OPINION OF ADVOCATE GENERAL COSMAS
delivered on 13 July 1995 *

1. In this case, the Court has been asked, by order of the Kantonrechter (Cantonal Court), Rotterdam, to give a preliminary ruling on the interpretation of Article 119 of the EC Treaty as it applies to access to an occupational pension scheme, the interpretation of the judgment in *Barber* v *Guardian Royal Exchange Assurance Group* delivered by the Court on 17 May 1990, [1] and the interpretation of the Protocol (No 2) concerning Article 119, annexed to the EC Treaty by the Treaty on European Union of 7 February 1992.

I — The dispute

2. The main proceedings concern the effects of the *Barber* judgment for women working part-time. Mrs Francina Johanna Maria Dietz worked part-time, in her case seven hours per week, as a helper for the aged from 11 December 1972 to 6 November 1990 for the Stichting Thuiszorg Rotterdam (hereinafter 'Thuiszorg'), the defendant, and its predecessor in law (Stichting Katholieke Maatschappelijke Gezinszorg). On 6 November 1990, Mrs Dietz reached the age of 61 and, in accordance with an agreement which she had entered into with her employer on 18 July 1990, took early retirement under Thuiszorg's voluntary early retirement scheme (*vervroegde uittredingsregeling*). Pursuant to the Law on compulsory affiliation to an occupational pension fund (*wet betreffende verplichte deelneming in een bedrijfspensioenfonds*, hereinafter 'the BPF Law'), [2] Thuiszorg is affiliated to the 'Pensioenfonds voor de Gezondheid-, Geestelijke en Maatschappelijke Belangen' (hereinafter the 'PGGM'). According to the order for reference, its affiliation to that occupational pension fund is compulsory by virtue of Article 3 of the BPF Law. That article provides that the Minister for Social Affairs and Labour may, at the request of representatives of the professional associations of the sector concerned, make affiliation to an occupational pension fund compulsory.

3. Until 1 January 1991, Mrs Dietz was not entitled to join her employer's pension scheme because part-time workers who, like Mrs Dietz, worked for 40% or less of full time were excluded from the scheme. Thus

* Original language: Greek.

1 — C-262/88 [1990] ECR I-1889.

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

Mrs Dietz was not entitled to any pension rights under the former pension scheme before 1 January 1991. On 1 January 1991, that restriction was removed as part of the adaptation of the pension fund system to 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. [3] In the course of that adaptation, a transitional regime was set up providing for workers who had been excluded from the PGGM to be granted a pension on the basis of a transitional benefits scheme (*Overbruggingsuitkering*, hereinafter the 'OBU').

4. On 2 December 1992, Mrs Dietz issued proceedings against Thuiszorg before the Kantonrechter, Rotterdam. In the main proceedings, Mrs Dietz submits that on 6 November 1990 she would have postponed her early retirement had she known that with effect from 1 January 1991 the exclusion of part-timers from the right to a pension would cease to apply and she would be able to claim a pension under the OBU on the basis of the abovementioned transitional scheme, which was introduced when the exclusion of part-timers was removed. Mrs Dietz claims that she was not aware of the modification in question concerning the removal of that exclusion, whereas Thuiszorg, by contrast, was aware of the removal of the exclusion and should have informed her of it. The plaintiff submits that Thuiszorg acted in breach of Article 119 of the EC Treaty since it did not admit her to the PGGM with which it had concluded an agreement. According to the plaintiff, the principle of equal pay for men and women, contained in Article 119, entitles her to insurance cover and, therefore, to a corresponding pension with retroactive effect to 8 April 1976, date of the judgment in *Defrenne II* [4] in which the Court held that that article had horizontal direct effect. Mrs Dietz therefore asks the abovementioned court to order Thuiszorg to admit her to the PGGM pension scheme as from 8 April 1976 or to take all measures to enable her to obtain, from the date on which she attains retirement age, a pension as if she had been accepted as a member of the PGGM since 8 April 1976.

5. The defendant counters by arguing that when it concluded an agreement with the plaintiff for early retirement it still did not know that the removal of the exclusion of part-timers would be accompanied by the adoption of a transitional scheme for such workers. Thuiszorg claims furthermore that it has no power or influence whatsoever on the PGGM's decisions and that the plaintiff

3 — OJ 1986 L 225, p. 40.

4 — Case 43/75 [1976] ECR 455.

should direct her claims concerning her membership of the pension scheme at issue directly to that fund and not to Thuiszorg, which is therefore not the proper defendant. Thuiszorg also contends that the plaintiff's claim concerning her insurance cannot be given retroactive effect to 8 April 1976 because of the *Barber* judgment. Considering that certain clarifications of Community law were necessary for the resolution of the dispute, the Cantonal Court, Rotterdam, decided to stay the proceedings and refer several questions to the Court of Justice for a preliminary ruling pursuant to Article 177 of the EC Treaty.

II — The questions referred

6. The Rotterdam Cantonal Court, by order of 18 October 1993, [5] asks the Court of Justice to rule on questions which the Utrecht Cantonal Court had already referred to the Court by its order of 18 March 1993 in *Fisscher*. [6] The order of the Rotterdam Cantonal Court expressly refers to the questions referred by the Utrecht Cantonal Court, which it also supplements.

5 — OJ C 338 of 15 December 1993, p. 12.

6 — Case C-128/93 [1994] ECR I-4583.

The complete text of the questions referred is as follows:

'(1) Does the right to equal pay laid down in Article 119 of the EEC Treaty include the right to join an occupational pension scheme such as that at issue in this case which is made compulsory by the authorities?

(1) (a) Is the answer to Question 1 referred by the Utrecht Cantonal Court in the abovementioned order the same:

(a) if the adoption of the BPF Law was based not only on considerations of social policy (when a pension scheme is set up for a particular branch of industry the costs are borne jointly by all undertakings in that branch) but also by the desire to prevent unfair competition in that branch?

(b) if automatic obligation to provide cover was provided for in the original draft of the BPF but not in the law which was finally adopted (TK 1948-1949 785, No 6)?

(c) whether or not Thuiszorg Rotterdam lodged a complaint against the order making the cover compulsory (thus bypassing the Minister)?

(d) whether or not Thuiszorg made an investigation among its employees which might have justified seeking an exemption or the employees were informed of the possibility of having an exemption?

(2) If the answer to Question 1 is in the affirmative, does the temporal limitation imposed by the Court in *Barber* for pension schemes such as those considered in that case ("contracted-out schemes") apply to the right to join an occupational pension scheme such as that at issue in this case, from which the plaintiff was excluded because she was a married woman?

(2) (a) If the answer to Question 1 is in the affirmative, does the temporal limitation imposed by the Court in *Barber* for pension schemes such as those considered in that case ("contracted-out schemes") apply to the payment of a retirement pension?

(3) Where membership of a pension scheme applied in an undertaking is made compulsory by law, are the administrators of the scheme (the occupational pension fund) bound to apply the principle of equal treatment laid down in Article 119 of the EEC Treaty, and may an employee who has been prejudiced by failure to apply that rule sue the pension fund directly as if it were the employer?

(2) If the answer to Question 1 is in the affirmative, does the temporal limitation imposed by the Court in *Barber* for pension schemes such as those considered in that case ("contracted-out

In considering this question it may be relevant that the Cantonal Court has no jurisdiction to hear a claim based on

unlawful conduct, since the extent of the claim exceeds the limits of its jurisdiction. In this case, therefore, it is relevant to know whether the plaintiff may claim against the pension fund on the basis of her contract of employment.

(4) If under Article 119 of the EEC Treaty the plaintiff is entitled to be a member of the occupational pension scheme from a date prior to 1 January 1991, does that mean that she is not bound to pay the premiums which she would have had to pay had she been admitted earlier to the pension scheme?

(5) Is it relevant that the plaintiff did not act earlier to enforce the rights which she now claims to have?

(6) Do the Protocol concerning Article 119 of the EEC Treaty appended to the Treaty of Maastricht ("the *Barber* Protocol") and the (draft law amending) the transitional Article III of Draft Law 20890, which is intended to implement the Fourth directive, affect the assessment of this case which was brought before the Cantonal Court by writ of summons issued on 16 July 1992?'

The questions set out above raise problems concerning the application of Article 119 of the Treaty to occupational pension schemes and the validity of the limitation of the effects in time of the *Barber* judgment.

III — The relevant legislation and case-law

7. Article 119 of the Treaty provides as follows: 'Each Member State shall during the first stage ensure and subsequently maintain the application of the principle that men and women should receive equal pay for equal work.

For the purpose of this Article, "pay" means the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives, directly or indirectly, in respect of his employment from his employer.

Equal pay without discrimination based on sex means:

(a) that pay for the same work at piece rates shall be calculated on the basis of the same unit of measurement;

(b) that pay for work at time rates shall be the same for the same job.'

In *Bilka*, [7] which was confirmed by *Barber* and by *Ten Oever*, [8] the Court held that both the right to join an occupational pension scheme and the right to benefits payable by such schemes fell within the scope of Article 119. More specifically, the Court held in *Barber* that, in contrast to benefits paid by national statutory social security schemes, pensions paid by occupational social security schemes were benefits paid by the employer to the worker by reason of the latter's employment and that consequently they fell within the definition of 'pay' within the meaning of Article 119 of the EC Treaty.

8. The practical consequence of that case-law is that, in relation to occupational pension schemes, determining pensionable age by reference to the sex of the recipient of the pension constitutes discrimination prohibited by Article 119, notwithstanding the fact that Directive 86/378/EEC on the implementation of the principle of equal treatment for men and women in occupational social security schemes [9] permits derogations from the principle of equal treatment for men and women in relation to the determination of pensionable age (Article 9(a) of the directive), as moreover does 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. [10] The consequence of that judgment is that Directive 86/378 is almost entirely devoid of purpose, since the grant of pensions by occupational pension schemes may no longer be considered as falling within the scope of that directive but within the scope of Article 119.

9. The Court however limited the effects in time of *Barber* by ruling 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

7 — Case 170/84 [1986] ECR 1607.

8 — Case C-109/91 [1993] ECR I-4879.

9 — See also the corrigendum published in OJ 1986 L 283, p. 27. The period prescribed for implementation of that directive by the Member States expired on 30 July 1989.

10 — OJ 1979 L 6, p. 24.

raised an equivalent claim under the applicable national law.' [11] Clarifying the scope of that limitation, the Court ruled in *Ten Oever* that 'By virtue of the judgment of 17 May 1990 in Case C-262/88 *Barber* v *Guardian Royal Exchange* the direct effect of Article 119 of the Treaty may be relied upon, for the purpose of claiming equal treatment in the matter of occupational pensions, only in relation to benefits payable in respect of periods of employment subsequent to 17 May 1990, subject to the exception in favour 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.' [12]

10. Protocol (No 2) (hereinafter 'the *Barber* Protocol'), which was added to the EC Treaty on 1 November 1993, the date when the Treaty on European Union entered into force, also seeks to clarify the effects in time of the direct effect of Article 119 of the Treaty in the occupational pension schemes sector. That protocol reads as follows: 'For the purposes of Article 119 of the 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.' That protocol thus adopted the same solution as that which had been applied by the Court in the case-law cited above.

IV — Replies to the questions referred

11. In the States where there is a long tradition of occupational pension schemes, a serious problem has come to light regarding the repercussions and effects in time of applying the principle of equal pay, laid down in Article 119, to those schemes; that problem has given rise to numerous preliminary references.

This case arises in the context of that problem. In *Fisscher*, cited above, the Court has already replied to the majority of the questions referred by the Rotterdam Cantonal Court.

The first question referred

12. This question has two parts. In the first part, the Rotterdam Cantonal Court asks

11 — See point 5 of the operative part of the *Barber* judgment.

12 — Point 2 of the operative part of the judgment. That decision has since been confirmed by Case C-110/91 *Moroni* [1993] ECR I-6591, point 3 of the operative part of the judgment, and Case C-152/91 *Neath* [1993] ECR I-6935, point 1 of the operative part of the judgment.

whether the right to join an occupational pension scheme is covered by the prohibition of discrimination laid down by Article 119 of the EC Treaty. The Court has already answered this question in the affirmative in *Fisscher*. [13] I will merely point out that the PGGM, the fund at issue in the present case, has the same characteristics as the pension scheme in *Fisscher*. According to the order for reference and the observations submitted to the Court by the defendant in the main proceedings, this case also concerns an occupational pension scheme which satisfies the criteria laid down in the *Barber* judgment. It is thus a scheme which the entire occupational sector concerned is required to join, which was set up following collective bargaining within the sector concerned rather than directly by statute, which is financed by the employers and the workers with no contribution from the public authorities, and which applies not to general categories of worker but solely to workers employed in a specific sector. Consequently, Article 119 and the principle of equal pay for men and women are also applicable to the PGGM.

13. By the second part (1)(a) of the first question, the national court asks whether the facts which it has set out affect the abovementioned conclusion with regard to the application of Article 119 of the Treaty to the right to join an occupational pension scheme. I consider that those facts are not such as to affect the fact that membership of an occupational pension scheme is to be treated as a benefit conferred by the employer on the worker by virtue of the employment relationship within the meaning of Article 119 of the EC Treaty, nor, consequently, to call in question the application of that article to this case. Neither the reasons which prompted the Netherlands legislature to enact the BPF law, nor the provision concerning compulsory membership in the initial draft law which was not finally adopted, nor the question whether Thuiszorg raised objections to compulsory membership, nor the fact that Thuiszorg carried out an investigation among workers as the possibility of an exemption from compulsory membership, has any effect on the criteria which I have just set out and on the basis of which, according to the *Barber* judgment, membership of occupational pension schemes and the benefits paid by those schemes are treated as benefits conferred by the employer on the worker by virtue of the employment relationship.

The second question referred

14. This question also has two parts. By the first part, the Rotterdam Cantonal Court asks whether the limitation of the effects in time of the *Barber* judgment also applies to the right to join an occupational pension scheme such as that at issue in this case. The Court has also replied to this question in *Fisscher*. It ruled that the 'limitation of the

13 — See point 1 of the operative part of the judgment.

effects in time of the *Barber* judgment does not apply to the right to join an occupational pension scheme.' [14]

15. A comparison of the two parts of the second question shows that the second part (2)(a) raises the problem whether, given the replies to the preceding questions, the limitation in time of the possibility of invoking the direct effect of Article 119, laid down by the case-law of the Court and by the *Barber* Protocol, applies to the payment of pension benefits where an occupational pension scheme has been joined with retroactive effect. The national court is asking essentially whether, with regard to the limitation in time at issue, a distinction must be drawn between the right to join an occupation pension scheme and the right to payments under that scheme.

16. In the judgments in *Ten Oever* and *Moroni*, cited above, the Court accepts that the principles laid down in the *Barber* judgment, including that of the limitation in time, also apply to other occupational pension schemes. That is so, for example, in the case of supplementary occupational pension schemes. It follows that the *Barber* judgment cannot be regarded as applying solely to the contracted-out occupational pension schemes with which it was concerned. Consequently and as explained above, the pension scheme in question falls, by its nature, within the scope of the limitation in time.

17. The next issue is the scope of the application of the limitation in time with regard to the benefits paid. The *Barber* Protocol, which adopted the same solution as the *Barber* judgment, provides essentially that benefits under an occupational social security scheme are not to be considered to be pay within the meaning of Article 119 if they concern periods of employment before 17 May 1990. Consequently there is no obligation to observe the principle of equal treatment with regard to benefits relating to periods of employment before that date.

The general character of the terms of the protocol suggests that the limitation in time which it lays down covers *all* benefits granted by occupational social security schemes. That consequence has been confirmed by the Court, which noted in its

14 — Point 2 in the operative part of the judgment.

recent judgments in *Fisscher*, cited above, and *Beune* and *Vroege* [15] that, while 'extending it to all benefits payable under occupational social security schemes ..., Protocol No 2 essentially adopted the same interpretation of the *Barber* judgment as did the *Ten Oever* judgment.' [16] Thus, in contrast to the right to join an occupational pension scheme which, as stated above, is not subject to a limitation in time, the right to a benefit (such as an old-age pension) payable by such a scheme is subject to the limitation in time.

18. The practical consequence of applying the limitation in time to the benefits payable by pension schemes is that, where the Court has found discrimination and so long as measures for bringing about equal treatment have not been adopted by the scheme, Article 119 requires, for the period after 17 May 1990, the 'grant to the persons in the disadvantaged class [of] the same advantages as those enjoyed by the persons in the favoured class.' [17] Thus, where the difference concerns retirement age, in order to bring about equality the pension rights of men must be calculated on the basis of the same retirement age as that for women. [18] That does not apply, however, for periods of employment before 17 May 1990. With regard to those periods, the application of Article 119 is not compulsory and employers and trustees of occupational pension schemes are not required to observe the principle of equal treatment for benefits payable in respect of those periods. [19]

19. It is logical that those principles should also apply in the case of workers who, because of discrimination, had been excluded from an occupational social security scheme which subsequently accepted them as members with retroactive effect. After joining that scheme, those workers will be unable to require application of Article 119 to the benefits relating to periods of employment before 17 May 1990.

20. Consequently, the fact that there is no limitation in time for the application of Article 119 to joining an occupational social security scheme does not mean that that article applies without limitation in time to the payment of benefits payable.

Any other interpretation would favour workers who, because of discrimination, had

15 — Case C-7/93 *Beune* [1994] ECR I-4471 and Case C-57/93 *Vroege* [1994] ECR I-4541.

16 — See *Fisscher*, paragraph 49, *Beune*, paragraph 61, and *Vroege*, paragraph 41.

17 — Case C-408/92 *Advel Systems* [1994] ECR I-4435, paragraph 17.

18 — See paragraph 18 of the judgment in *Advel Systems*.

19 — See paragraph 19 of the judgment in *Advel Systems*.

been excluded from an occupational scheme which subsequently accepted them as members with retroactive effect, since those workers would be able to rely on the principle of equality in determining the amount of the benefits payable to them for the periods of employment before 17 May 1990 whereas workers who had been members of the scheme in question from the beginning would not have such a right.

That distinction cannot be accepted. As the Court stressed in *Fisscher*, the worker 'cannot claim more favourable treatment, particularly in financial terms, than he would have had if he had been duly accepted as a member.' [20]

Those considerations lead me to conclude that the limitation in time of the right to rely on the direct effect of Article 119 applies in principle to the right to the payment of a pension by an occupational pension scheme where the worker was accepted as a member of that scheme with retroactive effect.

21. A further question which arises is whether that consequence covers all the forms of discrimination concerning the right to benefits. In order to answer that question, the decisions in *Bilka* and in *Barber* must be compared. In *Bilka*, the Court ruled that, in so far as the criteria which it laid down in *Defrenne I* [21] and subsequently applied in *Barber* are satisfied, benefits granted under an occupational pension scheme are 'pay' within the meaning of Article 119 of the EC Treaty and the exclusion of part-time workers from such an occupational pension scheme infringes Article 119 where it affects a far greater number of women than men, unless the undertaking shows that the exclusion is based on objectively justified factors unrelated to any discrimination on grounds of sex. [22] In that judgment, the Court did not provide for a limitation in time, since the solutions which it adopted were limited to explaining the earlier case-law.

22. In *Barber*, on the other hand, the Court replied for the first time to the question to what extent determining different retirement ages depending on sex in the context of occupational pension schemes constitutes unlawful discrimination. [23] When it answered that question in the affirmative, the Court deemed it necessary to limit the effects

20 — See paragraph 36 of the judgment.

21 — Case 80/70 [1971] ECR 445.

22 — See paragraphs 16 to 18 and 31 of the judgment and point 1 of the operative part.

23 — See paragraph 16 of the judgment in *Moroni*, cited above.

in time of its judgment. It essentially based that limitation:

— first, on the fact that the Community legislation, specifically Article 9(a) of Directive 86/378/EEC, [24] permitted exceptions with regard to pensionable age and that consequently the Member States and the parties concerned were reasonably entitled to consider that the principle of equality between men and women did not apply in that case,

— secondly, on the observation that the retroactive effect of the judgment might upset the financial balance of many occupational pension schemes.

23. Consequently, the limitation in time of the possibility of invoking the direct effect of Article 119 solely concerns discrimination which might be justified on the basis of exceptions provided for in Community provisions, such as Article 7 of Directive 79/7 and Article 9 of Directive 86/378. That was also confirmed by the Court in *Vroege* and *Fisscher*, in which it ruled that 'the limitation of the effects in time of the *Barber* judgment concerns only those kinds of discrimination which employers and pension schemes could reasonably have considered to be permissible owing to the transitional derogations for which Community law provided and which were capable of being applied to occupational pensions.' [25]

That is not however the case with regard to the discrimination at issue here, namely discrimination against part-time workers. In such a case, it cannot be accepted that the Member States and the parties concerned reasonably considered that the derogations from equality were permissible with regard to part-time workers.

24. Neither Directive 79/7 nor Directive 86/378 permits such a conclusion, since they contain nothing capable of supporting the proposition that part-time workers may be excluded from occupational pension schemes. On the contrary, those two directives expressly prohibit all 'discrimination on the basis of sex, either directly or indirectly, by reference in particular to marital or family status', especially as regards 'conditions of access [to the schemes]'. [26] Consequently, as Advocate General Van Gerven also

24 — That article repeats the exception laid down by Article 7(1)(a) of Directive 79/7.

25 — See paragraph 27 of *Vroege* and paragraph 24 of *Fisscher*.

26 — Article 5(1) of Directive 86/378 and Article 4(1) of Directive 79/7.

pointed out in *Vroege* and *Fisscher*, 'it was clear from the outset that excluding ... from pension schemes ... part-time workers through indirect discrimination not having any objective justification went beyond the derogations allowed and was therefore unlawful.' [27]

25. With regard to the case-law, the Court stated in *Jenkins* v *Kingsgate* [28] that inequalities in pay between full-time and part-time workers may constitute discrimination prohibited by Article 119. Specifically, it ruled in that judgment that 'if it is established that a considerably smaller percentage of women than of men perform the minimum number of weekly working hours required in order to be able to claim the full-time hourly rate of pay, the inequality in pay will be contrary to Article 119 of the Treaty where, regard being had to the difficulties encountered by women in arranging to work that minimum number of hours per week, the pay policy of the undertaking in question cannot be explained by factors other than discrimination based on sex.' [29] The Court has developed that test in its subsequent judgments and applies it consistently in its case-law. [30]

26. Moreover, with regard to the financial burdens which would weigh on employers and pension funds if the right to join occupational pension schemes and to be paid pensions by those schemes were not limited in time, it must be emphasized that, as is apparent from *Fisscher*, the fact that the worker may claim retroactive membership of an occupational pension scheme does not entitle him to avoid paying the contributions relating to the period of membership concerned. Consequently, there is no danger of seriously upsetting the financial balance of such a scheme with retroactive effect.

27. Accordingly, the limitation in time, imposed by *Barber*, cannot generally extend to all forms of sex discrimination concerning the right to benefits. In so far as the conditions which led to the effects of *Barber* being limited in time are not satisfied, forms of discrimination such as that at issue in this case cannot be regarded as included in that limitation.

28. It remains to consider whether the *Barber* Protocol may none the less impose a limitation in time for benefits payable under the occupational pension scheme at issue. It could be argued that the broad terms of the *Barber* Protocol, which extended the limitation in time to all benefits payable by an occupational social security scheme, unquestionably show that the protocol applies to all

27 — Point 17 of the Opinion in *Vroege*.

28 — Case 96/80 [1981] ECR 911.

29 — Paragraph 13.

30 — See *Bilka*, paragraphs 24 to 31 and 36, and Case 171/88 *Rinner-Kühn* [1989] ECR 2743, paragraphs 12 to 16; Case C-33/89 *Kowalska* [1990] ECR I-2591, paragraphs 13 to 16; Case C-184/89 *Nimz* [1991] ECR I-297, paragraphs 12 to 15; and Case C-360/90 *Bötel* [1992] ECR I-3589, paragraphs 18 and 21 to 27.

occupational pension schemes and *any* sex discrimination existing in that sector, including therefore indirect discrimination against part-time workers. Such an interpretation cannot however be accepted, given that the protocol must be interpreted in the light of the *Barber* judgment and the subsequent case-law clarifying that decision. The Court moreover has confirmed this in *Vroege* and *Fisscher*, in which it noted that it is clear that the protocol is linked to the *Barber* judgment since it refers to the date of the judgment, 17 May 1990, and essentially adopted the same interpretation of the *Barber* judgment as did the *Ten Oever* judgment. [31] Consequently, as Advocate General Van Gerven also stressed in *Vroege* and *Fisscher*, the 'aim and intention of the *Barber* Protocol is ... to clarify the effects in time of the *Barber* judgment'. [32]

29. Accordingly, the limitation in time which is laid down in the protocol and which follows from the *Barber* judgment, as clarified in the later cases, applies to sex discrimination relating to pensionable age and to the other cases for which Directive 86/378 provided exceptions. In those cases, the interested parties were reasonably entitled until the date of the *Barber* judgment to consider that exceptions to the principle of equal pay continued to be permitted. The limitation in time laid down by the *Barber* Protocol, however, cannot be so extended to indirect discrimination based on part time, since, as explained above, Directive 86/378 provides for no such exception. [33]

Consequently, in so far as concerns discrimination not covered by the *Barber* judgment and Protocol, there can be no distinction for the purposes of the application in time of the direct effect of Article 119 between the right to join an occupational pension scheme and the fact of claiming entitlement to a pension under that scheme.

The third, fourth, fifth and sixth questions referred

30. These questions are identical to those referred by the national court in *Fisscher*. The replies given by the Court in that case, in its judgment of 28 September 1994 (points 3 to 6 of the operative part), therefore apply also to this case.

31 — See paragraph 41 of *Vroege* and paragraph 49 of *Fisscher*.

32 — Point 23 of the Opinion in *Vroege*.

33 — See also the Opinion of Advocate General Van Gerven in *Vroege* and *Fisscher*, points 23 to 25. See, however, the Opinion of Advocate General Jacobs in *Beune* (point 56 et seq.).

V — Conclusion

31. In the light of the above, I propose that the Court reply as follows to the questions referred by the Cantonal Court, Rotterdam, for a preliminary ruling:

(1) The right to join an occupational pension scheme falls within the scope of Article 119 of the EEC Treaty and is therefore covered by the prohibition of discrimination laid down by that article.

(1) (a) The reply to the preceding question is not affected by the facts which the national court sets out in the second part (1)(a) of the first question referred.

(2) The limitation of the effects in time of the judgment of 17 May 1990 in Case C-262/88 *Barber* v *Guardian Royal Exchange Assurance Group* does not apply to the right to join an occupational pension scheme.

(2) (a) In so far as discrimination is covered by the *Barber* judgment, the limitation of the effects in time of that judgment also applies to the right to a retirement pension under an occupational pension scheme which a worker who was accepted as a member of that scheme with retroactive effect may assert.

(3) The administrators of an occupational pension scheme must, like the employer, comply with the provisions of Article 119 of the Treaty and a worker who is discriminated against may assert his rights directly against those administrators.

(4) The fact that a worker can claim retroactively to join an occupational pension scheme does not allow the worker to avoid paying the contributions relating to the period of membership concerned.

(5) The national rules relating to time-limits for bringing actions under national law may be relied on against workers who assert their right to join an occupational pension scheme, provided that they are not less favourable for that type of action than for similar actions of a domestic nature and that they do not render the exercise of rights conferred by Community law impossible in practice.

(6) The Protocol (No 2) concerning Article 119 of the Treaty establishing the European Community, annexed to the Treaty on European Union, does not affect the right to join an occupational pension scheme, which is governed by the judgment of 13 May 1986 in Case 170/84 *Bilka-Kaufhaus* v *Hartz*.