OPINION OF ADVOCATE GENERAL VAN GERVEN
delivered on 28 April 1993 *

Summary

* Original language: Dutch.

Mr President,
Members of the Court,

1. In these cases a considerable number of questions have been referred to the Court for a preliminary ruling on the interpretation of Article 119 of the Treaty, having regard in particular to the judgment of 17 May 1990 in the *Barber* case. [1] In Case C-110/91, Moroni, a number of questions of interpretation have also been referred on the relationship between, on the one hand, Article 119 of the Treaty and the *Barber* judgment and, on the other hand, Council Directive 86/378/EEC of 24 July 1986 on the implementation of the principle of equal treatment for men and women in occupational social security schemes. [2]

2. Given the scope and complexity of the questions which have been referred for a preliminary ruling and the observations submitted to the Court, I propose to proceed as follows. First, I shall examine what I consider to be the most crucial question, which runs like a thread through all these cases. It is this: what precisely are the effects in time of the *Barber* judgment. Then I will consider whether that judgment, as well as the temporal limitation imposed in that judgment, also applies to pension schemes other than those in question in that case. I will then go on to examine the question — which arises in particular in Case C-152/91, *Neath* [1993] ECR I-6953, and Case C-200/91, *Coloroll* [1994] ECR I-4397 — of the compatibility with Article 119 of the use of sex-based actuarial factors for the purpose of calculating pension contributions and benefits. Finally, I will examine a number of other questions which are raised in these cases. They are (i) whether the payment of a widower's pension falls under Article 119 (asked in Case C-109/91 Ten Oever); (ii) whether Article 119 may be relied upon by the spouse of a deceased employee and whether it may be relied upon against the trustees of a pension scheme (one of the key questions in the Coloroll case); and (iii) a number of questions concerning the way in which the principle of equal treatment laid down in Article 119 is to be implemented in practice in the field of occupational pension schemes and concerning liability for its implementation (again, arising in the Coloroll case).

At the outset, however, it would be useful to look briefly at the *Barber* judgment and to examine the background to the various cases before the national courts in so far as this is relevant to my Opinion.

The Court's case-law on Article 119 of the EEC Treaty and the judgment in *Barber*

3. As is well known, Article 119 of the Treaty lays down the obligation that the Member States must ensure in principle that men and women receive equal pay for equal work. 'Pay' is defined in the second paragraph of Article 119 as '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

1 — Judgment of 17 May 1990 in Case C-262/88 *Barber* v *Guardian Royal Exchange Assurance Group* [1990] ECR I-1889.

2 — OJ 1986 L 225, p. 40.

respect of his employment from his employer'. Since its judgment in the first *Defrenne* case the Court has developed a broad interpretation of the concept of pay as thus defined, it includes:

'any other consideration, whether in cash or in kind, whether immediate or future, provided that the worker receives it, albeit indirectly, in respect of his employment from his employer'. [3]

Moreover, in the second *Defrenne* case the Court went on to hold that Article 119

'applies directly, and without the need for more detailed implementing measures on the part of the Community or the Member States, to all forms of direct and overt discrimination which may be identified solely with the aid of the criteria of equal work and equal pay referred to by the article in question.' [4]

As far as the interpretation of 'consideration' in Article 119 is concerned, the Court had held in *Defrenne (No 1)* that social security schemes and benefits, in particular old-age pensions, although in principle not entirely separate from the concept of pay, did not fall under the concept of consideration. The Court came to this decision on the basis of the following characteristics of social security systems: (i) they are directly governed by legislation without any element of agreement within the undertaking or trade concerned and are obligatorily applicable to general categories of workers; and (ii) they provide workers with the benefit of a statutory scheme to which workers, employers and in some cases the public authorities contribute financially in a measure determined less by the employment relationship between the employer and the worker than by considerations of social policy, so that the employer's contribution cannot be regarded as a direct or indirect payment to the worker for the purposes of Article 119. [5] However, in its judgment of 13 May 1986 in the *Bilka-Kaufhaus* case, the Court, applying those criteria, came to the view that benefits paid under an occupational pension scheme originating in an agreement between the employer and the staff committee and forming an integral part of the contract of employment are to be classified as 'consideration' within the meaning of Article 119. [6]

4. In the *Barber* case the Court had to consider a 'contracted-out' pension scheme approved under United Kingdom legislation, that is to say an occupational pension scheme established in consultation between the social partners or by unilateral decision of the employer, financed by the employer alone or by employer and employees combined, and which employees may join in partial substitution for their statutory pension. From the principles set out above the Court deduced that

3 — Case 80/70 *Defrenne* v *Belgian State* [1971] ECR 445, paragraph 6; confirmed in *inter alia* the judgment in Case 12/81 *Garland* v *British Rail Engineering* [1982] ECR 359, paragraph 5; Case C-262/88 *Barber* v *Guardian Royal Exchange Assurance Group*, paragraph 12; see, most recently, the judgment of 17 February 1993 in Case C 173/91 *Commission* v *Belgium* [1993] ECR I-673, paragraph 13.

4 — The quotation comes from the judgment in Case 129/79 *Macarthys* v *Smith* [1980] ECR 1275, paragraph 10, which on this point expressly refers to the judgment in *Defrenne (No 2)*; as far as the judgment in *Defrenne (No 2)* itself is concerned, see the judgment in Case 43/75 [1976] ECR 455, in particular paragraphs 18, 21, 24 and 40. For subsequent confirmatory judgments, see *inter alia* the judgment in Case 69/81 *Worringham and Another* v *Lloyds Bank* [1981] ECR 767, paragraph 23, the judgment in Case 96/80 *Jenkins* v *Kingsgate (Clothing Productions)* [1981] ECR 911, paragraph 17; and the judgment in *Barber*, paragraph 37.

5 — *Defrenne (No 1)*, paragraphs 7 to 9; see the judgment in Case 170/84 *Bilka-Kaufhaus GmbH* v *Karin Weber von Hartz* [1986] ECR 1607, paragraphs 17 and 18; see, more recently, paragraph 14 of the judgment in *Commission* v *Belgium*, cited above in footnote 3

6 — *Bilka*, paragraph 22.

'a pension paid under a contracted-out scheme constitutes consideration paid by the employer to the worker in respect of his employment and consequently falls within the scope of Article 119 of the Treaty.' [7]

Asked whether a scheme under which a man made compulsorily redundant was entitled only to a deferred pension at the normal pensionable age whilst a women in the same circumstances was entitled to a pension which was payable immediately was compatible with Article 119, the Court replied in the negative. The reasons given by the Court in paragraph 32 of its judgment were that:

'... Article 119 prohibits any discrimination with regard to pay as between men and women, whatever the system which gives rise to such inequality. Accordingly, it is contrary to Article 119 to impose an age condition which differs according to sex in respect of pensions paid under a contracted-out scheme, even if the difference between the pensionable age for men and that for women is based on the one provided for by the national statutory scheme.'

5. The Court was, however, aware of the tremendous financial implications of its judgment. It also considered that, in view of the exceptions to the principle of equal treatment regarding pensionable age provided for in Directives 79/7/EEC [8] and 86/378/EEC, [9] the Member States could reasonably have taken the view that Article 119 was not applicable to pensions paid under a contracted-out scheme. For those two reasons the Court decided to limit the effect of its judgment in time:

'In those circumstances, overriding considerations of legal certainty preclude legal situations which have exhausted all their effects in the past from being called in question where that might upset retroactively the financial balance of many contracted-out pension schemes. It is appropriate, however, to provide for an exception in favour of individuals who have taken action in good time in order to safeguard their rights. Finally, it must be pointed out that no restriction on the effects of the aforesaid interpretation can be permitted as regards the acquisition of entitlement to a pension as from the date of this judgment.' [10]

The Court therefore held that:

'The direct effect of Article 119 of the Treaty may not be relied upon in order to claim entitlement to a pension with effect from a date prior to that of this judgment, except in the case of workers or those claiming under them who have before that date initiated legal proceedings or raised an equivalent claim under the applicable national law.' [11]

Upon the phrases 'legal situations which have exhausted all their effects in the past',

7 — *Barber*, paragraph 28.

8 — More specifically, Article 7(1) of Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security, OJ 1979 L 6, p. 24.

9 — More specifically, Article 9(a) of this directive.

10 — *Barber*, paragraph 44.

11 — *Barber*, paragraph 45 and point 5 of the operative part.

'the acquisition of entitlement to a pension as from the date of this judgment' and 'a pension with effect from a date prior to this judgment' the issues arising in the present cases from the limitation in time of the effects of the *Barber* judgment turn.

Background to the present cases

6. *The Ten Oever case.* Mr Ten Oever was married to M. F. Heeren, who was employed in the cleaning sector. Her employer had established a pension scheme which was administered by the Stichting Bedrijfspensioenfonds voor het Glazenwassers-en Schoonmaakbedrijf (Pension Fund for the Window-cleaning and Cleaning Sector, hereinafter referred to as 'the Pension Fund'). It was a collective occupational pension scheme financed by employers and workers. Until 1 January 1989 the Pension Fund's rules made provision only for a widow's pension; since that date a widower's pension has also been provided for, but without retroactive effect. After his wife had died on 13 October 1988, Mr Ten Oever applied — according to the judgment referring the case, before 17 May 1990 — for the grant of a survivor's pension with effect from 13 October 1988. The Pension Fund rejected his request on the ground that at the time of his wife's death its rules did not provide for such a pension.

On 8 June 1990 Mr Ten Oever applied to the Kantongerecht (Magistrate's Court), Utrecht, requesting it to decide that he should be granted a widower's pension with effect from 13 October 1988. According to Mr Ten Oever, the pension constituted pay within the meaning of Article 119 of the Treaty and the refusal to grant him a widower's pension, when a widow's pension would have been granted had he been a woman and his wife a man, was contrary to the principle of equal pay for men and women laid down in that provision. The Pension Fund, on the other hand, relied on the limitation in time of the effects of the *Barber* judgment, in which the Court held for the first time that payments under non-statutory pension schemes are pay. Since the proceedings were not pending when the *Barber* judgment was delivered, Mr Ten Oever had no right to the pension.

The Kantongerecht considered it desirable to refer the matter to the Court of Justice for a preliminary ruling. [12]

7. *The Moroni case.* From 1968 to 1983 Mr Moroni, who was born in 1948, was an employee of Collo GmbH. In 1983 he entered the service of another employer. When taking up his employment with Collo he had acquired a prospective right to a pension under that undertaking's pension scheme, which provided *inter alia* that employees leaving the service of the firm and gainful employment in general were to be entitled to a pension on reaching the age of 65 (60 in the case of female employees), provided that by that time they had worked in the service of Collo for at least 10 years. On 6 November 1990 Mr Moroni brought an action against Collo in the Arbeitsgericht [Labour Court] Bonn. On the basis of Article 119 of the EEC Treaty and Articles 5 and 6 of Directive 86/378 he argues that the

12 — For the precise wording of the questions of the Kantongerecht, reference is made to the Report for the Hearing.

occupational pension promised to him must be granted to him already on reaching the age of 60 and that the value of his prospective pension is to be calculated as if the pension had been promised from that time. Collo, on the other hand, relies on Article 8 of the aforementioned directive. Taking the view that the outcome of the case depends on the interpretation of the relevant provisions of Community law, the Arbeitsgericht Bonn has referred a number of questions to the Court for a preliminary ruling. [13]

It is useful to look at the relevant German legislation. Under that legislation, Mr Moroni, despite having left Collo's employment prematurely, has, by virtue of his length of service and the time at which before leaving that employment he had qualified for future pension rights, acquired as against Collo an indefeasible *right vested in interest to benefits* ('Versorgungsanwartschaft'), which, as far as the old-age pension at issue is concerned, is transformed into *entitlement vested in possession to benefits* ('Versorgungsanspruch') when he reaches 65 years of age. [14] Upon his early departure from the undertaking's employment, the calculation of that entitlement is as follows: the occupational pension which would be payable upon his reaching 65 years of age in Collo's employment is reduced in proportion to the ratio between the actual period of that service and that which he would have completed by the age of 65. [15] However, a female employee with an indefeasible right vested in interest who leaves the undertaking's employment prematurely suffers a proportionately lower reduction under the rules of Collo's pension scheme when her pension entitlement is calculated: as far as the possible length of service is concerned, in a woman's case only the time served up to the age of 60 years (when she can leave without any reduction of pension) is taken into account.

Mr Moroni has also the possibility under the German legislation of making an early claim, that is to say before he reaches the age of 65 (and at the earliest upon reaching the age of 60), to the occupational pension earned with Collo. [16] However, the condition imposed on male employees in this regard is that they must be entitled to claim the statutory old-age pension and actually do so, which, besides requiring the completion of certain insurance periods under the statutory old-age pension rules, also generally requires a relatively long period of unemployment prior to the attainment of the age of 60. That condition does not apply to female employees. [17] In making an early claim Mr Moroni must also be prepared to accept a *further reduction*: besides the *pro rata* reduction mentioned above, a male employee's pension will also be subject to an *actuarial deduction* ('versicherungs-mathematische Abschlag'). On the other hand, a female employee can, upon completion of the insurance periods required under the statutory pension rules, automatically obtain early payment of the old-age pension: if she leaves the undertaking prematurely with an indefeasible prospective

13 — For the precise wording of the questions, reference is made to the Report for the Hearing.

14 — Paragraph 1(1) of the Gesetz zur Verbesserung der betrieblichen Altersversorgung (Law on the enhancement of occupational old-age benefits, hereinafter referred to as 'the BetrAVG').

15 — Paragraph 2(1) of the BetrAVG.

16 — Paragraph 6 of the BetrAVG.

17 — The Arbeitsgericht refers in this regard to Paragraph 1248(2) and (3) of the Reichsversicherungsordnung and Paragraph 25(2) and (3) of the Angestelltenversicherungsgesetz.

right to pension benefits she will be subject only to the reduction based on her early departure, and not to a *pro rata* reduction or any actuarial deduction for drawing her pension early.

This treatment of men and women under occupational pension schemes reflects the position under the statutory rules on old-age pensions, which have served as a model for occupational pension schemes. [18]

8. *The Neath case.* Mr Neath, who was born in 1935, was employed by Hugh Steeper Ltd until he was made redundant on 29 June 1990, which was after the delivery of the judgment in the *Barber* case. At that time he was 54 years and 11 months old. During that period Mr Neath was consecutively a member of two occupational pension schemes run by Hugh Steeper. Between December 1975 and December 1978 he was a member of Scheme 5; from January 1979 until the termination of his employment he was a member of Scheme 4, a contracted-out scheme to which his rights acquired under the first scheme were transferred.

Both schemes were financed by contributions paid by the employer and the employees, those paid by the employees being the same for men and women. However, some scheme rules varied according to the sex of the employee. A women could retire on a full pension at the age of 60, whereas a man could not do so until the age of 65.

A member of Scheme 4 can, with the consent of his employer and the trustees of that pension scheme, retire early and take a reduced pension immediately at any time after his 50th birthday. If that consent is given, the pension is calculated on the basis of the pension which the member would have received at the normal retirement date, having regard, however, to the anticipated period of payment of the pension. A reduction of 6% is applied for each year and month between the actual retirement date and the normal pensionable age. If the employer and the trustees do not consent to a member taking early retirement, a member leaving Scheme 4 after his 50th birthday and before the normal retirement date will be entitled only to a deferred pension or to a transfer payment to another pension scheme. If the member opts for a deferred pension, Scheme 4 is liable to pay the part of the pension owed which accrued during the member's affiliation to the scheme. If he opts for a transfer payment, an amount which is actuarially equivalent to the sum of benefits which the member had accrued during his membership of Scheme 4 is transferred to another pension scheme of the member's choice. Scheme 4 then ceases to be liable to provide any benefits to the member.

When Mr Neath was made redundant, he was not allowed to take an immediate pension; he was therefore offered the choice of a deferred pension or a transfer payment. He was told that, if he opted for a transfer payment, the transfer value would be £30 672.59. The calculation of that transfer value was based on the assumption that Mr Neath's normal retirement date, in respect of benefits

18 — The Arbeitsgericht Bonn points out in this regard that both the Bundessozialgericht and the Bundesverfassungsgericht have held that there can be no legal objections, in terms of the equal treatment of men and women, to the provisions concerned of the statutory legislation on old age pensions before 1992.

attributable to service after 17 May 1990 (the date of the *Barber* judgment), was his 60th birthday. On the other hand, the *Barber* judgment was not considered to be applicable to periods of service prior to the judgment. Moreover, it was assumed that Article 119 of the Treaty did not preclude the use of actuarial factors. According to the calculations of Scheme 4's actuary, if, for the purpose of calculating Mr Neath's benefits in respect of his *entire service*, he were assumed to have a normal retirement age of 60, his transfer value would have been £39 934.56, using male actuarial factors. If female actuarial factors were used, his transfer value would have been £41 486.25: that difference is attributable to the fact that female actuarial factors assume that women have a higher life expectancy so that the costs involved for Scheme 4 in providing benefits to women are regarded as being higher than in the case of men.

After the options on offer had been explained to him, Mr Neath instituted proceedings against Steeper before the Leeds Industrial Tribunal on the ground that the conditions offered to him were less favourable than those which would have been offered to him had he been a woman. As regards the option of a deferred pension, he would have to wait five more years than a woman in order to receive the pension; even if he exercised his right at that time to exchange part of his pension for a cash sum, he would again receive a smaller amount (£17 193.94) than if he had been a woman (£21 029.02). That difference was again based on actuarial factors based on a longer life expectancy for women. Mr Neath considered this to be contrary to Article 119 of the Treaty, as interpreted by the Court of Justice in the *Barber* case. The Industrial Tribunal decided to refer the matter to the Court of Justice. [19]

9. *The Coloroll case*. The background to the main proceedings in this case is the financial collapse in the middle of 1990 of the Coloroll Group of Companies and the consequential necessity to wind up certain of the pension schemes of those undertakings. The proceedings are not conventional proceedings but a test case (a representative action) which Coloroll Pension Trustees Limited (hereinafter 'the Coloroll Trustees'), which is still the trustee for eight pension schemes of the Coloroll Group, has brought before the High Court. They seek directions from the High Court on matters which fall within that court's supervisory jurisdiction over trusts. The 'defendants' in the main proceedings are a number of persons selected by the Coloroll Trustees as representative of the divergent interests and views. [20]

The Coloroll Trustees are confronted by a whole range of factors which may influence their decisions concerning the winding-up of the pension schemes. All the schemes contain different provisions for men and women. The most important difference is that under all the schemes the normal retirement age for men is 65 and for women 60, which are the ages at which the state pension is payable

19 — For the precise wording of its questions, reference is again made to the Report for the Hearing.

20 — For a description of the situation of these persons, see the Report for the Hearing in this case.

in the United Kingdom. Consequently, different pension amounts are payable to men and women of the same age and having the same number of years of service. Furthermore, where alternative benefits are provided by reference to a capital valuation of pension rights, actuarial factors are applied which produce different results as between males and females because life expectancy *and* pension commencement dates for men and women differ. Finally, two of the pension schemes have the particular feature of having no female members; yet the aforementioned sex-based calculation factors still affect the benefits of certain male employees.

Owing to these differences of treatment on grounds of sex the Coloroll Trustees are unable to determine with finality the liabilities for which they must provide in winding up the pension schemes. They are concerned in particular that the provisions of the trust deeds and rules may be overridden in certain respects by Article 119 of the EEC Treaty. Pending further clarification by the Court of Justice of the extent to which Article 119 applies in the circumstances of the present case, the Coloroll Trustees consider that it is not possible to say with certainty how the funds should be distributed. In view of this uncertainty, the Chancery Division of the High Court has referred a number of questions to the Court. [21]

21 — See the Report for the Hearing in the Coloroll case.

The operation in time of the *Barber* judgment

10. *Possible interpretations.* As I have said, the key question in these cases concerns the precise operation in time of the *Barber* judgment. It is clear from the observations submitted to the Court that the practical importance of the answer to this question is enormous. I therefore propose to focus at once on the core of the problem. Apparently, there are some four possible interpretations of the limitation which the Court sought to place on the operation in time of its judgment in the *Barber* case.

A *first interpretation* would be to apply the principle of equal treatment only to workers who became members of, and began to pay contributions to, an occupational pension scheme as from 17 May 1990. This view would deprive the *Barber* judgment of almost all retroactive effect. In practical terms, it would mean that the full effect of the judgment would be felt only after a period of about 40 years.

A *second interpretation* is that the principle of equal treatment should only be applied to benefits payable in respect of periods of service after 17 May 1990. Periods of service prior to that date would not be affected by the direct effect of Article 119.

According to a *third interpretation*, the principle of equal treatment must be applied to all pensions which are payable or paid for the first time after 17 May 1990, irrespective of the fact that all or some of the pension accrued during, and on the basis of, periods

of service completed or contributions paid prior to that date. In other words, it is not the periods of service (before or after the judgment in *Barber*) which are decisive, but the date on which the pension falls to be paid.

A *fourth interpretation* would be to apply equal treatment to all pension payments made after 17 May 1990, including benefits or pensions which had already fallen due and, here again, as in the previous interpretation, irrespective of the date of the periods of service during which the pension accrued. This interpretation undoubtedly has the most far-reaching effect. [22]

11. The argument before the Court centred mainly on the second and fourth interpretations. The first view is not supported in these cases by any of the intervening parties. The third interpretation was supported by the Commission at the time when it submitted written observations in the Ten Oever, Moroni and Neath cases. However, in its written observations in the Coloroll case and at the hearing the Commission switched its support to the second interpretation.

Besides the Commission, all the intervening pension funds and trustees and all the Member States which have submitted observations (Denmark, Germany, Ireland, the Netherlands and the United Kingdom) now support the second option. In the Coloroll case it is also supported by two defendants, Judith Broughton and Coloroll Group plc.

The fourth possible approach is advocated by four of the defendants in the main proceedings in the Coloroll case (James Russell, Gerald Parker, Robert Sharp and Joan Fuller).

12. In order to put the issues arising in these cases in their full setting, attention must also be drawn to the 'Protocol concerning Article 119 of the Treaty establishing the European Community' annexed to the Treaty on European Union, [23] although that Treaty, signed at Maastricht on 7 February 1992, is not yet in force. The Protocol provides:

'For the purposes of Article 119 of this Treaty, benefits under occupational social security schemes shall not be considered as remuneration if and in so far as they are attributable to periods of employment prior to 17 May 1990, except in the case of workers or those claiming under them who have before that date initiated legal proceedings or introduced an equivalent claim under the applicable national law.'

The significance of that protocol for the interpretation to be given to the effect in time of the judgment in *Barber* is a matter to which I shall soon return.

22 — See also the description of these possible interpretations by S. Honeyball and J. Shaw, 'Sex, Law and the Retiring Man', *European Law Review* 1991 (47), pp. 56-57. For a survey of academic opinion on this point, see D. Curtin, 'The Constitutional Structure of the Union: A Europe of Bits and Pieces', *Common Market Law Review* 1993 (17), pp. 50-51, with references.

23 — The text of this Treaty was published in OJ 1992 C 191.

13. *The case-law of the Court of Justice on the temporal effect of judgments.* Before I take my position on the effect in time of the *Barber* judgment, I consider it important to clarify the *rationale* which led the Court to introduce this limitation into its judgment. That this is an unusual step needs no demonstration, given the declaratory character which in principle attaches to the Court's interpretation of Community law pursuant to Article 177 of the Treaty. [24] This was formulated by the Court in its judgments in the *Salumi* and *Denkavit Italiana* cases:

'The interpretation which, in the exercise of the jurisdiction conferred upon it by Article 177, the Court of Justice gives to a rule of Community law clarifies and defines where necessary the meaning and scope of that rule as it must be or ought to have been understood and applied from the time of its coming into force. It follows that the rule as thus interpreted may, and must, be applied by the courts even to legal relationships arising and established before the judgment ruling on the request for interpretation, provided that in other respects the conditions enabling an action relating to the application of that rule to be brought before the courts having jurisdiction, are satisfied.

As the Court recognized in its judgment of 8 April 1976 in Case 43/75 *Gabrielle Defrenne* v *Société Anonyme Belge de Navigation Aérienne Sabena* [1976] ECR 455, it is only exceptionally that the Court may, in application of the general principle of legal certainty inherent in the Community legal order and in taking account of the serious effects which its judgment might have, as regards the past, on legal relationships established in good faith, be moved to restrict for any person concerned the opportunity of relying upon the provision as thus interpreted with a view to calling in question those legal relationships.

Such a restriction may, however, be allowed only in the actual judgment ruling upon the interpretation sought. The fundamental need for a general and uniform application of Community law implies that it is for the Court of Justice alone to decide upon the temporal restrictions to be placed on the interpretation which it lays down.' [25]

14. It appears from that passage that in deciding to limit the scope of a judgment in time the Court is guided mainly by two considerations: a *general principle of legal certainty* inherent in the Community legal order and a concern to prevent *serious problems* from arising, through an unrestricted retroactive application of the judgment, in respect of legal relationships established *in good faith*. However, it is to be added at once that, as the Court has repeatedly confirmed, the mere fact that a judicial decision has important practical consequences is not in itself a sufficient reason to curtail its unrestricted application. In *Blaizot* this was explained, with reference to *Defrenne (No 2)*, as follows:

24 — See, in this regard, R. Joliet, *Le droit institutionnel des Communautés européennes. Le contentieux*, Luik, Faculté de Droit, d'Economie et de Sciences Sociales de Liège, 1981, p. 219

25 — Judgments of 27 March 1980 in Case 61/79 *Amministrazione delle Finanze dello Stato* v *Denkavit Italiana* [1980] ECR 1205, paragraphs 16-18, and Joined Cases 66/79, 127/79 and 128/79 *Amministrazione delle Finanze dello Stato* v *Meridionale Industria and Others* [1980] ECR 1237, paragraphs 9-11; Case 811/79 *Ariete* [1980] ECR 2545, paragraphs 6-8 and Case 826/79 *Mireco* [1980] ECR 2559, paragraphs 7-9; Case 309/85 *Barra* [1988] ECR 355, paragraphs 11-13, and Case 24/86 *Blaizot* [1988] ECR 379, paragraphs 27-28; Case 210/87 *Padovani* [1988] ECR 6177, paragraph 12. Recently, the Court summarized these principles again in a judgment of 16 July 1992 delivered in Case C-163/90 *Legros* [1992] ECR I-4625, paragraph 30.

'As the Court has held (see in particular the judgment of 8 April 1976), in determining whether or not to limit the temporal effect of a judgment it is necessary to bear in mind that, although the practical consequences of any judicial decision must be weighed carefully, the Court cannot go so far as to diminish the objectivity of the law and compromise its future application on the ground of the possible repercussions which might result, as regards the past, from a judicial decision.' [26]

15. The fact that the principle of legal certainty forms part of the Community legal order is sufficiently well-known. [27] In essence, the Court is prepared, on account of special circumstances, to avoid calling in question legal relationships established in the past, notwithstanding the fact that there are grounds for this under a clarifying ruling which the Court has given in the meantime. It appears from its case-law that the Court recognizes the good faith, or the legitimate expectation, [28] of the parties concerned or of the Member States as such a special circumstance if the retroactive application of the judicial decision involves serious problems for the parties or the Member States. Such good faith exists where those parties or Member States 'were reasonably entitled to consider' [29] that their conduct was in accordance with Community law, for example where the scope of a Community provision was not entirely clear. The Court has accepted *a fortiori* that good faith exists where the Community institutions themselves had helped to create an impression of validity under Community law, either by approving a particular act of secondary Community law which left the practices concerned intact (judgments in *Pinna (No 1)*, [30] *Barber* and *Legros*) or by not bringing an action under Article 169 against the Member State in default (*Defrenne (No 2)* and *Legros*) or by vacillating over the question of compatibility (*Blaizot*).

If it is clear, however, that parties or Member States, particularly in view of clear, well-known case-law of the Court, could be in no doubt as to their Community obligations, the condition of good faith is not fulfilled. As is clear from the judgments in *Worringham* [31] and *Essevi and Salengo*, [32] the Court does not then feel compelled to limit its judgment in time.

16. The good faith of parties concerned or Member States is thus a special circumstance which can justify limiting the effect of a judgment in time if the absence of a limitation would produce serious problems for legal relationships created in the past.

26 — Case 24/86 *Blaizot*, cited in the previous footnote, paragraph 30; judgment in the *Defrenne (No 2)* case, paragraph 71; see also the judgment in *Worringham* (cited above in footnote 4), paragraph 31, and the judgment in *Legros*, cited in the previous footnote, paragraph 30.

27 — For express confirmation of this, see, *inter alia*, the judgment in Joined Cases 205/82 to 215/82 *Deutsche Milchkontor and Others* v *Federal Republic of Germany* [1983] ECR 2633, paragraph 30. On legal certainty as a principle for the protection of legal relationships which have come into being in good faith, see, *inter alia*, K. D. Borchardt, *Der Grundsatz des Vertrauenschutzes im Europäischen Gemeinschaftsrecht*, Kehl, Schriftenreihe Europa-Forschung, Volume 15, 1988, pp. 135-136, and M. Schlockermann, *Rechtssicherheit als Vertrauensschutz in der Rechtsprechung des EuGH*, dissertation, Munich, 1984, pp. 144-151.

28 — This term was used by the Court in its judgment in Joined Cases 142/80 and 143/80 *Amministratzione delle Finanze dello Stato* v *Spa Essevi and Carlo Salengo* [1981] ECR 1413, paragraph 34.

29 — This expression is used in the judgment in *Barber*, at paragraph 43, as well as in the judgment in *Legros*, at paragraph 33.

30 — Case 41/84 *Pinna* v *Caisse d'Allocations Familiales de la Savoie* [1986] ECR 1, paragraph 27. Since the Council had approved Article 73(2) of Regulation No 1408/71, which was declared invalid in that judgment, France had believed for a long period of time that it could maintain practices which had no legal basis under Articles 48 and 51 of the Treaty.

31 — *Worrington*, paragraph 33.

32 — Already cited in footnote 28, paragraph 34.

According to the Court, such a problem arises if the judgment concerned may have important *general economic and financial consequences* going beyond the particular facts of the case in point. Thus in *Defrenne (No 2)* the Court lent a receptive ear when the United Kingdom and Irish Governments expressed the fear that many undertakings might experience serious financial difficulties as a result of unforeseen pay claims. [33] Partly in view of the good faith (mentioned above) of the market participants the Court held that

'In these circumstances, it is appropriate to determine that, as the general level at which pay would have been fixed cannot be known, important considerations of legal certainty affecting all the interests involved, both public and private, make it impossible in principle to reopen the question as regards the past.

Therefore, the direct effect of Article 119 cannot be relied on in order to support claims concerning pay periods prior to the date of this judgment, except as regards those workers who have already brought legal proceedings or made an equivalent claim.' [34]

The Court's regard for 'all the interests at stake, public and private', [35] including the serious financial consequences of a judgment for the parties or authorities which have acted in good faith, is also evident in a number of recent cases. In *Blaizot*, for example, the Court took account of the possibility that its judgment (in which it ruled that a supplementary enrolment fee for foreign university students was incompatible with Article 7 of the EEC Treaty) might 'retroactively throw the financing of university education into confusion and might have unforeseeable consequences for the proper functioning of universities'. [36] In *Barber*, too, the Court noted (see the passage cited above in paragraph 5) that 'the financial balance of many contracted-out pension schemes' might be 'upset retroactively'. And still more recently, in the *Legros* case, in which a charge levied by the French overseas territories (the 'octroi de mer') was declared incompatible with Community law, the Court was prepared to limit the temporal effect of its judgment on account of the catastrophic financial repercussions which the French overseas territories would face if unduly paid charges became repayable:

'In these circumstances, overriding considerations of legal certainty preclude legal situations which have exhausted all their effects in the past from being called in

33 — *Defrenne (No 2)*, paragraph 70. In its judgment in *Worringham*, however, the Court decided that 'the number of the cases which would be affected in this instance by the direct effect of that provision' was not sufficiently relevant in order, in the interests of legal certainty, to limit the temporal effect of its judgment: *Worringham*, paragraph 33.

34 — *Defrenne (No 2)*, paragraphs 74 and 75.

35 — This expression is also used by the Court in its judgment in *Punta (No 1)*, at paragraph 28; in this regard, see J. Boulouis, 'Quelques observations à propos de la sécurité juridique', in *Du droit international au droit de l'intégration. Liber amicorum Pierre Pescatore*, Baden Baden, Nomos, 1987 (53) p. 55.

36 — *Blaizot*, paragraph 34.

question when such calling in question would upset retroactively the financing system of the local authorities of the French overseas departments.' [37]

17. *Clarifying the temporal effect of the Barber judgment.* It is in the light of the case-law cited above that the passage in the *Barber* judgment concerning the temporal limitation of the effects of that judgment must be read.

However, a few preliminary observations are necessary: in considering the issues arising in these cases it is crucial to understand how occupational pension schemes (contracted-out and supplementary) are built up and run. As is clear from the observations of the governments and pension schemes appearing before the Court, most of these pension schemes are characterized by their *accruing nature*. In practice, an employee accrues pension entitlements on the basis of his periods of service with the employer concerned. For that purpose, contributions (calculated on the basis of actuarial factors) are periodically paid to a particular pension fund by the employee and/or employer in respect of specific periods of service. [38]

From the legal point of view, this accruing nature of occupational pension schemes leads to a distinction between the coming into being of pension rights, namely as a result of the *accrual* of the pension on the basis of completed periods of service, and those rights' becoming exercisable, namely when the pension *falls to be paid for the first time*.

In financial and economic terms, the balance of such occupational pension schemes is also based on a number of premises, including data concerning pension lifetimes and the survival probabilities of men and women (see paragraphs 34-39).

37 — *Legros*, paragraph 34. For another recent temporal limitation imposed on account of the important financial consequences of a judgment, this time in relation to the invalidity of a Community regulation in the field of agricultural policy (concerning, in particular, a 'clawback' levy on products which had attracted a variable slaughter premium), see the judgment of 10 March 1992 in Joined Cases C-38/90 and C-151/90 *Lomas* [1992] ECR I-1781, paragraphs 27-30.

38 — A distinction must be made in this regard between the so-called *fixed-contribution schemes* (frequently called 'defined contribution plans' or 'money purchase schemes') and the so-called *fixed-benefit schemes* (also called 'defined benefit plans'). In the first-mentioned schemes the benefit consists of the capitalized sum of — and is accordingly dependent on — contributions periodically made in the past by the members. In schemes with fixed benefits, on the other hand, the level of the benefit is fixed in advance (in the trust deed, constitutive rules, policy conditions or other general conditions) on the basis of the number of years of service, either as a fixed amount or as a percentage of the employee's final salary. I would, incidentally, point out that the pension schemes in the Coloroll case are of the second type and that, according to the evidence before the Court, most occupational pension schemes in Denmark, the Netherlands and the United Kingdom also belong to this category. As regards the aforementioned difference between occupational pension schemes, see, *inter alia*, P. E. d'Herbais, *Mémento des retraités dans la C. E. E. Analyse comparée des régimes de base et complémentaires des salariés et des fonctionnaires*, Paris, CERR, 1990, pp. 17-18; see also, together with other categorisations, G. Tamburi and P. Mouton, 'Problèmes de frontières entre régimes privés et régimes publics de pensions', *Revue internationale du Travail*, 1986, (163), pp. 145-146.

18. It seems to me that in *Barber*, too, the Court recognizes, if only implicitly, the distinction between the accrual and the falling due of an occupational pension. The Court's conclusion that pension payments made under a contracted-out scheme constitute 'consideration paid by the employer to the worker in respect of his employment' [39] can be so understood. This is because, from the point of view of Article 119 of the EEC Treaty, benefits paid under an occupational pension scheme are to be regarded as a form of 'deferred' pay which the worker has *accrued* in respect of his service with one or more employers during a specific period of employment.

Moreover, this distinction makes it clear what the Court meant in paragraph 44 of the *Barber* judgment by 'the acquisition of entitlement to a pension as from the date of this judgment'. Since it is the service itself and, in some cases, the relevant contributions which give rise to the employee's pension rights, on the one hand, and the obligations of the employer and/or (the trustees of) the pension fund, on the other, the Court clearly has in view here periods of service after 17 May 1990. Any sex discrimination occurring in this field after that date — owing, in particular to the practice of taking account of a different pensionable age in calculating contributions and/or benefits payable by virtue of those contributions — thus falls under the prohibition laid down by Article 119.

19. I also consider the distinction between the accrual of the pension (or the coming into being of pension rights) and the pension's falling to be paid for the first time (or the pension rights' becoming exercisable) to be important for a proper understanding of what the Court means in paragraph 44 of its judgment in *Barber* where it holds that 'legal situations which have exhausted all their effects in the past' may not be called in question. To give that passage a literal reading, as certain parties to the main proceedings in the Coloroll case (namely James Russell, Gerald Parker and Robert Sharp) do, is quite wrong. On a literal reading, it may indeed be asserted that the effects of an occupational pension are only fully exhausted once the pension has been paid in full to the (retired) employee. Such a reading would mean that the temporal limitation of the judgment decided on by the Court would have almost no significance and that the useful effect of the limitation imposed by the Court would largely vanish. [40]

Here again, the distinction between the accrual and the falling due of the pension helps to clarify matters. Since it is the service itself and, in some cases, the relevant contributions which give rise to the rights and obligations of the employee and the employer (and/or of the trustees of the pension scheme), it may reasonably be assumed that in using the expression 'legal situations which have exhausted all their effects in the past' the Court had in view situations in which the right to a pension *had already been acquired* by virtue of periods of service prior to the judgment in *Barber*. The coming into being of a pension right on the basis of a

39 — *Barber*, paragraph 28; see paragraph 4 above.

40 — That judgments of the Court may not be interpreted in a way which deprives them of their useful effect was confirmed by the Court in *inter alia* its judgment of 2 March 1989 in Case 359/87 *Pinna (No 2)* [1989] ECR 585, paragraph 16; see also the Opinion of Advocate General Lenz in that case, in particular at pp. 605-606, paragraph 29, in which he cites case law from which it is clear that a teleological interpretation of judgments of the Court is usual

period of service in the past leads indeed to a legal situation whose effects are exhausted in the sense that the worker has definitively acquired the pension right relating to that period of service.

20. The reason why the Court decided to opt for a limitation of its judgment to the pension rights as understood above can be attributed directly to the Court's expressly stated wish not to upset retroactively the financial balance of contracted-out pension schemes. Legal certainty means in this connection that the extent of those rights falls to be determined on the basis of the Community rule which applied at the time of the period of service on the basis of which those rights were *acquired*, that is to say Article 119 as it was interpreted before the *Barber* judgment.

This is by no means an innovation in Community law. A precedent may be cited from Community case-law on social security schemes, namely the judgment of 12 October 1978 in *Belbouab*. This case related to Regulation No 1408/71. It concerned an Algerian worker who before Algeria's independence had possessed French nationality and had worked as a French national in France and Germany. When he applied for a mineworker's pension in Germany, no account was taken of the periods of insurance which he had completed in France on the ground that he no longer fulfilled the requirement, laid down in Article 2(1) of the regulation, that he should be a national of a Member State. The Court rejected the referring court's premise that the nationality requirement laid down in Article 2(1) of the regulation related to the claimant's nationality at the time of *submission of his application for a pension*. It stated:

'In order to satisfy the principle of legal certainty, one of the requirements of which is that any factual situation should normally, in the absence of any contrary provision, be examined in the light of the legal rules existing at the time when that situation obtained, the second condition [the nationality requirement contained in Article 2(1)] must be interpreted as meaning that the status of being a national of one of the Member States refers to the time of the employment, of the payment of the contributions relating to the insurance periods *and of the acquisition of the corresponding rights*.' [41]

It is not therefore the time when an application for a pension is made that is relevant for the purposes of Regulation No 1408/71 and in particular for the purposes of the nationality requirement which that regulation lays down, but *the periods of employment or insurance*: it is in those periods that the insurance contributions are paid and, as the Court stated in *Belbouab*, the corresponding rights, including the right to a statutory pension, are acquired. [42]

A similar application of the principle of legal certainty, this time in the field of family allowances, is to be found in the judgment in *Pinna (No 1)*. After reaching the view that the former version of Article 73(2) of Regulation No 1408/71 (which, in the matter of

41 — Judgment of 12 October 1978 in Case 10/78 *Belbouab* v *Bundesknappschaft* [1978] ECR 1915, paragraph 7, with my emphasis; see also the judgment of 14 November 1990 in Case C-105/89 *Buhari Haji* [1990] ECR I-4211, paragraph 17. In its *Henck* judgments, delivered on 14 July 1971, the Court had already held that '[t] the principle of legal certainty makes it necessary to refer to the state of the law in force when the provision in question was applied': Case 12/71 [1971] ECR 743, paragraph 5; Case 13/71 [1971] ECR 767, paragraph 5; and Case 14/71 [1971] ECR 779, paragraph 5.

42 — This principle already formed the basis of the Court's case-law in relation to Regulation No 3: see in particular the judgment of 26 June 1975 in Case 6/75 *Horst* v *Bundesknappschaft* [1975] ECR 823, paragraph 8.

family allowances, laid down for workers active in France rules which departed from those laid down in Article 73(1) for other Member States) was invalid, the Court nevertheless limited the temporal effect of its judgment. According to the Court, 'overriding considerations of legal certainty involving all the interests at stake, public and private' precluded the calling in question of 'the payment of family benefits for periods prior to the delivery of this judgment'. [43] The Court ruled that the invalidity of the provision in question could not be relied upon 'in order to support claims regarding benefits for periods prior to [the date of this judgment]'. [44]

21. *Proposed interpretation.* On the basis of the foregoing, paragraph 45 and point 5 of the operative part of the judgment in *Barber*, in which the Court held that Article 119 may not be relied upon in order 'to claim entitlement to a pension with effect from a date prior to that of this judgment' (see above, paragraph 5), must be interpreted as meaning that entitlement to a pension is entitlement which was acquired in relation to periods of service prior to the date of the *Barber* judgment. In other words, I choose the second interpretation mentioned in paragraph 10 above.

This interpretation sits most easily with the *good faith* of employers and of occupational pension schemes since account must indeed be taken of their belief that conditions as to pensionable age varying according to sex were permissible. In *Barber* this was recognized by the Court in as many words: in view of the derogations from the principle of equal treatment contained in Directive 79/7 and 86/378 the Member States and the 'parties concerned' were 'reasonably' entitled to consider 'that Article 119 did not apply to pensions paid under contracted-out schemes and that derogations from the principle of equality between men and women were still permitted in that sphere'. [45]

The fact that the good faith of the parties concerned, in particular of employers and occupational pension funds, is to be taken into account means that, before *Barber*, those parties, in the belief that Article 119 was not applicable, could promise pensions and make payments based on a different pensionable age for men and women. The *financial balance* of the pension schemes concerned could therefore be maintained on that basis before the judgment. Only in respect of periods of service *after Barber* did employers know that in administering occupational pension schemes and calculating the contributions to be made to them account had to be taken of a pensionable age which was the same for men and women. If no account were taken of their good faith and that of pension scheme administrators, this would entail serious financial problems for pension schemes. All these factors argue in

43 — *Pinna (No 1)*, paragraph 28.

44 — Except by employed persons who had already brought legal proceedings or made an equivalent claim prior to the date of the judgment: judgment in *Pinna (No 1)*, paragraph 30. The Court took the same position in this regard in its judgment of 13 November 1990 in Case C 99/89 *Yaniez-Campoy* v *Bundesanstalt fur Arbeit* [1990] ECR I-4097, paragraph 18.

45 — *Barber*, paragraph 43.

favour of not allowing obligations entered into and payments made before the date of the *Barber* judgment to be affected. [46]

22. In passing, I would point out that, in my view, the *third interpretation*, in which it is suggested that the falling due of the pension after 17 May 1990 should be the decisive criterion (irrespective of the time when the periods of service to which the pension relates were completed), cannot be entertained under any circumstances. I consider this option undesirable not only in view of the way, described above, in which pension rights accrue but also on account of the *clear unfairness* to which this interpretation would lead for a large number of workers: not a single worker whose occupational pension became payable or was paid for the first time before 17 May 1990 would then be able to rely on the principle of equal pay. Situations which are otherwise completely the same but differ only in that they lead to entitlement to payment before or after 17 May 1990 would then be treated in a very different way.

Finally, I consider that the *fourth interpretation* goes too far. It has no regard at all for the financial balance of occupational pension schemes, as established in good faith on the basis of calculation factors based on different pensionable ages for men and women.

23. The interpretation of the temporal limitation of the effects of the *Barber* judgment which I propose here largely coincides with that adopted in the Protocol on Article 119 annexed to the Treaty on European Union. I would, moreover, point out that if the Court should come to a different conclusion, its decision would be entirely superseded as soon as the Treaty on European Union comes into force.

Article 239 of the EEC Treaty will be applicable to the Protocol which is to be annexed to the EEC Treaty: as soon as the Treaty on European Union comes into force, that Protocol will become an integral part of the EEC Treaty. In other words, it will have the same legal force as a provision of the Treaty. [47] I would, however, emphasize that the Protocol is not intended to amend Article 119 nor does it appear to call in question the decisions of the Court. Indeed, the fifth indent of Article B of the Treaty on European Union expressly confirms that one of the Union's objectives is 'to maintain in full the "acquis communautaire" and build on it', that is to say the entire body of the existing Community rules as interpreted and applied by the Court. [48] Accordingly, I see in the Protocol no more than a *declaratory deter-*

46 — The Court has repeatedly taken a similar position when declaring invalid acts of the institutions: it is then said that, for the sake of 'important reasons of legal certainty', the declared invalidity of the act in question cannot affect the validity of payments made and commitments entered into in implementation of that act: see the judgment in Case 34/86 *Council* v *Parliament* [1986] ECR 2155, paragraph 48 and the judgment in Case C-284/90 *Council* v *Parliament* [1992] ECR I-2277, paragraph 37.

47 — C. Vedder, 'Artikel 239', in *Grabitz Kommentar zum EWG-Vertrag*, Munich, Beck, p. 2, point 5. Breach of a protocol is thus equivalent to a breach of the Treaty: M. Hilf, 'Artikel 239', in *Groeben-Thiesing-Ehlermann, Kommentar zum EWG-Vertrag*, IV, Baden-Baden, Nomos, 1991, p. 5947, points 7 and 8. Moreover, in international law on treaties, protocols are generally regarded as constituting parts of the Treaty to which they are annexed: Myers, 'The name and scope of Treaties', *Am. J. Int. L.*, 1957, (574), 587; see also the definition of 'treaty' in Article 2(1)(a) of the Vienna Convention on the Law of Treaties of 21 May 1969: 'an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation'.

48 — See also Article C of the Treaty on European Union, which provides that the institutional framework of the Union is to respect and build upon the 'acquis communautaire'.

mination of meaning adopted in relation to Article 119 and the case-law of the Court. [49]

Does the ruling in *Barber* as well as the temporal limitation provided for therein also apply to occupational pension schemes other than those envisaged in that judgment?

24. In the Coloroll case the High Court also asks the Court of Justice whether the temporal limitation on the *Barber* judgment also extends to occupational pension schemes other than 'contracted-out' occupational pension schemes which were considered in that judgment (Question 3), in other words whether it also applies to supplementary or non-statutory, and not just contracted-out, pensions. This question also arises in the Moroni case, although the question submitted by the Arbeitsgericht Bonn primarily seeks to ascertain whether the ruling in *Barber*, in particular on the point concerning the incompatibility with Article 119 of an age condition varying according to sex for entitlement to a pension (see above, at paragraph 4), is also applicable to the occupational pension scheme in that case.

25. Both questions are interwoven and, in my view, are particularly connected with the scope to be given to the *Bilka* judgment of 1986. I would remind the Court that in that judgment it held that benefits paid under an occupational pension scheme applicable in a German undertaking constitute consideration within the meaning of Article 119 (paragraph 3 above).

According to the defendants in the main proceedings in the Coloroll case other than Judith Broughton and Coloroll Group plc, the Court had in view in the *Bilka* judgment, which concerned a non-contracted-out occupational pension scheme, the entire situation of such pension schemes. In other words, according to these parties, that judgment concerned not only the point concerning the *exclusion* of workers who are members of non-contracted-out occupational pension schemes, with which that case was specifically concerned, but also the point relating to the *commencement date* of the pension under such occupational pension schemes. Since the point concerning the commencement date in non-contracted-out occupational pension schemes had accordingly been decided in the judgment in *Bilka*, thus long before the judgment in *Barber* was delivered, the temporal limitation imposed in the judgment in *Barber* should not, in their view, be applied to non-contracted-out occupational pension schemes.

Judith Broughton, Coloroll Group plc and the United Kingdom and, in the Moroni case, the German Government, on the other hand, have put forward the view that the scope of the judgment in *Bilka* is indeed limited to the point concerning the exclusion of workers who are members of non-contracted-out occupational pension schemes. Unlike the German Government, however, the other three interveners consider that the judgment in *Barber*, including the temporal limitation for which it provides, with regard to the commencement date of the pension — with which that case was specifically concerned — applies to all occupational pension schemes, both contracted-out and non-contracted-out.

49 See, in the same sense, S Prechal, 'Bommen ruimen in Maastricht', *Nederlands Juristenblad*, 1992, (349), p 354

26. I agree with Judith Broughton, Coloroll Group plc and the United Kingdom: the ruling in *Barber*, including the temporal limitation which it lays down, is applicable to *all occupational pension schemes*, irrespective of the category to which they belong.

In my view, in *Bilka* the Court ruled only on the question whether an occupational pension scheme of the type in question in that case (a contractual company scheme financed exclusively by the employer and established after consultation within the company concerned) fell within the scope of Article 119 and on the question whether the exclusion of part-time workers (mainly women) from such a scheme constitutes discrimination contrary to that provision. The Court answered both questions in the affirmative. Only in *Barber* did the Court also address the question of the lawfulness of an age condition, for the commencement of the pension, varying according to sex under an occupational pension scheme (which in that case was a contracted-out scheme) (see above, paragraph 4).

Although that judgment concerned a contracted-out occupational pension scheme, I consider that the Court dealt with the issue arising in that case — the commencement date of the pension — in a general way which is applicable to all occupational pension schemes and that consequently the temporal limitation laid down in the judgment is also applicable to pension schemes other than contracted-out schemes. I find no support in the operative part of the *Barber* judgment for making a distinction between contracted-out and non-contracted-out pension schemes since nowhere in points 3 and 5 thereof does there appear to be a limitation to contracted-out occupational pension schemes alone. Moveover, such a distinction would, from the economic point of view, lead to arbitrary distortion between the respective pension schemes. In any event, if in its *Bilka* judgment the Court had also ruled on the commencement date of the pension under non-contracted-out pension schemes, it would, in my view, have also limited the temporal effect of that judgment rather than, as is the case, giving it retroactive effect to ... 8 April 1976, that is the date on which the Court in *Defrenne (No 2)* held Article 119 to have direct effect. [50] The upshot of this would then be that, as regards the commencement date of the pension, Article 119 would be applied to the scheme with retroactive effect going back more than 14 years, depending on whether the occupational pension scheme in question was a non-contracted-out or a contracted-out scheme. The financial consequences of such an interpretation would be catastrophic for Member States in which supplementary occupational pension schemes, that is to say non-contracted-out schemes, are very common. This cannot have been the intention of the Court.

50 — According to its own case-law (see paragraph 13 above), the Court would not in fact have the possibility of now imposing a temporal limitation on the effects of the *Bilka* judgment. For a case in which the Court declined to impose such a temporal limitation with regard to a previous judgment, see paragraph 14 of the judgment in *Barra*, cited in footnote 25.

Is the use of actuarial calculation factors differing according to sex contrary to Article 119 of the Treaty?

27. *The positions of the parties.* In the Neath case (Question 3(b)) and the Coloroll case (Question 4) the question is raised whether it is compatible with Article 119 of the EEC Treaty for the payments made under a pension scheme to be calculated on the basis of actuarial calculation factors, in particular actuarial assumptions about the different life expectancy of men and women, which lead to different results for men and women.

The pension funds and pension fund administrators as well as most of the intervening Member States argue that this is completely normal. They say that such actuarial calculation factors are based on reliable and objective statistical data which are related to life expectancy after pensionable age has been reached. Since those factors vary from sex to sex — on average women live longer and therefore on average receive their pension over a longer period of time than men — actuarial factors are, according to their arguments, essential for evaluating the liabilities assumed by a pension scheme and consequently for the financial structuring of the entire pension scheme. Taking into account actuarial factors — which, moreover, is a generally accepted practice in (contractual) schemes — thus has a direct and quite legitimate influence on the sum of rights which are transferable to another scheme and on the amounts of commutation payments (that is to say, where a scheme member opts to receive a capital sum instead of a periodic pension): in the last case, other circumstances being equal, men receive a lower amount than women.

28. The Commission, on the other hand, takes the view that the principle of equal pay for men and women must be applied individually and not on a category basis. The fact that women generally live longer than men has no significance at all for the life expectancy of a specific individual and it is not acceptable for an individual to be penalized on account of assumptions which are not certain to be true in his specific case. Moreover, there are a number of risk factors which are not taken into account: risks associated with certain occupations, smoking, state of health and so on. Finally, there is no technical necessity for pension schemes to have a distinction based on life expectancies: some pension schemes, and all State pension schemes, use a system of risk compensation which covers differences in the probable lifespan of men and women. [51] The Commission points out that the Supreme Court of the United States has held that similar discrimination in pension schemes is incompatible with the Civil Rights Act 1964. From this the Commission concludes that, since different actuarial calculation factors are contrary to Article 119 of the Treaty, neither employers nor trustees may rely on them to justify a proportionately greater reduction of the pension of a man than that of a woman upon early retirement, to justify smaller capital sums for men than for women where these are opted for, or to justify a different measure of the reduction of the pension

51 — These arguments were also advanced by the Commission in the explanatory note of 29 April 1983 on the proposal which was to lead to the adoption of Directive 86/378: COM (83) 217 final, pp. 7-8.

necessary in order to pay a widow's or widower's pension to an entitled person. In the Commission's view, the same applies to the payment of a capital sum to the trustees of another pension scheme after a worker has changed jobs, since those trustees, too, must comply with the principle of equal pay with regard to that worker. Only if the capital sum is paid to an insurance company or another third party who is a complete stranger to the employment relationship and not therefore bound by Article 119 may that undertaking or third party be exempt from a prohibition on using different life tables for men and women.

29. *Community legislation and case-law.* Before I explain my position, I will put the issue of actuarial calculation factors in their Community law context. As far as Community *legislation* is concerned, there is Directive 86/378. In contrast to the original Commission proposal for a directive, which expressly prohibited the determination of benefit amounts or rates of contribution by taking account of 'different factors of calculation, actuarial or otherwise, with regard to the phenomena of ill-health, mortality or life expectancy', [52] the directive contains various derogations from the implementation of the principle of equal treatment in occupational social security schemes, those derogations being related to the use of actuarial calculation factors varying according to sex. For the sake of clarity, I will set out those derogations:

— Article 9(c) provides that, in derogation from the prohibition laid down in the first subparagraph of Article 6(1)(i) on setting different levels of *worker contribution*, Member States may defer the application of the principle of equal treatment on this point in order 'to take account of the different actuarial calculation factors', at the latest until the expiry of a 13-year period as from the notification of the directive, that is to say until 30 July 1999;

— Article 6(1)(h) allows levels of *benefit* differing according to sex to be set in so far as may be necessary to take account of actuarial calculation factors which differ according to sex in the case of benefits designated as contribution-defined; [53]

— according to the second subparagraph of Article 6(1)(i), levels of *employer contribution* differing rules according to sex may be set in the case of benefits designated as contribution-defined [54] 'with a view to making the amount of those benefits more nearly equal';

— according to Article 6(1)(d), except as provided for in subparagraphs (h) and (i),

52 — Article 6(1)(h)(i) of the Commission's proposal of 5 May 1983, OJ 1983 C 134, p. 7. For this approach the Commission found support from *inter alia* the European Parliament: see the report by H. Peeters on behalf of the Committee on Social Affairs and Employment of 12 March 1984, European Parliament, Documents de séance, 1983-1984, doc. I-1502/83 (PE 87/755/def.), p. 10.

53 — The expression 'designated as contribution-defined' refers to so-called fixed-contribution schemes; on this, see above, footnote 38.

54 — See the footnote above.

rules differing according to sex may be laid down for the *reimbursement of contributions* where a worker leaves a scheme without having fulfilled the conditions guaranteeing him a deferred right to long-term benefits;

— finally, Article 6(1)(j) allows, so far as provided for in subparagraphs (h) and (i), different standards to be laid down for workers of a specified sex as regards the *guarantee or retention of entitlement to deferred benefits* when a worker leaves a scheme.

Community legislation therefore contains five important restrictions on the implementation of the principle of equal treatment which are related to actuarial calculation factors; four of them bear no temporal limitation. [55] Some relate to contributions of either employees or employers, others to the payment of benefits or the reimbursement of contributions.

30. As yet, there is no Community *case-law* on the relationship between actuarial calculation factors and the principle of equal treatment. [56] Again, regard must be had to the *Barber* judgment in which the Court, in the interests of effective judicial review of compliance with the principle of equal treatment, [57] expressly confirmed that

'[t]he application of the principle of equal pay must be ensured in respect of each element of remuneration and not only on the basis of a comprehensive assessment of the consideration paid to workers.' [58]

It is precisely this passage from the judgment on which the Commission relies in order to argue that the prohibition of discrimination laid down in Article 119 covers all aspects of an occupational pension scheme, including actuarial calculation factors. [59] The Commission further argues that no account has to be taken of the derogations from Directive 86/378 mentioned above, since in *Bilka* and *Barber* the Court confirmed that, as far as the employee is concerned, Article 119 is directly applicable to the conditions of an occupational pension scheme.

55 — These derogations have attracted criticism from various authors who have doubts about their compatibility with Article 119 of the Treaty: see D. Curtin, 'Occupational pension schemes and Article 119: beyond the fringe?', *Common Market Law Review*, 1987, (215), pp. 225-229; E. Ellis, *European Community Sex Equality Law*, Oxford, Clarendon Press, 1991, pp. 56-57; A. Laurent, 'Les CE éliminent des discriminations fondées sur le sexe dans les régimes professionnels de sécurité sociale', *Revue internationale du Travail*, 1986, (753), pp. 759-761; S. Prechal and N. Burrows, *Gender discrimination law of the European Community*, Aldershot, Dartmouth, 1990, pp. 280-282.

56 — I can disregard the case-law which the Court of Justice and the Court of First Instance have developed in staff cases with regard to the taking into account of pension rights acquired elsewhere, in particular the actuarial countervalue of such rights, by members of staff of the Community institutions: see *inter alia* the judgment in Joined Cases 118/123/82 *Maria Grazia Celant and Others* v *Commission* [1983] ECR 2995; Joined Cases 75/88, 146/88 and 147/88 *Bonazzi-Bertottilli and Others* v *Commission* [1989] ECR 3599; Case C-137/88 *Schneemann and Others* v *Commission* [1990] ECR I-369.

57 — See paragraphs 33 and 34 of the judgment in *Barber*.

58 — *Barber*, paragraph 35 and point 3 of the operative part.

59 — Whether that passage must in fact be given such a wide ranging meaning is a question which I will leave aside here. The passage cited was referring in fact to various types of consideration granted, according to the circumstances, to men and women. The national court was asked to assess all those types of consideration *in globo*, a task which it was hardly able to fulfil. The present cases do not, however, concern different elements of pay but the actuarial method of calculating one single element of pay.

31. *The applicability in principle of the prohibition of discrimination.* We are thus immediately confronted with the question which Community rule applies to the issues in these cases — Article 119 of the Treaty or Directive 86/378. Drawing the dividing line between the scope of Article 119 and that of Council directives designed to implement the principle of equal treatment has always been a delicate matter. Expressed succinctly, the essence of the Court's case-law is that, where a dispute can be resolved through an interpretation of Article 119 alone, only that provision is relevant for Community law purposes. [60] In other words, the directives on the implementation of the principle of equal treatment operate only in so far as they *supplement* or *extend* [61] the effect of Article 119; however, they may not in any way alter or restrict the meaning or scope of that article. [62] The fact that Directive 86/387, as regards the taking into account of actuarial calculation factors varying according to sex, introduces derogations from the principle of equal treatment (see above, paragraph 29) can therefore be no reason for considering that those derogations, by way of analogy, are also applicable to the principle of equal treatment laid down in Article 119. Derogations from the scope of Article 119 must spring from that article itself.

32. As far as the last point is concerned, namely the scope attributable to the prohibition of discrimination laid down in Article 119, the Court has, since its judgment in the second *Defrenne* case, adhered to settled case-law, which was also confirmed in *Barber*:

'... a distinction must be drawn within the whole area of application of Article 119 between, first, direct and overt discrimination which may be identified solely with the aid of the criteria based on equal work and equal pay referred to by the article in question and, secondly, indirect and disguised discrimination which can only be identified by reference to more explicit implementing provisions of a Community or national character'. [63]

Article 119 is therefore directly applicable only to forms of discrimination which are ascertainable as such *by the national court* [64] with the aid of the criteria of 'equal work' and 'equal pay' mentioned in that article. [65] In *Defrenne (No 2)* the Court made it clear that this is the case as regards discrimination

60 — A clear illustration of this is to be found in the judgment in *Macarthys*: although the national court had specifically referred to the Court questions about the scope of Directive 75/117/EEC, the Court decided that the dispute could be entirely resolved through an interpretation of Article 119; see paragraph 17 of that judgment.

61 — For example, mention may be made of the fact that Directive 86/378 has a wider scope *ratione personae* than Article 119 since by virtue of Article 3 of the directive it is also applicable to self-employed persons. *Ratione materiae* the directive applies *inter alia* to all occupational schemes which provide protection against the risks of sickness, invalidity, old age, industrial accidents, occupational diseases and unemployment (Article 4(a)).

62 — See, in relation to Directive 75/111, the judgment in *Jenkins*, paragraph 22; the judgment of 3 December 1987 in Case 192/85 *Newstead* [1987] ECR 4753, paragraph 20. This was also expressly confirmed by the Court in paragraph 11 of *Barber*.

63 — *Defrenne (No 2)*, paragraph 18.

64 — The reference to 'judicial' identification is made for the first time in the judgment in *Macarthys*, paragraph 10; see also the judgment in *Worringham*, paragraph 23, and the judgment in *Jenkins*, paragraph 17. In paragraph 38 of the judgment in *Barber* the Court refers to 'the national court'.

65 — *Macarthys*, paragraph 10; judgment in *Worringham*, paragraph 23; judgment in *Jenkins*, paragraph 17.

which a court may detect on the basis of a *purely legal analysis*, in particular forms of discrimination which have their origin in legislative provisions or in collective labour agreements, [66] and as regards discrimination in situations in which the court is in a position *to establish all the facts* in order to decide whether there is pay discrimination, in particular in cases where men and women receive unequal pay for equal work performed in the same establishment or service, whether public or private. [67]

Although, according to the Court, the full attainment of the economic and social aims of Article 119 [68] also require that all other sex discrimination is eliminated, it considers in this regard that more detailed Community or national legislative provisions are necessary for this purpose:

'It is impossible not to recognize that the complete implementation of the aim pursued by Article 119, by means of the elimination of all discrimination, direct or indirect, between men and women workers, not only as regards individual undertakings but also entire branches of industry and even of the economic system as a whole, may in certain cases involve the elaboration of criteria whose implementation necessitates the taking of appropriate measures at Community and national level.' [69]

33. When applied to the issue of actuarial calculation factors, that case-law leads to the following result. In certain cases, as in the Moroni case (paragraph 7, above), unequal treatment due to the use of different actuarial factors in the matter of benefits (in particular upon early retirement) arises from a *legislative* provision. In other cases, as in the Neath case (paragraph 8, above) and the Coloroll case (paragraph 9, above), differences based on actuarial calculation factors arise in transfer payments or capital sum payments as a result of the *contractual* conditions governing the occupational pension schemes in question, even under pension schemes having only male members (Coloroll case, paragraph 9).

In all these cases, it is, however, possible for the national court to ascertain the existence of unequal treatment on the basis of a purely legal analysis: the actuarial calculation factors are contained in a statutory provision or form part of the conditions governing an occupational pension scheme (contained in the trust deed, constitutive rules or general conditions) and are clearly based on nothing else than the distinction between men and

66 — *Defrenne (No 2)*, paragraph 21.

67 — *Defrenne (No 2)*, paragraphs 22-23; *Macarthys*, paragraph 10; *Worringham*, paragraph 23; *Jenkins*, paragraph 17.

68 — As regards those aims, see the judgment in *Defrenne (No 2)*, paragraphs 8 12.

69 — *Defrenne (No 2)*, paragraph 19. That the question of the scope of the direct effect of Article 119 essentially depends on the criterion whether unequal treatment can be ascertained on the basis of a purely judicial analysis of the circumstances of the case and does not depend so much on the criterion whether 'direct' or 'indirect', 'overt' or 'disguised' forms of discrimination exist is convincingly argued by Advocate General VerLoren Van Themaat in his Opinion in the *Burton* case, [1982] ECR 582, paragraph 2.6., with reference to the judgment in *Jenkins*.

women. [70] Furthermore, the discrimination can be established by a court with the aid of the criteria of equal work and equal pay contained in Article 119: where the pension benefit, capital sum or transfer payment which a male (or female) worker can claim is lower than those to which a female (or male) worker is entitled, then, in the orthodoxy of the Court's case-law, there is unequal *pay* for workers of one sex with regard to that of the other sex. [71] The conclusion must therefore be that, where account is taken of actuarial calculation factors varying according to sex, this constitutes, *at least in so far as* such factors result in different contributions or benefits for men and women (see below, paragraph 34), unequal treatment on the ground of sex, which *in principle* is prohibited by Article 119. [72]

34. *Possible grounds of justification.* Nevertheless, the question arises whether it is possible to identify an objective reason on the basis of which such unequal treatment may be justified under Community law. It is argued by various sides that such a reason is to be found in objectively determinable differences in average life expectancy between men and women.

Before going into this question, I would draw attention to the reservation expressed at the end of the previous paragraph. I agree with the United Kingdom and the Netherlands Government that the use of sex-based actuarial calculation factors with a view to assessing a pension scheme's financial liabilities is not prohibited *per se* by Article 119. In other words, Article 119 does not interfere with the method of financing an occupational pension scheme in so far as this does not result in unequal pay for the workers of one sex in relation to that of the other sex. Unlike the United Kingdom (whose view on this point differs as a matter of fact from that of the Netherlands Government), I consider, however, that if the use of such actuarial factors leads to different *employee contributions* and/or different *benefits* [73] — in the form of transfer payments, capital sums or reduced pensions upon early retirement — Article 119 is fully applicable (see above, paragraph 33).

35. I thus come to the question whether differences in average life expectancy between men and women can *justify* the use of sex-based actuarial factors in the calculation of employee contributions and benefits in occupational pension schemes. It is true that women as a group prove to live longer than men. It is, however, equally true that not all individual men and women exhibit the

70 — On this point, see, in relation to the sex discrimination existing in the *Barber* case in the matter of conditions of access, in particular the age requirement in the Guardian pension scheme rules, paragraph 47 of my Opinion in that case [1990] ECR I-1934-1935.

71 — *Barber*, paragraph 38.

72 — For examples of other, more indirect discrimination in occupational pension schemes, see D. Curtin, *art. cit.*, *Common Market Law Review*, 1987, p. 216.

73 — If the pension scheme is also financed by employers' and/or State contributions, I consider that account may be taken, in calculating those contributions, of sex-based actuarial factors in so far as differences resulting therefrom do not in any way lead to a different burden in respect of contributions for male and female employees and the payments made to men and women with the help of those contributions are not discriminatory either.

average characteristics of their sex: many women live for a shorter time than the average man and many men live longer than the average woman. The key question, therefore, is whether discrimination, within the meaning of Article 119, exists when men and women are treated, not as individuals, but as a *group* and unequal treatment for *individual* men or women arises as a result.

In my view, the answer must be in the affirmative: although Article 119 — unlike its American counterpart, the Civil Rights Act 1964, which is expressly orientated towards equal treatment of the *individual*, distinct from the sex group to which the individual belongs [74] — prescribes in general terms the application of the principle of equal pay for 'men and women', this provision also reflects the aspiration to treat the worker as an *individual* with regard to the worker's right to equal pay for equal work, and not simply as a member of one particular sex group. [75] For, as the Court confirmed in its judgment in *Murphy*, underlying Article 119 is the principle that a worker of one sex engaged in work of equal value to that of a worker of the opposite sex may not be paid a lower wage than the latter on grounds of sex. [76] The mere fact that, in general, women live on average longer than men cannot, therefore, be a sufficient reason to provide for different treatment in the matter of contributions and benefits under occupational pension schemes.

36. I can put those propositions in another way. The unequal treatment of men and women may be justified, and therefore not constitute unlawful discrimination, if the difference in treatment is based on objective differences which are relevant, that is to say which bear an actual connection with the subject of the rules entailing unequal treatment. In this regard, I could for instance imagine that factors having a direct impact on the life expectancy of a specific individual, such as risks associated with a particular occupation, smoking, eating and drinking habits and so forth, would be taken into account, if this is technically possible, in order to justify individual differences in contributions and/or benefits. As regards differences in average life expectancy between men and women, the situation is different, however. These differences bear no relation to the life expectancy of a specific individual and are thus irrelevant for the calculation of the contributions and/or benefits which may be ascribed to that individual.

37. The assertion that, as the Danish Government points out, the propositions set out

74 — The Civil Rights Act prohibits discrimination 'against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's ... sex': 42 USC § 2000e-2(a)(1).

75 — See, in the same sense, D. Curtin, 'Scalping the Community legislator: occupational pensions and "Barber"', *Common Market Law Review*, 1990, (475), p. 495.

76 — Judgment of 4 February 1988 in Case 157/86 *Murphy* v *Bord Telecom Eireann* [1988] ECR 673, paragraph 9; see also the Opinion of Advocate General Lenz in that case, [1988] 684, paragraph 12.

above must inevitably lead to a redistribution between the two sexes, so that one sex *de facto* 'subsidizes' the pension benefits received by the other sex, I do not consider to be a convincing objection. In order to negate it I would refer to the judgment of the United States Supreme Court in *City of Los Angeles, Department of Water and Power* v *Manhart*, in which a similar argument was rejected in these words:

'... when insurance risks are grouped, the better risks always subsidize the poorer risks. Healthy persons subsidize medical benefits for the less healthy; unmarried workers subsidize the pensions of married workers; persons who eat, drink, or smoke to excess may subsidize pension benefits for persons whose habits are more temperate. Treating different classes of risks as though they were the same for purposes of group insurance is a common practice which has never been considered inherently unfair. To insure the flabby and the fit as though they were equivalent risks may be more common than treating men and women alike; but nothing more than habit makes one "subsidy" seem less fair than the other.' [77]

The concern also expressed by the Danish Government that workers who became aware that their contributions were to some extent benefitting workers of the other sex might not wish to become members of such schemes likewise appears to me unfounded, at least in so far as it is assumed that the prohibition laid down in Article 119 extends to *all* occupational pension schemes, irrespective of the legal form which they take (see also below, paragraphs 62-63).

38. In order to justify the use of sex-based actuarial calculation factors in the determination of employee contributions or pension benefits some parties point out that their use is necessary in order to maintain the *financial balance* of occupational pension schemes. The United Kingdom above all attempts to convince the Court of the need for this. Its argument runs as follows: the fact that women live on average longer than men is an essential element in assessing the financial liabilities of such schemes since it must be assumed that women will draw their pension during a longer period than their male colleagues. This necessarily gives rise to unequal costs for a scheme, depending on whether men or women are involved, which inevitably has effects on the level of benefits. The imposition of a unisex method for calculating the funding required for the scheme would also fly in the face of reality and impair the actuary's ability to give sound advice concerning the pension scheme's liabilities and the appropriate level of future contributions.

39. Although, in view of recent case-law of the Court, I cannot immediately exclude the possibility that the necessity for a financial balance may in some circumstances justify

77 — 435 US 677, in particular at p. 710; 55 L Ed 2d 657, at p. 666.

discriminatory treatment, [78] I am not convinced by those arguments. I have difficulty in accepting that it would be technically necessary to take into account actuarial factors differing according to sex (in particular differences in life expectancy between men and women) in order to determine the contributions and benefits to be paid, since not a single *state* pension scheme applies such a distinction [79] and some occupational pension schemes, particularly in countries where their use is prohibited, do not do so either. [80] I can well understand that it is important for a pension fund to get an accurate picture of the life expectancy of the scheme members so as to assess outstanding and future liabilities. But this concerns only the *internal* actuarial methods of administration which are used by actuaries in order to ascertain the funds needed in order to maintain a financial balance between contributions and benefits, taking into account the lifespan of the persons entitled to pensions. There is nothing to prevent actuaries, when determining that balance, from taking account of actuarial factors differing according to sex (see above, paragraph 34). What is, however, required by Article 119 is that the determination of the amount of contributions to be paid by members and the amount of benefits to be paid to the entitled employee — thus, as far as the *external* relations of the scheme with its members are concerned — should take place on the basis of the same criteria for men and women.

Whilst I therefore find that the necessity to maintain the financial balance of occupational pension schemes does not constitute a ground of justification for discriminatory treatment of men and women as regards contributions and benefits, it does, however, seem to me to be a reason to take a broad view of the temporal limitation of the proposed interpretation. I consider that limitation to be sensible and shall now devote the following paragraphs to it.

40. *Limitation of the temporal effect of the interpretation proposed in this Opinion.* Should the Court decide to adopt the position taken in this Opinion, it would be appropriate to place a temporal limitation on the operation of that interpretation and to indicate as precisely as possible the modalities of the proposed limitation.

This is in fact what the High Court seeks to ascertain in the Coloroll case with its

78 — See, in particular, the judgment in the *Equal Opportunities Commission* case, which concerned the interpretation of the derogation from the principle of equal treatment of men and women provided for in Article 7(1)(a) of Directive 79/7: judgment of 7 July 1992 in Case C 9/91 *The Queen* v *Secretary of State for Social Security, ex parte Equal Opportunities Commission* [1992] ECR I 4297, in particular paragraphs 15-18. Just recently that judgment has been confirmed and clarified: see the judgment of 30 March 1993 in Case C 328/91 *Thomas* [1993] ECR I 1247, in particular paragraphs 9-12. In the recent *Poucet* case, too, central to which was the question whether a body charged with the administration of a special social security scheme was to be regarded as an undertaking within the meaning of Articles 85 and 86 of the EEC Treaty, the Court laid stress on the necessity to maintain the financial balance of such a scheme: judgment of 17 February 1993 in Joined Cases C 159/91 and C 160/91 [1993] ECR I 637, in particular paragraph 13. Mention may also be made of the judgment in the *Celant* case, in which the Court, with regard to the taking into account, in the Community pension scheme, of insurance periods completed under a national pension scheme, likewise stressed the need for 'sound financial management' of that scheme: judgment in *Celant*, cited in footnote 56, paragraph 27.

79 — See A. Laurent, *art. cit.*, p. 760.

80 — I am here thinking of the United States, where it is established that the use of actuarial factors varying according to sex for the calculation of *contributions* to pension schemes is contrary to the Civil Rights Act 1964 since the ruling of the United States Supreme Court in *Los Angeles Department of Water and Power* v *Manhart*, 435, U. S. 702, 55 L. Ed. 2d 657, 98 S. Ct. 1370 (1978). In 1983 the Supreme Court ruled that the use of such factors in respect of *benefits* under such schemes was also caught by the prohibition of discrimination: *Arizona Governing Committee for Tax Deferred Annuity and Deferred Compensation Plans* v *Norris*, 463 U. S. 1073, 77 L. Ed. 2d 1236, 103 S. Ct. 3492 (1983); see also *Florida* v *Long*, 487 U. S. 223, 101 L. Ed. 2d 206, 108 S. Ct. 2354 (1988).

Question 4(c) wherein it is asked to what extent (in particular, in respect of which periods) can the trustees of a pension scheme be required to review and recalculate determinations made by reference to actuarial considerations in relation to events prior to 17 May 1990.

Nearly all the parties intervening before the Court have adopted a position with regard to the temporal effect of a judgment in which the Court *ex hypothesi* holds Article 119 to be applicable to the use of actuarial calculation factors varying according to sex. Their positions may be summarized as follows.

41. The German Government and the United Kingdom argue that the same principles must apply as in relation to the temporal effect of the *Barber* judgment itself. From this the United Kingdom deduces that benefits would fall to be reviewed and recalculated only in so far as they related to service after 17 May 1990.

The Netherlands Government does not suggest any date but argues that current differences in lifelong periodic benefits upon early retirement or upon the conversion of part of a pension into a lump sum may continue to exist if accruing in respect of periods of service prior to a point in time to be determined by the Court, or at any rate 17 May 1990.

The Commission's position is less clear. In Neath, clearly assuming that the issue of actuarial factors was not covered by the *Barber* judgment, it suggested that, should the Court adopt the interpretation proposed above, it should limit the temporal effect of its judgment in the present case. In its observations in the Coloroll case, on the other hand, the Commission takes the view that the reasoning followed in the *Barber* judgment in relation to the effects in time of that judgment must also be applicable in relation to claims challenging discrimination which appeared to be permissible on account of Directive 86/378. Should the Court uphold a different view, the Commission suggests that it should invite written observations as to the most appropriate limitation in time of its decision.

42. Like the aforementioned intervening parties, I consider that the *principles* indicated in *Barber* in relation to temporal effect, as I have explained those principles above (paragraphs 17-20), should apply. This means that, as regards the issue of actuarial calculation factors, too, it seems to me that, for overriding reasons of legal certainty and in view of the good faith of market participants and the Member States, it is necessary to limit the temporal effect of the interpretation which I advocate in this Opinion. The reason for this is that market participants as well as the Member States could rely on the permissibility under Community law of the differences in actuarial calculation applied by occupational pension funds, in view of the extensive derogations which Directive 86/378 (paragraph 29, above) provided for on this point in relation to the implementation of the principle of equal treatment laid down by that directive. Relying on this, pension fund administrators determined the

contributions to be paid by, and the benefits to be paid to, male and female employees in respect of periods in the past by taking account of such actuarial differences. To alter such determinations in respect of the past could seriously jeopardize the financial balance of pension schemes.

As regards, more specifically, the *date* from which the temporal limitation is to apply, I consider — unlike the United Kingdom and, so it seems, the Commission in its observations in the Coloroll case — that the Court may not take the *Barber* judgment as its reference point but must take the date of the *judgment in these cases*. The judgment in *Barber* related, after all, to a different issue, namely the question whether an age condition differing according to sex for entitlement to an occupational pension was permissible under Article 119. It is only in the present cases, in particular in Neath and Coloroll, that the Court was asked to address the issue of the actuarial calculation factors applied in relation to such pensions.

43. This brings me to the following conclusion. In view of the derogations provided for in Directive 86/378, the parties concerned could reasonably assume that the use of actuarial factors varying according to sex, in particular for the determination of contributions to be paid by, and benefits to be paid to, employees, was permissible under Article 119. In order to prevent pension schemes built up in the past on the basis of such factors from being called in question, with all the considerable financial repercussions which this would entail, it is therefore appropriate for the Court to limit the effect of its interpretation to pension entitlements which correspond to periods of service *subsequent to the date of its judgment* in the Neath and Coloroll cases. The only exception which I consider desirable in this regard concerns the situation of persons — employees or those claiming under them — who before the date of the Court's judgment have initiated legal proceedings or raised an equivalent claim under the applicable national law.

Does the payment of a widower's pension fall under Article 119 of the Treaty?

44. In the Ten Oever case the Kantonrechter at Utrecht asks whether 'pay' within the meaning of Article 119 or the 'other consideration' referred to in that article is to be understood as covering the payment of non-statutory benefits to surviving relations (in that case, the payment of a widower's pension).

Mr Ten Oever, the United Kingdom and the Commission take the view that this question must be answered in the affirmative. The Pension Fund and the Netherlands and German Governments, on the other hand, propose a negative answer.

45. Before giving my view, I consider it necessary to describe the precise characteristics of the widower's pension in question. According to the rules of the Pension Fund, it is a pension which is awarded to the man to whom the female member or the former

female member was married at the time of her death, provided that the marriage took place before the woman in question reached the age of 65. [81]

It also appears from the observations of the Netherlands Government and the Pension Fund that the scheme concerned is an industry pension scheme which was compulsorily established pursuant to the Wet betreffende verplichte Deelneming in een Bedrijfspensioenfonds [Law concerning compulsory affiliation to an occupational pension fund] [82] for the entire window-cleaning and cleaning industry. In order for it to be made compulsory — which occurs through ministerial order — the aforesaid Law requires that the representative employers' and employees' organizations in an industry which has established a pension fund must submit an application for this purpose. [83] The Netherlands Government has explained that the terms of the pension scheme are determined by collective bargaining between employers' and employees' organizations; the scheme is funded mainly by means of an average contribution, which, as in the instant case (see paragraph 6 above), is paid jointly by employers and employees. Finally, amendments to the order rendering the scheme compulsory, the statutes and the rules of the occupational pension fund require the prior consent of the competent minister.

46. Is such a widower's pension a form of pay within the meaning of Article 119 of the Treaty? According to the Netherlands Government, this is doubtful or at any rate unclear: on the one hand, the *Barber* judgment — which did not concern a survivor's benefit — appears to suggest that occupational pension schemes are indeed covered by Article 119; on the other hand, however, benefits for surviving relatives occupy a specific place in secondary Community law. The Government is referring in this regard to Article 3(2) of Directive 79/7, which expressly excludes survivors' benefits from equal treatment in the matter of social security, as well as to Article 9(b) of Directive 86/378, which allows the Member States to defer the implementation of the principle of equal treatment with regard to survivors' pensions 'until a directive requires the principle of equal treatment in statutory social security schemes in that regard'. This special position of benefits for the surviving spouse was, according to the Netherlands Government, also confirmed in the proposal for a directive completing the implementation of the principle of equal treatment for men and women in statutory and occupational social security schemes submitted by the Commission to the Council on 27 October 1987. [84] Article 4 of the proposal implements the principle of equal treatment as regards surviving spouse's benefits. [85]

81 — This is what is provided by Article 2(1)(c) of the rules of the Pension Fund, which has been in force since 1 January 1989.

82 — Law of 17 March 1949, *Staatsblad* J 121.

83 — Article 3(1) of the Wet betreffende verplichte Deelneming in een Bedrijfspensioenfonds.

84 — OJ 1987 C 309, p. 10. In the fifth recital of the preamble to this proposal, express reference is made to Article 9(b) of Directive 86/378.

85 — It is to be noted that Article 4 forms part of Title I of the proposed directive, 'Survivors' benefits', in which it appears alongside provisions intended to implement the principle of equal treatment in the matter of orphans' benefits (Article 5) and other survivors' benefits (Article 6).

Finally, the Netherlands Government finds confirmation of its view that survivors' benefits occupy a specific place in Community law in the Court's judgment in *Newstead*. According to the Pension Fund, in its judgment in that case the Court proceeded from the assumption that a widow's pension is not an element of pay within the meaning of Article 119.

47. I propose to consider first of all the argument which these parties believe they can derive from the judgment in *Newstead*. That case concerned the question of the compatibility with Community law of a United Kingdom occupational pension scheme (again, a contracted-out scheme) which required only male civil servants to contribute 1.5% of their gross salary to a widows' pension fund. Although the gross salary of male and female civil servants was the same, the relevant contributions led to a lower net salary for men. However, the contributions of an unmarried official such as Mr Newstead were paid back, together with compound interest, if he left the civil service or in the event of his death.

The Court held that Article 119, read in conjunction with Directive 75/117, did not preclude such a scheme. [86] It reasoned that the disparity in net salary at issue was in fact the result of the deduction of a contribution to an occupational pension scheme. Since that scheme replaced the statutory scheme, the Court concluded that such a contribution 'must therefore, like a contribution to a statutory social security scheme, be considered to fall within the scope of Article 118 of the Treaty, not of Article 119.' [87]

Asked in the second place whether the scheme rules were compatible with Council Directive 76/207/EEC, [88] the Court held — with reference to Article 3(2) of Directive 79/7 and Article 9(b) of Directive 86/378 cited above (at paragraph 46) — that none of the directives which the Council had established on the progressive implementation of the principle of equal treatment in the field of social security was applicable to survivors' pensions. [89] The Court accordingly concluded that there was no breach of Directive 76/207 either. Thus, according to the Court, the case fell within the exception to the application of the principle of equal treatment provided for in Article 1(2) of Directive 76/207. [90]

48. One should be wary of drawing too far-reaching conclusions from that judgment. After all, in that case the Court was addressing itself to the question whether a difference in net salary between men and women as a result of compulsory affiliation for men to a widows' pension fund constituted discrimination contrary to Article 119; the question whether a widow's pension itself was to be regarded as pay within the meaning of that provision was not in point as such. However, I consider it to be of decisive importance that in *Barber* the Court expressly went back

86 — *Newstead*, cited in footnote 62, paragraph 21.

87 — Paragraph 15 of the judgment in *Newstead*.

88 — Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, OJ 1976 L 39, p. 40.

89 — *Newstead*, paragraphs 25 27.

90 — *Newstead*, paragraph 28. Article 1(2) of this directive refers, with a view to ensuring the progressive implementation of the principle of equal treatment in matters of social security, to provisions which the Council, acting on a proposal from the Commission, is to adopt defining its substance, its scope and the arrangements for its application.

on the view it had taken in *Newstead* that the supplementary pension concerned did not fall under Article 119 but under Article 118: in *Barber* the Court ruled that 'a pension paid under a contracted-out private occupational scheme falls within the scope of Article 119 of the Treaty.' [91]

49. In *Barber* the Court came to that conclusion on the basis of an analysis of the contracted-out occupational pension scheme in question in that case which goes back to the criteria developed in *Defrenne (No 1)* and *Bilka* (see paragraph 3 above) and which I will shortly apply to the widower's pension with which the Ten Oever case is concerned. First of all, however, I would make this point: it follows from the very nature of a widower's pension of the kind now in question that the pension is not granted to the employee but to the employee's surviving spouse. However, I do not see in that circumstance any convincing objection to the application of Article 119 to such a widower's pension despite the way in which the Court defined 'pay' for the purposes of Article 119 (see above, paragraph 3) — 'consideration which *the worker* receives ... in respect of his employment'. The essential point is that under the rules of the Pension Fund, *membership* of the scheme affords entitlement to the widower's pension: [92] in other words, as the United Kingdom rightly points out, the pension is acquired within the employment relationship between employer and employee and therefore paid to surviving spouses *in respect of the employment* of their deceased spouses, i. e., in the words of the pension scheme rules, 'female members or former female members'.

50. There remains the question whether, as the Netherlands Government and the Pension Fund argue, a pension scheme such as the one under consideration is not rather like an old-age pension, as in the first *Defrenne* case, and therefore still falls outside the scope of Article 119. If I apply the criteria developed in the judgments in *Defrenne (No 1)*, *Bilka* and *Barber* (see above, paragraph 3) to the widower's pension in the Ten Oever case, then I must answer that question in the negative. First of all, it is clear that this pension scheme, although made compulsory by law, is the result of *collective consultations* within the industry concerned and is not as such directly established by law. Upon application by the employers' and trade union organizations considered to be representative, which initially drew up the actual terms of the pension scheme through a process of collective bargaining, the State merely stipulates that the scheme concerned is to be made compulsory for an entire industry. The scheme is therefore primarily 'the result ... of an agreement between workers and employers'. [93]

Furthermore, it is not disputed that the pension scheme in question is funded exclusively by employers and employees *without any contributions from the State*. [94]

91 — *Barber*, paragraph 30, and point 2 of the operative part.

92 — Article 2(1), first sentence, of the pension scheme rules, as applying from 1 January 1989.

93 — *Barber*, paragraph 25.

94 — The situation was the same in *Barber*: see paragraph 25 of that judgment.

Finally, the scheme is not compulsorily applicable to general categories of workers but only to *workers employed by certain undertakings*, in particular workers in the window-cleaning and cleaning industry. In the words of the *Barber* judgment, it must therefore be assumed that affiliation to the scheme derives of necessity from the employment relationship with a given employer and that the scheme, even though recognized and made compulsory by the public authorities, is governed by its own rules. [95]

51. It follows that a widower's pension, such as that concerned in the Ten Oever case, falls within the scope of Article 119 of the Treaty. Although I think that, strictly speaking, it was possible, even before the judgment in *Barber* and particularly after the judgment in *Bilka*, to come to this conclusion on the basis of the Court's case-law, I agree with the Netherlands and German Governments and the United Kingdom that the Court's judgment must be limited in time on this point, too. Once again, given the derogation provided for in Article 9(b) of Directive 86/378 (see above, paragraph 46), the Member States and the parties concerned could assume that discrimination in occupational pension schemes as regards the granting of widowers' pensions was still permissible under Community law.

I accordingly consider that, as regards the application of Article 119 to widowers' pensions, the Court must again limit its judgment in time in accordance with the principles which I have indicated above in relation to the temporal effect of the *Barber* judgment. [96] As far as the reference date is concerned, I would consider appropriate not the date of the *Barber* judgment but that of the judgment to be given in the Ten Oever case, since only in that case is the Court asked to rule on this issue.

Concretely, the view I have taken means that, contrary to what the United Kingdom in particular argues, Mr Ten Oever is indeed entitled to the widower's pension which he claims since as a person claiming under a worker he took action in good time to safeguard his rights, namely by initiating legal proceedings on 8 October 1990 before the Kantonrechter at Utrecht.

The question whether Article 119 may be relied upon by the spouse of a deceased worker

52. In the Coloroll case (Question 1), and to some extent in the Ten Oever case as well, the question arises as to whether, apart from the worker himself or herself, persons dependent on the worker, in particular the widow or widower of the worker, may also rely on the direct effect of Article 119 of the EEC Treaty with regard to claims to benefits under a pension scheme.

95 — *Barber*, paragraph 26

96 — Indeed, a similar approach is proposed by the Commission in its proposal of 27 October 1987 for a Council directive mentioned above, wherein Article 13(2) provides that with respect to the application of the principle of equal treatment to benefits of the surviving spouse, the directive may not be relied upon in respect of applications submitted before the date of its implementation

Five of the defendants in the main proceedings in the Coloroll case (James Russell, Gerald Parker, Robert Sharp, Joan Fuller and Judith Broughton), the United Kingdom, Ireland and the Commission have answered this question in the affirmative. The Netherlands Government, on the other hand, argues that Article 119 has in view only the relationship between the employer and the employee. Since the surviving relatives are outside that relationship, they cannot rely independently on that provision. However, the Netherlands Government immediately goes on to point out that the practical significance of this aspect of the scope *ratione personae* of Article 119 is not very great, since surviving relatives will usually be able to rely on Article 119 as heirs in so far as they may in any case be legal successors — under national law on succession — as regards any claims of the deceased worker against the former employer.

53. I cannot accept that last view. I have already reached the conclusion (in paragraph 51) that a widower's pension of the type in question in the Ten Oever case falls within the scope of Article 119 of the EEC Treaty. As far as such a pension scheme is concerned, but also with regard to other occupational pensions, the question whether Article 119 may be relied upon by the worker's surviving spouse usually arises in practice where the worker has died and the surviving spouse subsequently claims the benefits from the pension scheme of which the worker was a member. If, as a matter of law, this spouse could not rely on Article 119, then in such a situation the principle of equal pay would lose its useful effect.

Moreover, the Court has already taken such a view in relation to the application of Directive 79/7, in particular in the *Verholen* judgment. That case concerned *inter alia* the question whether the *spouse* of a worker who falls within the scope of that directive (but who is not a party to the proceedings) may rely on the provisions of that directive if he bears the effects of a discriminatory national provision. The Court expressly recognized that

'the right to rely on the provisions of Directive 79/7 is not confined to individuals coming within the scope *ratione personae* of the directive, in so far as the possibility cannot be ruled out that other persons may have a direct interest in ensuring that the principle of non-discrimination is respected as regards persons who are protected.' [97]

Although the Court admitted that the determination of an individual's standing and legal interest in bringing proceedings was a matter of national law, it referred to its settled case-law according to which Community law requires that national legislation should ensure effective judicial protection and that the application of national legislation must not render virtually impossible the exercise of the rights conferred by Community law. [98] The Court's actual answer to the question raised was that an individual may rely on Directive 79/7 before a national court if he bears the effects of a discriminatory national provision regarding his spouse who is not a party to the proceedings,

97 — Judgment of 11 July 1991 in Joined Cases C-87/90 to C-89/90 *Verholen and Others* v *Sociale Verzekeringsbank* [1991] ECR I-3757, paragraph 23.

98 — *Verholen*, paragraph 24.

provided that his spouse herself comes within the scope of the directive. [99]

54. Consequently, the surviving spouse may also rely on the direct effect of Article 119 with regard to claims to benefits which the deceased worker had under an occupational pension scheme, although, of course, the temporal limitations which I have proposed in relation to the *Barber* judgment and to the issue of actuarial calculation factors also apply on this point, too.

The question whether Article 119 may be relied upon against the trustees of an occupational pension scheme

55. The question submitted to the Court in the Coloroll case (Question 1) is a different one: it is whether employees or those claiming under them may, in relation to claims to pension benefits, also rely on the direct effect of Article 119 *against* a person other than the employer, namely the trustees of an occupational pension scheme. I will first consider the main issue itself, as to whether Article 119 may be relied upon, before going on to deal with the other problems raised in the High Court's questions.

Most of the defendants in the main proceedings in the Coloroll case (all but Judith Broughton and Coloroll Group plc), the United Kingdom and the Commission take the view that Article 119 may be relied upon against the trustees of a pension scheme. I can only endorse their arguments: the practical significance and the useful effect of Article 119 would be considerably reduced — and the necessary judicial protection for the operation of that article substantially impaired — if an employee or those claiming under him could rely on that provision only as against the *employer*. This is especially true of countries like the United Kingdom in which the use of trusts for occupational pension schemes is widespread.

56. Moreover, I find support for this view in both the wording of Article 119 and the case-law of the Court. As far as the *wording* of Article 119 is concerned, the Commission rightly points out that 'pay' includes all consideration which the worker receives *directly or indirectly* from the employer in respect of his employment. The Court accordingly held in *Barber* that the fact that contracted-out occupational pensions are not paid to the employee by the employer himself but by the trustees of a pension scheme is irrelevant for the purposes of Article 119:

'That interpretation of Article 119 is not affected by the fact that the private occupational scheme in question has been set up in the form of a trust and is administered by trustees who are technically independent of the employer, since Article 119 also applies to consideration received indirectly from the employer.' [100]

99 — *Verholen*, paragraph 26, and point 3 of the operative part.

100 — *Barber*, paragraph 29.

Subsequently, in settled *case-law* since *Defrenne (No 2)*, the Court has confirmed that the prohibition of discrimination laid down in Article 119 is mandatory and applies *erga omnes*:

'The prohibition of discrimination between male and female workers contained in [Article 119 of the Treaty], being mandatory, not only applies to the action of public authorities but extends also to all agreements which are intended to regulate paid labour collectively, as well as to *contracts between individuals*.' [101]

From that case-law it follows that the Court does not limit the direct effect of Article 119 to vertical situations (State-private individuals) and contractual conditions agreed collectively or individually between the employer and employees but extends it to *all contracts between individuals*. These undoubtedly include contractual agreements which an employer has made with persons, including trustees, who are engaged in some way or other to administer the pension rights accruing to an employee from the employment relationship with that employer.

57. In my view, this carry-over effect which Article 119 has with regard to the trustees of an occupational pension scheme cannot be resisted by arguing for example, as Judith Broughton does, that the trustees might then be compelled to act in a way which would be contrary to the provisions of the trust deed and it might become impossible for them to give effect to the deed. The fundamental nature of the principle of equal pay for men and women laid down in Article 119, which constitutes an application of the prohibition of discrimination on grounds of sex and therefore of a fundamental right, [102] means that any provision which is contrary to it, whether contained in national legislation, administrative provisions or in a contract or (trust) deed governed by private law, must be overridden by that rule. To take a different view would make it all too easy for the principle of equal treatment to be circumvented by bringing in persons who are not parties to the employment relationship.

Nor do I consider that this view is contradicted by Article 6(2) of Directive 86/378, as the Netherlands Government argues. That provision requires the management bodies of supplementary or contracted-out occupational pension schemes to take account of the principle of equal treatment where the granting of benefits is left to their discretion. I see in that provision merely a confirmation of the Community legislature's intention to give effect to the principle of equal treatment

101 — Judgment of 27 June 1990 in Case C-33/89 *Kowalska* v *Freie und Hansestadt Hamburg* [1990] ECR I-2591, paragraph 12, containing a reference to the judgment in *Defrenne (No 2)*, paragraph 39; on the matter of collective labour agreements, see also the judgment of 7 February 1991 in Case C-184/89 *Nimz* v *Freie und Hansestadt Hamburg* [1991] ECR I-297, paragraph 17.

102 — See the judgment of 15 June 1978 in Case 149/77 *Defrenne* v *Sabena (Defrenne (No 3))* [1978] ECR 1365, paragraph 27; judgment of 20 March 1984 in Joined Cases 75/82 and 117/82 *Razzouk and Reydoun* v *Commission* [1984] ECR 1509, paragraph 16. It is precisely the fundamental nature of the principle of equal treatment in the Community legal order that has repeatedly led the Court to interprete narrowly the derogations from it permitted by the Community legislature: see the judgments in Case 151/84 *Roberts* [1986] ECR 703, paragraph 35, Case 152/84 *Marshall* [1986] ECR 723, paragraph 54, and Case 262/84 *Beets-Proper* [1986] ECR 773, paragraph 38.

as effectively as possible and certainly not any argument *a contrario* according to which the worker or the person (or persons) claiming under him could not, as regards pay discrimination directly caught by Article 119, rely on Article 119 against trustees as well. In any case, that directive cannot detract from the effect of Article 119 (see paragraph 31 above).

58. For the sake of clarity, I will deal with another point raised by the Netherlands Government. This Government points out the complications which, in its view, could be produced by an extension of the horizontal direct effect of Article 119 where a worker is a member of different occupational pension schemes in succession — usually, but not necessarily, as a result of his changing his employer. This point is also touched upon by the High Court in Question 5(2) of its order for reference. In such circumstances, it happens quite frequently (consider Mr Neath's option between a deferred pension and a transfer payment, paragraph 8 above) that the most recent pension scheme, in exchange for a transfer payment, has taken over the previous scheme's obligation to pay benefits. In such a case, can the last pension scheme be confronted with the claims of a worker which are based on unequal treatment to which that worker was subjected under a previous pension scheme with a different employer?

Like the interveners who advocate the second interpretation of the temporal effect of *Barber*, I consider that this feared 'domino' effect will be almost entirely neutralized by the limitations concerning the temporal effect of the Court's rulings which I have proposed, and in particular of the *Barber* judgment itself (paragraph 21, above) as well as of the judgments to be given in the Neath and Coloroll cases in which the Court is asked to rule on the question of actuarial calculation factors (paragraph 43, above). The periods of service in relation to which a worker is entitled to rely on the principle of equal treatment will then be clear for all parties, so that in principle no more problems should arise where transfer payments are made from one pension scheme to another.

59. *The effects of Article 119 in relation to the action of trustees.* In the event that Article 119 may also be relied upon against the trustees of a pension scheme, the High Court poses a number of sub-questions about the way in which the trustees or the employer should act in order to give effect to the principle of equal treatment (Question 1(2)(i), (ii) and (iii)). [103] Essentially, there are two questions to be answered: they concern (i) the effect of Community law on the way in which trustees or employers are to exercise their powers, and (ii) the financial shaping of the equal treatment principle, in particular whether this must be put into effect by increasing the benefits granted to the disadvantaged sex or whether it may also be put into effect by reducing the benefits granted to workers of the advantaged sex.

103 For the exact wording, see the Report for the Hearing.

On the first point, concerning the effect of Community law on *the way in which trustees and employers are to exercise their powers*, I can be brief. It is clear that these persons are bound to do everything within their powers to ensure that benefits payable to workers or those claiming under them are in conformity with the principle of equal treatment, having due regard for the limitations on the temporal effect of that principle proposed above. With this in view, they can be obliged to cooperate with one another, such cooperation being, according to the High Court's order for reference, generally required in order to make amendments to the trust deed and to the rules of the pension scheme. It goes without saying that this leaves a major supervisory task to be performed by the national court, which must ensure that Community law takes full effect and that the legal protection which it requires is available, [104] and to that end — making full use of the discretion conferred upon it by its own national law — must interpret and apply national (legislative and, *a fortiori*, contractual or constitutive) provisions in accordance with Community law or, when this does not appear to be possible, if necessary set aside on its own authority the legislative, contractual or constitutive provisions which conflict with it. [105]

60. The second question, concerning the *financial result* to be achieved as far as employees are concerned, appears to me to be more delicate. A number of defendants in the main proceedings in Coloroll (James Russell, Gerald Parker, Robert Sharp and Joan Fuller) rightly refer in this regard to the judgment in *Defrenne (No 2)*. In that case, the Court, having regard to the social aim underlying Article 119, as reflected in Article 117, which refers to the need to promote improved working conditions and an improved standard of living for workers, stated that 'the objection that the terms of this article may be observed in other ways than by raising the lowest salaries may be set aside'. [106] However, that ground of judgment must be read in its context: the main proceedings concerned a claim for compensation made by Gabrielle Defrenne against her former employer, Sabena, on account of pay discrimination in relation to service which had taken place in the previous decade. The Court's statement may accordingly be regarded as only having in view discrimination occurring *in the past*. The fact that, in relation to such discrimination and pending a measure eliminating it, an *increase* of the lowest salaries is required has been confirmed by more recent case-law: particularly since its judgment in *Razzouk and Beydoun* [107] the Court has indicated that 'the only valid frame of reference' for an immediate implementation of the principle of equal treatment, *so long as* a scheme is still not

104 — This is settled law: see, *inter alia*, the judgment of 19 June 1990 in Case C-213/89 *The Queen* v *Secretary of State for Transport, ex parte Factortame and Others (Factortame (No 1))* [1990] ECR I-2433, paragraph 19, and the judgment of 19 November 1991 in Joined Cases C-6/90 and C-9/90 *Francovich and Bonifaci* v *Italian Republic* [1991] ECR I-5357, paragraph 32.

105 — See the judgment in *Murphy*, cited above in footnote 76, paragraph 11; the judgment in *Nimz*, cited in footnote 101, paragraph 19; the judgment of 9 March 1978 in Case 106/77 *Simmenthal* [1978] ECR 629, paragraph 21.

106 — *Defrenne (No 2)*, paragraph 15.

107 — *Razzouk and Beydoun*, cited in footnote 102, paragraph 19: see, with regard to the criterion of the 'only valid point of reference' applied in that judgment, J. Mertens de Wilmars, 'Le système communautaire de contrôle des sanctions dans le domaine de l'égalité de traitement entre hommes et femmes', in *Egalité de traitement entre les hommes et les femmes, Revue du Travail*, April-May-June 1990, (731), p. 735.

adapted to that principle, is to be found in the pension scheme rules in force. This means that, pending new adjusted rules, the rule applicable under the existing scheme provisions to members of the more favoured sex must also be applied to members of the less favoured sex. [108] As regards the past, or, more precisely, as regards pension benefits which relate to periods of service performed in the past, the principle of equal treatment therefore requires that the benefits of the disadvantaged sex be brought up to the level of those of the advantaged sex.

However, in the case of benefits based on new rules adapted to the principle of equal treatment which govern periods of service *in the future*, the situation is different. Like the Commission, I take the view that Community law does not preclude a reduction of such benefits, so long as those benefits are set at a level which is the same for men and women. To take any other view would entail undesirable Community interference in a policy area which, in the present state of Community law, belongs to the sphere of competence of the Member States, which, as the Court has repeatedly emphasized, 'enjoy a reasonable margin of discretion as regards both the nature of the protective measures and the detailed arrangements for their implementation'. [109]

61. *The relation between the liability of the pension scheme and that of the employer.* In the event that Article 119 may be relied upon against both the employer and the trustees of a pension fund, the High Court poses a number of detailed questions regarding the relation between the liability of the pension fund and that of the employer (Question 1(3)), in particular where the funds of the pension scheme or of the employer are insufficient (Question 1(4)).

Like Judith Broughton, Coloroll Group plc, the United Kingdom and the Commission, I consider that, as Community law stands at present, these questions can only be dealt with at the national level. Article 119 of the EEC Treaty lays down a directly effective duty under which men and women are guaranteed the same pay for the same work. Neither the Treaty nor any other Community legislation regulates the respective liabilities of the employer and third parties as far as the performance of that obligation is concerned, in particular where an occupational pension scheme or the employer is insolvent. However, here again, it is for the national court to give full effect to Community law and to guarantee the necessary judicial protection (see paragraph 54 above). Moreover, it is quite clear that the rules on liability which apply in relation to a breach of Article 119 may not be less favourable than those

108 — The Court applied this criterion in particular in order to ensure application of the principle of equal treatment laid down in Article 4(1) of Directive 79/7 for as long as this directive is not being implemented (in full) by the national legislature: see the judgment of 4 December 1986 in Case 71/85 *Netherlands* v *Federatie Nederlandse Vakbeweging (FNV)* [1986] ECR 3855, paragraph 22; the judgment of 24 March 1987 in Case 286/85 *McDermott and Cotter* v *Minister for Social Welfare and the Attorney-General* [1987] ECR 1453, paragraph 18; the judgment of 24 June 1987 in Case 384/85 *Borrie-Clarke* v *Chief Adjudication Officer* [1987] ECR 2865, paragraph 12; the judgment of 13 December 1989 in Case C-102/88 *Ruzius-Wilbrink* v *Bedrijfsvereniging voor Overheidsdiensten* [1989] ECR 4311, paragraph 20; the judgment in *Kowalska*, cited in footnote 101, paragraph 20; the judgment in *Nimz*, cited in the same footnote, paragraph 18; and the judgment of 11 July 1991 in Case C-31/90 *Johnson* v *Chief Adjudication Officer* [1991] ECR I-3723, paragraph 36.

109 — Judgment of 12 July 1984 in Case 184/83 *Hofmann* v *Barmer Ersatzkasse* [1984] ECR 3047, paragraph 27; judgment of 7 May 1991 in Case C-229/89 *Commission* v *Belgium* [1991] ECR I-2205, paragraph 22, judgment of 19 November 1992 in Case C 226/91 *Molenbroek* [1992] ECR I 5943, paragraph 15.

which apply to similar national claims or be of such a nature as to make it virtually impossible, or extremely difficult, to exercise rights conferred by Community law. [110]

Article 119 and the different methods of funding occupational pension schemes

62. By its Question 5(1) the High Court also seeks to ascertain whether, in the case of pension schemes which are not funded exclusively by employers' contributions but are also funded by compulsory and/or additional voluntary employees' contributions, Article 119 only applies to the benefits payable out of those assets of the fund which are attributable to employers' contributions or also to benefits attributable to the aforesaid employees' contributions.

The answer to this question is of fundamental importance, although I consider it to be obvious. First of all, we must go back to the passage in the *Barber* judgment cited earlier (paragraph 4), in which the Court held that a pension paid under a contracted-out scheme constituted *consideration* paid by the employer to the worker in respect of his employment and consequently fell within the scope of Article 119 of the Treaty. [111] The Court came to this decision on the basis of an analysis of the pension schemes in question, from which it ascertained *inter alia* that they were 'wholly financed by the employer or by both the employer and the workers without any contribution being made by the public authorities in any circumstances'. [112] This shows that, for the purpose of classifying benefits as 'advantages' covered by Article 119, the Court makes no distinction between benefits paid under an occupational pension scheme depending on the *method of funding* such a scheme, whether exclusively on the basis of employers' contributions or on the basis of both employers' and employees' contributions. As a matter of fact, that not only benefits paid out of employers' contributions are covered by Article 119 could already be deduced from the judgment in *Worringham*, in which the Court held that an employee's contribution to a contracted-out pension scheme (under which only men had to make contributions) which was paid by the employer to the pension fund on behalf of the employee constitutes pay within the meaning of Article 119. [113]

In practice, such a distinction between employers' and employees' contributions would be ineffective in any case. Normally, both forms of contribution are not kept separate in the pension scheme's assets and are managed as one whole fund. Yet, even if a distinction were possible, I consider it to be completely arbitrary and undesirable: schemes which are funded exclusively by employers' contributions would then have to

110 — This has already been expressly confirmed by the Court in equal treatment cases: see, with regard to Directive 79/7, the judgment in *Verholen*, cited in footnote 97, as well as the judgment of 25 July 1991 in Case C-208/90 *Emmott* v *Minister for Social Welfare and the Attorney-General* [1991] ECR I-4269, paragraph 16. See, more particularly, as far as claims for compensation are concerned, the judgment in *Francovich and Bonifaci*, paragraph 43. The three judgments refer on this point to the judgment of 9 November 1983 in Case 199/82 *Amministrazione delle Finanze dello Stato* v *San Giorgio* [1983] ECR 3595, in particular paragraph 12.

111 — *Barber*, paragraph 28; see, too, the last sentence of paragraph 25: 'Accordingly, such schemes form part of the consideration offered to workers by the employer'.

112 — *Barber*, paragraph 25.

113 — *Worringham*, paragraph 17.

apply the principle of equal treatment in full, whereas it would only partly apply — namely not as far as employees' contributions are concerned — to schemes whose funding also depends on employees' contributions. This would undoubtedly lead to a large number of devices designed to circumvent Article 119 and therefore to new forms of discrimination.

63. In my view, largely the same reasons support the case for not allowing, as far as the application of Article 119 is concerned, any distinction according to whether *compulsory or voluntary employees' contributions* are involved. The arguments put forward by a number of interveners to the effect that such optional employees' contributions are managed in a separate fund and that the corresponding benefits are not usually calculated on the basis of the member's service and pay but through the determination of a specific sum which corresponds to the value of the contributions paid cannot convince me otherwise. Here again, these are invariably benefits which are paid under a contracted-out or supplementary pension scheme and so it cannot be denied that they, too, form part of the consideration which an employer offers to his employees in respect of their employment, within the meaning of the *Barber* judgment. In other words, Article 119 is applicable to *all benefits* which are paid under an occupational pension scheme to employees *in respect of their employment*.

Applicability of Article 119 to pension schemes having members of only one sex

64. By its sixth and last question the High Court seeks to ascertain whether Article 119 applies to schemes which have at all times had members of only one sex. More specifically, it asks whether a member of such a scheme is entitled to additional benefits to which that member would have been entitled as a result of Article 119 had the scheme had a member or members of the other sex.

65. From the point of view of Article 119, this question can be answered quite simply, since pension schemes having members of only one sex generally, if not always, relate to an undertaking or company division in which only workers of one sex are employed. In the judgment in *Macarthys* the Court expressly rejected the argument that a female worker can rely on Article 119 in order to claim the pay to which she would be entitled if she were a man, even if there are or were no male employees in the undertaking or service concerned who perform or performed the same work (the 'hypothetical male worker' criterion). The Court held that, under Article 119, comparisons are confined to 'parallels which may be drawn on the basis of concrete appraisals of the work actually performed by employees of different sex

within the same establishment or service'. [114] In other words, if only workers of one sex work in an undertaking or division of an undertaking, those workers may not rely on Article 119 with a view to the equalization of their pay and other consideration to the level of the pay and consideration which a hypothetical worker of the other sex would receive: in such a case, the criterion of equal, or at least comparable, work by workers of the other sex, which is essential for the application of Article 119, cannot be applied.

Matters would be different, of course, if an employer decided to propose separate pension schemes to his employees depending on their sex. In that event, which, as the United Kingdom rightly points out, falls outside the ambit of the question asked by the High Court, it seems to me that Article 119 requires an examination to establish whether the pension benefits granted to male and female employees — this time under different pension schemes — meet the 'equal pay' and 'equal work' criteria laid down in Article 119.

Conclusion

66. In view of the foregoing considerations, I propose that the Court should answer the questions arising in these cases as follows:

In Cases C-109/91, C-110/91, C-152/91 and C-200/91:

The direct effect of Article 119 of the Treaty may not be relied upon in order to claim entitlement to an occupational pension which was acquired in connection with periods of employment served prior to the date of the judgment of 17 May 1990 in Case C-262/88 *Barber* [1990] ECR I-1889, except in the case of workers or those claiming under them who have before that date initiated legal proceedings or raised an equivalent claim under the applicable national law.

In Case C-109/91:

A widower's pension of the kind in question in this case is to be regarded as 'pay' within the meaning of the second paragraph of Article 119 of the EEC Treaty.

114 — *Macarthys*, paragraph 15.

However, Article 119 may not be relied upon in this respect in order to claim entitlement to such a widower's pension in so far as this pension corresponds to periods of employment served before the date of the judgment of the Court in this case, except in the case of workers or those claiming under them who have before that date initiated legal proceedings or raised an equivalent claim under the applicable national law.

In Cases C-110/91 and C-200/91:

The prohibition resulting from Article 119 of the EEC Treaty with regard to the setting of a pensionable age varying according to sex, as well as the temporal limitation of that rule, as prescribed in the judgment of 17 May 1990 in Case C-262/88 *Barber*, are not only applicable to contracted-out pension schemes but also to all other forms of occupational pension schemes.

In Cases C-152/91 and C-200/91:

Article 119 of the Treaty precludes account from being taken, in an occupational pension scheme, of actuarial calculation factors varying according to sex, at least in so far as this leads to men and women paying different contributions or receiving different benefits. The direct effect of Article 119 may not, however, be relied upon in this regard in relation to pension entitlements which correspond to periods of employment served before the date of the judgment in these cases, except in the case of workers or those claiming under them who have before that date initiated legal proceedings or raised an equivalent claim under the applicable national law.

In Case C-200/91:

(1) The surviving spouse may also rely upon the direct effect of Article 119 of the EEC Treaty with regard to entitlements to benefits which the deceased worker had under an occupational pension scheme.

(2) An employee or those entitled under him may rely upon Article 119 of the Treaty against the trustees of an occupational pension scheme.

(3) The trustees of an occupational pension scheme are obliged under Article 119 of the Treaty to do everything within their powers in order to ensure that benefits to be paid to employees or those entitled under them comply with the principle of equal treatment laid down in that article.

(4) So long as Article 119 of the EEC Treaty has not been properly implemented, the pension benefits of the disadvantaged sex must be brought up to the level of those of the advantaged sex. However, Community law does not prevent new scheme rules, adapted to the principle of equal treatment, which relate to periods of service in the future, from reducing pension benefits, so long as those benefits are set at a level which is the same for men and women.

(5) As Community law stands at present, the question as to the relation between the liability of a pension scheme and that of the employer with regard to breaches of Article 119 of the EEC Treaty, particularly where the funds of one of those parties are insufficient, can be dealt with only at the national level. However, Community law requires the national rules on liability which apply in relation to breaches of Article 119 to be no less favourable than those which apply to similar national claims and that they must not be of such a nature as to make the exercise of rights conferred by Community law virtually impossible or extremely difficult.

(6) It is immaterial for the purposes of Article 119 of the Treaty whether an occupational pension scheme is funded exclusively on the basis of employers' contributions or also on the basis of compulsory or voluntary employees' contributions.

(7) Where only employees of one sex work within an undertaking or division of an undertaking and those employees are members of an occupational pension scheme having members only of that sex, those employees may not rely on Article 119 of the EEC Treaty with a view to the equalization of their pensions with that which an hypothetical worker of the other sex would receive.