THE COURT

in answer to the questions referred to it by the Belgian Conseil d'État (section d'administration, IIIrd Chamber) by order of that court of 4 December 1970, hereby rules:

1. **A retirement pension established within the framework of a social security scheme laid down by legislation does not constitute consideration which the worker receives indirectly in respect of his employment from his employer within the meaning of the second paragraph of Article 119 of the EEC Treaty;**

2. **The other questions do not call for a reply.**

Lecourt Donner Trabucchi

Monaco Mertens de Wilmars Pescatore Kutscher

Delivered in open court in Luxembourg on 25 May 1971.

A. Van Houtte
Registrar

R. Lecourt
President

OPINION OF MR ADVOCATE-GENERAL DUTHEILLET DE LAMOTHE DELIVERED ON 29 APRIL 1971[1]

Mr President,
Members of the Court,

Royal Decree No 50 of 24 October 1967, issued under special delegated powers, is a basic act which in Belgium lays down the retirement pension scheme for employed persons and the survivor's pension, called sometimes reversion, from which those entitled under him may benefit.

Article 3 (6) provides that the special conditions implementing this general act shall be laid down by royal decree for certain employed persons, in particular civil aviation air crews, and the text sets out in a non-exhaustive manner certain of these implementing conditions (special rules giving rise to the entitlement to the pension, retirement age, pay to be taken into account in calculating the pension etc.).

It was in implementation of this provision that an act having the character solely of a regulation, the Royal Decree of 3 November 1969, laid down the special conditions implementing Royal Decree No 50 in respect of air crews of aviation companies.

Article 1 of this decree, which determines the persons to whom it is applicable, provides (I quote) 'any member of the air crew *except air hostesses*' may benefit.

1 — Translated from the French.

To understand how this provision can prejudice air hostesses, it is necessary to consider it in the light of their contractual position.

Their contract of employment adopted under the terms of the collective agreement provides that they cannot continue to perform their duties beyond the age of 40 years.

The effect of the combination of these different provisions is that their pension can never be calculated on the basis of the whole duration of their active life save under the conditions of the general scheme and thus they find themselves in a very inferior position to that of their male colleagues.

If the latter remain in active service as air-crew until 55 they are entitled to a special pension more advantageous than that of the general scheme and if they leave the service before 55 they are entitled, as was explained to us the other day in the oral procedure, to a mixed pension calculated on a *pro rata* basis for their years of service as air crew and their years of service counting for the pension under the general law.

On the other hand, with regard to air hostesses their services performed before the age of 40 are taken into account only under the conditions laid down for the general scheme and not under the more advantageous conditions laid down by the special scheme. Moreover they cannot claim any retirement pension before the age laid down by the general scheme, that is to say 60 for women and 65 for men.

Their bitterness may therefore be understood, a bitterness which they feel all the more when they compare their pension scheme to that of their colleagues in a neighbouring country, France, where air hostesses have, in complete equality with other members of the crew, on the one hand, an entitlement to the retirement pension under the general scheme of social security and on the other hand from the age of 50 at the latest to a supplemental pension if they have 15 years service.

It is true that we learned yesterday, on reading a judgment of the Tribunal du travail (Labour Court), Brussels, to which I shall refer later, that Sabena had established an 'extra-statutory pension scheme' exclusively for the benefit of air hostesses about which no one had informed us until now.

However this may be, their position has led an air hostess of Sabena, Miss Defrenne, to bring two series of actions before the court.

On the one hand, having been dismissed under the contract which she had made with Sabena when she reached the fatal age laid down by the contract, she asked the Tribunal du travail, Brussels, to declare this dismissal decision, based solely on a consideration of age, to be improper and to award her damages. By judgment of 17 December 1970 that court, on the basis of the interpretation which it gave to Article 119 of the Rome Treaty, rejected the claim. We do not know whether this judgment has become final or not.

On the other hand Miss Defrenne requested the Belgian Conseil d'État to annul the provision of Article 1 of the Royal Decree of 3 November 1969 which excludes air hostesses from the benefit of the pension scheme enjoyed by other members of the air crew.

When this application for annulment, in support of which the plaintiff relied on Article 119 of the Rome Treaty, came before it, the Conseil d'État stayed the proceedings and referred the following questions to you under Article 177 of the Treaty:

(1) Does the retirement pension granted under the terms of the social security financed by contributions from workers, employers and by State subsidy, constitute consideration which the worker receives indirectly in respect of his employment from his employer?

(2) Can the rules establish a different age-limit for men and women crew members in civil aviation?

(3) Do air hostesses and stewards in civil aviation do the same work?

I shall return at the end of my opinion to Questions Nos 2 and 3. But let me say straight away that the main question, Question No 1, although formulated somewhat concisely, and in spite of the doubts which certain people have had in this respect, is indeed a question of interpretation.

You are asked to say whether the provisions of Article 119 of the Treaty are capable of applying to a retirement benefit such as that considered by the Belgian Conseil d'État which does not however state whether it relates to a retirement benefit under the general scheme or the special scheme for air crew; this will lead me to examine both positions and, in view of certain doubts as to the nature of the special scheme, to consider several possible cases.

I

Since it appears to be the first time that you have to interpret Article 119 of the Treaty, I should like first of all very briefly to recall its origin and scope. The debates which took place in certain parliaments on the ratification of the Treaty, in particular the explanations given by the Government of the Netherlands to the Second Chamber of the States General provide us with certain information on the origin of this provision.

It appears to be France which took the initiative, but the article necessitated quite long negotiations.

Although its adoption scarcely raised any difficulties for States which had already ratified Convention No 100 of the International Labour Organization (ILO) which, as the German Government stressed in the Bundestag, had very much the same scope and on certain points the same wording as the draft article in question, three of the Member States, or rather future Member States at the time, had not ratified this agreement, because its application risked creating very serious difficulties for them in internal law.

It seems that the reason for the State's finally succeeding in reaching agreement is to be found in the double objective pursued by this article: a social objective, it is true, since it leads all the countries of the Community to accept the principle of a basically social nature raised by the ILO Convention; but an economic objective, too, for in creating an obstacle to any attempt at 'social dumping' by means of the use of female labour less well paid than male labour, it helped to achieve one of the fundamental objectives of the common market, the establishment of a system ensuring that 'competition is not distorted'. This explains perhaps why Article 119 of the Treaty is of a different character from the articles which precede it in the chapter of the Treaty devoted to social provisions.

The two articles, Article 117 and Article 118, are limited indeed to fixing in social matters the general objectives for an approximation of the laws and co-operation between Member States in a certain number of matters in the social field, particularly in matters relating to social security and rules relating to employment or working conditions.

Article 119 has a very different scope as is shown by its wording which is, let me remind you:

> 'Each Member State shall during the first stage ensure and subsequently maintain 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 or 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.'

This article is thus not limited, as are Articles 117 and 118, to setting out objectives of harmonization of laws and regulations or cooperation between Member States, but it creates an obligation for the Member States.

The question could have been asked whether in addition or as a result of the obligation which it created for the States, it gives rise to individual rights in favour of the nationals of Member States and whether it has a 'direct effect'.

But this question no longer arises for two reasons:

1. Although the difficulties of application encountered by certain countries were great and although in particular a conference of Member States extended until 31 December 1964 the period initially laid down, it appears to me certain that at least as from this date Article 119 created subjective rights which the workers of the Member States can invoke and respect for which national courts must ensure.

2. It is even more certain in Belgium since, to avoid any difficulty of interpretation by the courts and give additional publicity to this provision of the Treaty, the Belgian Government by an initiative which was *legally superfluous but the intentions of which were highly commendable*, has insisted on inserting in Royal Decree No 40 of 27 October 1967 concerning the work of women an Article 14 worded thus:

'In accordance with Article 119 of the Treaty establishing the European Economic Community, adopted by the Law of 2 December 1957, any woman worker may institute proceedings in the competent court for the application of the principle of equal pay for men and women workers.'

In these circumstances the reasons may be well understood why the Belgian Conseil d'État does not even seem to have considered and in any event has not asked us to consider whether Article 119 had a direct effect or not. This appeared to it, as it does to me, to be obvious.

II

Let us return now to the first of the questions which are put to you by the Belgian Conseil d'État.

The written procedure like the oral arguments may perhaps have given you the impression that in order to give an answer you were going to have to take a decision in the enormous controversy between the holders of two different concepts of the salary of the worker. For some indeed, those who support what is sometimes called 'social salary' concept, which is more economic than legal, the salary or pay covers all sums paid or due to the worker not only *as consideration* for, but *because* of the work, from wherever those sums may come.

For others on the other hand the salary remains only *the price of a service* and includes only amounts paid by the employer as remuneration for this service during the currency of the contract of employment.

The choice at the Community level between these two concepts would be difficult, on the one hand because the various member countries do not have the same attitude to this subject—for example, it would be possible to set certain dicta of the French Cour de cassation almost word for word against those uttered by the Belgian Cour de cassation in the judgments cited by the Belgian Government—and on the other hand perhaps above all because often in the same State different solutions prevail depending on whether the subject is considered from the point of view of labour law, properly so called, or social security law or fiscal law.

But I do not think you will have to make this choice, for I think the draftsmen of the Treaty have very largely done it for you in advance.

Adopting definitions which were already contained in Convention No 100 of the ILO, Article 119 takes a middle course rejecting both the wide and restricted theses which I have just cited to you.

It provides that it applies:

— on the one hand to the salary properly so called,

— on the other hand to any other consideration which the worker receives, if such consideration fulfils two conditions:

First condition: it must be paid directly or indirectly by his employer.

Second condition: it must be in respect of his employment.

It is not necessary for you to consider whether the retirement pension does or does not constitute a 'deferred salary' or a 'salary for the non-active status' as some maintain.

It suffices for you to consider whether or in which case a retirement pension constitutes consideration in accordance with the two conditions laid down in Article 119.

III

The difficulty which this problem presents arises basically from the diversity and the complexity of the retirement pension schemes in the Member States.

In the majority of them there exist simultaneously several retirement pension schemes sometimes complementary, sometimes substitutive and sometimes cumulative.

Schematically two large categories of retirement pension schemes may be distinguished:

— on the one hand the general retirement pension scheme from which *all* workers benefit under the national social security system;

— on the other hand certain retirement pension schemes from which only *certain* employed persons or workers benefit.

A — As regards the first category, the general scheme for workers, it appears to me clear that this does not come within the scope of Article 119 of the Treaty and I think that on this point the observations of the Belgian Government and the Commission are fully convincing.

There could certainly be a temptation to give this article a wide interpretation and to consider that it covers any consideration which the employed person receives because of his position as worker, including that which he receives from the social security institutions of the general scheme.

If Article 119 were taken in isolation and if priority were given to its economic objective, this argument would obviously be attractive, for by adopting it, one would be sure of eliminating in every case any possibility of 'social dumping' and of achieving 'harmonization while the improvement is being maintained' in the 'working conditions and . . . standard of living for workers' which represents one of the objectives of the common market.

But there are three objections which appear to me to demolish this conception.

(1) First of all an objection based on the wording.

Article 119 applies to any consideration which the worker receives, directly or indirectly, in respect of his employment from his employer. On the one hand it is not because he has a particular post in the employment of a particular employer that the employed person receives the benefit from the general scheme but because of his status as a worker and he would receive it in the same way if he had paid employment in another post or another employer or even, in the majority of cases, if he were self-employed.

(2) On the other hand there is no link even indirectly between the employer's contribution and the benefit received.

So far as I know all legislative systems provide that default in payment of the employer's contribution does

not deprive the employed person of the right to the benefit. Moreover certain countries have treated the contributions as tax or have brought the system into the budget, which only confirms its true nature. The benefits from the general scheme of social security, including retirement pensions, are in my opinion no more consideration received indirectly from the employer than are the road, water mains or sewer, the benefit of which the employed person has as a citizen and to finance which the taxes and duties paid by the employer have contributed.

(3) In addition to these arguments based on the wording of Article 119 there is an objection based on its comparison with Article 118 which in social security matters lays down only an objective of close cooperation between the States and not obligations as precise as those resulting from the application of Article 119.

B — Much more difficult problems are raised by retirement pension schemes from which only certain employed persons benefit because of their employment by certain employers or because of the nature of this employment.

Daily experience teaches us that the consideration which these special retirement schemes comprise is at least as important for the worker as the salary which he receives.

One has only to open a newspaper to find that in a great number of countries and in numerous branches of economic activity any negotiation between employers and employees today relates almost always both to salary and to special pension schemes and very often the final result is a package deal on these two issues, one of the parties foregoing certain claims relating to salary in return for new benefits in relation to pension or vice versa.

Certain of these special schemes are in my opinion, undoubtedly of the nature of consideration which the worker receives, directly or indirectly, in respect of his employment from his employer.

(a) First of all I think this is the case with regard to *retirement pensions* which the former employed person *receives directly from his employer*. This is a retirement pension which I thought was in the process of disappearing but which I have discovered in studying the present case is still of considerable importance in certain countries. In such a case the pension paid by the employer seems truly to come within the category of consideration referred to by Article 119. It is true that it relates to deferred consideration. But the deduction for the pension which as a rule the employed person suffers during his active period is in fact only a reduction of salary which he accepts in consideration for the promise of a retirement pension. It is moreover because of the post, which it is true he no longer occupies but which he had necessarily to occupy, that he may receive this benefit. The two conditions laid down in Article 119 thus appear to be satisfied.

(b) The same answer appears to me to apply, though with a little more difficulty, to a second category of special retirement schemes, called 'supplemental' schemes. The objective of these schemes is to give employed persons in certain positions in certain undertakings a retirement pension additional to that paid by the general social security institution. They are characterized on the one hand by their independence of the general social security scheme both as regards the management and their funding which are organized on an occupational or inter-occupational basis. Moreover they are often of a voluntary origin, but the extension of the collective agreement which had initially established them has often however given them an obligatory nature. Some of these supplemental schemes are even brought within the law, as, for example, in France by Article 186 of the Code de l'aviation civile et commerciale in respect of the supplemental scheme for air crew.

The analysis which I proposed to you a moment ago in respect of retirement pension received directly from the employer appears likewise to apply to the supplemental pension paid by occupational or inter-occupational institutions. But this requires more effort of interpretation than in the first case.

On the one hand, indeed, the contribution which the employed person pays is not analogous in every respect to the deduction on account of retirement pension of which I spoke to you a moment ago. On the other hand most importantly the payment is not received directly from the employer but indirectly from an occupational or inter-occupational fund which each year in the majority of cases redistributes, after providing for reserves, the whole of the sums paid both by the workers and the employers.

I think however that supplemental retirement pensions may be regarded as coming within the category of consideration referred to by Article 119 of the Treaty for two reasons:

(1) The fact that the retirement pension is partly financed by contributions from the actively employed person does not suffice in my opinion to exclude the application of Article 119. This article does not indeed stipulate that it applies only to consideration provided *solely* by the employer and in so far on the other hand as it provides for the concept of indirect payment the object in my opinion was precisely to provide for situations such as those existing in respect of supplemental pensions.

(2) The necessary link between the consideration, the employer, the employed person and the employment, which Article 119 implies, appears to me sufficiently established in cases of supplemental pensions. There is no doubt that the supplemental pension is payable only by reason of the occupation of certain posts. It is likewise only payable if these posts are held in certain undertakings.

In this respect the very serious difficulties which are created in this field in certain countries, as for example France, by today's ever increasing mergers and take-overs of undertakings are particularly revealing.

Except where there is agreement between the occupational or inter-occupational funds or except when the legislature intervenes, not only the actively employed person but also the pensioner risk seeing their position from the point of view of the supplemental pension completely altered and sometimes even very much worsened in the frequent cases where the 'take-over' undertaking, if it may be so called, provides for its employed persons a supplemental retirement pension different from that which the 'taken-over' undertaking provided.

If a specific example is required one has only to read in the Journal Officiel de la République Française No 3016, 1969, p. 251, the question in which a French deputy from the Département du Rhône reveals to the Minister responsible for social security how, unless there is agreement between the funds or intervention by the State, the take-over of a local undertaking by an economically more powerful undertaking is going to have the result of cutting down the retirement pensions of the former employees of the undertaking taken-over by from FF 50 to FF 250 per month.

Such an example which is certainly not peculiar to France sufficiently shows the existence of a strong link which with regard to supplemental pension unites the employer the employed person and the post which the latter has during the period of his active status.

C — Still much more difficult is the question raised by retirement pensions paid within the framework of what are usually called special schemes of social security.

There are two characteristics of all these schemes in spite of their diversity.

(1) They are closely and intimately linked with the general scheme of social security either because payment of the pensions is made by

the same funds as the general scheme or, when it is made by special funds, because these funds are financially and administratively linked with the institutions of the general scheme and often even depend on them and their function thus comes within the general system of equalization laid down at a national level.

(2) They obtain certain special advantages for employed persons in certain posts and, in return, they provide for a contribution from employer and employee usually at a higher rate than that of the general scheme.

Various occupational categories enjoy these in many countries, miners and seamen almost everywhere, railway and tramway employees and employees of gas and electricity utilities in certain countries, as well as in Belgium, it appears, civil aviation air crews under the scheme established by the Royal Decree which is at the origin of the present case.

Does the application of Article 119 of the Treaty of Rome require these special schemes to be assimilated to the supplemental schemes of which I spoke to you a moment ago?

I cannot conceal from you the doubts and hesitations which I have about the answer that should be given to this question.

There are many considerations in favour of an assimilation of the special schemes with the supplemental schemes with regard to the application of Article 119.

The first consideration, which it is true is not negligible but which nevertheless is of secondary importance, is that from the point of view of their practical effect it is difficult to make a distinction between the two kinds of schemes.

The Belgian scheme applicable to air crew excluding air hostesses for example appears to be a special scheme of social security, whereas the French scheme applicable to air crew is a supplemental scheme.

Having regard to the various components of pay is there any difference in position of the beneficiaries of these two schemes? It is very difficult to say and would require in any event a long study.

The second consideration which is much more important in my opinion is that in the two schemes it is not the work of itself but the characteristics of the work and of the post to which it relates, its intrinsically special nature, which determine the right to a pension, and this is obviously one of the conditions required for the application of Article 119 as we saw a moment ago.

Finally there is a third consideration and it is this which caused me much searching of conscience in the present case.

Is it proper to make the application of an article of the Treaty depend on the administrative organization and on the character which the legislature or the executive power of a Member State gives to a pension scheme the special nature of which depends on the kind of post filled?

If Article 119 and its economic and social objective were considered in isolation, these considerations would appear decisive for the application of this article both to special and to supplemental schemes.

But as I have already said Article 119 can be interpreted only in conjunction with Article 117 and above all Article 118.

This latter article formally provides, as I have also recalled, that with regard to social security, Member States must cooperate closely for the purpose of harmonizing the schemes, but unlike Article 119 does not lay down that any clearly defined objectives must be attained within specific periods. It is difficult to separate the special schemes of retirement pension from the general system of social security into which they are integrated.

(1) They integrate workers and employed persons into the vast complex of universal equalization which the national system seeks to establish.

(2) Although they make a distinction between the employed persons by

reason of the post filled with the result that one of the conditions laid down by Article 119 appears to be fulfilled, on the other hand the second condition in the same article for the benefit accorded to an employed person to be regarded as coming within its scope does not appear to be satisfied.

If the link between the consideration which the pension constitutes and the part played by the employer himself appears often to be getting tenuous in a system of supplemental pensions, it disappears almost completely in a special social security pension scheme.

The position or the capacity of the employer no longer plays any part in the right to or the amount of the benefit. Whereas in a supplemental scheme the fact that the employer belongs to a particular occupational fund may, as the example cited a moment ago shows, have a decisive influence on the rights to, or on the amount of, the benefit, this is not the case at all with the special scheme of social security.

The only differences between the position of the employer and the employed person in such a scheme and their position in the general scheme lie in methods of operation; there is no material difference.

There is no relationship at all between the employer's contribution and the pension and it is this absence of relationship which in this case as in that of the general scheme prevents the pension from being regarded as consideration which the employed person receives from his employer within the meaning of the provisions of Article 119.

Finally let me observe that if those who desire, as I do, that the fundamental principle expressed in Article 119, that is to say the equality of actual remuneration between women and men, should be strictly observed, then in giving to this article a scope trespassing on social security, they risk in many cases sacrificing the principal to the accessory.

To summarize then with regard to the first question I think that within the meaning of Article 119 of the Treaty only the retirement pensions which employed persons who have occupied certain posts in the undertaking receive directly from the employer or indirectly from occupational or inter-occupational organizations, over and above the retirement pensions to which the general social security system entitles such employed persons, may be regarded as consideration which the worker receives, directly or indirectly, in respect of his employment from his employer. On the other hand pensions from the general scheme or the special schemes of social security cannot be regarded as having the same character.

IV

Let us now deal with the second and third questions raised by the Belgian Conseil d'État.

To start with the third question, it will suffice, I think, to observe that it implies a judgment on the facts and therefore does not appear to me to be of the kind in which the Court has jurisdiction under Article 177 of the Treaty.

The second question raises a rather difficult problem of interpretation.

As I told you it was worded by the Conseil d'État:

> 'Can the rules establish a different age-limit for men and women crew members in civil aviation?'

The difficulty arises, as Counsel for the Belgian Government very well saw, from the fact that the expression 'age-limit' in contemporary legal terminology is ambiguous.

Although it retains its traditional sense in public administrative law, that is to say the age at which the person concerned is required to retire, it is frequently used in social security matters in another sense to indicate the *pensionable age*, the age at which the worker can claim the normal retirement pension. I think that it is this latter 'social security' sense which the Conseil d'État

wished to give it and I do so for three reasons:

(1) None of the regulations which it had to examine contains a provision laying down an age-limit in the strict sense nor does either Royal Decree No 50 or the Decree of 3 November 1969.

(2) If there is an age-limit in the strict sense for air hostesses, it is due only to a clause in a contract of employment concluded within the framework of a collective agreement. The Conseil d'État is not referring to these contractual acts when it uses the expression 'regulation'. Moreover the question of the validity of the clause in question arose before the Tribunal du travail, Brussels, and not the Conseil d'État.

(3) It thus seems clear in my opinion that what the Conseil d'État wanted to ask you is whether the provision of Article 4 (2) of Royal Decree No 50, that workers may receive the normal pension at the earliest from the age of 65 for men and 60 for women, a provision which is to be found in other forms in various Belgian social security provisions, is compatible with Article 119 of the Treaty.

I therefore suggest that you interpret the second question as reading:

'Do the principles contained in Article 119 of the Treaty prevent the age at which an employed person may receive a retirement pension from the social security from being fixed differently for men and women?'

This question does not arise if in answer to the first question you decide, as I suggest, that the retirement pensions from the general scheme or the special schemes of social security do not constitute consideration as referred to in Article 119 of the Treaty.

In these circumstances my opinion is that you should rule that within the meaning of Article 119 of the Treaty only the retirement pensions which employed persons who have occupied certain posts in the undertaking receive directly from the employer or indirectly from occupational or inter-occupational organizations, over and above the retirement pensions to which the general social security entitles such employed persons, may be regarded as consideration which the worker receives, directly or indirectly, in respect of his employment from his employer. On the other hand pensions from the general scheme or the special schemes of social security cannot be regarded as having the same character.