Overview of Recent Cases before the European Court of Human Rights and the European Court Of Justice (December 2007-February 2008)

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NEWS AND CASES


1. EUROPEAN COURT OF JUSTICE

This has been a relatively quiet period in the Court of Justice as concerns social security case law. There has been only one important 1408 case (Habelt discussed in more detail below) in which the Court reflects further on its case law on citizenship (albeit almost without mentioning the concept). The Court also decided the Klöppel case in which it ruled that Regulation 1408/71 required a Member State to take into account, for the purposes of family benefits, the period during which a comparable benefit was received in another Member State as though that period had been completed in its own territory. The Court might have, but did not, refer to this as an example of the principle of assimilation of facts now enshrined in the (still not applicable) Regulation 883/2004. The Court of First Instance considered an important issue in relation to the provision of private health insurance benefits which, in a number of Member States, play a significant role in the provision of national health care (BUPA v Commission discussed below).

1.1. Territoriality and citizenship

The Habelt case reflects the development of the concept of EU citizenship. In short, the case concerned the compatibility of restrictions to the principle of exportability of benefits (set out in annexes to Regulation 1408/71) with the Treaty provision on freedom of movement. As outlined by Advocate General Trstenjak, the provisions were intended to allow the Federal Republic of Germany to leave in force domestic legislation in the field of old-age pensions for ethnic German expellees, which was to remain unaffected by the provisions of Regulation 1408/71, including Article 10 concerned with the exportability of benefits. Basically the German legislation took into account contributions paid outside the

2. Joined cases C-396/05, C-419/05 and C-450/05, Habelt, Möser and Wachter [2007] ECR I-000.
3. The facts of the three joined cases are somewhat lengthy and will not be discussed in detail here.
current territory of the Federal Republic for the purposes of calculating entitlement to a German pension but restricted this entitlement if the claimant did not reside in the territory of the Federal Republic of Germany.

The first issue to be decided was whether the benefits fell within the material scope of Regulation 1408/71. At first appearance they clearly did as they involved general pension schemes. However, the German authorities understandably relied on the earlier decisions of the Court in Fossi and Tinelli,\(^4\) in which the Court had held that similar benefits, based on insurance periods completed during World War II, did not fall within the sphere of social security for the purposes of Regulation 1408/71. The Court, however, refused to follow this approach, setting out at some length the reasons why the benefits in question did fall within the concept of social security.\(^5\)

Moving on to the substance of the issue, the effect of the provisions was to penalise freedom of movement. The Court pointed out that Regulation 1408/71 gives effect to Article 42 EC, regarding freedom of movement for workers, and that the provisions of the Regulation (concerning the exportability of benefits) helped to ensure the freedom of movement, ‘not only for workers, under Article 39, but also for citizens of the Union, within the European Community, under Article 18’. The Court stated that the restriction on free movement would make more difficult or prevent the exercise of that freedom of movement.

The Court moved on to consider whether this restriction was justified. The German authorities argued that the objective of the rule restricting freedom of movement was to ensure the integration into German society of refugees from the former eastern territories (para. 77 of the judgment). The Court held that while restricting exportability was allowed in the case of special non-contributory benefits linked to the social environment of the Member State, it could not be allowed in relation to social security benefits which were not so linked. Accordingly the Court stated that to allow the competent Member State to rely on grounds of integration into the social environment of that State in order to impose a residence clause would run directly counter to the fundamental objective of the Union, which is to encourage

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5. Unfortunately the Court, as in a number of recent decisions, made no effort to explain why it was now following a different approach. One might assume that the earlier decisions no longer represent good law but it might tend towards legal clarity if the Court addressed this issue in its judgments.
the movement of persons within the Union and their integration into the society of other States (para 82). The Court therefore found that the relevant provisions were incompatible with the freedom of movement of persons and, in particular, Article 42.6

The outcome of this case may be welcomed but the Court’s approach may be subject to some criticism. First, although the Court’s case law on free movement is clearly driven by the citizenship provisions, the Court continues to rely on specific provisions (Article 39 and 43 EC in this case) as the expression of the general principle of freedom of movement set out in Article 3EC.7 In general this approach may not create any difficulties, but in this particular case it simply serves to obscure the reasoning behind the Court’s approach. The Court relies ostensibly on Articles 39 and 42EC to justify its approach. But both refer only to free movement of workers and it is difficult to see why freedom of movement for workers (as opposed to citizens) should be affected by a provision which (in two of the cases here) impacted on a decision to move to a third country (neither the place of birth, nor Germany) after attaining pension age. Second, the Court confounds two entirely different issues when it repeats its standard distinction between full exportability of social security and non-exportability of special non-contributory benefits, on the basis that the latter are closely linked to the social environment, and then makes this the basis for rejecting the German government’s rationale of wishing to integrate the persons concerned into its social environment. Assuming that the linkage of a benefit to its social environment justifies its non-exportation, this principle still says nothing about whether the desire to integrate ethnic Germans into a German social environment is or is not justified.8

The correct basis for the decision is surely that set out by Advocate General Trstenjak who questioned whether the ‘integration idea’ which, according to the German government, provided the basis for the German provisions, was compatible with the concept of Union citizenship set out in Articles 17 and 18 EC. He went on to argue that

6. One of the joined cases also concerned the compatibility of an annex provision concerning a German-Austrian bilateral convention which the Court also declared incompatible with the Treaty in that it restricted export of benefits.
8. And while one appreciates the difficulties in trying to distinguish special non-contributory benefits (perhaps more closely linked to providing a minimum income in a Member State) from social security (perhaps, but not in several cases, more in the nature of wage replacement), the Court surely needs to look at its terminology. To state that social security benefits ‘do not appear to be linked to the characteristic social environment of the Member State concerned’ is simply nonsensical.
81. One of the main concerns of European social security legislation, and also in relation to freedom of movement, is the integration of workers and, thereby, of Union citizens into the social life of a Member State. Articles 18(1) and 39 EC are obviously infringed by national legislation which, like that at issue in the present cases, although pursuing the integration of a particular group of persons into the society of the home country, is at the same time directed against their integration into the society of other Member States.

82. The aim of integration of Union citizens will be frustrated and Article 18(1) thereby infringed if a Member State segregates a particular group of its own nationals for no apparent reason and puts them at a disadvantage, compared with the majority, by making it difficult for them to exercise their freedom of movement by reducing their pensions.

83. I fail to see why integration into the society of the Federal Republic of Germany should not at the same time always entail integration into the society of peoples within the European Union, particularly as the declared aim of the EC Treaty is, according to the first recital of the preamble, to lay the foundations of an ever closer union among the peoples of Europe.

While coming to the same conclusion as the Court, the Advocate General arguably arrived there by a much clearer and more legally-sound route.

1.2. Private health insurance, competition and risk equalisation

In an interesting case, the Court of First Instance considered the compatibility of the Irish ‘risk equalisation’ scheme for private health insurers with EU competition law. Private health insurance plays an important role in the provision of health care in Ireland. Private insurance is strongly supported by government, including by the provision of tax incentives, and almost half the Irish population are members of private health insurance schemes (one of the highest levels of coverage in the OECD). The main insurer is the VHI (Voluntary Health Insurance). This is a statutory body established in the 1950s, which originally had a monopoly in the Irish market. This had to be removed because of EU competition law and an

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extensive framework for the operation of the health insurance market was established in the Irish Health Insurance Act 1994, which opened up the market to other providers subject to certain principles.

One of the main principles on which the operation of the Irish system is based is ‘community rating’. ‘Community rating’ means that an insurance company must charge the same rate for a given level of service, regardless of age, sex or health status.\(^{10}\) However, despite the principle of community rating, it would be possible for an insurer by targeting a younger and/or healthier sector of the market to ensure that it had lower costs and could charge lower premiums. This could result in ‘cherry picking’ with one or more insurers being left with the older and less healthy members and running into financial difficulties. The legislation therefore also contains provisions concerning ‘risk equalisation’. Risk equalisation is a process that aims to neutralise differences in insurers' costs that arise due to variations in the health status of their members by requiring insurers with a lower risk profile to pay a risk equalisation payment to a company with a higher risk profile. In practice this was always going to involve a subsidy to the existing, long established VHI (with, almost by definition, a large proportion of older people in its client base) from BUPA, the main new entrant to the market.

Although the risk equalisation scheme was not actually brought into effect until 2006, the EC Commission was notified by the Irish authorities of their intention to introduce such a scheme and, having reviewed the scheme did not object. The Commission decided that the risk equalisation scheme did not constitute State aid within the meaning of Article 87(1) EC and could be declared compatible with the common market pursuant to Article 86(2) of the Treaty.\(^{11}\) The Commission took the view that although the RES could be qualified as a State aid in the sense of the EC Treaty, its effect was to compensate insurers for services of general economic interest (SGEI) responsibilities and, therefore, following the Ferring judgment, did not constitute State aid.\(^{12}\)

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10. Although insurance companies may not refuse to accept a person on the basis of health status or charge higher premiums, they can restrict the cover provided on the basis of a pre-existing condition.


It was this decision by the Commission which was challenged by BUPA. Clearly the provisions of the Irish legislation do interfere to a certain extent with the operation of a free market in health insurance and it would be important for Ireland (and other European countries with extensive health insurance markets) to establish the balance which would be struck by the EU courts between competition and broader social issues. In the BUPA case the Court of First Instance showed a marked reluctance to interfere with the Member State’s judgment as to appropriate restrictions to impose.

Article 86.2 EC provides:
Undertakings entrusted with the operation of services of general economic interest … shall be subject to the rules contained in the Treaty, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them.

Article 87(1) EC provides:
Save as otherwise provided in this Treaty, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the common market.

BUPA argued that the decision of the Court of Justice in the Altmark case – given after the Commission decision – and, in particular the criteria laid down in that judgment in order to establish the existence of a SGEI mission, required annulment of the Commission decision. However, the Court of First Instance, in a lengthy judgment, rejected each of the arguments advanced by BUPA and dismissed the application to annul the Commission’s decision.

BUPA had, in particular, argued that the concept of a SGEI mission was one of Community law which was strict in nature, and compliance with it was subject to unlimited control by Community institutions and not capable of being delegated to national authorities. The Court rejected this sweeping argument holding that ‘Member States have a wide discretion to define what they regard as SGEIs and that the definition of such services by a Member State can be

questioned by the Commission only in the event of manifest error’ (para 166). The Court (at para 167) confirmed that the determination of the nature and scope of an SGEI mission in specific spheres, which either do not fall within the powers of the Community or are based on only limited or shared Community competence remained, in principle, within the competence of the Member States. It pointed out that the health sector falls almost exclusively within the competence of the Member States. Therefore, the determination of SGEI obligations in this context also fell primarily within the competence of the Member States. Consequently, the Court went on, ‘the control which the Community institutions are authorised to exercise over the use of the discretion of the Member State in determining SGEIs is limited to ascertaining whether there is a manifest error of assessment’ (para 169). This fundamental point meant that a less rigorous standard of review applied and that the Court was able to reject subsequent detailed challenges to aspects of the Commission’s assessment on the basis that, for example, the applicants had not demonstrated that the RES was a ‘manifestly inappropriate means of compensating for the additional costs’ resulting to the VHI (para 238).14

Overall, this is an important decision in allowing Member States considerable margin to define social priorities in relation to ‘services of general economic interest’ and to ensure that social services are not run on a purely competitive basis.15

2. EUROPEAN COURT OF HUMAN RIGHTS16

2.1. Maintenance obligations and non-discrimination

In Hansen, the applicant was a father of a daughter who lived with her mother who had sole parental authority. He was not married to the mother. German civil law sets out maintenance obligations in respect of non-custodial parents of children and outlines how maintenance is to

14. As the detailed arguments are mainly of interest from a competition law perspective they will not be discussed here.

15. It should be noted that, before this judgment was given, BUPA had in part fulfilled its own prophecies about the disastrous effect the RES would have on competition by withdrawing from the Irish market. On the other hand, the impact may be somewhat less disastrous given that BUPA’s Irish business was taken over by another insurance company.

16. Readers should note that there have been a number of recent ECHR decisions concerning the pension entitlements of citizens of the former GDR, in which the decision of Klose v Germany, 12923/03, 25 September 2007 has been cited as a precedent. However, at the time of writing this case is still not available on the Court’s website.
be calculated according to a range of circumstances including the age of the child and the financial circumstances of the non-custodial parent. Separately, the federal Child Benefits Act provides for payment of child benefit to the custodial parent (where the child lives with one parent only). However, in order to ensure that the non-custodial parent also benefits, he or she is allowed to deduct half of the child benefit paid from the amount of maintenance which he or she is liable to contribute. This does not, however, apply where the amount of maintenance payable falls below a set minimum calculated to cover the costs of a child’s basic needs. Because the amount of maintenance due fell below that set minimum, Mr. Hansen was not allowed to deduct half the child benefit received from his maintenance obligations.

Mr. Hansen complained under Article 14 in conjunction with Article 8 of the Convention that this constituted discrimination against him in relation to the mother of his child, who was able to use the whole amount of child benefits whereas he had had to use his part of the child benefits for the maintenance payments. He also submitted that it constituted discrimination against him in relation to non-custodial parents with higher incomes.

The German Federal Constitutional Court had already ruled that the maintenance provisions were compatible with the provisions of the German Basic Law (in unrelated proceedings). The Constitutional Court held that, first, there was no violation of the principle of equality under Article 3 of the Basic Law in so far as the deduction of child benefits from maintenance payments depended on the financial position of the non-custodial parent. In particular, there was no unequal treatment of persons placed in analogous situations as the rules applied equally to all parents with child maintenance obligations and because a distinction according to different financial capacities did not constitute unequal treatment of persons placed in equal situations. Although the obligation of non-custodial parents to supplement their maintenance payments by their child benefits up to the set amount affected non-custodial parents with lower incomes rather than those with higher earnings, the Court argued that this was not the consequence of unequal treatment but the result of different living situations and incomes. It held that the German legislator merely took into account these differences and provided for a financial adjustment for those cases in which non-custodial parents were not able to cover the costs of their children’s basic needs. Even

17. 1 BvL 1/01 and 1 BvR 1749/01, Decisions of the Federal Constitutional Court (BVerfGE), vol. 108, pp. 52 et seq.
assuming that the provision did involve unequal treatment, the Constitutional Court held that this would be justified by the legitimate aim of securing the subsistence level of children of separated parents. In view of the parents’ duty to provide for the maintenance of their children, and given that non-custodial parents were protected by minimum amounts of self-retention from falling below the level of subsistence on account of their maintenance obligations, there was no violation of the principle of equality.

Second, the Court accepted that the provisions entailed different treatment between custodial and non-custodial parents. However, the unequal treatment was justified because the rules aimed to adjust the double burden lone parents are faced with when caring for their children and working to cover the financial needs of the family. Thus, the Court took the view that the provisions assisted custodial parents to cover their own living costs and to ameliorate the child’s living conditions, which are determined by the financial situation of the custodial parent. The non-custodial parents’ income was sufficiently protected by minimum amounts set in the legislation for retained income.

The Court of Human Rights, following its Petrovic judgment, did not have any difficulty in deciding that the issue fell within the scope of Article 8. On the substantive issue, the Court of Human Rights (as it has done in several previous cases) followed closely the approach of the Constitutional Court. Turning first regarding the issue of discrimination between parents, given that it found that both parents are equally responsible for the maintenance of their children, the Court took the view that the maintenance rules did entail a different treatment of persons placed in an analogous situation (in that non-custodial parents were treated differently to custodial parents). However, following the reasoning of the German Constitutional Court as to (i) the aim of supporting the burdens faced by lone parents and (ii) the safeguards built in for the income of non-custodial parents, the Court of Human Rights held that the provisions pursued a legitimate aim and were proportionate. Regarding the argument that the provisions acted to the disadvantage of non-custodial parents on low incomes, this would appear to be the inevitable outcome of the system as described (although no statistics are presented in the decision). However, as is its wont, the Court did not find it

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18. *Petrovic v Austria* 20458/92, 27 March 1998, *Reports of Judgements and Decisions* 1998-II, (1998) 33 EHRR 307. It would appear that the issue would also fall within the scope of P1-1 as it related to the right to child benefit but the Court, presumably because the issue had not been raised by the applicant, did not advert to this.
necessary to address the issue of whether there was a difference in treatment as, even assuming there was, it found, again following the reasoning of the German Constitutional Court, that the provisions pursued a legitimate aim (securing a minimum income for the children of separated parents) and were proportionate (given that the law set a minimum retained income for the non-custodial parent).

This decision again highlights the limited degree of success which applicants have in bringing social security claims before the Court of Human Rights and the extent to which the Court (arguably correctly) defers to the decisions of national courts (in this case, the German Constitutional Court) which are best placed to make an informed assessment of their national rules. While some might argue that such decisions (which do not display a very rigorous analysis of the national provisions) justify national courts in applying a similarly relaxed level of review, it is – on the contrary – arguable that the approach adopted by the Court of Human Rights requires a more rigorous approach at a national level, thereby ensuring that responsibility for the implementation of the Convention is appropriately allocated amongst the different judicial levels.

2.2. The Jonkman case – righting former wrongs

The Jonkman judgment involves the compatibility of measures taken by the Belgian authorities to rectify earlier discrimination in relation to statutory pensions with Directive 79/7/EEC on equal treatment for men and women in matters of social security.

Court of Justice 21 June 2007
(P. Jann, President of the Chamber, R. Schintgen, A. Borg Barthet, M. Ilešič (Rapporteur) and E. Levits)
National Pensions Office v E. Jonkman, H. Vercheval, and N. Permesaen v National Pensions Office (Joined Cases C-231/06 to C-233/06)

Judgment
Those references were submitted in the context of proceedings between Ms Jonkman, Ms Vercheval and Ms Permesaen and the National Pensions Office (the ‘NPO’).

The disputes in the main proceedings and the questions referred for a preliminary ruling

Ms Jonkman, Ms Vercheval and Ms Permesaen, after having worked as air hostesses for Sabena SA, a Belgian airlines company, brought a claim for a retirement pension as civil aviation air crew. They brought those claims in 1992, 1995 and 1996, in order to claim their pension rights from 1 March 1993, 1 July 1996 and 1 February 1997 respectively.

The NPO granted them a pension. However, Ms Jonkman, Ms Vercheval and Ms Permesaen disputed the decisions of the NPO before the Tribunal de travail de Bruxelles (Brussels Labour Court), in the case of Ms Jonkman, and before the Nivelles Labour Court in the other cases, arguing that the calculation of their pensions was based on discriminatory provisions and that they should receive a pension calculated under the same rules as those applicable to male cabin crew.

Specifically, it followed from a comparison of the notes on the calculation in their pensions that the amounts of remuneration taken into account by the NPO were, in respect of the period from 1 January 1964 to 31 December 1980, significantly less for air hostesses than for air stewards, despite the fact that their basic remuneration was equal.

That was explained by a difference in treatment during the abovementioned period between, on the one hand, the air hostesses and, on the other hand, the other cabin crew members. In fact, by a Royal Decree of 10 January 1964 determining the contributions intended for the financing of the retirement and survivors pension scheme for civil aviation air crew, and the detailed rules for their payment (Moniteur belge of 17 January 1964, p. 464), which entered into force on 1 January 1964, a special retirement pension scheme was introduced for the benefit of civil aviation air crew, from which air hostesses were nevertheless excluded. The latter remained subject to the general retirement pension scheme applicable to employed persons, which was characterised by account being taken, in respect of the collection of contributions and the calculation of the pension, of a smaller percentage of remuneration than that which served as the basis for the calculation in the special scheme for civil aviation air crew.
7. The reason for the exclusion of air hostesses from entitlement to that special retirement pension scheme lay in the impossibility for them at that time to continue their career as members of an air crew beyond the age of 40. They could not therefore complete a full career. On those grounds the Kingdom of Belgium decided not to include them in the special scheme established.

8. The problem of careers at Sabena SA and the air hostess pension scheme has been the subject of several disputes before the Belgian courts, some of which have been resolved by a judgment given by the Court after a reference for a preliminary ruling (Case 80/70 Defrenne [1971] ECR 445; Case 43/75 Defrenne [1976] ECR 455, and Case 149/77 Defrenne [1978] ECR 1365). By a Royal Decree of 27 June 1980 amending the Royal Decree of 3 November 1969 determining, in respect of civil aviation air crew, the special rules on eligibility for a pension and the special rules for the application of Royal Decree No 50 of 24 October 1967 concerning retirement and survivor’s pensions for employed persons (Moniteur belge of 23 August 1980, p. 9700), which came into force on 1 January 1981, the air hostesses were finally integrated into the special scheme for civil aviation air crew. Subsequently, the Belgian legislature, by a Royal Decree of 28 March 1984 with the same title as the preceding decree (Moniteur belge of 3 April 1984, p. 4100), introduced an adjustment for air hostesses in respect of the period from 1 January 1964 to 31 December 1980. That Royal Decree having been annulled by a judgment of the Conseil d’Etat (Council of State) of 7 September 1987, a new Royal Decree, also with the same title, was adopted on 25 June 1997 (Moniteur belge of 31 July 1997, p. 19635, ‘the Royal Decree of 25 June 1997’), in order to remedy the difference in treatment between air hostesses and stewards during the period from 1 January 1964 to 31 December 1980.

9. Under the Royal Decree of 25 June 1997, air hostesses who had been employed as such during the period from 1 January 1964 to 31 December 1980 now had the right to a retirement pension under the same rules as those applicable to stewards, subject to a single payment of adjustment contributions, together with interest at the annual rate of 10%. Those adjustment contributions essentially consist of the difference between the contributions paid by the air hostesses during the period from 1 January 1964 to 31 December 1980 and the higher contributions paid by the stewards during the same period.
Ms Jonkman, Ms Vercheval and Ms Permesaen are of the opinion that the adjustment provided for by the Royal Decree of 25 June 1997 does not completely eliminate any discrimination between the air hostesses and the stewards.

By judgments of 17 November 1997 and 9 January 1998, given by the Brussels Labour Court and by the Nivelles Labour Court respectively, the actions brought by Ms Jonkman and Vercheval were allowed, on the ground that the methods for calculating their pensions are discriminatory.

In the case of Ms Permesaen, the Nivelles Labour Court, by a judgment of 26 December 2003, upheld the NPO’s arguments in part. It found that making the grant of a pension identical to that of male workers subject to payment of the contributions which would have had to have been paid had the worker been affiliated to that scheme during her professional career was not discriminatory. By contrast, it did consider interest at an annual rate of 10% to be discriminatory.

The NPO appealed against the judgments of 17 November 1997 and 9 January 1998 to the Cour du travail de Bruxelles (Brussels Higher Labour Court). Ms Permesaen appealed to that same court against the judgment of 26 December 2003.

The Brussels Labour Court takes the view that the way in which the adjustment system introduced by the Royal Decree of 25 June 1997 is to be applied may be discriminatory. It notes in that regard that the single payment of a very large capital sum represents, for a pensioner, a considerable obstacle. It also draws attention to the tax aspect of that adjustment system, namely that at the material time the adjustments were deductible for tax purposes with regard to the stewards, which is not the case for the air hostesses. It observes lastly that the rate of interest applied is higher than the statutory rate for damages and default interest, and higher than the banking rate.

The Brussels Labour Court takes the view that the resolution of the disputes in the main proceedings is dependent on the interpretation of Directive 79/7. It has therefore decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

‘(1) Is Directive 79/7/EEC of 19 December 1978 to be interpreted as meaning that it authorises a Member State to adopt rules intended to allow a category of persons of a particular sex, originally discriminated against, to become eligible for the pension scheme applicable to the category of persons of the opposite sex by making retroactive payment (a single payment of a very large sum) of contributions, recovery
of which would be time-barred under the legislation applicable in that State in the case of the latter category of persons?
If so, is not Directive 79/7/EEC of 19 December 1978 to be interpreted as requiring a Member State to amend legislation contrary to that provision as soon as a judgment of the Court of Justice of the European Communities rules that there is a conflict of norms and, at the very least, within the applicable time-limit for recovery of the contributions which have become payable by virtue of the adoption of those rules?

(2) Is Directive 79/7/EEC of 19 December 1978 to be interpreted as meaning that it authorises a Member State to adopt rules intended to allow a category of persons of a particular sex, originally discriminated against, to become eligible for the pension scheme applicable to the category of persons of the opposite sex by making payment of a large amount of late payment interest, recovery of which would be time-barred under the legislation applicable in that State in the case of the latter category of persons?
If so, is not Directive 79/7/EEC of 19 December 1978 to be interpreted as requiring a Member State to amend legislation contrary to that provision as soon as a judgment of the Court of Justice of the European Communities rules that there is a conflict of norms and, at the very least, within the applicable time-limit for recovery of late payment interest due as a result of the adoption of those rules?’

On the questions referred for a preliminary ruling

Preliminary considerations

16. It should first of all be noted that the parties to the main proceedings do not dispute that the initial exclusion of the air hostesses from the special scheme for civil aviation air crew was discriminatory.

17. Moreover, it should be noted that Article 141(1) and (2) EC, on the principle of equal pay for male and female workers, is not applicable in the present case, since that article only applies to occupational pension schemes and not to statutory pension schemes (Case 80/70 Defrenne, paragraphs 10 to 13; Case C-109/91 Ten Oever [1993] ECR I-4879, paragraph 9, and Case C-207/04 Vergani [2005] ECR I-7453, paragraphs 22 and 23).

18. The referring court is therefore correct in asking its questions with regard to Directive 79/7, which applies to statutory schemes on social security, including statutory
pension schemes (Case C-154/92 van Cant [1993] ECR I-3811, paragraphs 10 and 11).

19. Article 4(1) of that directive prohibits any ‘discrimination whatsoever on ground of sex ... in particular as concerns ... the scope of the schemes and the conditions of access ..., the obligation to contribute and the calculation of contributions [and] the calculation of benefits’. That provision can be relied upon by an individual before national courts in order to have any national provision not in conformity with that article disapplied (Case C-102/88 Ruzius-Wilbrink [1989] ECR 4311, paragraph 19, and Case C-337/91 van Gemert-Derks [1993] ECR I-5435, paragraph 31).

The requirement to pay adjustment contributions

20. By the first part of its questions, the referring court is essentially asking whether Directive 79/7 precludes a Member State, when it adopts rules intended to allow a category of persons of a particular sex, originally discriminated against, to become eligible for the pension scheme applicable to the category of persons of the opposite sex, from making such membership conditional on payment, in a single sum and together with interest at the annual rate of 10%, of adjustment contributions consisting of the difference between the contributions paid by the persons originally discriminated against during the period over which the discrimination took place and the higher contributions paid by the other category of persons during the same period.

21. It follows from the observations lodged before the Court that the parties to the main proceedings, the Commission of the European Communities and the Italian Government are all of the opinion that the main condition imposed on the air hostesses by the Royal Decree of 25 June 1997 in order that their professional activity during the period from 1 January 1964 to 31 December 1980 be taken into account in the same way as that of stewards, that is the payment of a sum representing the difference between the contributions they paid during that period and the higher contributions paid by the stewards during the same period, is not in itself discriminatory.

22. That view is correct. As the Court has already held in the context of disputes relating to occupational pension schemes, the fact that a worker can claim retroactively to join such a scheme does not allow him to avoid paying the contributions relating to the period of membership concerned (Case C-128/93 Fisscher [1994] ECR I-4583, paragraph 37; Case C-435/93 Dietz [1996] ECR I-5223, paragraph 34, and Case C-78/98 Preston and Others [2000] ECR I-3201, paragraph 39).
23. Where such discrimination has been suffered, equal treatment is to be achieved by placing the worker discriminated against in the same situation as that of workers of the other sex. Consequently, the worker cannot claim more favourable treatment, particularly in financial terms, than he would have had if he had been duly accepted as a member (see Fisscher, paragraphs 35 and 36, and Preston and Others, paragraph 38).

24. Clearly that case-law is applicable by analogy to membership of a statutory pension scheme. It follows that a Member State, when it adopts rules intended to allow a persons of a particular sex, originally discriminated against, to become eligible for the pension scheme applicable to persons of the opposite sex, can choose to restore equal treatment by requiring the payment of a sum representing the difference between the contributions paid by the persons originally discriminated against during the period in which the discrimination took place and the higher contributions paid by the other category of persons during the same period. The fact that the latter category of persons benefit in the meantime from limitation of an action for payment of contributions cannot prevent adjustment as described above, on the condition however, as the Advocate General pointed out in point 70 of her Opinion, that a similar limitation period is set with regard to the new members.

25. In addition, in order to prevent any reverse discrimination, the adjustment contributions can be increased by interest intended to compensate for inflation. As the Advocate General observed in point 38 of her Opinion, and subject to the condition in point 39 thereof, such an increase ensures that the contributions paid by the new members are not in real terms lower than those paid by the workers who have been members since the pension scheme was established.

26. For the reasons set out by the Advocate General in points 64 and 65 of her Opinion, the foregoing considerations are limited to the case where the adjustment of pension rights is effective from the date on which the worker is entitled to retire. Adjustment offered to persons who have already retired, and which requires the payment of a sum representing the difference between the contributions paid by those persons in the period during which they were discriminated against and the higher contributions paid by the other category of persons during the same period, does not end the discriminatory treatment unless it results in the same calculation of pension rights throughout the retirement of each of the interested parties.
27. It follows from the foregoing that Directive 79/7 does not preclude a Member State, when it adopts rules intended to allow persons of a particular sex, originally discriminated against, to be eligible throughout their retirement for the pension scheme applicable to persons of the other sex, from making such membership dependent upon the payment of adjustment contributions consisting of the difference between the contributions paid by the persons originally discriminated against in the period during which the discrimination took place and the higher contributions paid by the other category of persons during the same period, together with interest to compensate for inflation.

The method of paying the adjustment contributions

28. In so far as the referring court seeks to ascertain whether the Member State can require that the payment of adjustment contributions is made by a single payment together with interest at an annual rate of 10%, it should be noted that any measure taken by a Member State in order to comply with the norms of Community law, such as the principle of equal treatment between men and women, must be effective (see, to that effect Fisscher, paragraph 31; Preston and Others, paragraphs 40 to 42; Case C-187/00 Kutz-Bauer [2003] ECR I-2741, paragraph 57, and Case C-212/04 Adeneler and Others [2006] ECR I-6057, paragraph 95). Consequently, it was for the Belgian legislature, when it adopted the Royal Decree of 25 June 1997 in order to put the air hostesses in the same position as that of stewards, to fix the method of the adjustment in such a way that it would not be impossible or excessively difficult in practice.

29. It is apparent from the observations lodged before the Court that, having regard to the long period over which the discrimination took place, which ran from 1 January 1964 to 31 December 1980, and the many years which had passed between the end of that period and the adoption of the Royal Decree of 25 June 1997 establishing an adjustment (1981 to 1997), the adjustment contributions are of a particularly large amount. As the Advocate General has observed in point 49 of her Opinion, that sum may even exceed the annual pension of the persons to whom the adjustment is offered. As Ms Jonkman, Ms Vercheval and Ms Permesaen have pointed out, without being contradicted on this issue by the NPO, the single payment of such a sum may be impossible, or else require a loan from a financial organisation which will in turn demand the payment of interest.
30. It is furthermore apparent from the Royal Decree of 25 June 1997 that that decree makes provision, in exceptional circumstances which are not applicable in this instance, for spreading the payments of adjustment contributions, in the form of the payment of annual instalments.

31. In the light of the facts set out above, it must be held that the obligation imposed on the interested parties to make the adjustment payments in a single payment has made the adjustment of the air hostesses’ pension rights excessively difficult.

32. As regards interest at an annual rate of 10%, the parties to the main proceedings, the Commission and the Italian government have all stated or admitted that that rate is exceptionally high. When questioned on that subject at the hearing, the NPO was not able to explain why the Royal Decree of 25 June 1997 had set an interest rate exceeding the rate of inflation.

33. In any event, it is common ground that the effect of setting an interest rate which exceeds that necessary to compensate for inflation is that the contributions paid by the new members are in real terms higher than those paid by the workers which have been members since the pension scheme was established. Therefore, far from putting the air hostesses in the same position as the stewards, that interest rate has allowed the unequal treatment of the air hostesses to continue.

34. It is, however, for the referring court, which is the only court to have full knowledge of national law, to ascertain what percentage of the annual interest rate of 10% laid down by the Royal Decree of 25 June 1997 could be intended to compensate for inflation.

35. It follows from all the foregoing considerations that Directive 79/7 precludes a Member State, when it adopts rules intended to allow persons of a particular sex, originally discriminated against, to become eligible for the pension scheme applicable to persons of the other sex, from requiring the payment of adjustment contributions to be made together with interest other than that to compensate for inflation. That directive also precludes a requirement that that payment be made as a single sum, where that condition makes the adjustment concerned impossible or excessively difficult in practice. That is the case in particular where the sum to be paid exceeds the annual pension of the interested party.

The obligations on a Member State stemming from a judgment given on an order for reference
36. By the second part of its questions, read in the context of the disputes in the main proceedings, the referring court is essentially asking whether a Member State is obliged to adapt its legislation following a judgment given by the Court on an order for reference from which it is apparent that that legislation is incompatible with Community law.

37. In that regard, it should be recalled that, under the principle of cooperation in good faith laid down in Article 10 EC, the Member States are required to nullify the unlawful consequences of a breach of Community law (Case C-201/02 Wells [2004] ECR I-723, paragraph 64, and the case-law cited).

38. Therefore, following a judgment given by the Court on an order for reference from which it is apparent that national legislation is incompatible with Community law, it is for the authorities of the Member State concerned to take the general or particular measures necessary to ensure that Community law is complied with within that state (see, to that effect, Wells, paragraphs 64 and 65, and Case C-495/00 Azienda Agricola Giorgio, Giovanni e Luciano Visentin and Others [2004] ECR I-2993, paragraph 39). While they retain the choice of the measures to be taken, those authorities must in particular ensure that national law is changed so as to comply with Community law as soon as possible and that the rights which individuals derive from Community law are given full effect.

39. In addition, as the Court has repeatedly held in situations of discrimination contrary to Community law, for as long as measures reinstating equal treatment have not been adopted, observance of the principle of equality can be ensured only by granting to persons within the disadvantaged category the same advantages as those enjoyed by persons within the favoured category. In such a situation, a national court must set aside any discriminatory provision of national law, without having to request or await its prior removal by the legislature, and apply to members of the disadvantaged group the same arrangements as those enjoyed by the persons in the other category (Case C-408/92 Avdel Systems [1994] ECR I-4435, paragraphs 16 and 17; Case C-442/00 Rodríguez Caballero [2002] ECR I-11915, paragraphs 42 and 43, and Case C-81/05 Cordero Alonso [2006] ECR I-7569, paragraphs 45 and 46).

40. A Member State is, moreover, required to make reparation for loss and damage caused to individuals as a result of breaches of Community law. Where the conditions for State liability are fulfilled, it is for the national court to apply that principle (see,

41. In the light of the foregoing, the answer to the second part of the questions referred is that, following a judgment given by the Court on an order for reference from which it is apparent that the national legislation is incompatible with Community law, it is for the authorities of the Member State concerned to take the general or particular measures necessary to ensure that Community law is complied with, by ensuring in particular that national law is changed so as to comply with Community law as soon as possible and that the rights which individuals derive from Community law are given full effect. Where discrimination infringing Community law has been found, for as long as measures reinstating equal treatment have not been adopted, the national court must set aside any discriminatory provision of national law, without having to request or await its prior removal by the legislature, and apply to members of the disadvantaged group the same arrangements as those enjoyed by the persons in the other category.

Costs

42. …

On those grounds, the Court (First Chamber) hereby rules:

1. When a Member State adopts rules intended to allow persons of a particular sex, originally discriminated against, to become eligible throughout their retirement for the pension scheme applicable to persons of the other sex, 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 preclude that Member State from making such membership dependent upon the payment of adjustment contributions consisting of the difference between the contributions paid by the persons originally discriminated against in the period during which the discrimination took place and the higher contributions paid by the other category of persons during the same period, together with interest to compensate for inflation,

   – does preclude, by contrast, that Member State from requiring that payment of adjustment contributions to be made together with interest other than that to compensate for inflation,
also precludes a requirement that that payment be made as a single sum, where that condition makes the adjustment concerned impossible or excessively difficult in practice. That is the case in particular where the sum to be paid exceeds the annual pension of the interested party.

2. Following a judgment given by the Court on an order for reference from which it is apparent that the national legislation is incompatible with Community law, it is for the authorities of the Member State concerned to take the general or particular measures necessary to ensure that Community law is complied with, by ensuring in particular that national law is changed so as to comply with Community law as soon as possible and that the rights which individuals derive from Community law are given full effect.

3. Where discrimination infringing Community law has been found, for as long as measures reinstating equal treatment have not been adopted, the national court must set aside any discriminatory provision of national law, without having to request or await its prior removal by the legislature, and apply to members of the disadvantaged group the same arrangements as those enjoyed by the persons in the other category.

Notes

1. This is an interesting case which concerns the measures which must be taken by a Member State to rectify former discrimination under Directive 79/7/EEC. The issue dates back to the early Defrenne decisions involving the pension rights of Sabena air hostesses. At that time, male cabin crew had access to a different pension scheme and basically paid higher contributions in order to obtain higher benefits. Under the then legislation female hostesses were required to retire at 40 and, therefore, the higher pension scheme was not applied to them. This was clearly discriminatory on grounds of sex. Subsequently, from 1981, the male pension scheme was made available to women. In respect of the period prior to 1981, Belgian law required payment of retrospective contributions and a special ‘adjustment procedure’ was introduced in 1997. It was the existence and details of this scheme which were questioned in the questions referred to the Court of Justice.

2. First, the Court clarified that persons who are entitled to join a pension scheme (from which they were formerly excluded on discriminatory grounds) must pay the relevant
contributions (para 22-3 of the judgment). As Advocate General Kokott pointed out, such persons could not ask to be treated in a more favourable manner than if the scheme had been open to them from its inception (at para 33 of her opinion). In many cases of discrimination, this may not give rise to any difficulties (such as where contributions were the same for men and women but benefits differed). However, it would have implications if, for example, the Court of Justice were to hold that the (direct or indirect) exclusion of women from insurance under national law was in breach of Directive 79/7.

3. Second, the Court has made clear that interest to compensate for inflation (‘purchasing power’ in the words of the Advocate General) could be included in the calculation of the retrospective contributions.

4. However, although a Member State is allowed to require payment of retrospective contributions (adjusted for inflation), it must still do so in a manner which does not deprive the remedy of its effectiveness and may not require payment in a manner which is ‘impossible or extremely difficult in practice’ (para 28 of the judgment).

5. This issue was addressed by Advocate General Kokott. She suggested that the claimants should be allowed to make monthly payments (para 52 of the opinion et seq.). She also suggested a number of (possibly inconsistent) principles for the calculation of the monthly amount. First, the retrospective contributions should be paid in full over the period during which the pension would be paid; and second, however, the amount of the monthly contributions should not be so high as to deny any material benefit to the claimants. Kokott went on to suggest that it would be

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20. Although as we will see Kokott went on to modify somewhat this bald statement.
21. See, for example, the issue discussed by the Court of Human Rights in Wessels-Bergervoet v Netherlands, 34462/97, 4 June 2002, ECHR 2002-IV, (2004) 38 EHRR 793.
22. This principle would seem to be supported by the Court’s general approach as if a person does not benefit financially by the payment of monthly contributions how can such an arrangement be effective?
‘reasonable’ to allow the claimants to retain about half of the resulting increase in their pension. Limited financial details are provided in the case materials. However, it is not necessarily clear that the objective of paying off the full contributions and providing some financial benefit to the claimants are mutually consistent. Recognising this (at para 56), Advocate General Kokott pointed out that the Member States concerned (whose legislation had caused the discrimination) and the social security institutions must bear any financial burdens involved in the effective enforcement of equal treatment (para 57). The Court did not comment on this aspect of the case.

6. This is, however, an important issue. It is important to recall that statutory pension schemes are rarely calculated on anything approaching actuarial principles and, therefore, the analogy with private and occupational schemes should not be pursued too far. While, in principle, it may be reasonable to require those discriminated against to pay retrospective contributions, it may also be important to emphasise the effective implementation of the principle of equal treatment (i.e. putting persons discriminated against insofar as possible in the situation they would have been in had in not been for the discrimination) rather than formal equality (i.e. concern about whether such persons are paying exactly the equivalent amount a man would have paid at the time). It may be necessary for the Court to adopt some practical approaches (such as those suggested by the Advocate General) to ensure that the principle of equal treatment is implemented and to place any additional financial burden on the authors of the discrimination (in reality of course in many cases on current and future social insurance contributors).

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