures linked to that age difference would be tantamount to depriving the derogation for which Article 7(1)(a) of the Directive provides of its practical effect'. [27]

49. Hence, given that the pre-retirement scheme not only comes within the scope of Directive 79/7 but also qualifies in principle as an 'other benefit' within the meaning of Article 7(1)(a) of that directive, let us see whether the scheme in question can in fact be justified on the basis of that provision. To that end, I must point out that, according to settled case-law of the Court, 'where, pursuant to Article 7(1)(a) of the Directive [79/7], a Member State prescribes different pensionable ages for men and women for the purposes of granting old-age and retirement pensions, the scope of the permitted

25 — *Hepple*, paragraph 23 (emphasis added); in the same vein, see Case C-104/98 *Buchner and Others* [2000] ECR I-3625, paragraph 23.

26 — *Hepple*, paragraph 20.

27 — *Hepple*, paragraph 24.

derogation, defined by the words 'possible consequences thereof for other benefits', contained in Article 7(1)(a), is limited to the forms of discrimination existing under other benefit schemes which are necessarily and objectively linked to the difference in pensionable age'. [28] On that occasion, the Court also stated that that may be the position 'where such forms of discrimination are objectively necessary in order to avoid disturbing the financial equilibrium of the social-security system or to ensure coherence between the retirement-pension scheme and other benefit schemes'. [29]

50. In truth, none of the parties intervening in the present case maintains that the pre-retirement scheme at issue can be justified in terms of the first objective indicated by the Court, in other words in order to avoid upsetting the financial equilibrium of the German social security system. Nevertheless, as I have reported at length above, the Freie und Hansestadt Hamburg and the German Government invoke the other objective, insisting on the fact that the aim of the scheme in question is precisely to ensure coherence between the pension scheme and the unemployment insurance scheme. In particular, citing the objectives of the system under examination and the public sector financing of part of the salary of workers admitted to the scheme, they maintain that it is objectively necessary to exclude from the pre-retirement scheme female workers aged 60 or over who are already entitled to pension in order to avoid jeopardising the unemployment insurance scheme, which is itself one of those covered by Directive 79/7 (see Article 3(1)(a)), and undermining the coherence between that scheme and the pension system.

51. However, the Commission, for its part, disputes that there is any such relationship between the two schemes in question. In particular, as I have indicated, at the hearing the Commission pointed out that in the current state of German law female workers who have reached the age of 60, that is to say pensionable age, [30] may choose not to retire but to continue to work full-time or part-time (albeit in the latter case on a salary that is normally linked to the hours worked). If that is the case, I cannot see how allowing such female employees to work beyond the age of 60 and *at the same time* to benefit from the pre-retirement scheme could undermine the coherence between the two schemes in question and, in particular, jeopardise the fight against unemployment, given that in any case, even in the absence of the pre-

28 — *Hepple*, paragraph 25, which includes further references.

29 — *Hepple*, paragraph 26, which includes further references, including one to the *Thomas* judgment that I have already cited several times.

30 — Provided, of course, that they meet the conditions laid down in Article 39 of the SGB VI.

retirement scheme, female workers can continue to work and thus occupy a job.

52. I have to say, however, that things are not as simple as this. Above all, I do not believe that hypotheses which in reality are very different from one another can be placed on the same footing: on the one hand what one may term ordinary full-time or part-time employment, and on the other the pre-retirement scheme, which as we have seen has significant and substantial characteristics at least as far as its objectives, functioning and financing are concerned. One has only to consider that in the two cases I have indicated the salary is not the same (it is higher under the pre-retirement scheme), nor is the cost to the Bundesanstalt (which must pay all of the higher salary to the employer). Hence, to allow a female worker who is already entitled to pension at the age of 60 to opt for the pre-retirement scheme would be tantamount to encouraging her to continue working in view of the more favourable conditions under that scheme. In this way, as the defendant and the German Government emphasise, first the social security scheme would incur additional costs, drawing resources away from its other objectives, and secondly a job that the scheme in question intended for an unemployed worker would remain occupied. In other words, the result would be the opposite of that sought by the German legislature, which specifically in the light of the fight against unemployment intended to bring forward as far as possible the retirement of workers who have not yet reached pensionable age.

53. It is precisely the latter observation that in my opinion provides the key to understanding the question under examination by setting it in its correct context, which has been obscured, partly by a degree of confusion in the debate and partly by the objective complexity of the relevant German legislation, which for that very reason I wished to describe at length. In other words, it has to be emphasised that although in the debate the accent was placed only on the age of female employees and the consequent differentiation between men and women stemming from the difference in pensionable age, in reality the pre-retirement scheme is linked to the time at which female employees become entitled to pension and it is therefore organised and designed in an extremely flexible manner corresponding to the multitude of possibilities for which the German legislation provides in this regard (see point 12). These may relate to the different pensionable ages set for men and women, but they may also relate to other aspects, such as, depending on the case and equally for both sexes, the psychological and physical condition of the worker (serious invalidity and occupational incapacity), the type of work (the case of miners), the required minimum insurance period, the payment of compulsory contributions for a certain number of years, the fact of being unemployed.

54. All of this demonstrates that, as the Freie und Hansestadt Hamburg emphasises, the logic of the scheme in question is a perfect instrument for the legitimate social policy objective of the scheme, which is to bring forward as far as possible the retirement of female workers who are not yet entitled to a pension so that unemployed persons can fill the posts they vacate. In accordance with this logic, the point of reference can only be the date on which the person involved becomes entitled to pension, with all the consequences this entails, including any forms of discrimination as a consequence of that decision: discrimination on grounds of sex, but also, as we have seen, based on the other situations that I have just described. If that is so, however, such forms of discrimination cannot be judged to be arbitrary; on the contrary, given what I have stated above and in accordance with the cited case-law of the Court in *Hepple*, they are to be considered as 'objectively necessary in order to avoid disturbing the financial equilibrium of the social-security system or to ensure coherence between the retirement-pension scheme and other benefit schemes'.

55. Consequently, I feel able to conclude that a form of discrimination such as that to which the dispute in the main proceedings relates is necessarily and objectively linked to the different retirement ages for men and for women and can therefore be justified in accordance with the derogation under Article 7(1)(a) of Directive 79/7 and, in more general terms, by the aims of the pre-retirement scheme and the objective requirements on which it is based.

56. The reply to the first question from the national court should therefore be that Article 4(1) of Council Directive 79/7 does not stand in the way of a collective agreement for the public service which permits employees of both sexes to apply to work part-time on grounds of age only until the time when they may claim a full pension under the statutory old-age insurance scheme when the class of persons who may already draw such a pension at the age of 60 consists almost exclusively of women, while the class who may draw it only from the age of 65 consists almost exclusively of men.

B — *The second question*

57. Given the conclusions which I have reached regarding the first question, it would be unnecessary to dwell at length on the second, as although the court of reference framed it in abstract terms it nevertheless clearly posed the question for

the sole eventuality that the reply to the first was in the affirmative. I shall nevertheless proceed to examine it in case the Court does not share my conclusions regarding the first question.

58. By its second question, the court of reference asks essentially whether national courts are empowered to disregard provisions of legislation or collective agreements that are incompatible with Directives 76/207 and 79/7 because they are discriminatory until provisions which abide by the principle of equal treatment have been introduced.

1. Arguments of the parties

59. Setting out from the initial premiss that Directive 76/207 is applicable to the present case (see point 21), and without returning to this issue at the hearing apart from drawing attention to Directive 79/7, the Commission maintained during the written procedure that the reply to the second question would normally be found in the national legislation transposing the directive (in particular, those provisions implementing Article 5(2) of Directive 76/207) whereby, in the Commission's view, the Federal Republic of Germany incorporated the two directives concerned into national law. I wish to point out, however, that neither the court of reference nor the German Government nor the Commission has indicated which measures, if any, the Federal Republic of Germany adopted to transpose Article 5(2) of Directive 76/207.

60. More particularly, on the premiss that the pre-retirement scheme is essentially governed only by the collective agreement, [31] the Commission states that if the German legislature had opted for the first of the three solutions indicated in subparagraph (b) of that provision, in other words for abolition of the relevant provisions of the collective agreements that contravene the principle of equal treatment, the problem raised in the second question from the national court would not even arise. If, on the other hand, the national legislature had chosen one of the other two solutions, that is to say the possibility of declaring null and void or amending the discriminatory provisions of the collective agreements, the full and immediate effect of the relevant Community law could have been jeopardised because of the difficulties that the person concerned might have encountered in obtaining the declaration of nullity or the amendment of those provisions. In the present case, however, such difficulties should not be particularly serious, because

31 — And this on the basis of the rather limited indications in the order for reference, where there is not even mention of the AltTZG.

Dr Kutz-Bauer is a public employee. In that case, the national legislature should, by virtue of the principle of the direct effect of directives, give retroactive effect to the declaration of nullity or amendment of the discriminatory provisions, at least as regards cases for which legal action is already under way. Indeed, the Commission observes, any attempt to enforce the rights enshrined in Directive 76/207 by judicial process against the State in its capacity as an employer would be ineffectual if the declaration of nullity or amendment did not produce its effects from the outset (see Article 6 of Directive 76/207). If then, the Commission adds, for practical reasons it was not possible to give retroactive effect to the declaration of nullity or the amendment of the discriminatory provisions, the legislature should provide for compensation, for example in the form of the payment of additional contributions, in order to satisfy the claims of the interested party in the present case.

61. If, by contrast, the German legislature did not implement Directive 76/207 in full, the national provisions contrary to the principle of equal treatment must, according to the Commission, be disregarded in compliance with the case-law in the *Marshall* case, in which the Court recognised the direct effect of the directive in question in a case in which the female employee enforced her rights against the State in its capacity as employer. Nor is it relevant that the discriminatory provisions were adopted only in part by the State and in part also in agreement with the trade unions (the collective agreement), given that it is for the trade unions to protect workers' rights. Hence if, the Commission observes, they defended articles of collective agreements that were contrary to fundamental provisions of employment law, they were acting in a manner inconsistent with their vocation.

62. The German Government does not express an opinion on the second question from the national court, while the Freie und Hansestadt Hamburg merely makes a general reference to the case-law of the Court. In particular, with regard to the question of collective agreements incompatible with Community law, it cites the *Nimz* judgment, [32] in which the Court extended to such cases the case-law from the *Simmenthal* judgment, [33] by virtue of which the national court, in applying provisions of Community law, is under a duty to give full effect to those provisions, if necessary refusing to apply any conflicting provision of national legislation.

32 — Case C-184/89 *Nimz* [1991] ECR I-297.

33 — Case 106/77 *Simmenthal* [1978] ECR 629.

2. Assessment

63. In order to reply to the question under examination, I set out from the premiss that Directive 79/7 is applicable in the present case, for the reasons I have explained at length above. That directive, like Directive 76/207, requires the Member States to abolish any laws, regulations and administrative provisions contrary to the principle of equal treatment (see respectively Article 5 and Article 5(2)(a)), and to take such measures as are necessary to enable all persons who consider themselves discriminated against on grounds of sex to pursue their claims by judicial process (see Article 6 in both directives). Given its subject-matter, however, Directive 79/7 does not contain a provision corresponding to Article 5(2)(b) of Directive 76/207, which extends the said obligation to provisions in other acts, and in particular, as far as concerns us here, in collective agreements. However, it seems to me that that provision contains useful indications for identifying the means that will effectively ensure that the principal of equal treatment is also respected with reference to Directive 79/7.

64. Indeed, as I have mentioned, the absence in the latter directive of provisions similar to Article 5(2)(b) of Directive 76/207 manifestly derives from the fact that by reason of its subject-matter Directive 79/7 refers as a matter of principle to statutory schemes. Nevertheless, where the substance of such schemes is defined, complemented or implemented by means of a collective agreement, as in the present case, the rationale underlying that provision regains its full effectiveness, and hence the associated solutions must be taken into account here too as possible means of ensuring full compliance with the principles enshrined in the directives, as Directive 79/7 intends. Moreover, the Court has stated, in case-law of general validity, that 'a national court which is called upon, within the limits of its jurisdiction, to apply provisions of Community law is under a duty to give full effect to those provisions, if necessary by refusing of its own motion to apply any conflicting provision of national legislation, and it is not necessary for the court to request or await the prior setting aside of such provision by legislative or other constitutional means', [34] even in cases 'where the provision at variance with Community law is derived from a collective labour agreement'. [35] Not only that: the Court has also stated, precisely with regard to the prohibition on discrimination under Article 4(1) of Directive 79/7, that this also applies to collective agreements, [36] because 'the fact that the... Government [of the Member State involved] does not take part

34 — *Nimz*, paragraph 19, where, as I have said, reference is made to the *Simmenthal* judgment.

35 — *Nimz*, paragraph 20.

36 — See the judgment in Case C-187/98 *Commission* v *Greece* [1999] ECR I-7713, paragraph 44.

in the negotiation of collective agreements cannot absolve it of its obligation to adopt such *complementary* provisions as may be required to ensure compliance with the requirements of Community rules'.[37]

65. That having been clarified, it remains for me to ascertain the concrete powers available to the national courts to safeguard the principle of equal treatment in a case such as the one before the Court. I wish to recall yet again, however, that in the absence of indications of the measures adopted by the Federal Republic of Germany to transpose Article 5(2)(b) of Directive 76/207 it is necessary to examine all the possible alternatives in this regard, bearing in mind that whatever solution was chosen by the German legislature must ensure full compliance with the principles enshrined in the directives.

66. Hence, assuming first of all that the German legislature opted for solutions of the type envisaged in Article 5(2)(b) of Directive 76/207, in particular in the sense of providing for the abolition or amendment of the discriminatory paragraphs of collective agreements, it is clear that, as the Commission asserts, the employee involved should not be placed at a disadvantage because of the time which in that case is necessary to pursue her claims by judicial process. This means that abolition or amendment must be capable of having retroactive effect. On this point I believe it is important to recall the judgment of the Court in Case C-187/98, in which it was stated, with regard to Directive 79/7, that the obligation for the Member States 'of ensuring, by appropriate legislative and administrative provisions, that all workers in the Community are afforded the *full* protection provided for by the directive' (paragraph 47, emphasis added) also includes the obligation to provide for the retroactive elimination of discrimination on grounds of sex (see point 48).

67. If, on the other hand, the Federal Republic of Germany did not correctly transpose the directives in question, it is nevertheless under an obligation to ensure the protection of the rights guaranteed by

37 — *Commission* v *Greece*, paragraph 50 (emphasis added).

those directives. In accordance with settled case-law of the Court, 'wherever the provisions of a directive appear, as far as their subject-matter is concerned, to be unconditional and sufficiently precise, those provisions may be relied upon by an individual against the State where that State fails to implement the directive in national law by the end of the period prescribed or where it fails to implement the directive correctly', [38] because the State 'may not plead, as against individuals, its own failure to perform the obligations which the directive entails'. [39] In the present case, I wish to point out that, in accordance with established case-law, Article 4(1) of Directive 79/7 has direct effect because it 'is sufficiently precise and unconditional for individuals to rely upon it before the national courts in order to preclude the application of any national provision inconsistent with that article'. [40]

68. It is true that the provision of a directive having direct effect may be relied upon only against a Member State, [41] but the Court has also ruled that 'where a person involved in legal proceedings is able to rely on a directive as against the State he may do so regardless of the capacity in which the latter is acting, whether *employer* or public authority. In either case it is necessary to prevent the State from taking advantage of its own failure to comply with Community law'. [42] Since in the present case the employer is the Freie und Hansestadt Hamburg, in other words a local public authority and hence, in the final analysis, the State, Dr Kutz-Bauer is entitled to rely on the prohibition of discrimination under Article 4(1) of Directive 79/7 and thus to obtain satisfaction of her rights, even retrospectively. [43]

69. In conclusion, I am of the opinion that the reply to the second question from the national court should be in the affirmative.

38 — *Marshall*, paragraph 46, which also contains other references.

39 — *Marshall*, paragraph 47.

40 — *Balestra*, paragraph 32 (which contains further references); see also the judgments in *Ruzius-Wilbrink*, paragraph 19 (which contains further references), Case C-154/92 *Van Cant* [1993] ECR I-3811, paragraph 14 (which contains further references) and Case C-337/91 *Van Gemert-Derks* [1993] ECR I-5435, paragraph 31 et seq. (which contain further references). In the same vein, with regard to Article 5(1) of Directive 76/207, see, for all, the judgments in *Marshall*, paragraph 52, and Case C-188/89 *Foster and Others* [1990] ECR I-3313, paragraph 21.

41 — *Marshall*, paragraph 48, and the judgment in Case C-91/92 *Faccini Dori* [1994] ECR I-3325, paragraphs 19 to 25.

42 — *Marshall*, paragraph 49 (emphasis added).

43 — On the basis of the doctrine derived from the judgment in Case C-187/98 (see in particular paragraph 55).

VI — Conclusion

70. In the light of the foregoing considerations, I propose that the Court rule as follows:

Article 4(1) of Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security does not stand in the way of a collective agreement for the public service which permits employees of both sexes to apply to work part-time on grounds of age only until the time when they may claim a full pension under the statutory old-age insurance scheme when the class of persons who may already draw such a pension at the age of 60 consists almost exclusively of women, while the class who may draw it only from the age of 65 consists almost exclusively of men.

71. In the alternative, in other words if the Court holds that the described pre-retirement scheme provided for under German law is incompatible with the principle of equal treatment for men and women, with regard to the second question from the national court I propose that the Court rule as follows:

Where provisions of collective agreements and legislative provisions are in breach of Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions and with Council Directive 79/7/EEC, national courts are empowered to apply the corresponding provisions in favour of the disadvantaged class, disregarding the restrictions which are contrary to Community law, until non-discriminatory rules are created by the parties to the collective agreement and/or the legislature.