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Case note to the Judgments of the Court (Sixth Chamber) of 10 February 2000, in Case C-50/96, *Deutsche Telekom AG v. Lilli Schröder,* Joined Cases C-234/96 and C-235/96, *Deutsche Telekom AG v Agnes Vick and Ute Conze*, Joined Cases C-270/97 and C-271/97, *Deutsche Post AG v. Elisabeth Sievers and Brunhilde Schrage*.

Of fundamental human rights, procedural rights and economic rights

The three judgments of 10 February 2000 of the Sixth Chamber in five German pension cases, provide a rare instance of cases in which both fundental human rights, fundamental procedural rights and fundamental economic rights are at issue. The importance of these judgments regards firstly the relationship between national constitutional law and European Community law in cases in which national constitutional law provides better protection of a human right than Community law. The Court also makes a significant pronouncement on the hierarchy between social policy, fundamental economic rights, and fundamental (non-economic) human rights. Finally, a number of procedural incidents occurred with regard to the conclusion of the public hearing which may seem to be anecdotical, but which touch on fundamental procedural rights, and may even render one of the judgments delivered unconstitutional under German law.

Facts and background

All five cases concern part-time workers, who were at some stage during their careers excluded from an occupational retirement pension scheme of the Deutsche Telekom AG and Deutsche Post AG, formerly Deutsche Bundespost Telekom AG, due to the number of hours they worked per week. This exclusion was rectified by national legislation, and most effectively by the case law of the Bundesarbeitsgericht and Bundesverfassungsgericht. These German courts have considered the exclusion of part-time workers from a company pension scheme unlawful discrimination under Article 3 paragraph 1 of the German Constitution, the *Grundgesetz*: “All humans are equal before the law.” Significantly, this type of discrimination of part-time workers was founded on the general equal treatment provision and hence concerned direct discrimination of part-time workers as opposed to full-time workers; it was *not* (primarily) indirect discrimination on grounds of sex as forbidden by Article 3 paragraph 2 of the *Grundgesetz*. This state of affairs under German law must be explained from the fact that in the first case of exclusion of part-time (less than half time) workers which reached the Bundesverfassungsgericht, the statistics showed that there was no overrepresentation of women in such part-time jobs.[1] The crux of the German case law in the cases under discussion, however, is that according to the Bundesarbeitsgericht, the *Grundgesetz* does not allow for limiting the retroactive effect of the prohibition of discrimination; this was subsequently confirmed by the Bundesverfassungsgericht.[2] The German courts established this mainly after *Defrenne II* and after *Barber*.[3]

[1] BVerfGE 97, 35 [44 ff.], *Hamburger Ruhegeldgesetz* of 11 November 1998.

[2] BVerfG, 1 BvR 263/98 of 19 May 1999, para. 16, http://www.bverfg.de/; implicitly also in BVerfG, 1 BvR 264/98 of 5 August 1998, http://www.bverfg.de/, which also denied the duty Bundesarbeitsgericht to ask for a preliminary decision from the ECJ under Art. 177 (now 234) EC,

To put it briefly, Deutsche Telekom AG and Deutsche Post AG, formerly Deutsche Bundespost Telekom AG, argued that Article 119 (now 141) EC takes precedence over Article 3 of the *Grundgesetz* and that the limitation of its effects in time deriving from the *Barber* judgment[4] and *Barber* Protocol must apply also to German law, more particularly also in these cases.

The *Landesarbeitsgerichte* of Hamburg (in *Schröder* and *Vick and Contze*) and Niedersachsen (in *Sievers and Schrage*), posed a series of diffently formulated questions. In the Court of Justice's reformulation of these questions, the central issue common to all three is whether the limitation in time of the possibility of relying on the direct effect of Article 119 EC precludes national provisions which lay down a principle of equal treatment by virtue of which all part-time workers are entitled to retroactive membership of an occupational pension scheme and to a pension under that scheme - a retroactivity which extends to a period in time which lies further into the past than under the limitation of retroactivity under Article 119 EC.

Apart from this common question separate questions are posed in each case. In *Sievers and Schrage*, the labour court of Niedersachsen - after questions on the precedence of Community law and the conditions thereof - raised the question whether at least the Community law principle that national law is to be interpreted in a manner consistent with EC law, requires national provisions on equal treatment in the matter of benefits paid under occupational pension schemes to be interpreted and applied in accordance with the requirements and limitations (prohibition of retroactive effect) of Community law.

In *Schröder* the additional question is whether the German case law on retroactivity discriminates against German undertakings in a manner which contravenes Community law.

In *Sievers and Schrage*, the referring court considered that, apart from its social purpose, historically Article 119 EC also pursues an economic objective, namely that of equality of opportunity in terms of competition. Hence, it is asked whether precedence of EC law with respect to retroactivity exists only if the economic objective of Article 119 EC that co-exists with the social objective, namely the creation of equal competitive opportunities, is specifically affected. Thus the referring court presumably wished to know

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basing itself on an elaborate reasoning which is similar to that of the ECJ in the cases under discussion.

[3]For an succinct overview in English of the German law governing access to occupational pension schemes as it stood by 1996, see Elaine A. Whiteford, Adapting to Change: Occupational Pension Schemes, Women and Migrant Workers, Kluwer Law International, The Hague/London/Boston, 1997. For a general treatment of intertemporal matters in EC law see T. Heukels, Intertemporales Gemeinschaftsrecht: Rückwirkung, Sofortwirkung und Rechtsschutz in der Rechtsprechung des Gerichtshofes der Europäischen Gemeinschaften, Nomos, Baden-Baden, 1991; for an older assessment of the retroactive effect of court judgements in comparative perspective see T. Koopmans, Retrospectivity Revisited, Cambridge Law Journal 39 (2) 1980, 287-303; also in T. Koopmans, Juridisch Stippelwerk, Kluwer Deventer 1991, 292 ff.. The most recent study on part-time workers in Community law, Susanne D. Burri, Tijd delen: deeltijdwerk, gelijkheid en gender in Europees- en nationaalrechtelijk perspectief / Sharing Time: Part-time Work, Equality and Gender in European and National Legal Perspective, Europese Monografieën, Kluwer Juridische Uitgevers, Deventer 2000, 740 pp.

[4]Case C-262/88 *Barber* v *Guardian Royal Exchange* [1990] ECR I-1889, of 17 May 1990.

whether in case the economic intersts come in play which are at stake in Article 119 EC, (which were also at stake when limiting the retroactive effect in *Defrenne II* and *Barber*), the national provision on non-discrimination is drawn into the field of Community law, and hence the restrictions on retroactive effect of the non-discrimination norm protecting economic actors must be observed.

In *Vick and Contze* the additional question is posed whether it makes any difference that under national law indirect sex discrimination is irrelevant to the right to pension scheme membership and pension entitlement, but that it protects part-timers even if there is no such sex discrimination. Also this question touches on the manner in which the relevant national law enters the framework of Community law.

The Advocate General's Opinion

Advocate General Cosmas delivered one Opinion for all cases. He opined that the relevant time limits are the date of *Defrenne II* (7 April 1976), and that no provision or principle of Community law precludes the retroactive application of national provisions which remedy a discrimination which conflicts with Article 119 with retroactivity extending to a moment prior to *Defrenne II*.

I summarize the reasoning advanced by the Advocate General as to the proposed ruling that Community law does not preclude retroactivity of national law reaching further back in time than Community law. A distinctive feature in his reasoning is to his opinion the principle of the primacy of Community law only applies when national provisions are contrary to Community law, and not when national provisions conform with Community law. Also, the limitation of the effects of a Court judgment only arises as an exceptional measure after considering the consequences of a national provision which is contrary to Community law; limitation of the consequences of a judgment presupposes necessarily a conflict between national law and Community law. The limitation of the effects of a judgment is inconceivable when a national measure conforms with Community law, for otherwise there would be a self-curtailment ("autocensure") of Community law (para. 63). Thus the Advocate General is drawn into considering whether there is a conflict or conformity with Community law. In this context, he asserts that the German legislation forbidding discrimination of part-time workers as compared to full-time workers and Article 119 EC which forbids discrimination between men and women overlap (para. 67). Moreover, the national provisions are "absolutely in conformity" with Article 119 EC, because they also protect women, who tend to be the majority of part-time workers, against discrimination in comparison with men. And they even go further both *ratione temporis*, because they extend further into the past than Article 119 EC, and *ratione personae*, because they apply to all part-time workers, whether men or women, majority or minority (para. 68). As there is no contradiction nor conflict between national and Community law, "there are no grounds to apply the principle of the primacy of Community law".[5] Moreover, no limitation deriving from the Court's case law can be envisaged, because such limitations only consider rights which are based on Community law and not rights based on national law, as is the case in the present cases; and, anyway, when national law is in conformity with Community law, no limitation can be conceived lest there would be a self-curtailment of Community law (para. 70). Any other reasoning would have the result that Article 119 both enjoins Member States

[5]Translation is the present author's, as no official translation of the opinion into English was available at the time of writing.

to equalize men's and women's remuneration, and at the same time enjoin them not to equalize this remuneration by restricting national measures which realize that enjoinment to a date even before the existence of Article 119. Hence, if legal certainty has exceptionally allowed the maintenance of national provisions which are in conflict with Article 119, no provision or general principle allows for the annulation of national provisions which conform with Community law (para. 71).

A procedural incident

In all the cases under discussion, counsel for the original defendants, Deutsche Post and Deutsche Telekom, contended that the Opinion of the Advocate General had not been delivered in the prescribed manner since the operative part thereof had been read at a sitting of the Fifth Chamber, not of the Sixth Chamber, which was to give judgment in these cases.

Moreover, the representative and lawyer of Deutsche Post in *Sievers and Schrage*, through a combination of circumstances, had been unable to locate the courtroom in which the sitting of the Fifth Chamber was held until after the Opinion had been read. The circumstances were that the Court's staff provided them with the wrong courtroom number: that of the room where sittings of the Sixth Chamber take place. They did so first by telephone some days before the delivery of the Opinion and at the entrance of the building on the day of the sitting. As the representative and lawyer found out, only an internal memorandum of the Court which had not been forwarded to parties or their counsel specified the correct room and Chamber; also it was posted outside the courtroom where the Opinion was actually delivered; but not at the courtroom announced. Counsel argued that consequently he, the representative of the party and the public had not been given the opportunity to attend the sitting, in breach of Article 28 of the Statute of the Court of Justice: "The hearing in court shall be public, unless the Court, of its own motion or on application by the parties, decides otherwise for serious reasons."

Finally, in all cases the defendants brought forward a request based on Article 6 ECHR (as interpreted by the ECrtHR in its *Vermeulen* case law[6]) to draw attention to manifest errors or omissions in the Opinion of the Advocate General and to reply thereto. Especially, they wished to submit observations on the Opinion in the light of the order made by the Bundesverfassungsgericht on 5 August 1998,[7] which was after the hearing of parties in the present cases.

The Court of Justice

The procedural incident

The Court of Justice begins by dismissing the three incidental procedural objections: no rules applicable to the Court nor the rights of parties in the main proceedings have been

[6]ECrtHR, 6 January 1996, *Vermeulen v. Belgium*, 58/1994/505/587; subsequently repeated in several other jugdments, such as *J.J. v. the Netherlands*, 9/1997/793/994, 27 March 1998; *K.D.B. v. The Netherlands*, 80/1997/864/1075, 27 March 1998; *Van Orshoven v. Belgium*, 95/1995/601/689, 30 May 1997.

[7]See footnote 2, above.

infringed.[8] The judges hearing this case were apprised of the Opinion through the deposit thereof at the Registry, and it was made public inter alia by the reading in a public sitting and by the deposit at the Registry.[9] That a party's representative and lawyer were unable to find in good time the courtroom where the Opinion was delivered, is irrelevant in this regard.[10] The request based on Article 6 ECHR to respond to the Opinion, is rejected under reference to the *Emesa* order of 4 February 2000 (case C-17/98), the Court saying that "after hearing the views of the Advocate General, [the Court] considers that [defendant's] application contains nothing to indicate that it would be useful or necessary to re-open the oral procedure".[11]

Community pension law

The Court sets out in all three cases to delineate to the referring national courts the relevant main lines of Community pension law.

It reiterates the limitation of retroactivity of *Defrenne II* and *Barber* as further explained in *Vroege*, *Fisscher*, *Maggorian and Cunningham*, *Dietz* and *Bilka*. As far as the right to *join* an occupational scheme is concerned, this means that there is no further limitation in time than that which derives from *Defrenne II*, being 8 April 1976.[12]

Does Community law preclude the application of national law which extends the right to equal treatment to a period before Defrenne II?

The Court comes to the conclusion that the limitation in time resulting from the judgment in *Defrenne II*, does not preclude national provisions which lay down a principle of equal treatment by virtue of which part-time workers are entitled to retroactive membership of an occupational pension scheme and to receive a pension under that scheme.[13] The reasoning is the following.

First the Court recalls that the interpretation which the Court gives to a rule of Community law refers to the rule as it must be or ought to have been understood and applied from the time of its coming into force. Only exceptionally the Court may be moved to restricting the retroactive effect of its interpretation for reasons of legal certainty and good faith. It recalls *Defrenne II* as pointing out that the application of Article 119 was to have been fully secured by the original Member States as from 1 January 1962 (the second stage of the transitional period), and that even in the areas in which Article 119 has no direct effect, its implementation may if need be derive from a combination of Community and national measures. Also it recalled that in *Defrenne II* it was appropriate to take exceptionally into account the fact that, over a prolonged period, the parties concerned had been led to continue with practices which were contrary to Article 119 of the Treaty, although not yet prohibited under their national law (*Defrenne II*, paragraph 72) (para 43-45). It concludes:

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[8] *Schröder*, para 20; *Vick and Contze*, para 26; *Sievers and Schrage*, para 27.

[9] *Schröder*, para 21; *Vick and Contze*, para 27; *Sievers and Schrage*, para 28.

[10] *Vick and Contze*, para 29.

[11] *Schröder*, para 22-23; *Vick and Contze*, para 28-29; *Sievers and Schrage*, para 30-31.

[12] *Schroeder*, para 31 to 40; *Vick and Contze*, para 33-42; *Sievers and Schrage*, para 35-44.

[13] *Schroeder*, para 50; *Vick and Contze*, para 50; *Sievers and Schrage*, para 52.

> "46. It follows that the limitation of the possibility of relying on the direct effect of Article 119 [EC] was not intended in any way to deprive the workers concerned of the opportunity of relying on national provisions laying down a principle of equal treatment.
> 47. National provisions having the effect of ensuring application of the principle of equal pay for male and female workers contribute to the implementation of Article 119 [EC], in compliance with the obligation which has been incumbent on the original Member States since 1 January 1962.
> 48. In such circumstances, the principle of legal certainty inherent in the Community legal order, which may move the Court, exceptionally, to limit the possibility of relying on a provision which it has interpreted, does not fall to be applied and does not preclude the application of national provisions which ensure a result which conforms with Community law.
> 49. It is immaterial, in that regard, that the national provisions at issue were not interpreted in a manner consonant with Article 119 [EC] until after the date of the judgment in *Defrenne II*, since that interpretation is capable of being applied, if necessary, to situations which arose and became established before that date. It is not for the Court to pronounce as to the application in time of rules of national law."[14]

Consistent interpretation

In *Sievers and Schrage*, apart from questions on precedence, the question is raised whether at least the Community law principle that national law is to be interpreted in a manner consistent with EC law requires national provisions on equal treatment to be interpreted and applied in accordance with the requirements and limitations (limitation of retroactive effect) of Community law.[15]

The Court first recalls the settled case law under which national courts are required to interpret their national law as much as possible in the light of the wording of relevant provisions of Community law, in particular Article 119 EC in order to achieve the result pursued by them. Next it states that it is clear from the previously answered question that Article 119 does not preclude national provisions which are conducive to compliance with the principle of equal pay for men and women. It concludes "that national courts are required to interpret their national law as far as possible in the light of the wording and purpose of the relevant Community provisions, in particular Article 119 of the Treaty, in order to ensure application of the principle of equal pay for men and women" (para 64).

Discrimination of undertakings versus discrimination of women: economic rights versus fundamental human rights

In *Schröder* the additional question was posed whether the German case law on retroactivity discriminates against German undertakings in a manner which contravenes Community law. In *Sievers and Schrage*, the referring court wished to know whether only in case the economic objective is at stake in national law which also Article 119 EC takes into account, precedence of EC law with respect to retroactivity exists.

As to the discrimination on the basis of nationality, which the Court reads into the question in the *Schröder* case, the Court recalls that the principle of non-discrimination on grounds of nationality is not infringed simply because national law is stricter than that of other Member States (para 52).

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[14] The numbering is that of *Schroeder* and *Vick and Contze*; in *Sievers and Schrage*, para 48-51.

[15] A similar question is part of question 6 in *Schröder*.

In seven identical recitals both in *Sievers and Schrage* and in *Schröder*, the Court considers the nature of Article 119 EC. It concedes under reference to *Defrenne II* that Article 119 was aimed to avoid a competetive disadvantage for business enterprise in Member States with more advanced social legislation. Secondly, it recalls that Article 119 formulates a social objective for the improvement of the life of workers which extends beyond that of a mere economic union. Also it states that in later case law it has, however, held that the right not to be discriminated against on the grounds of sex is one of the fundamental rights whose observance the Court has to ensure. The Court concludes from this

> "that the economic aim pursued by Article 119 of the Treaty, namely the elimination of distortions of competition between undertakings established in different Member States, is secondary to the social aim pursued by the same provision, which constitutes the expression of a fundamental human right."

Hence, the fact that with regard to certain periods prior to *Defrenne II* one could not rely on the principle of equal pay in certain other Member States, does not affect the application of national rules concerning equal treatment in Germany, notwithstanding the risk of distortions of competition between economic operation of the various Member States to the detriment of employers in Germany.[16]

Who is discriminated against: part-timers or women?

In *Vick and Contze* the question is posed whether it makes any difference that under national law indirect sex discrimination is irrelevant to the right to pension scheme membership and pension entitlement, but protects also part-timers if there is no such sex discrimination.

The Court takes two (contradictory) views, which each lead to the same conclusion. There is a collusion of rights of equal treatment in various respects, so Community law does not stand in the way of national law: "[P]rovisions prohibiting other forms of discrimination may, in certain circumstances, contribute to ensuring that the principle of equal pay for men and women is applied in accordance with the obligations incumbent on the Member States. That is so in particular where national provisions prohibit discrimination in relation to pay against part-time workers, who, as a group, often comprise a higher percentage of women than men" (para 53-54). Also the Court finds that if national law concerns a prohibition of discrimination on other grounds than those of Community law, then Community law cannot be relevant to those other forms of discrimination: "[T]he fact that the relevant national provisions are based on a prohibition of other forms of discrimination cannot *a fortiori* lead to any limitation of their application in time solely because of the limitation in time of the possibility of relying on the direct effect of Article119 of the Treaty resulting from Defrenne II."

Comment

The procedural incident

Procedural incidents draw little attention in case notes. Nevertheless, they are sometimes quite important and extend much further than the case itself may seem to indicate. This is

[16] *Schröder* and *Sievers and Schrage*, para 53 to 59.

especially true with regard to European law: what in the multi-national clash of judicial cultures seems a *chicane* to one party,[17] may be a gross encroachment upon a fundamental procedural right to another. The most outstanding illustration has been the *Gaal* judgment, which revealed to European law the importance of particular aspects of access to justice as contained in the German conception of having a right to have one's case heard by a *gesetzlicher Richter* (in other Member States the *ius de non evocando*, in Italy the right to one's *giudice naturale*). In it, the Court rejected out of hand the complaint of the German government that it could not know how the Chamber judging the case was composed, nor on what objective and neutral criteria its composition was based. Shortly after, however, the Court found it necessary to publicize how and on what criteria Chambers were in future to be composed (it had partly to devise these criteria as they did not exist previously). Presumably the Court had become aware of the bomb under the Court's Chamber judgments: not giving any insight on the objective and neutral criteria by which a Chamber is composed, would have had the farreaching consequence that Chambers of the Court would no longer be recognized under German constitutional law as a *gesetzlicher Richter,* and hence their judgments could be ignored within the national legal order.[18]

In the cases under discussion, it concerned the right of entrance to a public hearing, especially the end of the oral procedure. Article 59 (2) of the Rules of Procedure of the Court state that the delivery of the Opinion by the Advocate General brings the oral procedure to an end. On the basis of this rule, the fundamental right to be present at the oral procedure at which one's case is heared, must necessarily extend to having the right to attend the delivery of the Opinion. In one case under discussion, however, legal counsel and a representative of one of the parties' right to attend have allegedly been frustrated by acts which must be attributed to the Court. Also it must touch on the right to have one's case being heard by the court adjudicating that case, to have the oral proceedings take place in front of the chamber adjucating. However, in these cases - as is not uncommon at the Court of Justice - the Opinion was not delivered at a hearing by the Chamber which had to judge the case, but in a public sitting of a quite different Chamber which had nothing to do with these cases.

Against this background, the statement that no infringement of applicable rules took place, nor of rights of the parties in the main proceedings, must at least be clearly motivated.

As to the complaint that legal counsel for one of the parties was unable to attend the delivery of the Opinion of the Advocate General, the judgment fails to mention the relevant circumstances.

The disinformation given by members of the Court's staff may well have had to do with the fact that the Opinion was not read in a sitting of the Chamber which was to judge the relevant case, but of an arbitrary other Chamber. That only an internal memorandum, which was not communicated to the relevant legal counsel and party, announced the change in Chamber and room where the Opinion was to be delivered, seems fatal to the outside

[17] Cf. Advocate General Tesauro, not aware of the implications under German constitutional law of the remarks of the German government intervening, in the *Gaal* case.

[18] Case C-7/94, Landesamt für Ausbildungsförderung Nordrhein-Westfalen/ Lubor Gaal; and Official Journal C 95/54.

observer.[19] Frustrating the right of a party and his counsel to attend a public sitting of a court under German law not only infringes on procedural law as such, but also infringes a constitutional right of access to a court (*gesetzlicher Richter*). If that is so, the referring German court may not recognize the ECJ judgement as having effect within the German legal order. It is curious that the Court - as in *Gaal* - takes this risk for granted.

The fact that the Opinion was being read in an arbitrary sitting of an arbitrary Chamber strikes the outsider as odd. The explanation of the Court that the Chamber judging the case was apprised of the Opinion by the deposit thereof at the Registry of the Court, only makes things odder. It turns into nonsense Articles 18 (3) of the Statute of the Court - which says that the oral procedure includes the "hearing of the submissions of the Advocate General",[20] and 59 (1) of the Rules of Procedure, which prescribes that the "Advocate General shall deliver his opinion orally at the end of the oral procedure." When Courts says that it is enough for the adjudicating judges to be able to read the conclusion, it acknowledges that it is not by actually hearing the Opinion that the Chamber has taken cognisance of the Opinion. On this understanding, the judgments begin with a statement which is *prima facie* false: "The Court (*Sixth Chamber*)..., after considering the written observations ..., after hearing the oral observations of ...., *after hearing the Opinion* of the Advocate General ..." - no Opinion was actually heard by the Sixth Chamber in this set of cases.[21]

The explanation that it is practical to have the Opinion read in another Chamber, is unconvincing. Even if it would in certain circumstances perhaps be very practical, one would not let any other part of the oral procedure be conducted by a chamber which has nothing to do with the case. The excuse that the Chamber which did have to judge the case could read the Opinion, would also apply to the minutes of a hearing being conducted by a different Chamber, which are deposited at the Registry[22] - and yet one would not dream of letting an arbitrary different Chamber conduct the hearing in a case of another one (or so we may hope). So why this odd circus when it concerns the delivery of the Advocate General? The real solution would, of course, be to change the Statute and Rules of Procedure and not make the delivery of the Opinion part of the oral procedure any longer - though this may be objectionable for practitioners and judges from the common law tradition. But as long as these provisions say what they do, it is bizarre to understand the relevant rules as allowing this part of the oral proceedings to be conducted by a Chamber which is not dealing with the case at all.

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[19]The Instructions to the Registrar do not impose the obligation to inform parties of the case list which includes the date, place and hour of a public hearing; it only specifies that the list be displayed at the entrance of the courtroom - which means that only those who know in which courtroom a public hearing takes place, can find out in which courtroom it takes place; Kafka in Luxembourg?

[20]This provision is retained in the Draft Treaty of Nice as Article 20 (4). The only exception introduced is when there is no new point of law raised and the Court, after hearing the Advocate General, decides to without his submissions (new Article 20 (5)).

[21]That delivering it orally, is a peremptory norm is also clear from Article 46 (3) of the Statute of the Court, which allows the Advocate General to make written submissions only in the Court of First Instance by way of exception to the provision that he deliver his Opinion orally to the Court of Justice.

[22]Article 62 Rules of procedure.

As to the right to respond to the Opinion of the Advocate General, I refer to the critical case note published in this journal to the *Emesa* order.[23] I may add that the Court in the *Emesa* order seems to interpret the Vermeulen case to mean that the institutional position of the Advocate General is decisive for whether his opinion is taken to be so influential an advice as to constitute a document on which parties should be allowed to comment. Both the *Vermeulen*, and the subsequent *Van Orshoven*, *J.J. v. the Netherlands*, and *K.D.B. v. The Netherlands* judgments of the ECrtHR allow, I submit, for this interpretation. But in other cases on the right to respond to submissions, the ECrtHR refers to *Vermeulen* while holding that the mere fact of such submissions being *aimed* to influence a court suffices to establish a right for parties to comment thereon; the *actual* influence or the instititutional source of such authority is not evidently of decisive importance.[24] Given the various possible interpretations, I submit that it has become most desirable that the European Court of Human Rights clarify in its case law whether the institutional position of an Advocate General is of such importance as to allow an approach as taken by the Court of Justice.

Be that as it may, it comes as a surprise that in the cases under discussion, the substance of the reasoning expounded by the Court in the *Emesa* order is not repeated. Instead, the Court merely uses the "useful or necessary" test: if an application contains nothing to indicate that is "useful or necessary" to re-open the oral procedure, the Court refuses the right to respond. This is - to put it mildly - a very meagre approach to rejecting a claim based on the European Convention on Human Rights. Why the principle of Community law deriving from Article 6 of the ECHR, granting a right to respond to the Opinion in these cases, does not apply, is not grounded on any consideration of this fundamental right itself. The Court does not even take the trouble to refer to the grounds in the *Emesa* order which relate to this right, but only to those on the possibility of re-opening the oral procedure, of which it states without further ado that this is not "useful or necessary".

Precedence of national human rights over ECJ restrictions of human rights

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[23]R. Lawson, CMLRev 37 (2000), 983-990; Case C-17/98, *Emesa Sugar (Free Zone) NV* v. *Aruba*.

[24]Notably in the case of Niderost-Huber v. Switzerland, 104/1995/610/698, 27 January 1997: "24.However, the concept of fair trial also implies in principle the right for the parties to a trial to have knowledge of and comment on all evidence adduced or observations filed (see the Lobo Machado v. Portugal and Vermeulen v. Belgium judgments of 20 February 1996, Reports 1996-I, p. 206, para. 31, and p. 234, para. 33, respectively). 25. The Government argued that this rule applied to cases where, as in the above-mentioned Lobo Machado and Vermeulen cases [...], an authority had taken the initiative of submitting arguments or observations intended to advise or influence a court. [...] 26. The Court notes that even though the observations in issue ran to only one page they nevertheless constituted a reasoned opinion on the merits of the appeal, and explicitly called for it to be dismissed. [T]hey were therefore manifestly aimed at influencing the Federal Court's decision. 27. In that connection, *the effect they actually had on the decision is of little consequence.* In any event,[...] it is unlikely that the Federal Court would have paid them no heed. It was therefore all the more needful to give the applicant an opportunity to comment on them if he wished to do so. 28. It is also of little consequence that the case concerned civil litigation, where the national authorities, as the Government rightly pointed out, enjoy greater latitude than in the criminal sphere [...] [O]n this point the requirements derived from the right to adversarial proceedings are the same in both civil and criminal cases" (italics added).

Of major importance are the judgments on the precedence of national human rights law over more restrictive EC human rights (more restrictive, because these are not to be considered directly effective over the relevant period). The cases at hand give one of those few examples in which national human rights standards prevail over EC standards, in the sense that national human rights standards apply while a more restrictive EC standard concerning a subject matter, which for all intents and purposes must be considered the same, does not. Anyone's intuition on these cases is that national law should be allowed to take this stricter view of the prohibition of discrimination than EC law does. But it is not easy to make transparent why in this case such higher national standards of protection should prevail over EC standards, whereas in others they should not.

The Advocate General's opinion is an indication of how difficult it is to formulate this in clear words. In trying to do so, he takes bold steps even with regard to the doctrine of EC law supremacy. He goes so far as saying that this doctrine does not apply when there is no conflict between national and EC law. This would have quite fundamental implications, because in that case "supremacy", contrary to what is usually assumed, is not a matter of hierarchy - EC law being of higher rank than national law - but only a matter of conflicts of law, i.e. a rule which solves conflicts which may arise between norms which do not stand in a relation of subordination to each other.

The Court does not explicitly follow this line of reasoning. But it is very hard to see what the line of argument actually is. The assumption seems to be that what the Court did in *Defrenne II,* did not touch on national law. To this extent there may still be a trace of the line of thought of the Advocate General. Somehow the Court constructs national and EC law as two different things. The difficulty is that the nexus between the two is that the Court (as the Advocate General) finds it meaningful that the national norm lives up to the EC norm. But that is of course true in one respect only, but not in respect of the apparent conflict which brought these cases before the ECJ. The conformity of German law is no mere coincidental conformity: the national norm not only accidentally conforms but can - so the Court suggests - even be supposed to "implement" the EC norm (see para. 47 quoted above). To this extent the German norm is taken up into the wider Community law perspective; it can even be considered to form part of the EC legal order, the competent organs of which supervise conformity through the celebrated doctrines of direct effect, supremacy, uniformity, useful effect and the like. And it is here that the problems creep in. Do these doctrines apply in cases like the ones under discussion? The Court seems vaguely to adhere to some pluralist conception which is at the background of the Advocate General's Opinion. Such a conception has much to be said for it, but seems an unlikely theory for a Court which from the beginning has tended to consider European integration in terms of limitation and transfer of national sovereignty from the Member States to the EC.

There is a friction in the logic of reasoning, which can also be traced in the Advocate General's Opinion. The Court and Advocate General are really saying that on the one hand the national norm can be considered as implementing EC law in conformity with the EC Treaty, and on the other hand that the national norm is outside the sphere of EC law and hence EC norms do not apply to the relevant cases. Logically only one of these reasons can be valid, but not the two simultaneously as they are mutually exclusive. The inconsistency becomes most apparent when the court deals with the issue of interpreting national law in conformity with EC law in *Sievers and Schrage*.

The Court could, and perhaps should, have stressed the normative status of the restriction in time of its case law: the restriction in time of *Defrenne II* (and *Barber* for that

matter) is not obligatory but only *allows* Member State law to diverge from the non-discrimination principle as a consequence of the restriction in time of the direct effect of the EC. As soon as a Member State organ comes to the conclusion that national non-discrimination norms, even those implementing Article 119 EC, do not have such restrictions but operate unreservedly, its national legislation (at any rate as far as its surplus protection in periods before the direct effect of Article 119 is concerned) falls outside the scope of the doctrine of direct effect of Community law. Clearly, Member States were allowed to have legislation which forbade unequal treatment of women before Article 119 entered into force. Also they could implement it before the deadline of 1962, or *Defrenne II*, and this remains to be the case when a national court interprets a national norm with retrospective effect to 1948. The Court seems to be hinting as this type of reasoning, but unfortunately it does not state it very clearly. As it is said now, it may still seem as if the restriction in time is compulsory as a matter of Community law. As we shall see below, this is also how some national courts have understood the case law, with detrimental consequences for the fundamental right to equal treatment.

The question why the national norm prevails in these pension cases over the norm of Community law can then be answered by the fact that the national norm had earlier already reached the aim of equal treatment before this was compulsory as matter of Community law. For the periods that it was not compulsory to attain the relevant aim yet, only national law applies.

Consistent interpretation

The Court's answer in *Sievers and Schrage* to the question whether courts must interpret their national law in accordance with limitations in retroactivity of Community case law, is somewhat puzzling. At first sight, it seems a classic case of turning a question on its head. The Niedersachsen labour court posed this question as an alternative to precedence in a strict sense of EC law: if the case law on restricting retroactive effect of the equality principle does not take hierarchical precedence over contrary national law, does the principle of consistent interpretation lead to the same result, to wit that EC restrictions in retroactive effect must be respected if such an interpretation of national law is at all possible? The Court in its answer, however, simply repeats that no Community law principle stands in the way of the stricter national law of non-discrimination, and concludes that national law must indeed be interpreted in conformity with Article 119 EC.

From a correct understanding of the question as raised by the Niedersachsen labour court, one might be tempted to think that given the limitation in retroactive direct effect, the national court must after all interpret its national anti-discrimination law with the same restrictions and limitations - as this is what the Niedersachsen court wanted to know. The crux, however, is in the additional words, to the effect that national courts are required to interpret national law in conformity with EC law Ain order to ensure the application of the principle of equal pay for men and women." Presumably, this means that national courts only can do so *to ensure* equality, and are not to interpret national discrimination law to the *disadvantage* of the principle of equal pay. Thus the Court repeats what it had already said: the Article 119 case law restrictions do not stand in the way of more favourable national law which does not have such restrictions. But this was not really an answer to what the referring court was actually asking. If our understanding of the Court's words is correct, the answer which the Court wishes to give to the question raised is: no, national courts are not

under an obligation to interpret national law in conformity with the restrictions in retroactive effect of the ECJ case law when this is to the disadvantage of the principle of equal pay.

Consequences for Dutch case law and state practice on Article 26 ICCPR

A correct understanding of the judgments is important for national courts.The Dutch *Centrale Raad van Beroep* - which is court of highest instance in social security and civil servants' cases - has held that "although perhaps also with regard to provisions like Article 119 EC it must be assumed that they do not form an obstacle for member states to bring about equal treatment in relevant respects at an earlier moment than that to which EC law forces them to, the *Raad* assumes that the limitation in time of the *Barber* judgment, which is grounded in "*dwingende overwegingen"* (literally: "mandatory" or "peremptory" considerations) of legal certainty (para 44 of the judgment), also has a protective function, and that therefore the member states are legally obliged by Community law to respect this limitation."[25] The present judgments make patently clear that this view is wrong.

As a matter of fact the *Centrale Raad van Beroep* went on from its starting point as quoted, to find herein "sufficient grounds" to apply the same limitation which applies to Article 119 EC also to Article 26 ICCPR and Article 14 ECHR. "Also with regard to these provisions it must be held that mandatory requirements of legal certainty prevent that previous applications of the law can at this moment in time still be disputed in law; for which the *Raad*, for the sake of legal uniformity, also here takes as its point of reference 17 May 1990."[26]

The government of the Netherlands has recently taken this national case law as justification for refusing to conform itself to the Views expressed by the Human Rights Committee under the Optional Protocol to the International Convention on Civil and Political Rights, of 26 July 1999, on the individual complaint of Vos against the Netherlands[27] , "on grounds of compelling reasons (*dwingende redenen*) of legal certainty and for the sake of the legal uniformity in relation to the law of the European Community."[28]

The Court of Justice has now taken away all grounds to the reasoning of the *Centrale Raad van Beroep,* for the argument based on the necessity to respect the limitation in time of EC law with regard to other non-discrimination regimes. It has removed

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[25]CRvB 26 November 1998, Rechtspraak Sociale Verzekeringen 1999, 92 and Tijdschrift Ambtenaren Recht 1999, 23: "Ofschoon wellicht ook met betrekking tot een bepaling als artikel 119 van het EG-Verdrag moet worden aangenomen dat zij er niet aan in de weg staat dat de lidstaten met ingang van een vroeger tijdstip gelijke behandeling op het betreffende terrein tot stand brengen dan waartoe het EG-recht verplicht, gaat de Raad ervan uit dat de lidstaten derhalve krachtens het gemeenschapsrecht gehouden zijn die beperking te respecteren."

[26]Ibid.: "De Raad ziet in het vorenstaande voldoende grond om met betrekking tot de toepassing van zowel artikel 26 van het IVBPR als artikel 14 van het EVRM, in zoverre de toepassing van de Wet hier geacht kan worden met die bepalingen in strijd te komen, een overeenkomstige beperking aan te brengen als geldt voor de toepassing van artikel 119 van het EG-Verdrag. Ook ten aanzien van eerstgenoemde bepalingen dient te worden aanvaard dat dwingende overwegingen van rechtszekerheid zich ertegen verzetten dat rechtstoepassing uit het verleden thans nog in geding worden gebracht, waarbij de Raad ter wille van een uniforme rechtstoepassing ook hiet aanknoopt bij de datum van 17 mei 1990."

[27]Human Rights Committee, 66th session, Comm. 786/1997, CCPR/C/66/D/786/1997, A.P. Johannes Vos. Published on the internet via http://www.unhchr.ch/tbs/. Also published in NJCM-Bulletin, 25 (2000), 5, pp. 1012, with an annotation by Aleidus Woltjer.

[28]*Staatscourant* 1999, nr. 214.

one card from the lowest floor of the card house constructed by the *Centrale Raad van Beroep*: if the Article 119 EC restrictions in time do not apply to national law, there is no reason to assume that these restrictions must also be followed by national law when these are called upon by their national constitutions to apply other non-EC law, such as the ICCPR and the ECHR.

It should, however, be noted that the Court has used both in *Defrenne II* and in *Barber* language which may have confused the *Centrale Raad van Beroep* and the Dutch government - much as it did *Deutsche Post* in the cases under discussion. In the Dutch language version the wording of the justification of a restriction of the retroactive effect the Court uses the words "*dwingende overwegingen*" of legal certainty, which means "mandatory", "compelling" or "peremptory considerations", which suggests that there can be no other considerations outweighing others; whereas the English uses in *Defrenne* the words "important considerations" and in *Barber* "overriding" considerations. "dmittedly, not only the Dutch language versions of *Defrenne* and *Barber* use compelling language.[29] Nevertheless, the judgments of the Court have now made clear that these reasons are not quite so compelling as to extend beyond the reach of the direct effect of Article 119 EC proper.

The precedence of fundamental human rights over economic rights

A final point of great importance is the stance which the Court takes on the relationship between fundamental economic rights and fundamental human rights. The EC is still characterized as focussed on the rights of economic actors and has as a fundamental aim to secure these rights. Thus the ECJ has consistently held the free movement of goods, services, capital and persons to be "fundamental rights". Similarly, the principles of non-discrimination on the basis of nationality, the common and internal market and their underlying principles, all assume the form of economic rights of a fundamental nature. This has been the strong point of European integration in the European Communities: it has provided the countries of the European Union with an economic constitution. In fact, it is not difficult to analyse the case law of the ECJ on human rights in terms of the predominance of economic (fundamental) rights over the classic human rights.

In *Schroeder* and *Sievers and Schrage* the Court now takes a very principled different stance: the fundamental human right to equal treatment of men and women takes precedence over the economic non-discrimination rights of business enterprise; and it does so, because of the very fact that equal treatment of men and women has been recognized as a fundamental human right. In the wake of the EU Charter on fundamental rights, this is a very important statement. It is to be hoped that the Court will not be satisfied with making a merely ideological statement, but will take claims based on fundamental human rights seriously. The fact that in these very same cases the Court dismissed serious claims based on the right to a fair hearing out of hand, may make one doubt.

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[29]The French versions of both *Defrenne* and *Barber* use the phrase "considérations impérieuses"; the German in *Defrenne* uses "zwingende Erwägungen" and in *Barber* "zwingende Gründe"; the Italian in *Defrenne* "considerazioni imprescindibili" and in *Barber* "considerazioni tassative".

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