OPINION OF ADVOCATE GENERAL COSMAS

delivered on 10 July 1997 *

1. In the present case the Court is requested, by order for reference from the Office of the Industrial Tribunals and the Fair Employment Tribunal, Belfast, Northern Ireland, to reply to two questions submitted for a preliminary ruling which the Industrial Tribunal considers are necessary in order to resolve the dispute pending before it.

2. Those questions involve the interpretation of Article 119 of the Treaty and of Protocol No 2 concerning Article 119 of the Treaty. More specifically, they concern, on the one hand, determination of the date as from which account is to be taken of the period of service of two nurses who, in the national court's view, were subjected to unfair discrimination on the ground of their sex, for the purposes of calculating certain additional retirement benefits. On the other hand, the questions concern the compatibility with Community law of certain national provisions which, if the action is successful, limit the years of service which may retrospectively be taken into account to two years.

* Original language: Greek.

I — Legal framework

A — *Community legislation and case-law*

3. Article 119 of the Treaty enshrines the principle of equal pay for men and women for equal work. It provides as follows:

'Each Member State shall during the first stage ensure and subsequently maintain the application of the principle that men and women should receive equal pay for equal work.

For the purpose of this Article, "pay" means the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives, directly or indirectly, in respect of his employment from his employer.

Equal pay without discrimination based on sex means:

(a) that pay for the same work at piece rates shall be calculated on the basis of the same unit of measurement;

(b) that pay for work at time rates shall be the same for the same job.'

4. In *Defrenne II* the Court held [1] that the direct effect of Article 119 of the Treaty may be relied on, that is to say the Article in question produced direct effect from the date of judgment in that case, that is as from 8 April 1976. In *Bilka-Kaufhaus*, [2] confirmed in *Barber* [3] and in *Ten Oever*, [4] the Court held that Article 119 covered both the right to belong to occupational pension schemes and the right to receive benefits under those schemes.

5. In its judgment of 17 May 1990 in *Barber*, [5] the Court limited in time the effects of its judgment, by holding that 'the direct effect of Article 119 of the Treaty may not be relied upon in order to claim entitlement to a pension, with effect from a date prior to that of this judgment, except in the case of workers or those claiming under them, who have before that date initiated legal proceedings or raised an equivalent claim under the applicable national law'. [6] In further elucidation of that limitation, the Court held in *Ten Oever* that 'by virtue of the judgment in *Barber* the direct effect of Article 119 of the EEC Treaty may be relied upon, for the purpose of claiming equal treatment in the matter of occupational pensions, only in relation to benefits payable in respect of periods of employment subsequent to 17 May 1990, subject to the exception in favour of workers or those claiming under them who have, before that date, initiated legal proceedings or raised an equivalent claim under the applicable national law'. [7]

6. Elucidation of the temporal effects of the direct effect of Article 119 of the Treaty in the field of benefits granted under occupational pension schemes was also provided by Protocol No 2 concerning Article 119 of the Treaty, incorporated in the EC Treaty with effect from 1 November 1993, the date of commencement of the Treaty on European Union. Protocol No 2 is as follows:

1 — Case 43/75 *Defrenne* v *Sabena* [1976] ECR 175, point 5 of the operative part (hereinafter '*Defrenne II*').

2 — Case 170/84 *Bilka-Kaufhaus* [1986] ECR 1607 (hereinafter '*Bilka*').

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

4 — Case C-109/91 *Ten Oever* [1993] ECR I-4879.

5 — Cited above in footnote 3.

6 — Point 5 of the operative part of the judgment in *Barber*.

7 — Judgment in *Ten Oever*, cited at footnote 4, point 2 of the operative part. That decision has since been reaffirmed in judgments in Case C-110/91 *Moroni* [1993] ECR I-6591, point 3 of the operative part, and in Case C-152/91 *Neath* [1993] ECR I-6935, point 1 of the operative part.

'For the purposes of Article 119 of this Treaty, benefits under occupational social security schemes shall not be considered as remuneration if and in so far as they are attributable to periods of employment prior to 17 May 1990, except in the case of workers or those claiming under them who have before that date initiated legal proceedings or introduced an equivalent claim under the applicable national law.'

7. Thus, Protocol No 2 essentially adopted the same interpretation as the judgment in *Barber*. Indeed, as regards its content, the Court has repeatedly held that: 'It is clear that the Protocol is linked to the *Barber* judgment, since it refers to the date of that judgment, 17 May 1990. That judgment declares unlawful discrimination as between men and women resulting from an age condition that varies according to sex for the purposes of entitlement to a retirement pension following dismissal for economic reasons. There have been divergent interpretations of the *Barber* judgment which limits, with effect from the date of the judgment, namely 17 May 1990, the effect of its interpretation of Article 119 of the Treaty. Those divergences were removed by the judgment in *Ten Oever*, cited above, which was delivered before the entry into force of the Treaty on European Union. While extending it to all benefits payable under social security schemes and incorporating it in the Treaty, Protocol No 2 essentially adopted the same interpretation of the *Barber* judgment as did the *Ten Oever* judgment. It did not, on the other hand, any more than the *Barber* judgment, deal with or make any provision for, the conditions of membership of such occupational schemes.' And it was made clear that that continued to be governed by the judgment in *Bilka*, which does not limit in time the validity of the interpretation which it gives to Article 119 of the Treaty. [8]

B — *National legislation*

8. Regulation 3 of the Health and Personal Social Services (Superannuation) Regulations (Northern Ireland) 1984 No 336 ('the Superannuation Regulations') [9] defines a Mental Health Officer ('MHO') as a whole-time officer on the medical or nursing staff of a hospital used wholly or partly for the treatment of persons suffering from mental disorder who devotes the whole or substantially the whole of his time to the treatment of such persons. [10]

9. As provided for in Regulation 50(2) of the Superannuation Regulations, any person who has worked as a Mental Health Worker

8 — See the three judgments of 28 September 1994 in Case C-7/93 *Beune* [1994] ECR I-4471, paragraphs 61 and 62, Case C-57/93 *Vroege* [1994] ECR I-4551, paragraphs 41 and 42, and in Case C-128/93 *Fisscher* [1994] ECR I-4583, paragraphs 49 and 50.

9 — The Health and Social Services (Superannuation) Regulations (Northern Ireland) were issued on 18 September 1984 and their commencement date was 29 October 1984.

10 — Moreover, the same provision of Regulation 3 of the Superannuation Regulations defines an MHO as a specialist who devotes nearly all his time to the cure and care of mentally disturbed persons and, if the Ministry so approves in a given case, any other health officer who, having continued as an MHO without interruption in service and without acquiring the right to any benefit under the Superannuation Regulations, subsequently works reduced hours in any of the above occupations, and such other category of health workers employed in hospitals as above as the Ministry may determine.

for a total period of at least 20 years (a) obtains the right to retire at the age of 55 years instead of 60 years and (b) every year of service as an MHO after the age of 50 years, or after completion of 20 years service as an MHO, whichever shall be the later, is reckoned at twice its length (double-time service).

10. Under Section 2(4) of the Equal Pay Act (Northern Ireland) 1970 ('the EPA'), [11] claims concerning the application of the equal pay clause in connection with the employment of a woman must be brought before the competent industrial tribunal within six months of the end of the relevant period of employment. Section 2(5) of the EPA provides that in proceedings brought in respect of a failure to comply with an equal pay clause a woman shall not be entitled to be awarded any payment by way of arrears of remuneration or damages in respect of a time earlier than two years before the date on which the proceedings were instituted.

11. Regulation 12 of the Occupational Pension Schemes (Equal Access to Membership) Regulations (Northern Ireland) 1976 No 238 ('Occupational Pension Regulations), [12] amending the EPA, [13] provides that in proceedings concerning access to membership of occupational pension schemes the right to be admitted to the scheme, in accordance with equal access requirements, is to have effect from a date no earlier than two years before the institution of proceedings.

II — Facts

12. Mrs Magorrian and Mrs Cunningham, the applicants in the main proceedings, were employed as qualified nurses in the mental health sector by a public sector health board. They began their careers working full-time with MHO status. When their family responsibilities increased, they began working part-time [14] and lost that status.

11 — Northern Ireland law of 17 December 1970 on equal pay precluding distinctions between men and women as regards terms and conditions of employment.

12 — The Northern Ireland Occupational Pension Regulations were issued on 9 August 1976 and their commencement date was 6 April 1978.

13 — Regulation 12 concerns the power of the ordinary courts or of the Industrial Tribunal to uphold the right to be admitted to the occupational pension scheme and to require the employer to make additional contributions.

14 — As is apparent from the order for reference, when the applicants in the main proceedings began working part-time, they worked for 27 hours and 25 minutes per week. On reorganization of the shift patterns in 1981, the part-time hours were increased by the employer to 31 hours and five minutes per week. At the same time full-time nursing officers' hours were reduced from 40 hours to 37 hours and 30 minutes per week. Each applicant worked night shifts, which was better suited to their domestic arrangements. Both applicants had been in charge of wards and of full-time nurses who had Mental Health Officer status.

13. Both of the applicants in the main proceedings were affiliated to the Health & Personal Social Services Scheme, a voluntary contracted-out scheme to which both employer and employee contribute. That scheme was open to part-time workers working a specified number of hours.

14. The applicants in the main proceedings paid contributions to the scheme in order to qualify for benefits, including a lump-sum payment on retirement and monthly payments thereafter.

15. Mrs Magorrian retired on 18 October 1992, having completed 9 years and 111 days of full-time work as an MHO between 1951 and 1963, and the equivalent of 11 years and 25 days of full-time service as a part-time worker between 1979 and 1992. She also worked part-time between 1969 and 1979 but for hours not reckonable for pension purposes.

16. Mrs Cunningham retired in April 1994, having completed 15 years and 175 days of full-time service as an MHO between 1956 and 1974, and the equivalent of 11 years and 105 days' full-time service as a part-time worker between 1980 and 1994. Between 1974 and 1980 she also worked part-time on a non-superannuable basis and she elected not to make pension contributions during that period.

17. When the applicants in the main proceedings retired, they received the lump sums to which they were entitled, together with their basic retirement pensions, but not the additional benefits to which they would have been entitled, if they had had MHO status at the time of their retirement.

18. The applicants in the main proceedings emphasize (paragraph 5 of their written observations) that they had already initiated proceedings before ceasing to be employed. Their claims against the Eastern Health & Social Services Board and the Department of Health and Social Services (respondents in the main proceedings) were lodged on 22 September 1992. Mrs Magorrian retired on 18 October 1992, whilst Mrs Cunningham retired on 31 March 1994.

19. The applicants in the main proceedings sought equal treatment with persons having MHO status in the calculation of the amounts of their future pensions. Specifically, they argued that they were entitled to the additional benefits and that the calculation thereof should be based on their length of service starting either on 8 April 1976, the date of the judgment in *Defrenne II*, [15] or on 13 May 1986, the date of the judgment in *Bilka*. [16] Finally, it is contended on their behalf, there is no justification for applying the two-year restriction laid down in the EPA in calculating their length of service, or for applying the cut-off date of 17 May 1990,

15 — Cited above at footnote 1.
16 — Cited above in footnote 2.

the date of the judgment in *Barber*, [17] since to do so would be to deprive them of an effective legal remedy.

20. The respondents in the main proceedings acknowledged a limited right on the part of the applicants to the additional benefits, in accordance with the provisions concerning MHO status. In their view, it would be necessary to take account of periods of service subsequent either to 22 September 1990, that is to say two years prior to lodgment of their claim, as provided for by the EPA, or to 17 May 1990, the date of the judgment in *Barber* and the date referred to in Protocol No 2, until the date when they retired from the service.

21. The national court, in its order for reference dated 12 September 1995, found that it was common ground between the parties to the main proceedings that the payment of such benefits constitutes 'pay' within the meaning of Article 119 of the Treaty and of Directive 75/117/EEC [18] on the principle of equal pay for men and women. The national court also found that a considerably smaller proportion of women than men employed in the mental health sector in Northern Ireland could comply with the requirement of full-time working as Mental Health Officers, and accepted that the exclusion of the applicants in the main proceedings from MHO status discriminates against them on the ground of sex and is not justified.

III — The preliminary questions

22. In the context of the proceedings pending before it, the Industrial Tribunal referred the following questions to the Court of Justice for a preliminary ruling:

'In circumstances where:

(a) a worker has been employed by a Health Board which is part of the State, in employment concerned with the care of the mentally ill to which an occupational pension scheme applies;

(b) the worker has at all material times either been a member or been eligible to be a member of the pension scheme;

17 — Cited above in footnote 3.

18 — Council Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women (OJ 1975 L 45, p. 19).

(c) the pension scheme contains a term according to which those who work full-time and devote all or substantially all their working hours to the care of the mentally ill (who are described as "Mental Health Officers") are entitled to additional benefits not available to those doing the same work part-time, as follows:

where a person has reached or passed the age of 50 and has worked as a Mental Health Officer for 20 years (here referred to as the "qualifying service") and continues to work as a Mental Health Officer, then

(i) their subsequent service is reckoned for pension purposes at twice its length (here referred to as the "double-time service"); and

(ii) they have the right to a pension at the age of 55 instead of the normal age of 60;

(d) the worker is deprived of the status of Mental Health Officer and the additional benefits attached thereto solely on the ground that her employment was part-time;

(e) the national tribunal has held that the provisions described at (c) and (d) constitute discrimination on grounds of sex against women working part-time in the care of the mentally ill;

(f) the pension which the worker receives and the additional benefits which they claim, are only payable to them as and from their respective retirements in 1992 and 1994, after their claims have been brought before the national tribunal; and

(g) the calculation of the additional benefits from their respective retirement dates in 1992/94 would involve counting their years of service prior to 1992,

Question 1: From what date should the service of the workers be counted for the purpose of calculating the additional benefits to which they are entitled:

(i) 8 April 1976

(ii) 17 May 1990

(iii) some other and if so, what date?

Question 2: Where the relevant national legislation restricts back-dating entitlement in the event of a successful claim to a period of 2 years prior to the date on which the claim was made, does this amount to the denial of an effective remedy under Community law and is the Industrial Tribunal obliged to disregard such provision in domestic law if it feels it necessary to do so?'

IV — Replies to the preliminary questions

A — *Reply to the first preliminary question*

23. The first question concerns the determination of the date from the point of view of Community law for the purposes of calculating the additional retirement benefits to which Mrs Magorrian and Mrs Cunningham are entitled, who have suffered discrimination on the ground of sex. The national court is thereby essentially asking whether the temporal limitation of the effect of the *Barber* judgment, adopted in Protocol No 2, applies to the action brought by the applicants.

24. Therefore, since the first question concerns part-time workers not entitled to the additional benefits provided for, the matter exercising the national court is whether the dispute in question concerns admission to a pension scheme in which case, in accordance

with the judgment in *Bilka*, [19] the temporal limitation imposed by the Court in the *Barber* judgment, and adopted by Protocol No 2, does not apply or, conversely, whether it concerns benefits granted under that scheme in which case the temporal limitation does apply.

25. The applicants in the main proceedings, who lodged their claims before they retired, emphasize that they are not seeking retroactive payment of the additional benefits provided for in the case of MHOs but equal treatment as regards future benefits according to their period of service on the same basis as MHOs who under the law must be full-time employees. They are therefore asking for the whole of their period of service to be taken into account for the purposes of calculating those benefits. At the hearing the two applicants pointed out that no additional deduction or contribution is required of full-time employees with MHO status in relation to part-time employees who did not have that status. In reply to a question by the Court, they emphasized that if they had enjoyed MHO status, they would have received those additional benefits without being required to make additional contributions.

26. The United Kingdom Government underlines that the present case does not concern the right of membership to an occupational social assurance scheme, to which Protocol No 2 does not apply, following the judgments in *Vroege* and *Fisscher*, but the right to receive certain benefits the extent of which is to be determined in accordance with Article 119 of the Treaty. Moreover, relying on the judgment in *Beune*, [20] it considers that Protocol No 2, in view of the general terms in which it is couched, covers benefits granted under an occupational pension scheme such as that in the present case. But since the applicants in the main proceedings lodged their claims after 17 May 1990, they cannot rely on Article 119 of the Treaty in order to seek payment of equal benefits in respect of periods of employment prior to 17 May 1990, the date of the judgment in *Barber*.

27. The first question to be clarified is indeed whether the temporal limitation provided for in Protocol No 2 may be extended also to cover indirect discrimination of part-time workers, as in the present case.

28. At the outset, it must be recalled that in the judgment in *Bilka* [21] there was held to be an infringement of Article 119 of the Treaty by an undertaking which excluded part-time workers from the undertaking's

19 — Cited above at footnote 2.

20 — Paragraph 59. Judgment cited above at footnote 8.

21 — Cited above at footnote 2 (point 1 of the operative part). See also judgment in Case 171/88 *Rinner Kühn* [1989] ECR 2743.

occupational pension scheme, where that exclusion affected a far greater number of women than men, and the undertaking did not show that the exclusion was based on objectively justified factors unrelated to any discrimination on the ground of sex. [22]

29. In particular, as regards the right of membership of an occupational scheme, the Court found that 'there is no reason to suppose that the professional groups concerned could have been mistaken about the applicability of Article 119'. [23]

30. Moreover, in *Barber*, the Court held that a pension paid under a contracted-out scheme constitutes consideration paid by the employer to the worker in respect of his employment and consequently falls within the scope of Article 119 of the Treaty. [24]

31. Yet, in *Barber*, the Court, adjudicating for the first time on the question whether the determination of a different pensionable age depending on sex constitutes, in the context of occupational pension schemes, unlawful discrimination, [25] and answering that question in the affirmative, deemed it necessary to limit in time the effects of its judgment. It based that limitation, on the one hand, on the fact that the Member States and the parties concerned were reasonably entitled, in light of the derogations provided for in Directives 79/7/EEC [26] and 86/378/EEC [27] with regard to pensionable age, to take for granted that the principle of equality as between male and female employees did not apply to the case in question and, on the other hand, on the finding that the retroactive validity of the judgment would risk disturbing the financial equilibrium of many occupational pension schemes.

32. Consequently, the temporal limitation of the possibility of reliance on the direct effect of Article 119 of the Treaty concerns solely discrimination which might be justified on the basis of exceptions provided for in Community provisions, [28] such as Article 9 of

22 — *Bilka* judgment, cited at footnote 2 (point 1 of the operative part). In the judgment in *Vroege*, cited above at footnote 8, the Court held that 'The reasoning behind that finding is that if, as can be seen from the judgment of 31 March 1981 in Case 96/80 *Jenkins* v *Kingsgate (Clothing Productions)* [1981] ECR 911, a pay policy which consists of setting a lower hourly rate for part-time work than for full-time work may in certain cases entail discrimination between men and women, the same applies where part-time workers are refused a company pension. Since such a pension falls within the concept of "pay", within the meaning of the second paragraph of Article 119, it follows that, hour for hour, the total remuneration paid by the employer to full-time workers is higher than that paid to part-time workers (paragraph 27).'

23 — Judgment in *Vroege*, cited above at footnote 8 (paragraph 28).

24 — Cited above at footnote 3 (paragraph 28).

25 — See, for example, the *Moroni* judgment (paragraph 16), cited above at footnote 7.

26 — More precisely, Article 7(1)(a) of Council Directive 79/7/EEC of 19 December 1979 on the progressive application of equal treatment for men and women in matters of social security (OJ 1979 L 6, p. 24).

27 — Article 9(a) of Council Directive 86/378/EEC of 24 July 1986 on the implementation of the principle of equal treatment for men and women in occupational social security schemes (OJ 1986 L 225, p. 40: corrigendum published in OJ 1986 L 283, p. 27).

28 — I emphasized that in my Opinion in Case C-435/93 *Dietz* [1996] ECR I-5223 (paragraph 23). Judgment was given in that case on 24 October 1996.

Directive 86/378/EEC. [29] The Court has repeatedly held [30] that 'the limitation of the effects in time of the *Barber* judgment concerned only those kinds of discrimination which employers and pension schemes could reasonably have considered to be permissible owing to the transitional derogations for which Community law provided and which were capable of being applied to occupational pensions'. [31] It further held that 'the limitation of the effects in time of the *Barber* judgment did not apply to the right to join an occupational pension scheme', [32] inasmuch as the judgment in *Bilka* did not provide for any such limitation.

33. According to the United Kingdom Government, in order for the applicants in the main proceedings to be entitled to the additional benefits provided for in the case of MHOs, they need to rely on Article 119 of the Treaty at two different stages. First, they have to rely on it in order to have their part-time service recognized as satisfying the 20-year requirement, and secondly, to have their subsequent service counted double in order to acquire the right to a pension at 55 years of age instead of 60. Particularly in regard to recognition in the case of the two applicants of the whole or part of their period of service for the purposes of completion of the 20-year period, the United Kingdom Government maintains that to take into account any periods prior to 17 May 1990 would run counter to Protocol No 2.

34. In the present case, it appears from the pleadings that the contracted-out occupational pension scheme in the main proceedings is essentially a twofold scheme. On the one hand, it makes provision for persons merely having the duties of psychiatric nurses (Mental Health Officers), but not MHO status and, consequently, not having the right to additional benefits because they were part-time workers. On the other hand, it contains provisions concerning persons having MHO status and the right to additional benefits because they were full-time employees.

35. It is thus clear from the pleadings that, under the national legislation, the discrimination is directed essentially against part-time employees to whom the more favourable provisions in favour of MHOs do not apply.

29 — The exceptions provided for in that Article concern (a) determination of a different retirement age for men and women, (b) survivors' pensions and (c) determination of different levels of contributions by workers.

30 — See judgments in *Dietz*, cited above at footnote 28 (paragraph 19), and *Vroege* (paragraphs 20 to 27) and *Fisscher* (paragraphs 17 to 24), cited at footnote 8, and paragraphs 28 and 29 of my Opinion in the *Dietz* case.

31 — See also paragraph 29 of my Opinion in *Dietz*, cited above at footnote 28.

32 — See *Dietz* (paragraph 22), *Vroege* (paragraph 32) and *Fisscher* (paragraph 28).

36. In accordance with the settled case-law of the Court, [33] I do not consider that any provision of Directive 86/378/EEC entitled the parties concerned reasonably to regard as permissible, owing to the transitional derogations contained in that directive, the kind of discrimination, such as that in the present case, directed against part-time workers depriving them on retirement of the additional benefits to which MHOs are entitled. Thus, a person may very well invoke with retroactive effect rights in his favour which are not covered by the exceptions contained in Article 9(a) of Directive 86/378/EEC.

37. Accordingly, there can be retroactive reliance on the direct effect of Article 119 of the Treaty by the applicants in the main proceedings who suffered discrimination, so that the additional benefits provided for in the case of MHOs under the existing scheme may be made available to them, with effect from 8 April 1976, the date of the judgment in *Defrenne II*.

38. I now come to an examination of the question whether the present dispute concerns admission to a pension scheme in which case, following the judgment in *Bilka*, [34] the temporal limitation imposed by the Court in *Barber* and adopted in Protocol No 2 does not apply or, conversely, whether it concerns the calculation of benefits granted under such a scheme in which case the temporal limitation does apply.

39. Certainly, inasmuch as this case involves discrimination not covered by the *Barber* judgment and Protocol No 2, it would be possible to avoid the distinction between the right to membership of an occupational pension scheme and the right to receive benefits under that scheme. Thus, in the present case, it would be possible to obviate the need for examination of the question whether the discrimination suffered by the applicants constitutes discrimination in regard to membership of an occupational pension scheme and not simply in regard to the claim of entitlement to certain benefits.

40. Nevertheless, for the sake of completeness in the analysis of the issue raised in the first preliminary question and in view of the issue arising in the second preliminary question, I would add the following considerations. On the basis of the foregoing analysis, according to which the discrimination against the applicants in the main proceedings could not reasonably be regarded by the parties concerned as permissible, I consider that, as a condition precedent to a successful claim to additional benefits provided for by the national legislation in the case of MHOs, retroactive admission to the status of MHO, of which the two applicants were deprived, would be necessary and, with it, recognition of entitlement in that connection to those

33 — See, for example, the *Barber* judgment, cited above at footnote 3 (paragraphs 42 and 43), the judgments cited above at footnote 8 in *Vroege* (paragraphs 20 to 27), *Fisscher* (paragraphs 17 to 34) and the *Dietz* judgment cited above at footnote 28 (paragraph 19). See also judgment in Case C-200/91 *Coloroll Pension Trustees* [1994] ECR I-4396, paragraph 53.

34 — Judgment cited above at footnote 2.

benefits. Thus, in my opinion, the fact that account was not taken of the period of part-time service in calculating the period of service as MHOs of the two applicants in the main proceedings constitutes unfair treatment in connection with admission to the special MHO status which provides for the grant of additional benefits, and not in connection with the calculation in itself of the benefits, which would result in the application of the temporal limitation of the effects of the *Barber* judgment. Consequently, it will be necessary to apply the solution adopted in *Bilka*, in connection with the right of admission to an occupational pension scheme, and to exclude the possibility of a temporal limitation pursuant to the *Barber* judgment. [35]

41. That solution is warranted by the case-law of the Court. In its judgment in *Dietz*, [36] which concerned the old-age pension entitlement under an occupational scheme of a part-time worker who was originally excluded from her pension scheme, it was held that the preconditions which led to the temporal limitation in *Barber* are not fulfilled in the case of discrimination against part-time workers. The Court stressed that: 'Entitlement to a retirement pension under an occupational scheme is indissolubly linked to the right to join such a scheme. Membership would be of no interest to employees if it did not confer entitlement to the benefits provided for by the scheme'. [37] It was further held that: '... it should be noted that since the judgment in *Bilka* imposed no time restriction the direct effect of Article 119 may be relied upon retroactively as from 8 April 1976, the date of the *Defrenne* judgment, by victims of discrimination regarding the right to join an occupational pension scheme who seek payment of benefits under that scheme'. [38] And the judgment concluded: 'The limitation of the effects in time of the *Barber* judgment (...) does not apply to the right to join an occupational pension scheme, such as that at issue in the main proceedings, or to the right to payment of a retirement pension where the worker was excluded from membership of the scheme in breach of Article 119 of the Treaty.' [39]

42. In light of the foregoing analysis, I consider that Article 119 of the Treaty and related Protocol No 2 are to be interpreted as meaning that in the case of discrimination against part-time workers, as described in the order for reference, their period of work, for the purpose of conferring entitlement to benefits under an occupational pension scheme, must be calculated as a matter of

35 — Consequently, the solution adopted in *Beune*, cited above in footnote 8, cannot be applied, contrary to the assertions of the United Kingdom. That is because in that case the national legislation at issue laid down a rule for calculating the amount of the civil service pension for male married former civil servants which was different from that applicable to female married former civil servants. The Court held (points 2 and 3 of the operative part), first, that Article 119 of the Treaty precluded such a national provision, and that married men placed at a disadvantage by discrimination must be treated in the same way and have the same rules applied to them as married women and, secondly, that the temporal limitation under Protocol No 2 applies in the case of the persons who may rely on the direct effect of Article 119 in order to claim equal treatment as regards the payment of benefits under a pension scheme, such as the scheme in the main proceedings in that case.

36 — Cited above in footnote 28 (paragraph 23 et seq.). See also paragraph 27 et seq. of my Opinion in that case.

37 — Judgment in *Dietz*, cited above in footnote 28 (paragraph 23).

38 — Judgment in *Dietz* (paragraph 27).

39 — Judgment in Dietz, point 2 of the operative part.

principle as from 8 April 1976, the date of delivery of the judgment in *Defrenne II*.

B — *Reply to the second preliminary question*

43. The second question raises the issue of national rules governing remedies in respect of rights under Community law. [40]

44. More specifically, the question raised here concerns the case where the national legislation applied imposes a limitation, if a claim is successful, on the right to have years of service taken into account, to the two-year period preceding commencement of proceedings. When the question is asked whether the limitation imposed in this case by national law on the right of the persons concerned to receive the additional benefits provided for in the case of MHOs, a right conferred by Community law, leads to a denial of effective protection, national courts are obliged to disregard that provision of national law, if they deem it necessary.

45. The applicants in the main proceedings maintain that such a limitation rule in national law may not be applied by the national court. For, as they also pointed out at the hearing, if it were otherwise, the paradoxical result would be a finding of unequal treatment contrary to Article 119 of the Treaty, as the national court has already found, yet nevertheless that finding of unequal treatment would have no practical consequence owing to the application of the national rule in question. Moreover, they maintained, the removal of that discriminatory treatment would cost the civil service scheme very little. [41]

46. The United Kingdom Government submits that a national rule which limits to two years prior to commencement of proceedings the period in respect of which the additional benefits awarded in the case of MHOs may be backdated is perfectly compatible with Community law. Relying on the case-law of

40 — Since, as is apparent from the pleadings, the actions brought by Mrs Magorrian and Mrs Cunningham were lodged on 22 September 1992, that is to say before their retirement on 18 October 1992 and 31 March 1994 respectively, the reply by the Court to that question would have practical relevance only if the Court were to take the view that the temporal limitation on the effects of the *Barber* judgment, and Protocol No 2, do not apply to the present case, as the Commission and the two applicants correctly point out. If it did, the applicants would be almost entirely deprived of the advantages of admission to MHO status, from which they were excluded, given that, as stated in the order for reference, the defendants in the main proceedings maintained that the applicants' periods of service should be calculated only as from 17 May 1990.

41 — According to the applicants in the main proceedings, payment of the additional benefits provided for in the case of MHOs would cost the civil service scheme about UK £70 000 to UK £100 000 per annum, as opposed to an annual budget amounting to UK £355 000 000.

the Court, [42] it considers that a reasonable time-limit may be applied in respect of claims based on Article 119 of the Treaty in the context of occupational schemes. Time restrictions on the retroactive effect of a judicial decision do not render impossible the enforcement of rights under Community law but contribute to legal certainty by encouraging the persons concerned to show due diligence.

47. It should first of all be remembered that, as the Court has consistently held, [43] in the absence of Community rules in the matter, the national rules relating to time-limits for bringing actions are also applicable to actions based on Community law, provided that they satisfy two requirements. First, they must be no less favourable for such actions than for similar actions of a domestic nature, that is to say claims brought under national law and, secondly, they must not render the exercise of rights conferred by Community law impossible in practice. Thus, the national court has discretion in assessing whether the national rules setting time-limits on the bringing of actions are no less favourable for that type of action than for similar actions of a domestic nature [44] and do not render the exercise of the right conferred by Community law impossible in practice.

48. In the present case, as I have already indicated in earlier paragraphs, the limitation is one which affects the right of an employee to be admitted to a special status under an occupational pension scheme in accordance with the requirements concerning equal access, and not that person's right retroactively to seek certain benefits. [45]

49. Regulation 12 of the Occupational Pension Regulations 1976, amending the EPA, provides that, in the context of proceedings concerning access to membership of an occupational pension scheme, the right to join the scheme in question cannot be backdated more than two years prior to commencement of the proceedings. However, I consider that the above limitation under national law has more far-reaching effects than the limitation of the employee's right to claim a retroactive award of benefits. The reason is that it affects the number of years in respect of which the persons concerned may claim MHO status and, consequently, their ability

42 — Case 33/76 *Rewe* v *Landwirtschaftskammer* [1976] ECR 1989, Case 45/76 *Comet* [1976] ECR 2043, the judgment in *Fisscher*, cited above at footnote 8 (paragraph 40), and in Case C-410/92 *Johnson* [1994] ECR I-5483 *(Johnson II)*.

43 — See, for example, the judgment in *Fisscher*, cited above in footnote 8 (paragraphs 39 and 40, and point 5 of the operative part) and in *Rewe*, cited above in footnote 42 (paragraphs 5 and 6).

44 — In the present case that issue is not examined at all by the national court.

45 — Under Section 2(5) of the EPA, a female employee is not entitled, in the context of proceedings concerning non-observance of the equal pay clause (including proceedings before the Industrial Tribunal), to backdated pay or compensation for a period greater than two years prior to the date of commencement of the proceedings. Apart from the fact that the applicants emphasize that they are not seeking the retroactive award of any benefits but recognition for the future of the right to benefits which will not be granted to them on account of unfair treatment, that provision of the EPA does not raise a problem from the point of view of Community law because it does not limit the application of the principle of equal pay for the future and, consequently, does not render impossible or excessively difficult the exercise in practice of the right under Community law to equal pay. Moreover, applying those two criteria of Community law, the Court has repeatedly held that Community law does not preclude the application of a rule of national law which merely limits the period prior to the bringing of the claim in respect of which arrears of benefit are payable. See, for example judgments in Case C-338/91 *Steenhorst-Neerings* [1993] ECR I-5475; and in *Johnson II*, cited above in footnote 42.

to claim the additional benefits which flow from that status, [46] since the minimum period of 20 years of service can never be completed with the result that exercise of the right to additional benefits is rendered impossible in practice, [47] as the Commission, moreover, rightly points out.

50. On the first preliminary question I reached the conclusion that, in the event of discrimination of part-time employees, such as that described by the national court in the order for reference, their period of service, for the purpose of awarding the additional benefits to which they are entitled under the occupational pension scheme, must in principle be calculated with effect from 8 April 1976, the date of delivery of the judgment in *Defrenne II*. Thus, the temporal limitation imposed by *Barber* and Protocol No 2 does not apply in the present case. Consequently, I do not believe it is possible to invoke the principles of legal certainty and avoidance of retroactive disturbance to the financial equilibrium of a contracted-out occupational pension scheme relied on by the Court in *Barber* [48] in connection with recognition of the right of the applicants in the main proceedings to the additional benefits. That is because the unfair treatment of part-time employees sanctioned for breach of Article 119 of the Treaty was known about long before the judgment in *Barber*.

51. Nevertheless, a provision of national law such as Regulation 12 of the Occupational Pension Regulations 1976, amending the EPA, would substantially reduce the practical effectiveness of Article 119 of the Treaty, and could have the consequence of deterring workers suffering discrimination from vindicating their rights under that article and, finally, of depriving them of actual and effective judicial protection. [49]

46 — See also the problems expounded at paragraph 67 and in particular paragraph 69 in the Opinion of Advocate General Jacobs in Case C-2/94 *Denkavit International* [1996] ECR I-2827, in which the Court gave judgment on 11 June 1996, in connection with the terms 'virtually impossible' or 'excessively difficult' in relation to the exercise of rights conferred by Community law, owing to the limitation period imposed by national law for bringing proceedings. However, the Court did not express a view on this issue.

47 — The present case differs from that which exercised the Court in its judgment in Case C-271/91 *Marshall* [1993] ECR I-4367 *(Marshal II)*, which concerned the imposition of an upper limit fixed *a priori* for the reparation of the loss sustained by a person as a result of discriminatory dismissal, and the exclusion of an award of interest to compensate for the loss sustained by the recipient of the compensation as a result of the effluxion of time until the capital sum awarded was actually paid. That case differs from the present case because the latter concerns a temporal limitation on the right to retrospective admission to a special status for pension purposes (that of MHO), in the event that the action is successful.

48 — See, for example, paragraph 44 of the *Barber* judgment.

49 — See also analogous reasoning of the Court in Case C-180/95 *Draehmpaehl* [1997] ECR I-2195 (paragraph 40). In that case the question arose, *inter alia*, whether 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) precludes provisions of domestic law imposing a ceiling on the aggregate amount of compensation payable to several applicants discriminated against on the grounds of their sex in the making of an appointment. The Court held (paragraph 43) that the Directive precludes such provisions of domestic law.

52. Consequently, I consider that national legislation which does not permit retroactive admission, beyond the period of two years from commencement of proceedings, of part-time employees to the special occupational status provided for in the case of MHOs is rendering impossible in practice the exercise of their right to belong to the status in question and to receive the additional benefits provided for by it, which is a right flowing from the application of Article 119 of the Treaty, and the national court is required not to apply such a provision. [50]

53. If it were otherwise, the application of such a national provision would lead to a situation in which judgments of the Court are not observed. On the one hand, the Court may, as happened in *Defrenne II* and *Barber*, impose temporal limitations on the effects of its judgments and, on the other, may review the criteria for the application of national rules which impose time limits for bringing actions, including those based on Community law. [51]

V — Conclusion

54. In light of the foregoing analysis, I propose that the Court should reply as follows to the questions referred to it for a preliminary ruling:

(1) Article 119 of the Treaty and related Protocol No 2 are to be interpreted as meaning that, in the case of discrimination against part-time workers, as described in the order for reference, their period of work, for the purpose of conferring entitlement to benefits under an occupational pension scheme, must be calculated as a matter of principle as from 8 April 1976, the date of delivery of the judgment in *Defrenne II*.

50 — Since this is a case of unfair discrimination in breach of Article 119 of the Treaty, I do not consider it possible for the judgment in Case C-208/90 *Emmot* [1991] ECR I-4269, relied on by the applicants in the main proceedings, to be applied, since that case concerned inadequate transposition of Council Directive 79/7/EEC, cited above in footnote 26. According to the operative part of that judgment, so long as a Member State has not properly transposed that directive into its legal system, 'Community law precludes the competent authorities of a Member State from relying, in proceedings brought against them by an individual before the national courts in order to protect rights directly conferred upon him by Article 4(1) of Directive 79/7/EEC ... on national procedural rules relating to time-limits for bringing proceedings ...'. See also paragraph 31 of the Opinion of Advocate General Van Gerven in *Vroege*, cited above in footnote 8.

51 — See, for example, particularly *Fisscher* (paragraphs 39 and 40, and paragraph 5 of the operative part), cited above at footnote 8, and *Rewe* (paragraphs 5 and 6), cited above at footnote 42.

(2) National courts are required not to apply a rule of national law which, in the event of a successful claim, does not permit retroactive admission, beyond the period of two years from commencement of proceedings, of part-time employees to the special occupational status provided for in the case of MHOs, thus rendering impossible in practice the exercise of their right to belong to the status in question and to receive the additional benefits provided for by it, which is a right flowing from Article 119 of the Treaty.