JUDGMENT OF THE COURT (Fifth Chamber)
12 September 2002 *

In Case C-351/00,

REFERENCE to the Court under Article 234 EC by the Vakuutusoikeus (Finland) for a preliminary ruling in the proceedings brought by

Pirkko Niemi

on the interpretation of Article 119 of the EC Treaty (Articles 117 to 120 of the EC Treaty have been replaced by Articles 136 EC to 143 EC) and of Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men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),

* Language of the case: Finnish

THE COURT (Fifth Chamber),

composed of: P. Jann, President of the Chamber, S. von Bahr, D.A.O. Edward, M. Wathelet and C.W.A. Timmermans (Rapporteur), Judges,

Advocate General: S. Alber,
Registrar: H. von Holstein, Deputy Registrar,

after considering the written observations submitted on behalf of:

— P. Niemi, by S. Salovaara, asianajaja,

— the Finnish Government, by T. Pynnä, acting as Agent,

— the Commission of the European Communities, by A. Aresu and M. Huttunen, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of P. Niemi, represented by S. Salovaara, the Finnish Government, represented by T. Pynnä, and the Commission, represented by M. Huttunen and H. Michard, acting as Agent, at the hearing on 13 December 2001,

after hearing the Opinion of the Advocate General at the sitting on 21 February 2002,

gives the following

Judgment

1 By decision of 18 January 2000, received at the Court on 21 September 2000, the Vakuutusoikeus (Insurance Court, Finland) referred to the Court for a preliminary ruling under Article 234 EC a question on the interpretation of Article 119 of the EC Treaty (Articles 117 to 120 of the EC Treaty have been replaced by Articles 136 EC to 143 EC) and of Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men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).

2 That question was raised in the context of proceedings between Mrs Niemi and the Valtiokonttori (State Pensions Board) concerning the lawfulness of a binding advance ruling by the Board relating to the age from which she could claim an old-age pension.

Legal background

Community law

3 The first and second paragraphs of Article 119 of the Treaty state:

'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.'

4 Since 1 May 1999, when the Treaty of Amsterdam entered into force, Article 141 EC provides:

'1. Each Member State shall ensure that the principle of equal pay for male and female workers for equal work or work of equal value is applied.

2. 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.

...'

5 Article 141(1) and the first subparagraph of Article 141(2) EC are therefore essentially identical to the first and second paragraphs of Article 119 of the Treaty.

6 The Protocol concerning Article 119 of the Treaty establishing the European Community (hereinafter 'the Barber Protocol') annexed to the EC Treaty by the Treaty on European Union states:

'For the purposes of Article 119, 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.'

7 Directive 79/7 applies, under Article 3(1)(a), to statutory schemes which provide protection against, *inter alia*, the risk of old age.

8 Article 4(1) of Directive 79/7 provides:

'The principle of equal treatment means that there shall be no discrimination whatsoever on ground of sex either directly, or indirectly by reference in particular to marital or family status, in particular as concerns:

— the scope of the schemes and the conditions of access thereto,

— the obligation to contribute and the calculation of contributions,

— the calculation of benefits including increases due in respect of a spouse and for dependants and the conditions governing the duration and retention of entitlement to benefits.'

9 Article 7(1)(a) of Directive 79/7 states:

'This Directive shall be without prejudice to the right of Member States to exclude from its scope:

(a) the determination of pensionable age for the purposes of granting old-age and retirement pensions and the possible consequences thereof for other benefits'.

10 According to Article 4(1)(c) of Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community as amended and updated by Council Regulation (EC) No 118/97 of 2 December 1996 (OJ 1997 L 28, p. 1) (hereinafter 'Regulation No 1408/71'), that regulation applies to all legislation concerning the branches of social security relating to old-age benefits.

11 In accordance with Article 5 of Regulation No 1408/71, the Republic of Finland set out the legislation and schemes referred to in Article 4(1) of that regulation in a Declaration notified to the Council and published in accordance with Article 97 of that regulation (OJ 1999 C 234, p. 3). The Declaration lists, *inter alia*, the Kansaneläkelaki (National Pensions Law) 347/1956, in respect of the national pension scheme, and the Valtion eläkelaki (State Pensions Law) [280]/1966, in respect of the employment pension scheme.

National law

12 The referring court points out that, in Finland, all employment, whether public or private, is required by statute to be covered by a pension scheme known as the 'employment pension scheme'. The employment pension scheme laid down in the Valtion eläkelaki 280/1966 as amended by Law 638/1994 (hereinafter, 'Law 280/1966') covers all persons in a relationship with the State as a public servant or ordinary employee. Employees in the defence forces are covered by the pension regime laid down in Law 280/1966.

13 The amount of the pension under Law 280/1966 is determined on the basis of years of service and established income level. Each year of service increases the pension by 1.5%. The established income level is determined on the basis of the income earned during the last years of service.

14 The referring court states that the pensionable age under Law 280/1966 is now 65. For certain groups of workers, however, a pensionable age lower than the normal pensionable age, and in particular than the age-limit for compulsory retirement, is laid down. Such a pensionable age is laid down in the legislation governing the authority or department concerned, which in the case in the main proceedings is the Asetus puolustusvoimista (Regulation on the defence forces) 667/1992 as amended by Regulation 1032/1994 (hereinafter 'Regulation 667/1992').

15 Previously there applied to public servants enlisted in the defence forces a pension scheme under which the retirement age was set at 60 for women and 50 for men. The scheme was amended by legislation which was enacted in 1994. According to the scheme now in force, posts of enlisted public servants are classified, according to the nature of their functions and without taking account of sex, as professional military posts and civilian posts. At retirement age, which is 55 for the first category and 65 for the second, an official must leave his post and is then entitled to an old-age pension. The new pension scheme applies to service relationships which started on or after 1 January 1995.

16 For service relationships which began before 1 January 1995, the retirement age is determined in accordance with special transitional provisions. Under those provisions, the retirement age in earlier service relationships for public servants

enlisted in the defence forces is 50 to 55 depending on length of service, and for women 60. However, regardless of sex, a public servant who took up his or her post prior to 1 January 1995 becomes entitled to a pension on completing 30 years of service in that post. In the present proceedings, the following provisions are relevant.

17 Article 4 of Law 280/1966 states:

'Pensionable age for a new beneficiary under the first paragraph of Article 1 of the present Law is 65....'

18 However, under Article 8(4) of Law 280/1966, an old-age pension is to be granted before pensionable age has been reached:

'...

(2) where a public servant employed as a specialised soldier in the defence forces or as a border protection officer has, on reaching the age of 55, completed at least 30 pensionable years in such a post, including a minimum of six months' uninterrupted service before leaving the service or three years in the course of the last five years prior to leaving the service;

...

(4) where the beneficiary has reached retirement age'.

19 The transitional provisions of Regulation 667/1992 on the age-limit for public servants enlisted in the defence forces lay down an age-limit of from 50 to 55 for men and 60 for women.

The main proceedings and the question submitted for a preliminary ruling

20 Mrs Niemi sought clarification as to the age from which she became entitled to an old-age pension. An 'enlisted public servant' who served the defence forces from 1 April 1969, Mrs Niemi reached the age of 55 on 1 November 1993 and 60 on 1 November 1998. On 31 March 1999, she had completed 30 years of service in the defence forces.

21 As an enlisted public servant in the defence forces, Mrs Niemi is covered by the pension scheme laid down in Law 280/1966, for which the age-limit is set by Regulation 667/1992. That scheme is administered by the Valtiokonttori (State Treasury), which decides pension applications at first instance. In order to determine her pensionable age based on years of service, Mrs Niemi sought a binding advance ruling from the Valtiokonttori. By decision of 26 April 1995, the Valtiokonttori held that Mrs Niemi would not be entitled to an old-age pension until she reached the retirement age of 60 years.

22 Mrs Niemi appealed against that decision by the Valtiokonttori to the Valtion eläkelautakunta, claiming entitlement to a pension from the age of 55. Her appeal was dismissed by decision of 20 December 1995.

23 Mrs Niemi appealed against the decision of the Valtion eläkelautakuntato to the Vakuutusoikeus, seeking a declaration that she was entitled to an old-age pension from the age of 55. In support of her claim, she stated that a man who had exactly the same employment career as hers and exactly the same duties would have been entitled to a pension from the retirement age of 50 to 55, whereas the age for women enlisted in the defence forces was 60, without exception. Therefore, she contended, the transitional provisions of the pension scheme now in force as regards enlisted public servants in the defence forces are discriminatory on grounds of sex, contrary to the Finnish law on the equal treatment of men and women and to Community law.

24 The Vakuutusoikeus considered the pension scheme at issue not to be contrary to national law. However, it was uncertain as to whether a pension payable under Law 280/1966 falls within the scope of Article 119 of the Treaty and whether that pension scheme is contrary to the prohibition of discrimination laid down in that article.

25 In that regard, the Vakuutusoikeus pointed out that the Finnish employment pension scheme differs from almost all other employment pension schemes operating in the other countries of the Community, since it is a compulsory scheme covering all work in both the public and the private sectors, as well as work carried out on a self-employed basis.

26 Given the special features of the Finnish employment pension scheme and the difference between the Finnish and Netherlands schemes, the Vakuutusoikeus wondered in particular whether the decision in Case C-7/93 *Beune* [1994] ECR I-4471 can be considered applicable to the main proceedings and whether the provisions of the Treaty must be interpreted in the same way in this case as they were in *Beune*.

27 Accordingly, since it considered that the decision in the proceedings before it requires the interpretation of provisions of Community law, the Vakuutusoikeus decided to stay proceedings and to refer the following question to the Court for a preliminary ruling:

'Does the pension scheme under the Valtion eläkelaki fall within the scope of Article 141 EC or of Council Directive 79/7?'

The question submitted for a preliminary ruling

Observations submitted to the Court

28 Mrs Niemi claims that, in Finland, persons reaching retirement age must retire from the service and are then entitled to receive a retirement pension based on

their years of service completed up to that age. In those circumstances, such a pension constitutes a benefit comparable to pay and falls within the scope of Article 119 of the Treaty.

29 In addition, Mrs Niemi maintains that the existence of different age-limits for women and men carrying out the same work is contrary to 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).

30 The Finnish Government points out that the national employment pension scheme is a self-contained, comprehensive package which guarantees, in principle under identical conditions, statutory retirement insurance to all those who have worked in the public and private sectors. The elements which determine the amount of the employment pension are the salary received and the duration of employment. The total pension is always determined on the basis of the person's entire employment history. The Government adds that the employment pension scheme is financed by the payment of contributions by both employers and employees at the time when the salary is paid. The Government also maintains that there is no connection between the contributions paid and the pension subsequently received. Workers have a statutory right to a pension even if no contributions have been made. The scheme is thus not a contributory scheme.

31 As regards State employees, the pension scheme applicable to them is governed by Law 280/1966, which is an integral part of the Finnish statutory employment pension scheme and therefore constitutes neither an occupational nor a supplementary scheme. Moreover, the pensions covered by the scheme under that law are paid out of the national budget. Under the scheme, both employees'

and employers' contributions are paid into a State pension fund, separate from that budget. Every year money is transferred from the fund to the national budget in order to cover pension costs. The Finnish Government maintains that pension-related costs paid by the State are approximately 2.5 times the revenue from that fund, so that the greater part of those costs is paid directly from the national budget. The employment pension scheme is thus essentially a contributory scheme.

32 The Finnish Government states that the age-limit in question in the main proceedings is imposed by transitional legislation. At the time of the reform, it was concerned to guarantee to persons to whom the transitional rules applied the opportunity to obtain a pension at the full rate. The lowering of the age-limit for female workers usually had the effect of reducing the amount of their pensions.

33 The Government states that, according to settled case-law, Article 119 of the Treaty does not apply to pension schemes which fall within a statutory social security scheme. The pension paid under Law 280/1966 is not linked to a particular employment relationship, but encompasses all the employment relationships falling within the scope of that law. It adds that the scheme is based on a social-policy choice made by the public authorities and does not depend on the employment conditions of a particular person or category of persons. Such statutory social security schemes fall within the scope of Directive 79/7.

34 The Commission states that the employment pension scheme of which Law 280/1966 is a part is in itself statutory and compulsory, but the benefits derived from it are based solely on function or the employment relationship.

35 Moreover, although the basic principles of the Finnish occupational retirement scheme are the same for all employees, regardless of work and sector of activity, the Commission contends that that does not constitute a sufficient reason for departing from the Court's settled case-law, according to which the essential criterion for determining what constitutes pay within the meaning of Article 119 of the Treaty is whether the pension is paid to the employee on the basis of his employment relationship with a public or private employer.

36 Therefore, the Commission considers that the principal features of the case in the main proceedings are comparable to those of the case that gave rise to the judgment in *Beune*, cited above. The pension benefits provided in Law 280/1966 must therefore be considered as pay or any other consideration within the meaning of Article 119 of the Treaty.

37 The Commission states, however, that the Barber Protocol must be taken into consideration. It contends that, for Member States which acceded to the Community after 17 May 1990 and which, on 1 January 1994, were contracting parties to the Agreement on the European Economic Area of 2 May 1992 (OJ 1994 L 1, p. 3), the date referred to in that Protocol is, both in practice and in this specific case, 1 January 1994. It therefore falls to the referring court to define the procedures for applying the national statute in relation to the situation of a worker whose function or employment relationship has continued without interruption from before and until after the date referred to in the Barber Protocol.

Findings of the Court

38 By its question, the referring court is asking, essentially, whether a pension such as those paid under Law 280/1966 falls within the scope of Article 119 of the Treaty or of Directive 79/7.

39 As a preliminary point, it must be borne in mind that, according to settled case-law, the concept of pay, as defined in Article 119 of the Treaty, does not encompass social security schemes or benefits, in particular retirement pensions, which are directly governed by legislation (Case C-262/88 *Barber* [1990] ECR I-1889, paragraph 22, *Beune*, cited above, paragraph 44, and Case C-50/99 *Podesta* [2000] ECR I-4039, paragraph 24).

40 On the other hand, benefits granted under a pension scheme which essentially relates to the employment of the person concerned form part of the pay received by that person and come within the scope of Article 119 of the Treaty (see, in particular, to that effect, Case 170/84 *Bilka* [1986] ECR 1607, paragraph 22; *Barber*, cited above, paragraph 28; *Beune*, cited above, paragraph 46; Joined Cases C-234/96 and C-235/96 *Deutsche Telekom* v *Vick and Conze* [2000] ECR I-799, paragraph 32, and *Podesta*, cited above, paragraph 25).

41 The pension scheme at issue in the main proceedings is determined directly by statute. While that fact undoubtedly indicates that the benefits paid under that scheme are social security benefits (see, *inter alia*, Case 80/70 *Defrenne* [1971] ECR 445, paragraphs 7 and 8, and Case C-109/91 *Ten Oever* [1993] ECR I-4879, paragraph 9), it is not in itself sufficient to exclude such a scheme from the scope of Article 119 of the Treaty (see, in particular, *Beune*, cited above, paragraph 26).

42 The same is true as regards the argument of the Finnish Government to the effect that, by virtue of its general and compulsory character, the pension scheme at issue in the main proceedings does not have the features of an occupational or supplementary scheme. The fact that a particular pension scheme, such as that laid down in Law 280/1966 for public servants and other staff recruited by the State, is part of a general, harmonised legislative framework of pension schemes designed to ensure in particular that changes in the employment relationship do not interrupt the establishment of pension rights is not sufficient to exclude pension benefits provided under such a regime from the scope of Article 119 of the Treaty. In addition, the applicability of that provision to pension benefits is in no way conditional upon a pension being supplementary to a benefit provided by

a statutory social security scheme (*Beune*, paragraph 37, and Case C-366/99 *Griesmar* [2001] ECR I-9383, paragraph 37).

43 As regards the arrangements for funding and managing a pension scheme such as that introduced by Law 280/1966, it is clear from the case-law that these, too, are not conclusive for the purpose of determining whether a regime comes under Article 119 of the Treaty (*Beune*, paragraph 38, and *Griesmar*, paragraph 37).

44 The Court pointed out in paragraph 43 of its judgment in *Beune* and reiterated in paragraph 28 of its judgment in *Griesmar* that, of the criteria for characterising a pension scheme which it had adopted on the basis of the situations that had been brought before it, the only possible decisive criterion is whether the pension is paid to the worker by reason of the employment relationship between him and his former employer, that is to say, the criterion of employment based on the actual wording of Article 119 of the Treaty.

45 Accordingly, for the purpose of determining whether a retirement pension falls within the scope of Article 119 of the Treaty, the Court has held that a decisive criterion is the existence of a link between the employment relationship and the retirement benefit, and has not regarded the structural elements of a system of pension benefits as playing a decisive role. The fact that the pension scheme laid down by Law 280/1966 is part of a harmonised system, so that the total pension received by an insured person reflects the work carried out during his entire career, irrespective of the type of work and sector of activity concerned, and the fact that that scheme was notified as a scheme falling within the scope of Regulation No 1408/71 are not sufficient in themselves to preclude the application of Article 119 of the Treaty, if the pension benefit is linked to the employment relationship and, as a result, it is paid by the State in its capacity as employer.

46 Admittedly, that criterion cannot be regarded as exclusive, inasmuch as pensions paid under statutory social security schemes may reflect, wholly or in

part, pay in respect of work (*Beune*, paragraph 44, and *Griesmar*, paragraph 29).

47 However, considerations of social policy, of State organisation, of ethics, or even the budgetary concerns which influenced or may have influenced the establishment by the national legislature of a scheme such as the one in question in the main proceedings cannot prevail if the pension concerns only a particular category of workers, if it is directly related to the period of service completed and if its amount is calculated by reference to the public servant's last salary. The pension paid by the public employer is in that case entirely comparable to that paid by a private employer to his former employees (*Beune*, paragraph 45, and *Griesmar*, paragraph 30). Therefore, it is necessary to consider whether a pension such as that paid in accordance with Law 280/1966 satisfies those three criteria.

48 In that regard, it must first be pointed out that the Court has already held, in paragraph 31 of *Griesmar*, that public servants who benefit under a pension scheme such as that at issue in the main proceedings must be regarded as constituting a particular category of workers. They are distinguished from employees grouped within an undertaking or group of undertakings in a particular sector of the economy, or in a trade or inter-trade sector, only by reason of the specific features governing their employment relationship with the State, or with other public employers or bodies.

49 Although the pension scheme established by Law 280/1966 was introduced for all State employees, it must be pointed out that the access to pension benefits which it provides is linked to age-limits which are specifically set for certain categories of public servants, such as those enlisted in the defence forces, and which are different from the age-limits under the general pension scheme established by that law. If the group comprising all public servants was considered by the Court to constitute a specific category of workers, the same must *a fortiori* apply to the group constituted by those enlisted in the Finnish defence forces, who are distinct from other State employees.

50 Second, as regards the criterion that the pension must be directly related to the period of service completed, it must first be pointed out that a person is entitled to a pension under Law 280/1966 only if he is in a relationship with the State as a public servant or ordinary employee. Next, the age-limit which gives rise to compulsory retirement, which in turn gives rise to entitlement to pension benefits, is in the present case directly related to the period of service completed. Finally, the level of the pension paid under that law is determined by how long the person concerned has worked.

51 Third, as regards the amount of the benefit, it must be noted that pension benefits paid under Law 280/1966 are calculated on the basis of the pay received over a period limited to a few years directly preceding retirement. Such a basis of calculation essentially satisfies the criterion applied by the Court in *Beune* and *Griesmar*, according to which the amount of the pension is calculated on the basis of the official's last salary.

52 It follows that a pension paid under a scheme such as that established by Law 280/1966 satisfies the three criteria which characterise the employment relationship which, in *Beune* and *Griesmar*, the Court held to be decisive for the purpose of characterising, with respect to Article 119 of the Treaty, benefits provided under a retirement scheme for civil servants.

53 It must be pointed out, moreover, that Article 119 of the Treaty prohibits any discrimination with regard to pay as between men and women, whatever may be the system which gives rise to such inequality. Accordingly, it is contrary to that article of the Treaty to impose an age condition, differing according to sex, for eligibility for employment-related pensions for workers who are in identical or similar situations (see, to that effect, *Barber*, cited above, paragraph 32).

54 Furthermore, since the facts in the case in the main proceedings concern periods of work both before and after the accession by the Republic of Finland to the Agreement on the European Economic Area and to the European Union, the principle of equal pay for men and women for equal work has applied to that Member State since 1 January 1994 by virtue of Article 69 of that Agreement. In accordance with Article 6 of the Agreement, Article 69, so far as its applicability *ratione temporis* to a pension scheme such as that at issue in the main proceedings is concerned, is to be interpreted in the light of *Barber*, cited above.

55 It follows that, in the case of the Republic of Finland, the principle of equal pay for men and women cannot be invoked in respect of pension benefits relating to periods of work prior to 1 January 1994.

56 In the light of all the foregoing considerations, the answer to the question referred to the Court must be that a pension such as that paid in accordance with Law 280/1966 falls within the scope of Article 119 of the Treaty.

Costs

57 The costs incurred by the Finnish Government and by the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Fifth Chamber),

in answer to the question referred to it by the Vakuutusoikeus by decision of 18 January 2000, hereby rules as follows:

A pension such as that paid under the Valtion eläkelaki (State Pensions Law) 280/1966 as amended by Law 638/1994 falls within the scope of Article 119 of the EC Treaty (Articles 117 to 120 of the EC Treaty have been replaced by Articles 136 EC to 143 EC).

Jann von Bahr Edward

Wathelet Timmermans

Delivered in open court in Luxembourg on 12 September 2002.

R. Grass

Registrar

P. Jann

President of the Fifth Chamber