

## JUDGMENT OF THE COURT (Grand Chamber)

10 May 2011 (\*)

(Equal treatment in employment and occupation – General principles of European Union law – Article 157 TFEU – Directive 2000/78/EC – Scope – Concept of ‘pay’ – Exclusions – Occupational pension scheme in the form of a supplementary retirement pension for former employees of a local authority and their survivors – Method of calculating that pension favouring married recipients over those living in a registered life partnership – Discrimination based on sexual orientation)

In Case C-147/08,

REFERENCE for a preliminary ruling under Article 234 EC from the Arbeitsgericht Hamburg (Germany), made by decisions of 4 April 2008 and 23 January 2009, received at the Court on 10 April 2008 and 28 January 2009, in the proceedings

**Jürgen Römer**

v

**Freie und Hansestadt Hamburg,**

THE COURT (Grand Chamber),

composed of V. Skouris, President, A. Tizzano, J.N. Cunha Rodrigues, K. Lenaerts, J.-C. Bonichot, A. Arabadjiev, D. Šváby (Rapporteur), Presidents of Chambers, E. Juhász, G. Arestis, A. Borg Barthet and T. von Danwitz, Judges,

Advocate General: N. Jääskinen,

Registrar: A. Calot Escobar,

after considering the observations submitted on behalf of:

- Mr Römer, by H. Graupner, Rechtsanwalt,
- the Freie und Hansestadt Hamburg, by Mr Härtel, acting as Agent,
- the Commission of the European Communities, by V. Kreuzschitz and J. Enegren, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 15 July 2010,

gives the following

### Judgment

- 1 This reference for a preliminary ruling concerns the interpretation of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (OJ 2000 L 303, p. 16), and of the general principles of European Union law and Article 141 EC (the corresponding article now being Article 157 TFEU) relating to discrimination on grounds of sexual orientation in employment and occupation.
- 2 The reference has been made in the course of proceedings between Mr Römer and the Freie und Hansestadt Hamburg in relation to the amount of supplementary retirement pension to which he is

entitled.

## Legal context

### *European Union law*

3 Recitals 13 and 22 in the preamble to Directive 2000/78 state:

‘(13) This Directive does not apply to social security and social protection schemes whose benefits are not treated as income within the meaning given to that term for the purpose of applying Article 141[EC] ...

...

(22) This Directive is without prejudice to national laws on marital status and the benefits dependent thereon.’

4 Article 1 of Directive 2000/78 provides:

‘The purpose of this Directive is to lay down a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation, with a view to putting into effect in the Member States the principle of equal treatment.’

5 Under Article 2 of the Directive:

‘1. For the purposes of this Directive, the “principle of equal treatment” shall mean that there shall be no direct or indirect discrimination whatsoever on any of the grounds referred to in Article 1.

2. For the purposes of paragraph 1:

(a) direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation, on any of the grounds referred to in Article 1;

(b) indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons having a particular religion or belief, a particular disability, a particular age, or a particular sexual orientation at a particular disadvantage compared with other persons unless:

(i) that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary ...

...’

6 Article 3 of the Directive is worded as follows:

‘1. Within the limits of the areas of competence conferred on the Community, this Directive shall apply to all persons, as regards both the public and private sectors, including public bodies, in relation to:

...

(c) employment and working conditions, including dismissals and pay;

...

3. This Directive does not apply to payments of any kind made by state schemes or similar, including state social security or social protection schemes.

...’

- 7 Under the first paragraph of Article 18 of Directive 2000/78, Member States were, in principle, to have adopted the laws, regulations and administrative provisions necessary to comply with the Directive by 2 December 2003 at the latest or could entrust the social partners with the implementation of that directive as regards provisions concerning collective agreements, ensuring that those agreements were implemented by the same date.

*National law*

The Basic Law

- 8 Article 6(1) of the Basic Law for the Federal Republic of Germany (Grundgesetz für die Bundesrepublik Deutschland, ‘the Basic Law’) provides that ‘[m]arriage and family shall enjoy the special protection of the State’.

Law on registered life partnerships

- 9 Paragraph 1(1) of the Law on registered life partnerships (Gesetz über die Eingetragene Lebenspartnerschaft) of 16 February 2001 (‘the LPartG’) provides, as regards the form and the conditions of establishment of such a partnership:

‘Two persons of the same sex establish a partnership when they each declare, in person and in the presence of the other, that they wish to live together in partnership for life (as life partners). The declarations cannot be made conditionally or for a fixed period. Declarations are effective when they are made before the competent authority. ...’

- 10 Paragraph 2 of the LPartG provides:

‘The life partners must support and care for one another and commit themselves mutually to a lifetime union. They shall each accept responsibilities with regard to the other.’

- 11 Under Paragraph 5 of that Law:

‘The life partners are each required to contribute adequately to the common needs of the partnership. Paragraph 1360a and Paragraph 1360b of the Civil Code [Bürgerliches Gesetzbuch, “the BGB”] apply by analogy.’

- 12 Paragraph 11(1) of that Law, concerning the other effects of registered life partnership, provides:

‘Save provision to the contrary, a life partner shall be regarded as a member of the family of the other life partner.’

- 13 The Law revising life partnership law (Gesetz zur Überarbeitung des Lebenspartnerschaftsrechts) of 15 December 2004 (‘the Law of 15 December 2004’), which entered into force on 1 January 2005, amended the LPartG and brought the status of registered life partnership yet more closely into line with that of marriage. In particular, provision was made for the apportionment of pension rights between partners in the event of the dissolution of a life partnership (Paragraph 20 of the LPartG), as is the case between spouses in the event of divorce. In addition, the legislative old-age pension scheme was amended to ensure that registered partners receive, in the same way as spouses, a survivor’s pension, even where the partner died before 1 January 2005 (Paragraph 46(4) of Book VI of the Social Security Code (Sozialgesetzbuch)).

– Provisions applicable in the Land of Hamburg concerning social security

- 14 Paragraph 1 of the Law of the Land of Hamburg on supplementary pensions (Hamburgisches Zusatzversorgungsgesetz) of 7 March 1995 (‘the HmbZVG’) states that the Law applies to persons employed by the Freie und Hansestadt Hamburg and to any person to whom that city must pay a pension within the meaning of Paragraph 2 of that law (pension holders). According to Paragraph 2, the pension is granted in the form of a retirement pension, governed by Paragraphs 3 to 10 of that law, or a

survivor's pension, governed by Paragraphs 11 to 19 thereof. According to Paragraphs 2a and 2c of the HmbZVG, the employees of the City of Hamburg share pension costs by paying a contribution at the initial rate of 1.25% of taxable pay, by means of a deduction from pay. According to Paragraph 2b of the HmbZVG, the contribution obligation begins on the date when the employment relationship commences and ends on the date on which it ceases.

- 15 Paragraph 6 of the HmbZVG provides that the monthly amount of the pension corresponds, for each full year of employment giving entitlement to a pension, to 0.5% of the pay included in the calculation of the pension.
- 16 The pay included in the calculation of the pension is detailed in Paragraph 7 of the HmbZVG, while the periods of employment giving entitlement to the pension, and also those which do not, are set out in Paragraph 8 thereof.
- 17 Paragraph 29 of the HmbZVG contains the transitional provisions concerning pension holders who were covered by the legislation formerly in force, who are referred to in the second sentence of Paragraph 1(1) of the HmbZVG. Paragraph 29(1)(1), in conjunction with Paragraph 29(1)(5), states that those pension holders continue to receive, by derogation inter alia from Paragraph 6(1) and (2), a pension equal to that which they received for July 2003 or that to which they would have been entitled, under points 2 and 4 of Paragraph 29(1), for the month of December 2003.
- 18 The matter was previously governed by the Law of the Land of Hamburg on supplementary retirement and survivors' pensions for employees of the Freie und Hansestadt Hamburg (Erstes Ruhegeldgesetz der Freien und Hansestadt Hamburg, 'the First RGG'). Paragraph 10(6) of that law provides;
- 'The notional net income to be taken into account for the purposes of calculating the pension shall be determined by deducting from the income included in the calculation of the pension (Paragraph 8)
1. the amount of income tax which would have had to be paid (less the amount paid to the Church (Kirchenlohnsteuer)) on the basis of tax category III/0 in the case of a married pensioner not permanently separated at the date on which the retirement pension is first paid (Paragraph 12(1)), or a pensioner who, on that day, is entitled to claim child benefit or the equivalent, [or]
  2. the amount of income tax which would have had to be paid (less the amount paid to the Church) on the basis of tax category I at the date on which the retirement pension is first paid in the case of all other pensioners. ...'
- 19 According to the final sentence of Paragraph 8(10) of the First RGG, if the conditions laid down in Paragraph 10(6)(1) of that law are not satisfied until after payment of the retirement pension has commenced, the latter provision has to be applied from that date if the party concerned so requests.
- 20 The amount to be deducted from the income tax payable under tax category III/0 is significantly lower than that to be deducted from the income tax payable under tax category I.

### **The dispute in the main proceedings and the questions referred for a preliminary ruling**

- 21 The parties dispute the amount of the pension which the applicant in the main proceedings, Mr Römer, may claim from November 2001.
- 22 From 1950 until he ceased work on 31 May 1990, on grounds of incapacity, Mr Römer worked for the Freie und Hansestadt Hamburg, as an administrative employee. Since 1969, he has lived continuously with Mr U. On 15 October 2001, the applicant in the main proceedings and his companion entered into a registered life partnership, in accordance with the LPartG. Mr Römer informed his former employer of this by letter of 16 October 2001. By a subsequent letter, dated 28 November 2001, he requested that the amount of his supplementary retirement pension be recalculated on the basis of the more favourable deduction under tax category III/0, with effect from 1 August 2001, according to the information given by the referring court. The applicant in the main proceedings states in his observations, however, that he had asked for that amendment to his pension only from 1 November 2001.

- 23 By letter of 10 December 2001, the Freie und Hansestadt Hamburg informed Mr Römer of its refusal to amend the calculation of the said pension, on the ground that, in accordance with Paragraph 10(6)(1) of the First RGG, only married, not permanently separated, pensioners and pensioners entitled to claim child benefit or an equivalent benefit are entitled to have their retirement pension calculated on the basis of tax category III/0.
- 24 In accordance with the ‘statement of pension rights’ drawn up by the Freie und Hansestadt Hamburg on 2 September 2001, Mr Römer’s monthly retirement pension, from September 2001, on the basis of a salary reduced by the amount which would have had to be paid as income tax on the basis of tax category I, amounted to DEM 1 204.55 (EUR 615.88). According to Mr Römer’s calculations, which are not disputed by his former employer, the amount of that monthly retirement pension would have been, in September 2001, DEM 590.87 (EUR 302.11) higher if tax category III/0 had been taken into consideration in order to determine the amount of the pension.
- 25 The case was brought before the referring court. Mr Römer considers that, for the calculation of his pension under Paragraph 10(6)(1) of the First RGG, he is entitled to be treated in the same manner as a married, not permanently separated, pensioner. He claims that the criterion of ‘married pensioner not permanently separated’, contained in that provision, must be interpreted as including pensioners who have entered into a registered life partnership in accordance with the LPartG.
- 26 Mr Römer considers that his right to equal treatment with married, not permanently separated, pensioners results, in any event, from Directive 2000/78. He also argues that, since that directive was not transposed into national law within the period prescribed in Article 18 thereof, that is, by 2 December 2003 at the latest, it applies directly to the defendant in the main proceedings.
- 27 The Freie und Hansestadt Hamburg contends that the term ‘married’, within the meaning of Paragraph 10(6)(1) of the First RGG, cannot be interpreted as argued by Mr Römer. It submits, in essence, that Article 6(1) of the Basic Law places marriage and family under the special protection of the State. The Freie und Hansestadt Hamburg also submits that there is a parallel between the issue of joint taxation and the possibility of making a notional application of tax category III/0 when calculating supplementary retirement pensions paid under the First RGG. It contends that the financial resources available monthly to the parties concerned to cover their daily needs are determined by joint taxation during the period of professional activity and, thereafter, by the notional application of tax category III/0 for calculating pensions. The advantage granted to persons who have created a family, or who could have done so, is designed to compensate for the extra financial burden involved.
- 28 In those circumstances, the Arbeitsgericht Hamburg (Labour Court, Hamburg) decided, by decision of 4 April 2008, supplemented by a decision of 28 January 2009, to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:
- ‘1. Are supplementary pension payments to former employees of the Freie und Hansestadt Hamburg and their survivors, governed by [the First RGG], “payments of any kind made by State schemes or similar, including State social security or social protection schemes” within the meaning of Article 3(3) of [Directive 2000/78] with the consequence that the matters governed by the First RGG fall outside the scope of that directive?
  2. [(a)] If the above question is answered in the negative, [a]re the provisions of the First RGG which differentiate, in calculating the amount of pension payable, between married pensioners and all other pensioners, that is, which treat married pensioners more favourably than, specifically, persons who have entered into a life partnership with a person of the same sex in accordance with [the LPartG], “laws on marital status and the benefits dependent thereon” within the meaning of recital 22 in the preamble to Directive 2000/78?  
  
[(b)] [If the answer is in the affirmative, d]oes it follow that the Directive does not apply to those provisions of the First RGG, even though the Directive itself contains no limitation of its scope corresponding to recital 22 in the preamble?
  3. If Question 2(a) or Question 2(b) is answered in the negative, [i]n relation to a person who has entered into a life partnership with a person of the same sex and who is not permanently

separated from the latter, does Paragraph 10(6) of the First RGG, under which the pension entitlements of married, not permanently separated, pensioners are calculated on the basis of the notional application of tax category III/0 (more favourable to a taxable person) but the pension entitlements of all other pensioners are calculated on the basis of the notional application of tax category I (less favourable to a taxable person), constitute an infringement of Article 1 in conjunction with Article 2 and with Article 3(1)(c) of Directive 2000/78?

4. If Question 1 or Question 2(b) is answered in the affirmative or Question 3 is answered in the negative, [d]oes Paragraph 10(6) of the First RGG infringe Article 141 EC or a general principle of Community law by reason of the provision or legal effect described in Question 3?
5. [a] If Question 3 or Question 4 is answered in the affirmative, [d]oes it follow that – until such time as Paragraph 10(6) of the First RGG is amended to remove the unequal treatment complained of – in relation to the calculation of his [supplementary] pension entitlement a pensioner who has entered into a life partnership and is not permanently separated from his partner is entitled to insist that the defendant treat him in the same manner as it does a married, not permanently separated, pensioner?
 

[b] If so – if Directive 2000/78 is applicable and Question 3 is answered in the affirmative – does this entitlement apply even before the expiry of the transposition period prescribed in Article 18(1) of Directive 2000/78?
6. If Question 5 is answered in the affirmative, [i]s that subject to the qualification – in accordance with the grounds of the ... judgment in Case C-262/88 *Barber* [[1990] ECR I-1889] – that in the calculation of [supplementary] pension entitlement the principle of equal treatment is to be applied only in respect of that proportion of pension entitlement earned by the pensioner for the period from 17 May 1990?
7. In so far as the Court concludes that there is direct discrimination:
  - (a) What significance should, in this regard, be attached to the particular fact that, on the one hand, under the Basic Law ... as well as under European law, the principle of equal treatment must be observed, while, on the other hand, under the law of the Federal Republic of Germany, marriage and the family enjoy the special protection of the State, as expressly decreed in constitutional-law terms in Article 6(1) of the Basic Law?
  - (b) Can a directly discriminatory legislative provision be justified –notwithstanding the wording of Directive [2000/78] – because it has a different aim, where that aim is a component of the national legal order of the Member State [concerned], but not of European law? In that case, does that other aim pursued by [that] Member State's national legal order simply take precedence over the principle of equal treatment?
  - (c) If the above question is answered in the negative, [w]hat legal criterion should be applied in order to determine in such cases how to weigh up the principle of equal treatment under European law and that other legal aim of the Member State's national legal order? Is it perhaps the case here too that, as with the criteria for the legal acceptance of indirect discrimination adopted under Article 2(2)(b)(i) of Directive 2000/78, (i) the discriminatory provision must be objectively justified by a legitimate aim; and (ii) the means of achieving that aim must be appropriate and necessary?
  - (d) Does a provision such as Paragraph 10(6) of the First RGG fulfil the requirements for legitimacy under European law in accordance with the answers to be given to the above questions? Does it fulfil these purely on account of the special national-law provision which has no equivalent in European law, in other words, on account of Article 6(1) of the Basic Law?

### Considerations of the questions referred

*The first two questions*

- 29 By its first two questions, which should be answered together, the referring court is asking in essence whether supplementary retirement pensions such as those paid on the basis of the First RGG to former employees of the Freie und Hansestadt Hamburg and their survivors fall outside the material scope of Directive 2000/78 on account of Article 3(3) of the Directive or recital 22 in the preamble thereto.
- 30 According to the order for reference, such benefits constitute pay within the meaning of Article 157 TFEU.
- 31 With regard, first, to Article 3(3) of Directive 2000/78, the referring court asks, more specifically, whether the fact that, under that provision, the Directive ‘does not apply to payments of any kind made by State schemes’ means that the scheme at issue, as a State scheme, must be regarded as falling outside the scope of the Directive.
- 32 In that respect, it is sufficient to point out that the Court has held that the scope of Directive 2000/78 must be understood, in the light of Article 3(1)(c) and Article 3(3) read in conjunction with recital 13 in the preamble to the Directive, as excluding social security or social protection schemes, the benefits of which are not equivalent to ‘pay’ within the meaning given to that term for the application of Article 157 TFEU, and payments of any kind made by the State with the aim of providing access to employment or maintaining employment (Case C-267/06 *Maruko* [2008] ECR I-1757, paragraph 41).
- 33 Accordingly, Article 3(3) of Directive 2000/78 cannot be interpreted as meaning that a supplementary retirement pension paid by a public scheme and constituting pay within the meaning of Article 157 TFEU falls outside the scope of the Directive.
- 34 As regards, next, recital 22 in the preamble to Directive 2000/78, under which ‘[the] Directive is without prejudice to national laws on marital status and the benefits dependent thereon’, it need only be recalled that the Court has already ruled on the scope of that recital, at paragraphs 58 to 60 of its judgment in *Maruko*.
- 35 According to that judgment, since a supplementary retirement pension such as that at issue in the main proceedings has been identified as ‘pay’, within the meaning of Article 157 TFEU, and it falls within the scope of Directive 2000/78, recital 22 cannot affect the application of the Directive (see, to that effect, *Maruko*, paragraph 60).
- 36 It follows from the foregoing that the answer to Questions 1 and 2 is that Directive 2000/78 is to be interpreted as meaning that supplementary retirement pensions such as those paid to former employees of the Freie und Hansestadt Hamburg and their survivors on the basis of the First RGG, which constitute pay within the meaning of Article 157 TFEU, do not fall outside the material scope of the Directive either on account of Article 3(3) thereof or on account of recital 22 in the preamble thereto.

*Questions 3 and 7*

- 37 By Questions 3 and 7, which should be examined together, the referring court is asking in essence, first, whether Article 1 in conjunction with Articles 2 and 3(1)(c) of Directive 2000/78 preclude a provision such as Paragraph 10(6) of the First RGG, under which the supplementary pension paid to a married pensioner is more favourable than that paid to a pensioner who has entered into a registered life partnership with a person of the same sex, in so far as such a provision constitutes direct or indirect discrimination on the ground of sexual orientation. Second, it seeks to ascertain whether, and under what conditions, an objective pursued by a Member State such as the protection of marriage, contained in Article 6(1) of the Basic Law, could justify direct discrimination on the ground of sexual orientation.
- 38 As a preliminary point, it should be observed that, as European Union law stands at present, legislation on the marital status of persons falls within the competence of the Member States. However, in accordance with Article 1 thereof, the purpose of Directive 2000/78 is to combat, as regards employment and occupation, certain types of discrimination, including discrimination on the ground of sexual orientation, with a view to putting into effect in the Member States the principle of equal treatment.

- 39 Under Article 2 of the Directive, the ‘principle of equal treatment’ is to mean that there shall be no direct or indirect discrimination whatsoever on any of the grounds referred to in Article 1 of that directive.
- 40 According to Article 2(2)(a) of Directive 2000/78, direct discrimination is to be taken to occur where one person is treated less favourably than another person who is in a comparable situation, on any of the grounds referred to in Article 1 of the Directive.
- 41 Accordingly, the existence of direct discrimination, within the meaning of the Directive, presupposes, first, that the situations being weighed up are comparable.
- 42 In that regard, it should be pointed out that, as is apparent from the judgment in *Maruko* (paragraphs 67 to 73), first, it is required not that the situations be identical, but only that they be comparable and, second, the assessment of that comparability must be carried out not in a global and abstract manner, but in a specific and concrete manner in the light of the benefit concerned. In that judgment, concerning the refusal to grant a survivor’s pension to the life partner of a deceased member of an occupational pension scheme, the Court did not carry out an overall comparison between marriage and registered life partnership under German law, but, on the basis of the analysis of German law carried out by the court which made the reference for a preliminary ruling, according to which there was a gradual harmonisation in German law of the regime put in place for registered life partnerships with that applicable to marriage, it made it clear that registered life partnership is to be treated as equivalent to marriage as regards the widow’s or widower’s pension.
- 43 Thus, the comparison of the situations must be based on an analysis focusing on the rights and obligations of the spouses and registered life partners as they result from the applicable domestic provisions, which are relevant taking account of the purpose and the conditions for granting the benefit at issue in the main proceedings, and must not consist in examining whether national law generally and comprehensively treats registered life partnership as legally equivalent to marriage.
- 44 In that regard, it is apparent from the information in the order for reference that, from 2001, the year when the LPartG entered into force, the Federal Republic of Germany adapted its legal system to allow persons of the same sex to live in a union of mutual support and assistance which is formally constituted for life. Having chosen not to permit those persons to enter into marriage, which remains reserved solely to persons of different gender, that Member State created for persons of the same gender a separate regime, the registered life partnership, the regime of which has been gradually made equivalent to that of marriage.
- 45 In this context, the referring court observes that the amendment of the LPartG by the Law of 15 December 2004 contributed to the gradual harmonisation of the regime of registered life partnership with that of marriage. According to that court, there is no significant legal difference between those two types of status of persons as understood in German law. The main remaining difference is the fact that marriage presupposes that the spouses are of different gender, whereas registered life partnership presupposes that the partners are of the same gender.
- 46 Unlike the benefit at issue in *Maruko*, which was a survivor’s pension, the benefit at issue in the present case in the main proceedings is the supplementary retirement pension paid by the Freie und Hansestadt Hamburg to one of its former employees. In addition, it is not disputed that the application of the rules of the Land of Hamburg at issue in the main proceedings presupposes not only that the pensioner is married, but also that he is not permanently separated from his spouse. It aims to provide, on retirement, a replacement income which is deemed to benefit the recipient, but also, indirectly, the persons who live with him.
- 47 In that regard, it is apparent from the information in the order for reference that, although the Law of 15 December 2004 did indeed strengthen, on a number of specific points such as the entitlement to a survivor’s pension, the alignment of the legal status of registered life partnership to that of marriage, the fact remains that, in its original version, the LPartG already provided, in Paragraphs 2 and 5, that life partners have duties towards each other, to support and care for one another and to contribute adequately to the common needs of the partnership by their work and from their property, as is the case between spouses during their life together.

48 It follows that, since the entry into force of the LPartG, those obligations are incumbent both on life partners and on married spouses.

49 As regards, second, the criterion of less favourable treatment on the ground of sexual orientation, it is apparent from the documents before the Court that Mr Römer's supplementary retirement pension would have been increased, under the last sentence of Paragraph 8(10) of the First RGG, if, in October 2001, he had married instead of entering into a registered life partnership with a man.

50 However, as the Advocate General observed in point 99 of his Opinion, that more favourable treatment would not have been linked to the income of the parties to the union, to the existence of children or to other factors such as those relating to the spouse's financial needs.

51 Furthermore, it appears that, during his working life, the contributions payable by Mr Römer in relation to the benefit at issue in the main proceedings were not in any way based on his marital status, since he was required to contribute to the pension costs by paying a contribution equal to that of his married colleagues.

52 Accordingly, the answer to Questions 3 and 7 is that Article 1 in conjunction with Articles 2 and 3(1) (c) of Directive 2000/78 preclude a provision of national law such as Paragraph 10(6) of the First RGG, under which a pensioner who has entered into a registered life partnership receives a supplementary retirement pension lower than that granted to a married, not permanently separated, pensioner, if

- in the Member State concerned, marriage is reserved to persons of different gender and exists alongside a registered life partnership such as that provided for by the LPartG, which is reserved to persons of the same gender, and
- there is direct discrimination on the ground of sexual orientation because, under national law, that life partner is in a legal and factual situation comparable to that of a married person as regards that pension. It is for the referring court to assess the comparability, focusing on the respective rights and obligations of spouses and persons in a registered life partnership, as they are governed within the corresponding institutions, which are relevant taking account of the purpose of and the conditions for the grant of the benefit in question.

#### *Question 5*

53 By that question, the referring court asks first whether, if the Court of Justice should accept that the disadvantage suffered by a pensioner such as the applicant in the main proceedings constitutes a breach of European Union law, the party concerned could require treatment equal to that of married, not permanently separated, pensioners, even in respect of a period prior to the amendment of Paragraph 10(6) of the First RGG in order to make it compatible with that law, since the Freie und Hansestadt Hamburg is not a private-law employer but a local public authority which is both an employer and a legislator as regards that provision.

54 In accordance with settled case-law, a national court which is called upon, within the exercise of its jurisdiction, to apply provisions of European Union law is under a duty to give full effect to those provisions, if necessary refusing of its own motion to apply any conflicting provision of national legislation, even if adopted subsequently, and it is not necessary for the court to request or await the prior setting aside of such provision by legislative or other constitutional means (Case C-314/08 *Filipiak* [2009] ECR I-11049, paragraph 81 and the case-law cited).

55 In addition, where the necessary conditions for the provisions of a directive to be relied on by individuals before the national courts against the State are satisfied, they may do so regardless of the capacity in which the State is acting, whether as employer or as public authority (Joined Cases C-250/09 and C-268/09 *Georgiev* [2010] ECR I-0000, paragraph 70).

56 Accordingly, if a provision such as Paragraph 10(6) of the First RGG constituted discrimination within the meaning of Article 2 of Directive 2000/78, the right to equal treatment could be claimed by an individual against a local authority, and it would not be necessary to wait for that provision to be made consistent with European Union law by the national legislature, taking account of the primacy of that

- law (see, to that effect, Case C-341/08 *Petersen* [2010] ECR I-0000, paragraph 81, and *Georgiev*, paragraph 73).
- 57 Secondly, the referring court asks from which date equal treatment should be ensured. In that regard, it should be observed, first of all, that, if there were discrimination within the meaning of Directive 2000/78, the applicant in the main proceedings would not be entitled under that directive, before the expiry of the period allowed to Member States to transpose it, to the same rights as married pensioners in respect of the supplementary pension at issue in the main proceedings.
- 58 As regards that period, although, as stated in particular in Case C-144/04 *Mangold* [2005] ECR I-9981, paragraph 13, the Federal Republic of Germany requested, under the second paragraph of Article 18 of Directive 2000/78, an additional period of three years from 2 December 2003 in order to transpose the Directive, that possibility, as is clear from that provision, concerned only age and disability discrimination. Accordingly, the period prescribed for the transposition of the provisions of Directive 2000/78 concerning discrimination on the ground of sexual orientation expired, for the Federal Republic of Germany as for the other Member States, on 2 December 2003.
- 59 Lastly, as regards the period between the registration of the life partnership of the applicant in the main proceedings, on 15 October 2001, and the expiry of the period for transposition of Directive 2000/78, it should be recalled that the Council of the European Union adopted Directive 2000/78 on the basis of Article 13 EC, and the Court has held that the Directive does not itself lay down the principle of equal treatment in the field of employment and occupation, which derives from various international instruments and from the constitutional traditions common to the Member States, but has the sole purpose of laying down, in that field, a general framework for combating discrimination on various grounds (see *Mangold*, paragraph 74, and Case C-555/07 *Küçükdeveci* [2010] ECR I-0000, paragraph 20), including sexual orientation.
- 60 Nonetheless, for the principle of non-discrimination on the ground of sexual orientation to apply in a case such as that at issue in the main proceedings, that case must fall within the scope of European Union law (see *Küçükdeveci*, paragraph 23).
- 61 However, neither Article 13 EC nor Directive 2000/78 enables a situation such as that at issue in the main proceedings to be brought within the scope of European Union law in respect of the period prior to the time-limit for transposing that directive (see, by analogy, Case C-427/06 *Bartsch* [2008] ECR I-7245, paragraphs 16 and 18, and *Küçükdeveci*, paragraph 25).
- 62 Article 13 EC, which permitted the Council, within the limits of the powers conferred upon it by the EC Treaty, to take appropriate action to combat discrimination based on sexual orientation, could not, as such, bring within the scope of European Union law, for the purposes of prohibiting any discrimination of that nature, situations which, as in the main proceedings, did not fall within the framework of the measures adopted on the basis of that article, specifically, as regards Directive 2000/78, before the time-limit prescribed therein for its transposition (see, by analogy, *Bartsch*, paragraph 18).
- 63 Moreover, Paragraph 10(6) of the First RGG is not a measure implementing Directive 2000/78 or other provisions of European Union law, with the result that it is only from the expiry of the period for transposition of the Directive that it had the effect of bringing within the scope of European Union law the national legislation at issue in the main proceedings, which concerns a matter governed by that directive, namely the conditions of pay within the meaning of Article 157 TFEU (see, by analogy, *Bartsch*, paragraphs 17, 24 and 25).
- 64 In view of the foregoing considerations, the answer to Question 5 is that, should Paragraph 10(6) of the First RGG constitute discrimination within the meaning of Article 2 of Directive 2000/78, the right to equal treatment could be claimed by an individual such as the applicant in the main proceedings at the earliest after the expiry of the period for transposing the Directive, namely from 3 December 2003, and it would not be necessary to wait for that provision to be made consistent with European Union law by the national legislature.

#### *Questions 4 and 6*

65 In view of the answers to Questions 3 and 5, there is no need to answer Question 4.

66 As regards Question 6, it is sufficient to state that the dispute in the main proceedings relates to entitlement to a supplementary retirement pension paid from 1 November 2001, on which the limitation of the effects in time of the judgment in Case C-262/88 *Barber* [1990] ECR I-1889 to the period after 17 May 1990 cannot have any bearing, notwithstanding the fact that the contributions underpinning the entitlement had been paid before the date of that judgment. Furthermore, neither the Federal Republic of Germany nor the Freie und Hansestadt Hamburg suggested any limitation in time of the effects of the present judgment and no evidence submitted to the Court indicates that they should be so limited.

### Costs

67 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

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

1. **Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation is to be interpreted as meaning that supplementary retirement pensions such as those paid to former employees of the Freie und Hansestadt Hamburg and their survivors on the basis of the Law of the Land of Hamburg on supplementary retirement and survivors' pensions for employees of the Freie und Hansestadt Hamburg (Erstes Ruhegeldgesetz der Freien und Hansestadt Hamburg), as amended on 30 May 1995, which constitute pay within the meaning of Article 157 TFEU, do not fall outside the material scope of the Directive either on account of Article 3(3) thereof or on account of recital 22 in the preamble thereto.**
2. **Article 1 in conjunction with Articles 2 and 3(1)(c) of Directive 2000/78 preclude a provision of national law such as Paragraph 10(6) of that Law of the Land of Hamburg, under which a pensioner who has entered into a registered life partnership receives a supplementary retirement pension lower than that granted to a married, not permanently separated, pensioner, if**
  - **in the Member State concerned, marriage is reserved to persons of different gender and exists alongside a registered life partnership such as that provided for by the Law on registered life partnerships (Gesetz über die Eingetragene Lebenspartnerschaft) of 16 February 2001, which is reserved to persons of the same gender, and**
  - **there is direct discrimination on the ground of sexual orientation because, under national law, that life partner is in a legal and factual situation comparable to that of a married person as regards that pension. It is for the referring court to assess the comparability, focusing on the respective rights and obligations of spouses and persons in a registered life partnership, as governed within the corresponding institutions, which are relevant taking account of the purpose of and the conditions for the grant of the benefit in question.**
3. **Should Paragraph 10(6) of the Law of the Land of Hamburg on supplementary retirement and survivors' pensions for employees of the Freie und Hansestadt Hamburg, as amended on 30 May 1995, constitute discrimination within the meaning of Article 2 of Directive 2000/78, the right to equal treatment could be claimed by an individual such as the applicant in the main proceedings at the earliest after the expiry of the period for transposing the Directive, namely from 3 December 2003, and it would not be necessary to wait for that provision to be made consistent with European Union law by the national legislature.**

[Signatures]

\* Language of the case: German.