

JUDGMENT OF THE COURT (Grand Chamber)

1 April 2008 (\*)

(Equal treatment in employment and occupation – Directive 2000/78/EC – Survivors' benefits under a compulsory occupational pensions scheme – Concept of 'pay' – Refusal because the persons concerned were not married – Same-sex partners – Discrimination based on sexual orientation)

In Case C-267/06,

REFERENCE for a preliminary ruling under Article 234 EC, by the Bayerisches Verwaltungsgericht München (Germany), made by decision of 1 June 2006, received at the Court on 20 June 2006, in the proceedings

**Tadao Maruko**

v

**Versorgungsanstalt der deutschen Bühnen,**

THE COURT (Grand Chamber),

composed of V. Skouris, President, P. Jann, C.W.A. Timmermans, A. Rosas, K. Lenaerts and L. Bay Larsen, Presidents of Chambers, K. Schiemann, J. Makarczyk, P. Küris, J. Klučka (Rapporteur), A. Ó Caoimh, P. Lindh and J.-C. Bonichot, Judges,

Advocate General: D. Ruiz-Jarabo Colomer,

Registrar: J. Swedenborg, Administrator,

having regard to the written procedure and further to the hearing on 19 June 2007,

after considering the observations submitted on behalf of:

- Mr Maruko, by H. Graupner, R. Wintemute and M. Bruns, Rechtsanwälte,
- the Versorgungsanstalt der deutschen Bühnen, by C. Draws and P. Rammert, acting as Agents, assisted by A. Bartosch and T. Grupp, Rechtsanwälte,
- the Netherlands Government, by C. Wissels, acting as Agent,
- the United Kingdom Government, by V. Jackson, acting as Agent, and by T. Ward, barrister,
- the Commission of the European Communities, by J. Enegren and I. Kaufmann-Bühler, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 6 September 2007,

gives the following

**Judgment**

- 1 The reference for a preliminary ruling concerns the interpretation of Article 1, Article 2(2)(a) and (b)(i), and Article 3(1)(c) and (3) 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; 'Directive 2000/78' or 'the Directive').
- 2 The reference was made in proceedings between Mr Maruko and the Versorgungsanstalt der deutschen Bühnen (the German Theatre Pension Institution, the 'Vddb') relating to the refusal by the latter to recognise Mr Maruko's entitlement to a widower's pension as part of the survivor's benefits provided for under the compulsory occupational pension scheme of which his deceased life partner had been a member.

### **Legal context**

#### *Community law*

- 3 Recitals 13 and 22 of 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 of the EC Treaty, nor to any kind of payment by the State aimed at providing access to employment or maintaining employment.  
  
...  
  
(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 to adopt the laws, regulations and administrative provisions necessary to comply with the directive by 2 December 2003 at the latest or, so far as provisions concerning collective agreements were concerned, they could entrust implementation of the Directive to the social partners. However, in that event, Member States were to ensure that, no later than 2 December 2003, the social partners had introduced the necessary measures by agreement, the Member States concerned being required to take any necessary measures to enable them at any time to be in a position to guarantee the results imposed by the Directive. In addition, they were forthwith to inform the Commission of the European Communities of those measures.

#### *National law*

The Law on registered life partnerships

- 8 Paragraph 1 of the Law on registered life partnerships (Gesetz über die Eingetragene Lebenspartnerschaft) of 16 February 2001 (BGBl. 2001 I, p. 266), as amended by the Law of 15 December 2004 (BGBl. 2004 I, p. 3396, the 'LPartG'), provides:

'(1) 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.

(2) A partnership cannot be validly established:

1. with a person who is a minor or who is married or who already lives in partnership with a third person;
2. between relatives in the ascending and descending lines;
3. between brothers or sisters with the same mother and father, the same mother or the same father;
4. when, at the time of establishment of the partnership, the partners refuse to accept the duties under Paragraph 2.

...'

- 9 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.'

- 10 Under Paragraph 5 of that Law:

'The life partners are each required to contribute adequately to the common needs of the partnership by their work and from their property. The second sentence of Paragraph 1360, Paragraph 1360a and Paragraph 1360b of the Civil Code, and the second subparagraph of Paragraph 16, apply by analogy.'

- 11 Paragraph 11(1) of that Law provides:

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

Legislation relating to widow's or widower's pensions

- 12 By the LPartG, the German legislature introduced amendments to Book VI of the Social Security Code – statutory old age pension schemes (Sozialgesetzbuch VI – Gesetzliche Rentenversicherung).

- 13 Paragraph 46 of Book VI, in the version in force since 1 January 2005 ('the Social Security Code'), provides:

'(1) Widows or widowers who have not married again shall be entitled, after the death of the insured spouse, to a small widow's or widower's pension, provided that the insured spouse has been insured for the general qualifying period. This entitlement shall be restricted to a maximum period of 24 calendar months dating from the month following that of the insured's death.

...

(4) For the purposes of determining entitlement to a widow's or widower's pension, the establishment of a life partnership shall be treated as equivalent to a wedding, a life partnership as equivalent to a marriage, a surviving partner as equivalent to a widow or a widower, and a life partner as equivalent to a spouse. The termination or dissolution of a new partnership shall be regarded as equivalent, respectively, to the dissolution or annulment of a new marriage.'

- 14 Book VI contains other similar provisions on the treating of life partnership as equivalent to marriage, in particular Paragraph 47(4), Paragraph 90(3), Paragraph 107(3), and Paragraph 120e(1).

The Collective Agreement for Germany's theatres

- 15 Paragraph 1 of the Collective Agreement for Germany's theatres (Tarifordnung für die deutschen Theater) of 27 October 1937 (Reichsarbeitsblatt 1937 VI, p. 1080; 'the Collective Agreement') provides:

'(1) Any legal person who operates a theatre (theatre operator) within the Reich must take out on behalf of the theatrical professionals employed in his theatre premises insurance for old age and survivors' pensions, in accordance with the following provisions, and give written notice of the insurance taken out to every theatrical professional on his staff.

(2) In agreement with the Reich Ministers concerned, the Minister for Popular Enlightenment and Propaganda shall appoint the insuring institution and set out the insurance conditions (regulations). He shall also determine the date from which the insurance required under this Agreement must be taken out.

(3) For the purposes of this Agreement, theatrical professionals are persons who, under the Law on the Reich Chamber of Culture and the relevant implementing legislation, are compulsorily members of the Reich Theatre Chamber (stage section), in particular: producers, actors, orchestra leaders, directors, scriptwriters, choral directors, coaches, stage managers, prompters and persons in similar positions, technical staff (such as leading stagehands, the persons in charge of scenery and costumes and those occupying a similar position, in so far

as they are responsible in their departments), together with artistic directors, chorus members, dancers and hairdressers.'

- 16 Paragraph 4 of the Collective Agreement provides:

'The theatre operator and the theatrical professional shall each bear one half of the insurance premiums. The theatre operator must remit the insurance premiums to the insurance institution.'

The Vddb Regulations

- 17 Paragraphs 27, 32 and 34 of the Vddb Regulations provide:

'Paragraph 27 – Nature of pension and general conditions

(1) Occurrence of the following events shall give rise to entitlement to benefits: incapacity to work or invalidity, early retirement, reaching the normal retirement age, and death.

(2) On application, the institution shall pay ... by way of survivor's benefits ... a widow's pension (Paragraphs 32 and 33), a widower's pension (Paragraph 34) ... if, immediately before occurrence of the event giving rise to the entitlement to benefit, the insured person was compulsorily insured, voluntarily insured, or re-insured, and if the qualifying period is satisfied ... .

...

Paragraph 32 – Widow's pension

(1) The spouse of the insured man or retired man, if the marriage subsists on the day of the latter's death, shall be entitled to a widow's pension.

...

Paragraph 34 – Widower's pension

(1) The spouse of the insured woman or retired woman, if the marriage subsists on the day of the latter's death, shall be entitled to a widower's pension.

...'

- 18 Paragraph 30(5) of the Vddb Regulations sets out the procedure for determining the amount of the retirement pension by reference to which the survivor's pension is to be calculated.

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

- 19 On 8 November 2001, under Paragraph 1 of the LPartG in its initial version, Mr Maruko entered into a life partnership with a designer of theatrical costumes.

- 20 Mr Maruko's life partner had been a member of the Vddb since 1 September 1959 and had continued to contribute voluntarily to that institution during the periods when he was not obliged to be a member.

- 21 Mr Maruko's life partner died on 12 January 2005.

- 22 By letter dated 17 February 2005, Mr Maruko applied to the Vddb for a widower's pension. By decision of 28 February 2005, the Vddb rejected his application on the ground that its regulations did not provide for such an entitlement for surviving life partners.

- 23 Mr Maruko brought an action before the Bayerisches Verwaltungsgericht München (Bavarian Administrative Court, Munich), the referring court. According to Mr Maruko, the VddB's refusal infringes the principle of equal treatment, given that, since 1 January 2005, the German legislature has placed life partnership and marriage on an equal footing, in particular by introducing Paragraph 46(4) into the Social Security Code. To deny that a person whose life partner has died is entitled to survivor's benefits on the same conditions as a surviving spouse is discrimination on grounds of that person's sexual orientation. In the opinion of M. Maruko, life partners are treated less favourably than spouses, even though, like spouses, they must support and care for one another, they are mutually committed to a lifetime union and they each accept responsibilities with regard to the other. The rules relating to the property of life partners in Germany are the same as those relating to the property of spouses.
- 24 The referring court seeks to know, first, whether the pension scheme managed by the VddB can be regarded as equivalent to a state social security scheme within the meaning of Article 3(3) of Directive 2000/78 and whether that scheme is outside the scope of that directive. It states that the fact that membership of the VddB is a statutory obligation and that it is out of the question for such membership to be the subject of negotiation within any of the theatre companies is indicative of such equivalence. However, the referring court goes on to note that, outside periods of work, theatrical professionals have the possibility of voluntarily continuing membership of the pension scheme; that the scheme is based on the principle of capitalisation; that the theatre company and the insured person each pay one half of the contributions; and that the VddB manages and regulates its activities autonomously, without any involvement on the part of the federal legislature.
- 25 The referring court states that, in view of the structure of the VddB and the decisive influence exercised by the theatre companies and insured persons over its operation, it is inclined to think that the VddB does not manage a scheme equivalent to a state social security scheme, within the meaning of Article 3(3) of Directive 2000/78.
- 26 The referring court seeks to know, secondly, whether the survivor's benefit at issue can be regarded as 'pay', within the meaning of Article 3(1)(c) of Directive 2000/78, which would justify the application of the Directive. The referring court states that, as a general rule, in the light of the case law of the Court, benefits payable to survivors come within the scope of that concept of 'pay'. According to the referring court, that interpretation is not affected by the fact that the survivor's benefit at issue is paid not to the worker, but to his surviving partner, because the entitlement to such a benefit is an advantage which derives from the worker's membership of the pension scheme managed by the VddB, so that the benefit accrues to the worker's surviving partner by virtue of the employment relationship between the employer and the worker concerned.
- 27 The referring court seeks, thirdly, to know whether the combined provisions of Article 1 and Article 2(2)(a) of Directive 2000/78 preclude provisions in regulations such as those of the VddB, under which a person whose life partner has died does not receive survivor's benefits equivalent to those offered to a surviving spouse, even though, like spouses, the life partners have been living in a union of mutual support and assistance which was formally constituted for life.
- 28 According to the referring court, since the present case falls within the scope of Directive 2000/78 and there is discrimination, Mr Maruko can rely on the provisions of the Directive.
- 29 The referring court adds that, unlike heterosexual couples who can enter into marriage and, should the case arise, be entitled to survivor's benefits, it was impossible for the insured person and the applicant in the main proceedings, because of their sexual orientation, to satisfy the condition relating to marriage on which entitlement to such benefits is dependent under the pension scheme managed by the VddB. In the opinion of the referring court, it is possible that the combined provisions of Articles 1 and 2(2)(a) of Directive 2000/78 preclude provisions such as those of the VddB Regulations under which entitlement to those benefits is restricted to surviving spouses.
- 30 If the combined provisions of Articles 1 and 2(2)(a) of Directive 2000/78 preclude provisions of that nature in regulations such as those of the VddB, the referring court seeks to know,

fourthly, whether discrimination on grounds of sexual orientation is permitted in the light of Recital 22 in the preamble to that directive.

- 31 The referring court notes that the content of that recital is not reflected in the enacting terms of Directive 2000/78. It wonders whether such a recital can restrict the scope of the Directive. The referring court considers that, in view of the importance of the Community law principle of equal treatment, it is not appropriate to interpret the recitals to the Directive broadly. In that connection, the referring court seeks to know whether, in the case before it, the Vddb's refusal to pay survivor's benefits to a person whose life partner has died constitutes discrimination which is permissible even though it is based on sexual orientation.
- 32 Fifthly, the referring court seeks to know whether, pursuant to Case C-262/88 *Barber* ([1990] ECR I-1889), entitlement to survivors' benefits is limited to periods subsequent to 17 May 1990. The referring court states that the provisions of national law at issue in the main proceedings fall under Article 141 EC and that the direct effect of that Article can be relied on only in respect of benefits payable for periods of employment subsequent to 17 May 1990. The referring court refers in that regard to Case C-200/91 *Coloroll Pension Trustees* ([1994] ECR I-4389).
- 33 In those circumstances, the Bayerisches Verwaltungsgericht München decided to stay proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:
- '1. Is a compulsory occupational pension scheme, such as the scheme at issue in this case administered by the [Vddb], a scheme similar to state schemes as referred to in Article 3(3) of Council Directive 2000/78 ...?
  2. Are benefits paid by a compulsory occupational pension institution to survivors in the form of widow's/widower's pensions to be construed as pay within the meaning of Article 3(1)(c) of Directive 2000/78 ...?
  3. Does Article 1 in conjunction with Article 2(2)(a) of Directive 2000/78 ... preclude regulations governing a supplementary pension scheme under which a registered partner does not after the death of his partner receive survivor's benefits equivalent to those available to spouses, even though, like spouses, registered partners live in a union of mutual support and assistance formally entered into for life?
  4. If the preceding questions are answered in the affirmative: Is discrimination on grounds of sexual orientation permissible by virtue of Recital 22 in the preamble to Directive 2000/78 ...?
  5. Would entitlement to the survivor's benefits be restricted to periods from 17 May 1990 in the light of the case-law in *Barber* [cited above]?'

### **The questions referred for a preliminary ruling**

#### *The first, second and fourth questions*

- 34 By its first, second and fourth questions, which it is appropriate to answer together, the referring court seeks to know, in essence, whether a survivor's benefit paid under an occupational pension scheme such as that managed by the Vddb falls within the scope of Directive 2000/78.

#### Observations submitted to the Court

- 35 As regards the first and second questions referred, the Vddb considers that the scheme managed by it is a statutory social security scheme and that the survivor's benefit at issue in the main proceedings cannot be regarded as 'pay' within the meaning of Article 3(1)(c) of Directive 2000/78. That benefit is therefore outside the scope of that directive.

- 36 In support of that position, the Vddb states, inter alia, that it is a body governed by public law and is part of the federal State administration and that the pension scheme at issue in the main proceedings is a compulsory scheme, based on statute. The Vddb adds that the Collective Agreement has statutory force and was integrated, together with the Vddb Regulations, in the unification treaty of 31 August 1990 and that compulsory membership applies to categories of workers defined in general terms. The survivor's benefit at issue in the main proceedings is not linked directly to specific employment, but to general considerations of social policy. It does not directly depend on completion of periods of employment and the amount is not determined by reference to the last salary.
- 37 The Commission considers, on the other hand, that the survivor's benefit at issue in the main proceedings falls within the scope of Directive 2000/78, since it is paid by virtue of the employment relationship between a person and his employer, a consequence of which is the employee's compulsory membership of the Vddb. The amount of the benefit is determined by reference to the period of insurance and the contributions paid.
- 38 As regards the fourth question referred, both Mr Maruko and the Commission note that the content of Recital 22 in the preamble to Directive 2000/78 is not reflected in any of the enacting terms of the Directive. According to Mr Maruko, if the Community legislature had wanted to exclude all benefits bound up with civil status from the scope of Directive 2000/78, the content of that recital would have been the subject of a particular provision among the enacting terms of the Directive. According to the Commission, that recital does no more than state that the European Union lacks competence in matters regarding civil status.
- 39 The Vddb and the United Kingdom Government consider, inter alia, that Recital 22 in the preamble to Directive 2000/78 contains a clear and general exclusion and that it determines the scope of the Directive. The Directive does not apply to provisions of national law relating to civil status or to benefits dependent on that status, such as the survivor's benefit at issue in the main proceedings.

The Court's reply

- 40 It is clear from Article 3(1)(c) and (3) of Directive 2000/78 that the Directive applies to all persons, as regards both the public and private sectors, including public bodies, inter alia, in relation to conditions of pay and that it does not apply to payments of any kind made by state schemes or similar, including state social security or social protection schemes.
- 41 The scope of Directive 2000/78 must be understood – in the light of those provisions read in conjunction with Recital 13 of 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 141 EC, or to payments of any kind made by the State with the aim of providing access to employment or maintaining employment.
- 42 It must therefore be determined whether a survivor's benefit granted under an occupational pension scheme such as that managed by the Vddb can be treated as equivalent to 'pay' within the meaning of Article 141 EC.
- 43 Article 141 EC provides that 'pay' means the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives directly or indirectly, in respect of his employment, from his employer.
- 44 As the Court has already ruled (see Case C-109/91 *Ten Oever* [1993] ECR I-4879, paragraph 8, and Case C-7/93 *Beune* [1994] ECR I-4471, paragraph 21), the fact that certain benefits are paid after the termination of the employment relationship does not prevent them from being 'pay' within the meaning of Article 141 EC.
- 45 The Court has thereby recognised that a survivor's pension provided for under an occupational pension scheme, set up under a collective agreement, falls within the scope of Article 141 EC. The Court has stated that the fact that such a pension, by definition, is paid not to the worker but to his survivor, cannot affect that interpretation, since, such a pension being a benefit deriving from the survivor's spouse's membership of the scheme, the pension accrues to the



survivor by reason of the employment relationship between the employer and the survivor's spouse and is paid to the survivor by reason of the spouse's employment (see *Ten Oever*, paragraphs 12 and 13; *Coloroll Pension Trustees*, paragraph 18; Case C-147/95 *Evrenopoulos* [1997] ECR I-2057, paragraph 22; and Case C-379/99 *Menauer* [2001] ECR I-7275, paragraph 18).

- 46 Moreover, for the purposes of assessing whether a retirement pension – by reference to which, should the case arise, as in the present case, the survivor's pension is calculated – falls within the scope of Article 141 EC, the Court has stated that, of the criteria for identifying a pension scheme which it has adopted on the basis of the situations brought before it, the one criterion which may prove decisive is whether the retirement pension is paid to the worker by reason of the employment relationship between him and his former employer, that is to say, the criterion of employment, based on the wording of that article (see, to that effect, *Beune*, paragraph 43; *Evrenopoulos*, paragraph 19; Case C-366/99 *Griesmar* [2001] ECR I-9383, paragraph 28; Case C-351/00 *Niemi* [2002] ECR I-7007, paragraphs 44 and 45; and Joined Cases C-4/02 and C-5/02 *Schönheit and Becker* [2003] ECR I-12575, paragraph 56).
- 47 Admittedly, that criterion cannot be regarded as exclusive, inasmuch as pensions paid under statutory social security schemes may reflect, wholly or in part, pay in respect of work (*Beune*, paragraph 44; *Evrenopoulos*, paragraph 20; *Griesmar*, paragraph 29; *Niemi*, paragraph 46; and *Schönheit and Becker*, paragraph 57).
- 48 However, considerations of social policy, of State organisation, of ethics, or even the budgetary concerns which influenced or may have influenced the establishment by the national legislature of a scheme cannot prevail if the pension concerns only a particular category of workers, if it is directly related to the period of service completed and if its amount is calculated by reference to the last salary (*Beune*, paragraph 45; *Evrenopoulos*, paragraph 21; *Griesmar*, paragraph 30; *Niemi*, paragraph 47; and *Schönheit and Becker*, paragraph 58).
- 49 As regards the compulsory occupational pension scheme managed by the VddB, it must be observed, first, that it originates in the Collective Agreement which, according to the information provided by the referring court, was designed to supplement the social security benefits payable under national legislation of general scope.
- 50 Secondly, it is common ground that that scheme is financed exclusively by the workers and employers of the sector concerned, without any financial involvement by the State.
- 51 Thirdly, it is clear from the documents submitted to the Court that the scheme is aimed, according to Paragraph 1 of the Collective Agreement, at theatrical professionals employed in theatres operated in Germany.
- 52 As the Advocate General has stated in point 70 of his Opinion, recognition of entitlement to the survivor's benefit requires the spouse of the person who is to receive the pension to have been a member of the VddB before dying. That membership is compulsory for theatrical professionals employed by the German theatres. That membership is also held by a number of persons who decide voluntarily to become members of the VddB, such membership being possible provided that the persons concerned can demonstrate that they were previously employed by a theatre in Germany for a certain number of months.
- 53 Those compulsory and voluntary members therefore form a particular category of workers.
- 54 Further, as regards the criterion that the pension must be directly related to the period of service completed, it must be observed that, under Paragraph 30(5) of the VddB regulations, the amount of the retirement pension, by reference to which the survivor's benefits are calculated, is determined by reference to the period of the worker's membership, that being the logical consequence of the structure of the occupational pension scheme at issue which covers two types of membership, as has been stated in paragraphs 52 and 53 of this judgment.
- 55 Nor is the amount of that retirement pension fixed by statute; rather, pursuant to Paragraph 30(5) of the VddB Regulations, it is calculated by reference to the total amount of the contributions paid throughout the worker's membership, to which an indexing factor is applied.

- 56 It follows that, as the Advocate General has pointed out in point 72 of his Opinion, the survivor's pension in the main proceedings is derived from the employment relationship of Mr Maruko's life partner and must therefore be classified as 'pay' within the meaning of Article 141 EC.
- 57 That conclusion is not affected by the fact that the VddB is a public body (see, to that effect, *Evrenopoulos*, paragraphs 16 and 23) or by the fact that membership in the scheme giving entitlement to the survivor's benefits at issue in the main proceedings is compulsory (see, to that effect, Case C-50/99 *Podesta* [2000] ECR I-4039, paragraph 32).
- 58 As regards the significance of Recital 22 of the preamble to Directive 2000/78, that recital states that the Directive is without prejudice to national laws on marital status and the benefits dependent thereon.
- 59 Admittedly, civil status and the benefits flowing therefrom are matters which fall within the competence of the Member States and Community law does not detract from that competence. However, it must be recalled that in the exercise of that competence the Member States must comply with Community law and, in particular, with the provisions relating to the principle of non-discrimination (see, by analogy, Case C-372/04 *Watts* [2006] ECR I-4325, paragraph 92, and Case C-444/05 *Stamatelaki* [2007] ECR I-3185, paragraph 23).
- 60 Since survivor's benefit such as that at issue in the main proceedings has been identified as 'pay' within the meaning of Article 141 EC and falls within the scope of Directive 2000/78, for the reasons set out in paragraphs 49 to 57 of this judgment, Recital 22 of the preamble to Directive 2000/78 cannot affect the application of the Directive.
- 61 In those circumstances, the answer to the first, second and fourth questions must be that a survivor's benefit granted under an occupational pension scheme such as that managed by the VddB falls within the scope of Directive 2000/78.

#### *The third question*

- 62 By its third question, the referring court seeks to know whether the combined provisions of Articles 1 and 2 of Directive 2000/78 preclude legislation such as that at issue in the main proceedings under which, after the death of his life partner, the surviving partner does not receive a survivor's benefit equivalent to that granted to a surviving spouse, even though, like spouses, the life partners have been living in a union of mutual support and assistance which had been formally constituted for life.

#### Observations submitted to the Court

- 63 Mr Maruko and the Commission maintain that refusal to grant the survivor's benefit at issue in the main proceedings to surviving life partners constitutes indirect discrimination within the meaning of Directive 2000/78, since two persons of the same sex cannot marry in Germany and, consequently, cannot qualify for that benefit, entitlement to which is reserved to surviving spouses. In their opinion, spouses and life partners are in a comparable legal situation which justifies the granting of that benefit to surviving life partners.
- 64 According to the VddB, there is no constitutional obligation to treat marriage and life partnership identically, so far as concerns the law of social security or pensions. Life partnership is an institution *sui generis* and represents a new form of civil status. It cannot be inferred from the German legislation that there is any obligation to grant equal treatment to life partners, on the one hand, and spouses, on the other.

#### The Court's reply

- 65 In accordance with Article 1 thereof, the purpose of Directive 2000/78 is to combat, as regards employment and occupation, certain forms of discrimination including that on grounds of sexual orientation, with a view to putting into effect in the Member States the principle of equal treatment.

- 66 Under Article 2 of Directive 2000/78, the 'principle of equal treatment' means that there is to be no direct or indirect discrimination whatsoever on any of the grounds referred to in Article 1 of the Directive. According to Article 2(2)(a) of Directive 2000/78, direct discrimination occurs 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. Article 2(2)(b)(i) states that indirect discrimination occurs 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 that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.
- 67 It is clear from the information provided in the order of reference that, from 2001 – the year when the LPartG, in its initial version, entered into force – the Federal Republic of Germany altered 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 sex, that Member State created for persons of the same sex a separate regime, the life partnership, the conditions of which have been gradually made equivalent to those applicable to marriage.
- 68 The referring court observes that the Law of 15 December 2004 contributed to the gradual harmonisation of the regime put in place for the life partnership with that applicable to marriage. By that law, the German legislature introduced amendments to Book VI of the Social Security Code – statutory old age pension scheme, by adding inter alia a fourth paragraph to Paragraph 46 of that Book, from which it is clear that life partnership is to be treated as equivalent to marriage as regards the widow's or widower's pension referred to in that provision. Analogous amendments were made to other provisions of Book VI.
- 69 The referring court considers that, in view of the harmonisation between marriage and life partnership, which it regards as a gradual movement towards recognising equivalence, as a consequence of the rules introduced by the LPartG and, in particular, of the amendments made by the Law of 15 December 2004, a life partnership, while not identical to marriage, places persons of the same sex in a situation comparable to that of spouses so far as concerns the survivor's benefit at issue in the main proceedings.
- 70 However, the referring court finds that entitlement to that survivor's benefit is restricted, under the provisions of the Vddb Regulations, to surviving spouses and is denied to surviving life partners.
- 71 That being the case, those life partners are treated less favourably than surviving spouses as regards entitlement to that survivor's benefit.
- 72 If the referring court decides that surviving spouses and surviving life partners are in a comparable situation so far as concerns that survivor's benefit, legislation such as that at issue in the main proceedings must, as a consequence, be considered to constitute direct discrimination on grounds of sexual orientation, within the meaning of Articles 1 and 2(2)(a) of Directive 2000/78.
- 73 It follows from the foregoing that the answer to the third question must be that the combined provisions of Articles 1 and 2 of Directive 2000/78 preclude legislation such as that at issue in the main proceedings under which, after the death of his life partner, the surviving partner does not receive a survivor's benefit equivalent to that granted to a surviving spouse, even though, under national law, life partnership places persons of the same sex in a situation comparable to that of spouses so far as concerns that survivor's benefit. It is for the referring court to determine whether a surviving life partner is in a situation comparable to that of a spouse who is entitled to the survivor's benefit provided for under the occupational pension scheme managed by the Vddb.

#### *The fifth question*

- 74 By its fifth question, the referring court seeks to know whether, in the event that the Court were to rule that Directive 2000/78 precludes legislation such as that at issue in the main

proceedings, entitlement to the survivor's benefit at issue in the main proceedings must be restricted in time and in particular to periods subsequent to 17 May 1990 on the basis of the case-law in *Barber*.

Observations submitted to the Court

- 75 The VddB considers that the case which led to the judgment in *Barber* differs, on its facts and in law, from the case in the main proceedings and that Directive 2000/78 cannot be given retroactive effect by means of a decision that the Directive applied at a date prior to the date of expiry of the period allowed to Member States for its transposition.
- 76 The Commission maintains that there is no need to answer the fifth question. It considers that the case which led to the judgment in *Barber* differs, on its facts and in law, from the case in the main proceedings and notes that Directive 2000/78 contains no provision which derogates from the principle of non-discrimination on grounds of sexual orientation. The Commission states that, as distinct from the present case, in the case which led to the judgment in *Barber* attention was drawn to the financial consequences of a fresh interpretation of Article 141 EC. The Commission states that, in so far as the LPartG did not come into force until 1 August 2001 and since the German legislature introduced, from 1 January 2005, equal treatment as between life partnership and marriage, as regards the social security rules, occupational pension schemes are not placed in financial difficulty through having to take such equality into account.

The Court's reply

- 77 It is clear from the case-law that the Court may, exceptionally, taking account of the serious difficulties which its judgment may create as regards events in the past, be moved to restrict the possibility for all persons concerned of relying on the interpretation which the Court gives to a provision in response to a reference for a preliminary ruling,. A restriction of that kind may be permitted only by the Court, in the actual judgment ruling upon the interpretation sought (see inter alia *Barber*, paragraph 41, and Case C-292/04 *Meilicke and Others* [2007] ECR I-000, paragraph 36).
- 78 There is nothing in the documents before the Court to suggest that the financial balance of the scheme managed by VddB is likely to be retroactively disturbed if the effects of this judgment are not restricted in time.
- 79 It follows from the foregoing that the answer to the fifth question must be that there is no need to restrict the effects of this judgment in time.

### **Costs**

- 80 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national 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. A survivor's benefit granted under an occupational pension scheme such as that managed by the Versorgungsanstalt der deutschen Bühnen falls within the scope of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.**
- 2. The combined provisions of Articles 1 and 2 of Directive 2000/78 preclude legislation such as that at issue in the main proceedings under which, after the death of his life partner, the surviving partner does not receive a survivor's benefit equivalent to that granted to a surviving spouse, even though, under national law, life partnership places persons of the same sex in a situation**

comparable to that of spouses so far as concerns that survivor's benefit. It is for the referring court to determine whether a surviving life partner is in a situation comparable to that of a spouse who is entitled to the survivor's benefit provided for under the occupational pension scheme managed by the Versorgungsanstalt der deutschen Bühnen.