OPINION OF ADVOCATE GENERAL JACOBS
delivered on 29 June 1995 *

1. The question referred by the Bundesarbeitsgericht (Federal Labour Court) in this case puts in issue the compatibility of certain provisions of the Betriebsverfassungsgesetz ('BetrVG', Industrial Relations Law) with the principle of equal pay for men and women, in particular with Article 119 of the Treaty and the Equal Pay Directive. [1] The same issue was examined by the Court in its judgment in *Bötel*. [2] The referring court is not persuaded by the reasoning of the Court in that case and asks the Court to reconsider the issue.

2. The members of a staff council (Betriebsrat), according to the referring court, represent the interests of the employees of a firm. By virtue of Article 37(1) of the BetrVG, membership of a staff council is an unpaid and honorary office. Article 37(2) provides that members of the staff council shall be released, without loss of salary, from the obligations arising from their employment to the extent that that is necessary for the performance of their functions, taking into account the size and the nature of the undertaking concerned. Under Article 37(6), the provisions of Article 37(2) apply by analogy to participation by staff council members in training courses which provide information necessary for the performance of their functions.

3. Mrs Lewark is employed on a part-time basis in the care unit of the dialysis centre of the Kuratorium für Dialyse und Nierentransplantation e. V. in Kaiserslautern. She works for 7.7 hours a day for four days a week, her total working hours being 30.8 per week.

4. The care unit of the dialysis centre employs seven men and fourteen women. Of the men, six work full-time and one part-time. Of the women, four work full-time and ten part-time. Mrs Lewark is a member of the staff council of the dialysis centre, which consists of three members. She is the only member of the staff council who works part-time.

5. From 12 November to 16 November 1990, on the basis of a decision of the staff council and with the consent of her employer, Mrs Lewark attended a training course in order to obtain knowledge that

* Original language: English.

1 — 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).

2 — Case C-360/90 [1992] ECR I-3589.

was necessary for her duties as a member of the staff council. On 13 November 1990, the training course lasted for seven and a half hours. Since Mrs Lewark was employed on a part-time basis under a flexible system operated by her employer, she would not have had to work on that day if she had not attended the course.

6. In accordance with Article 37(6) of the BetrVG, Mrs Lewark was paid by her employer for the time that she spent on the course her contractual pay on the basis of her contractual working hours of 30.8 hours per week. She did not receive any payment for the time that she spent on the course on 13 November 1990, since she would not have had to work on that day.

7. Mrs Lewark claimed, in addition to her contractual pay, 'compensation' for the seven and a half hours that she spent attending the training course on 13 November 1990. She argued that members of the staff council who were employed part-time could not be required to make special sacrifices of their free time compared with members of the staff council who were employed full-time. In her submission, the refusal to grant her compensation amounted to indirect discrimination against women, which infringed Article 119 of the Treaty and the Equal Pay Directive. The Arbeitsgericht (Labour Court), in which Mrs Lewark brought proceedings, upheld her claim. The Kuratorium appealed to the Landesarbeitsgericht (Regional Labour Court). Following the dismissal of its appeal, the Kuratorium appealed to the Bundesarbeitsgericht, as a result of which the Bundesarbeitsgericht has made the present reference.

8. The reasons which led the Landesarbeitsgericht to dismiss the appeal of the Kuratorium are set out in the order for reference. The Landesarbeitsgericht took the view that Mrs Lewark had no right to receive compensation under Article 37 of the BetrVG. However, the failure to grant her compensation was indirect sex discrimination in breach of Article 119 of the Treaty and the Equal Pay Directive. According to the Landesarbeitsgericht, under the provisions of German industrial relations law, members of the staff council who were part-time employees received lower remuneration than those who were full-time employees. Considerably more women than men were affected as a result. The Landesarbeitsgericht had no statistical data concerning the proportion of women staff council members in part-time employment compared with men staff council members in part-time employment. However, according to official employment and social statistics for the end of June 1991, approximately 93.4% of all part-time employees were women and only 6.6% were men. In view of the extreme numerical disproportion between male and female part-time employees, the Landesarbeitsgericht considered that the proportion of women and men among staff council members on part-time employment was at least of the same order. The Landesarbeitsgericht took the view that there were no reasons which objectively justified the difference in treatment of Mrs Lewark as a part-time employee compared with the other members of the staff council who were employed full-time.

9. In the order for reference, the referring court states that it does not wish to follow

the reasoning of the Landesarbeitsgericht on the points of Community law. It would prefer to hold that, in the case of Mrs Lewark, there has not been any discrimination on grounds of sex for the purposes of Article 119 of the Treaty and the Equal Pay Directive. However, it refers to the judgment of the Court in *Bötel* and states that that judgment prevents it from holding that there is no indirect sex discrimination.

10. In *Bötel* the Court held that the compensation paid under the provisions of the BetrVG to an employee who is a member of a staff council for attending training courses in order to acquire knowledge necessary for the performance of his functions is pay for the purposes of Article 119. The Court also held that under the provisions of the BetrVG staff council members employed on a part-time basis are treated differently from those employed on a full-time basis as regards compensation for participation in training courses. Staff council members who are employed part-time devote the same number of hours in attending training courses as those who are employed full-time. However, once the duration of training courses held during the full-time working hours applicable in the undertaking exceeds the individual working hours of staff council members employed on a part-time basis, those members receive less compensation than staff council members who are full-time employees. The Court came to the conclusion that that was indirect discrimination on the grounds of sex because, according to the national court, staff council members working on a part-time basis were generally women and the documents relating to the main proceedings showed that amongst the members of the employer's staff council there was a much greater number of women than men who worked on a part-time basis.

11. In *Bötel* the Court concluded that Article 119 of the Treaty and the Equal Pay Directive preclude national legislation applicable to a much greater number of women than men from limiting to their individual working hours the compensation, in the form of paid leave or overtime pay, which staff council members employed on a part-time basis are to receive from their employer for attending training courses which impart the knowledge necessary for working on staff councils and are held during the full-time working hours applicable in the undertaking but which exceed their own part-time working hours, when staff council members employed on a full-time basis are compensated for attendance of the same courses on the basis of full-time working hours. The Court added that it was open to the Member State to prove that such legislation was justified by objective factors unrelated to any discrimination on grounds of sex. [3]

12. The referring court is not persuaded by the judgment of the Court in *Bötel*. It

3 — *Bötel*, paragraph 27 of the judgment.

suggests that the referring court in that case may have insufficiently explained the legal status of staff council membership under German industrial relations law.

13. The referring court considers that membership of a staff council is not employment and therefore that the compensation which staff council members receive for attending training courses is not pay within the meaning of Article 119. The referring court also considers that members of the staff council who are employed part-time are not treated differently *vis-à-vis* members of the staff council who are employed full-time. Even if it were accepted that a difference in treatment exists, that difference is justified on objective grounds.

14. In the order for reference, the referring court explains the rationale of Article 37 of the BetrVG. German industrial relations law prohibits any disadvantageous or preferential treatment of staff council members [4] so as to guarantee their independence and to avoid the risk that they might be influenced in the exercise of their functions by the receipt or threatened loss of material advantages. In line with that objective, Article 37(1) makes staff council membership an unpaid and honorary office. Article 37(2) is designed to ensure that members of a staff council do not suffer a loss of earnings as a result of performing their functions. Thus, staff council members receive from their employer compensation for loss of earnings with regard to the working hours that they spend in performing their functions. By virtue of Article 37(6) of the BetrVG, the same applies to the working hours they spend attending training courses which provide information necessary for the performance of their functions.

15. In the light of the above observations, the Bundesarbeitsgericht has referred the following question:

'Does the prohibition of indirect discrimination on grounds of sex in connection with pay (Article 119 of the EEC Treaty and 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) preclude a national legislature from making membership of a staff council an honorary office to be performed without payment and protecting staff council members only against loss of income which they would otherwise suffer as a result of missing working hours because of staff council duties?'

4 — See Article 78 of the BetrVG.

16. The German Government endorses the arguments stated in the order for reference and argues that the question referred should be given a negative reply.

17. It should be noted that in Case C-278/93 *Freers* the Arbeitsgericht Bremen has referred to the Court a question which raises essentially the same issue as that raised in the present case. In his Opinion of 5 July 1994, Advocate General Darmon proposed an answer to that question in conformity with the judgment of the Court in *Bötel*.

18. The question referred in the present case mentions both Article 119 of the Treaty and the Equal Pay Directive. According to the case-law of the Court, Article 1 of that Directive is principally designed to facilitate the practical application of the principle of equal pay outlined in Article 119 but in no way alters the content or scope of that principle as defined in the Treaty. [5] For the purposes of this case the two provisions can be considered together. I will deal first with the issue of pay, secondly with the issue of equal treatment and thirdly with the issue of justification.

5 — See e. g. Case 96/80 *Jenkins* v *Kingsgate* [1981] ECR 911, paragraph 22 of the judgment.

The issue of pay

19. The referring court recalls that, under the provisions of the BetrVG, membership of a staff council is an unpaid and honorary office, and that staff council members represent the interests of the employees of a firm. They exercise their functions independently, without being subject to the instructions of their employer. It follows that attendance by staff council members at training courses where they acquire knowledge which is necessary to enable them to exercise their functions is not performance of work. Under Article 37(6) of the BetrVG, a staff council member who attends such courses does not receive any payment in return but is merely protected against incurring loss of earnings as a result of exercising his function as a staff council member. If a staff council member uses his own leisure time for staff council activities or training sessions he receives no remuneration in connection with those activities. The compensation for loss of earnings paid to the members of a staff council under Article 37(6) of the BetrVG is not pay within the meaning of Article 119 of the Treaty. The referring court proposes that 'work' within the meaning of Article 119 should be interpreted as meaning the performance of services due as a result of an employment relationship in the course of which instructions must be followed and that that term does not cover the performance of staff council functions.

20. According to the case-law of the Court, the notion of pay within the meaning of the

second paragraph of Article 119 of the Treaty comprises any other consideration, whether in cash or in kind, whether immediate or future, provided that the worker receives it, albeit indirectly, in respect of his employment from his employer. It is not material whether that consideration is paid by virtue of a contract of employment, by virtue of legislative provisions or voluntarily. [6] On the basis of those considerations, the Court held in *Bötel* that the compensation which is paid to an employee who is a staff council member by virtue of Article 37(6) of the BetrVG is pay within the meaning of Article 119. The Court held that, although the compensation does not derive as such from the contract of employment, it is nevertheless paid by the employer by virtue of legislative provisions and under a contract of employment. The Court pointed out that staff council members are necessarily employees of the undertaking and that they are entrusted with the task of safeguarding staff interests, thus promoting harmonious working relationships in the general interest of the undertaking. The Court also stated that payment of the compensation is intended to ensure that staff council members receive income, although they do not perform the duties arising from their contract of employment during the period of the training course. [7]

21. The difficulty in this case arises from the fact that staff council members who participate in a training course do not receive, strictly speaking, any payment in respect of employment. The effect of Article 37(6) of the BetrVG is that they preserve entitlement to their salary although they do not work during the period of the training course. However, according to the case-law of the Court, in order for a benefit to constitute pay it is not necessary that it is given by the employer to the employee as a consideration for the performance of employment. The continued payment of salary, where that is provided for by law, does not cease to be pay because the employee does not perform any work as stipulated in the contract of employment. Thus, the Court has held that the continued payment of wages in a case where an employee has fallen ill is pay within the meaning of Article 119. [8]

22. I conclude that, as the Court held in *Bötel*, the compensation paid to a staff council member for attendance at training courses under Article 37(6) of the BetrVG is 'pay' for the purposes of Article 119 of the Treaty and the Equal Pay Directive. However, it must be recognized that on the facts of this case that compensation can be regarded as pay only in the broadest sense of the term. Even if the continuance of salary for undertaking such activities during normal working hours can be regarded as pay, it is less clear that payment for undertaking such activities outside working hours can be so regarded.

6 — Case C-262/88 *Barber* [1990] ECR I-1889, paragraphs 12 to 19 of the judgment.

7 — *Bötel*, paragraphs 14 to 15 of the judgment.

8 — Case 171/88 *Rinner-Kühn* v *FWW Spezial-Gebäudereinigung* [1989] ECR 2743 and see the Opinion of Advocate General Darmon in *Bötel*, cited in note, at p. 3601.

The issue of equal treatment

23. In the order for reference the referring court states that, even if the compensation which staff council members receive for attending training courses is regarded as pay within the meaning of Article 119, there is no difference in treatment between full-time and part-time employees who are staff council members. Both categories of members receive equal protection against suffering loss of earnings as a consequence of attending training courses. Under Article 37(6) of the BetrVG, staff council members who attend training courses receive the remuneration which they would have received if they had not attended the training course during their individual working hours. Where a training course extends beyond the individual working hours of the members of the staff council, neither part-time nor full-time employees receive remuneration for attendance at the course in addition to their contractual pay.

24. In its judgment in *Bötel*, the Court rejected that reasoning. The Court stated that both categories of staff council members devoted the same number of hours to attending training courses. However, once the duration of training courses held during the full-time working hours applicable in the undertaking exceeded the individual working hours of staff council members employed on a part-time basis, the latter received from their employer compensation which was less than that received by staff council members employed on a full-time basis and they were therefore treated differently. [9]

25. In *Bötel* it was argued that the difference in treatment between full-time and part-time employees was solely due to the difference in working hours since, under German law, compensation was granted without distinction only in respect of working hours during which no work was performed by reason of the participation in training courses. The Court held that that method of calculating the compensation did not alter the fact that staff council members who worked on a part-time basis received less compensation than their full-time colleagues when in fact both categories of employees received without distinction the same number of hours of training in order to be able effectively to look after the interests of employees for the sake of good working relations and for the general good of the undertaking. [10] The Court held that such a situation was likely to deter employees in the part-time category, in which the proportion of women was undeniably preponderant, from serving on staff councils or from acquiring the knowledge needed in order to serve on them, thus making it more difficult for that category of worker to be represented by qualified staff council members. [11]

9 — *Bötel*, paragraph 17 of the judgment.
10 — *Bötel*, paragraph 24 of the judgment.
11 — *Bötel*, paragraph 25 of the judgment.

26. It is clear that no difference in treatment exists between full-time and part-time employees where a training course takes place outside the working hours of both. In such a case, neither full-time nor part-time employees are entitled to receive compensation under Article 37 of the BetrVG. However, where a training course takes place within the working hours of full-time employees but outside the individual working hours of the part-time employees, the latter are placed at a disadvantage because they are required to sacrifice their free time. The order for reference states that under the provisions of the BetrVG holders of unpaid and honorary offices are expected to sacrifice their free time, where necessary, for the performance of their functions. However, that does not obviate the inequality between full-time and part-time employees since, in the circumstances stated above, it is only part-time employees who have to make that sacrifice.

27. Nevertheless certain special features of that unequal situation must be recognized, and may prove relevant to the issue of justification. In the first place, the national provisions do not discriminate on their face; they apply both to full-time and to part-time employees and any resulting inequality is consequential in the sense that it is an accidental consequence of the situation of certain part-time employees. This contrasts with many cases before the Court where there was *direct* discrimination against part-time employees (and hence *indirect* discrimination against women, who constituted the majority of part-time employees). In *Bilka*, [12] for example, the Court was concerned with a supplementary occupational pension scheme under the terms of which part-time employees could obtain a pension only if they had worked full time for a certain period. In *Rinner-Kühn*, [13] the German Law on the continued payment of wages excluded from its application part-time employees. By contrast, Article 37 of the BetrVG does not distinguish between full-time and part-time employees but ostensibly applies equally to both categories.

28. Where a measure does not distinguish on its face between full-time and part-time employees, it is more difficult to establish the existence of indirect sex discrimination. In *Helmig*, [14] it was argued that provisions of collective agreements which restricted overtime supplements to overtime worked in excess of the normal working hours, and thus excluded part-time employees from entitlement to overtime supplements for hours they worked over their individual working hours, infringed Article 119 and the Equal Pay Directive. However, in the circumstances of the case, the Court found that part-time employees received the same overall pay as full-time employees for the same number of hours worked and therefore that there was no difference in treatment.

12 — Case 170/84 *Bilka* v *Weber von Hartz* [1986] ECR 1607.

13 — Case 171/88, cited in note .

14 — Joined Cases C-399/92, C-409/92, C-425/92, C-34/93, C-50/93 and C-78/93 *Helmig and Others* [1994] ECR I-5727.

29. In the present case, given the basic features of the German system, the difference of treatment seems in certain respects inherent in the difference between full-time and part-time employees. Part-time employees are inherently more likely to be devoting more time to the activities in question, in proportion to their working hours, than full-time employees, and are also more likely to be taking part in the activities in question outside their normal working hours. Moreover if they were to receive compensation for those periods, it could be contended that they would receive a special advantage compared to other part-time employees who could not extend their working hours so as to receive additional remuneration. It would in any event be difficult to achieve complete equality of treatment between part-time and full-time employees. Indeed it seems doubtful whether any wholly egalitarian method could be devised without undermining the basic principles of the German system that there should neither be disadvantages nor preferential treatment for employees who are members of staff councils. It is necessary to bear these matters in mind in considering the issue of justification.

The issue of justification

30. The referring court considers that, even if it were accepted that full-time and part-time employees are treated differently, that difference in treatment is objectively justified by the fact that staff council membership is an unpaid and honorary office and by the objectives pursued by the German industrial relations law. In its judgment in *Bötel* the Court did not specifically examine that issue. Before discussing the arguments adduced in the order for reference and those submitted by the German Government and by the Commission, it will be helpful to examine the case-law of the Court concerning objective justification in the context of indirect sex discrimination.

31. The Court has consistently held that it is ultimately for the national court, which has sole jurisdiction to assess the facts and interpret the national legislation, to determine whether and to what extent a legislative provision which, though applying independently of the sex of the worker, actually affects a greater number of women than men is justified by reasons which are objective and unrelated to any discrimination on grounds of sex. [15]

32. The Court has however provided guidance on the issue of justification. It has accepted that both economic reasons and reasons of social policy may be objectively justified grounds. It has held that objectively justified economic grounds may include, if they can be attributed to the needs and objectives of the undertaking, various criteria such as the worker's flexibility or adaptability to hours and places of work, his training

15 — Case 171/88 *Rinner-Kühn*, cited in note, paragraph 15 of the judgment; Case 170/84 *Bilka* v *Weber von Hartz*, cited in note, paragraph 36.

or his length of service. [16] In *Enderby* the Court held that the state of the employment market, which may lead the employer to increase the pay of a particular job in order to attract candidates, may constitute an objectively justified economic ground. [17] The Court pointed out that in applying Community law national authorities must respect the principle of proportionality. Therefore, where the national court has been able to determine precisely what proportion of the increase in pay is attributable to market forces, it must accept that the pay differential is objectively justified to the extent of that proportion. [18]

33. In *Bilka* it was argued that the exclusion of part-time employees from the occupational pension scheme of the employer, which affected adversely a far greater number of women than men, was intended solely to discourage part-time work, since in general part-time employees refused to work in the late afternoon and on Saturdays. In order to ensure the presence of an adequate workforce during those periods it was necessary to make full-time work more attractive than part-time work, by making the occupational pension scheme open only to full-time employees. The Court held that if the national court found that the measures chosen by the employer corresponded to a real need on the part of the undertaking, were appropriate with a view to achieving the objectives pursued and were necessary to that end, the fact that the measures affected a far greater number of women than men was not sufficient to show that they constituted an infringement of Article 119. [19]

34. In *Rinner-Kühn* the Court was concerned with the German Law on the continued payment of wages, according to which an employer was under an obligation to continue to pay wages for a certain period to any employee who, after the commencement of his employment and through no fault of his own, was incapable of working. However, employees whose contract of employment provided for a normal period of work of not more than 10 hours a week or 45 hours a month were excluded from the benefit of that provision. In order to justify their exclusion, the German Government argued that those employees were not as integrated in, or as dependent on, the undertaking employing them as other employees. The Court held: [20]

'... those considerations, in so far as they are only generalizations about certain categories of workers, do not enable criteria which are both objective and unrelated to any discrimination on grounds of sex to be identified. However, if the Member State can show that the means chosen meet a necessary aim of its

16 — Case 109/88 *Handels- og Kontorfunktionaerernes Forbund i Danmark* v *Dansk Arbejdsgiverforening, acting on behalf of Danfoss* [1989] ECR 3199, paragraphs 22 to 24 of the judgment.

17 — Case C-127/92 *Enderby* [1993] ECR I-5535, paragraph 26 of the judgment.

18 — *Enderby*, paragraph 27 of the judgment.

19 — *Bilka*, cited in note, paragraph 36 of the judgment.

20 — *Rinner-Kühn*, cited in note, paragraph 14 of the judgment.

social policy and that they are suitable and requisite for attaining that aim, the mere fact that the provision affects a much greater number of female workers than male workers cannot be regarded as constituting an infringement of Article 119.'

35. A similar approach was taken in *Nimz*. [21] The collective agreement in issue in that case required employees who were employed for between one-half and three-quarters of the working time of a full-time employee to have completed double the length of service of full-time employees in order to qualify for the next higher salary grade. In order to justify the difference in treatment, it was argued that full-time employees or those who worked for three-quarters of normal working time acquired more quickly than others the abilities and skills relating to their particular jobs. In response to that argument the Court held: [22]

'... Although experience goes hand in hand with length of service, and experience enables the worker in principle to improve performance of the tasks allotted to him, the objectivity of such a criterion depends on all the circumstances in a particular case, and in particular on the relationship between the nature of the work performed and the experience gained from the performance of that work upon completion of a certain number of working hours. However, it is a matter for the national court, which alone is competent to evaluate the facts, to determine in the light of all the circumstances whether and to what extent a provision in a collective agreement such as that here at issue is based on objectively justified factors unrelated to any discrimination on the grounds of sex.'

36. In *Kowalska*, [23] as an argument to justify the exclusion of part-time employees from the payment of a severance grant paid upon retirement, it was submitted that part-time employees did not provide for their needs and those of their families exclusively out of their income from their employment and therefore that employers were not under a duty to provide temporary assistance for part-time employees. The Court did not express a view on the justification put forward but left the matter entirely to the national court.

37. The following conclusions can be drawn from the case-law of the Court with regard to objective justification. Once it is established that a measure in practice affects a considerably higher number of employees of one sex than the other, the onus of proving that the difference in treatment is justified on objective grounds lies with the person who argues that such objective justification exists, typically the employer or the Member State depending on the case. [24] Secondly, although

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

22 — At paragraph 14 of the judgment.

23 — Case C-33/89 *Kowalska* [1990] ECR I-2591.

24 — See further *Enderby*, cited in note, paragraphs 13 to 14 of the judgment.

the Court may give guidelines, it is often necessary to leave it to the national court to determine whether the arguments submitted are capable of justifying the difference in treatment between men and women in the circumstances of the case, regard being had to the principle of proportionality. But the Court may itself reject an argument if it is a mere generalization about certain categories of employees, as it did in *Rinner-Kühn* and *Nimz* or if it is clearly unconvincing and its evaluation does not depend on the assessment of the specific circumstances of the case which only the national court is equipped to carry out. [25]

38. A distinction can moreover in my view be drawn between economic grounds and social policy grounds. Where it is alleged that a difference in treatment between men and women is justified on economic grounds, it is usually necessary to evaluate the specific circumstances of the case, taking into account *inter alia* the requirements of the market and of the employer concerned. Where a difference in treatment arises directly from national legislation and it is alleged that it is justified by reasons of social policy, it is less likely that the specific circumstances of the employees and of the employer concerned will be of decisive influence. In such a case, it may be possible for this Court to give more detailed guidance to the national court. [26]

39. Consistently with that approach, and in the light of the fuller submissions on the issue of justification which have been advanced in the present case, it is possible for the Court to give further guidance on the issue of justification. I turn therefore to examine those submissions.

40. As mentioned above, the order for reference states that German law makes council membership an unpaid and honorary office and prohibits any disadvantageous or preferential treatment of staff council members so as to guarantee their independence and to avoid the risk that they might be influenced in the exercise of their functions by the receipt or threatened loss of material advantages. Thus, no special payment may be made to a staff council member for performing his functions in addition to the pay due under the contract of employment. If staff council members in part-time employment were able, by reason of their staff council activity, to extend their contractual working hours and obtain payment of additional remuneration as a result, they would be receiving special payment which is prohibited on good grounds by the German industrial relations law. The national court states that in the interests of ensuring that members of staff councils perform their functions

25 — See, in the context of Directive 79/7/EEC (OJ 1979 L 6, p. 24), Case C-102/88 *Ruzius-Wilbrink* v *Bedrijfsvereniging voor Overheidsdiensten* [1989] ECR 4311.

26 — See, in the context of Directive 79/7/EEC, *Ruzius-Wilbrink*, cited in note; Case C-226/91 *Molenbroek* [1992] ECR I-5943; Case C-343/92 *De Weerd and Others* [1994] ECR I-571.

objectively, the German legislature regarded the independence of staff councils as more important than financial inducements for accepting office as a staff council member.

41. The German Government advances similar arguments. It claims that it is not possible to recognize a partial exception from the principle that staff council membership is an honorary unpaid office in favour of part-time employees. Such an exception would lead to legitimate claims from full-time employees for remuneration for participation in training courses which happened to fall outside their working hours (which is especially likely if they are full-time shift workers) but within the working hours of part-time employees. Moreover, if members of staff councils were remunerated for participating in training courses they should also be remunerated for exercising all other functions as members of staff councils. In the German Government's view, if the judgment in *Bötel* were followed, German law would have to abandon the principle that council membership is an honorary unpaid office. That would have serious consequences. It would endanger the independence of staff councils. It would also lead to the creation of 'professional' staff council members, thereby reducing the proximity between staff councils and the employees whose interests they represent.

42. The Commission accepts that the unpaid and honorary character of staff council membership is compatible with Community law and may in principle be regarded as an objective ground justifying a difference in treatment. It points out, however, that according to the principle of proportionality the resulting difference in treatment between men and women can be considered objectively justified only to the extent that the principle of compensation for loss of earnings is suitable and necessary to achieve the objectives pursued by the BetrVG. It refers to the case-law of the Court according to which, where there are many appropriate measures, recourse must be had to the least restrictive.

43. In my view, in assessing whether the measures are justified, account must be taken of the effect of those measures in terms of sex discrimination, namely, of the extent to which the measures infringe the principle of equal pay for equal work between men and women. Account must also be taken of whether such infringement is the direct result or merely a side-effect of the measures. In this context, it is necessary to bear in mind, in the first place, that the benefit in issue for part-time employees, namely compensation for time spent outside contractual hours of employment, can only be regarded as pay on the broadest possible interpretation of that term. It is also necessary to bear in mind that the measures pursue an objective which, as the Commission itself accepts, is legitimate and one which is wholly unrelated to any discrimination on grounds of sex. Moreover, as I explained above, the difference in treatment of part-time workers is inherent in the nature of part-time work and any disadvantage which part-time employees

suffer as a result of the measures is only an accidental consequence of the principle of compensation for loss of earnings.

44. Taking those considerations into account, I consider that the arguments set out in the order for reference and the submissions of the German Government (paragraphs and above) go far towards providing a sufficient objective justification for the difference in treatment.

45. The Commission's objections to the above arguments are not altogether convincing. The Commission disputes the argument that if part-time employees were paid for attending training courses outside their working hours they would derive a financial advantage which would be incompatible with the honorary nature of staff council membership. It points out that staff council members who are employed part-time, unlike those who are employed full-time, are required to devote their free time to attending those courses. It also states that the provisions of Article 37 are sufficient to prevent the abusive use of staff council membership. Under Article 37(6), staff council members may participate in training courses only if that is necessary for the performance of their functions. Further, part-time employees, who are usually women, have family constraints. It is unlikely that they will be able to use staff council membership as a means of increasing their income. The Commission suggests that, if they received supplementary pay for attending training courses, that would enable them to cover the expenses required for child care during the period of the training course; but that does not seem to me to be required by the principle of equal pay. Indeed, none of the Commission's points seems to be of great weight in itself, nor do they meet the concerns expressed by the referring court and the German Government.

46. Nor has it been shown that other measures could be introduced which met the objectives of the German measures and were less restrictive than those in issue. It might be suggested that other means could be envisaged which met the objectives in question while fully respecting the principle of equal pay for men and women; for example, training courses could be organized within the working hours of part-time employees. [27] However, although that might be possible in some cases, it may not be possible in all cases. Training courses are organized for staff council members of many undertakings, and working hours of part-time employees may vary greatly even within the same undertaking. That seems to me to confirm the point that the situation in the present case is one in

27 — See the Opinion of Advocate General Darmon in *Freers* (above, paragraph), at paragraph 73.

which complete equality between full-time and part-time employees is unattainable.

47. In the light of the above, I conclude that the measures in issue pursue a legitimate objective and one which is unrelated to any grounds of sex discrimination; and that those measures do not impose a disadvantage on part-time employees disproportionate to their objectives. It follows that the difference in treatment can be regarded as justified.

Conclusion

48. Accordingly, I am of the opinion that the question referred should be answered as follows:

Article 119 of the EEC Treaty and 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 preclude national legislation applicable to a much greater number of women than men from limiting to their individual working hours the compensation, in the form of paid leave or overtime pay, which staff council members employed on a part-time basis are to receive from their employer for attending training courses which impart the knowledge necessary for working on staff councils and are held during the full-time working hours applicable in the undertaking but which exceed their own part-time working hours, when staff council members employed on a full-time basis are compensated for attendance of the same courses on the basis of full-time working hours, and in the absence of any objective justification for the different treatment of part-time employees. Such different treatment will be objectively justified where the alleged discrimination against part-time employees is only consequential, where the difference of treatment is based on a legitimate objective unrelated to any discrimination on grounds of sex and where the difference of treatment is justified by that objective.