# JUDGMENT OF THE COURT (Sixth Chamber)
24 October 1996 *

In Case C-435/93,

REFERENCE to the Court under Article 177 of the EEC Treaty by the Rotterdam Kantongerecht (Netherlands) for a preliminary ruling in the proceedings pending before that court between

**Francina Johanna Maria Dietz**

and

**Stichting Thuiszorg Rotterdam,**

on the interpretation of Article 119 of the EEC Treaty and Protocol No 2 on Article 119 of the Treaty establishing the European Community, annexed to the Treaty on European Union,

THE COURT (Sixth Chamber),

composed of: G. F. Mancini, President of the Chamber (Rapporteur), J. L. Murray and P. J. G. Kapteyn, Judges,

* Language of the case: Dutch.

Advocate General: G. Cosmas,
Registrar: H. A. Rühl, Principal Administrator,

after considering the written observations submitted on behalf of:

— Stichting Thuiszorg Rotterdam, by E. Lutjens, of the Utrecht Bar,

— the Government of the United Kingdom, by J. E. Collins, of the Treasury Solicitor's Department, acting as Agent, assisted by N. Paines, Barrister,

— the Commission of the European Communities, by M. Wolfcarius and B. J. Drijber, of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Mrs Dietz, represented by A. C. T. Hommes, of the Rotterdam Bar, of the Government of the United Kingdom, represented by N. Paines, and of the Commission, represented by B. J. Drijber, at the hearing on 18 May 1995,

after hearing the Opinion of the Advocate General at the sitting on 13 July 1995,

gives the following

## Judgment

1 By order of 18 October 1993, received at the Court on 4 November 1993, the Rotterdam Kantongerecht (Cantonal Court) referred to the Court for a

preliminary ruling under Article 177 of the EEC Treaty a number of questions concerning the interpretation of Article 119 of the EEC Treaty and Protocol No 2 on Article 119 of the Treaty establishing the European Community, annexed to the Treaty on European Union ('Protocol No 2').

2 The questions arose in proceedings between Mrs Dietz and the Stichting Thuiszorg Rotterdam ('Thuiszorg') concerning her membership of the Pensioenfonds voor Gezondheids-, Geestelijke en Maatschappelijke Belangen (Pension Fund for the Health, Religious and Social Services Sectors, hereinafter 'the pension scheme').

3 In the Netherlands, participation in an occupational pension scheme is in principle voluntary for employers and employees in the sector concerned.

4 Article 3(1) of the Wet Betreffende Verplichte Deelneming in een Bedrijfspensioensfonds (Law on compulsory affiliation to an occupational pension scheme, hereinafter 'the Occupational Pensions Law', *Staatsblad* J 121), as amended, provides that the Minister of Social Affairs and Employment ('the Minister') may, on application by an occupational or trade association which he deems to be sufficiently representative, make affiliation to the occupational pension scheme compulsory for all employees or certain categories of employees in the relevant sector. Article 16 provides that exemptions from the requirement of affiliation may be granted by, or in accordance with, a decision of the Minister.

5 Article 4 provides that notice of any application to have affiliation to an occupational pension scheme made compulsory must be published in the *Nederlandse Staatscourant*, together with a time-limit within which written objections may be submitted to the Minister.

6 Mrs Dietz was employed part-time for seven hours a week by Thuiszorg and its predecessor in law, the Stichting Katholieke Maatschappelijke Gezinszorg, as a helper for the aged from 11 December 1972 to 6 November 1990, when she reached the age of 61 and took voluntary early retirement by agreement with Thuiszorg made on 18 July 1990.

7 Affiliation to the pension scheme was made compulsory for Thuiszorg's employees under the Occupational Pensions Law.

8 Initially, however, part-time workers employed for 40% or less of the ordinary working hours were excluded from the pension scheme, a restriction which was lifted with effect from 1 January 1991 in order to bring the scheme into line with the requirements of 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 (OJ 1986 L 225, p. 40). At the same time transitional arrangements were introduced whereby notional insurance periods could be attributed to employees previously excluded from the pension scheme in order to build up pension rights.

9 On 2 December 1992 Mrs Dietz initiated proceedings before the Rotterdam Kantongerecht, claiming that when she made the agreement with Thuiszorg for voluntary retirement she was not aware of the forthcoming changes to the pension scheme and that had she been so she would have postponed early retirement in order to be entitled to a pension under the transitional arrangements. Thuiszorg, which had been aware of the forthcoming changes, ought to have informed her of them. She also claimed that under Article 119 of the Treaty she should be entitled to a pension based on her periods of employment after 8 April 1976, the date of the judgment in Case 43/75 *Defrenne* v *Sabena* [1976] ECR 455 or, alternatively, after 17 May 1990, the date of the judgment in Case C-262/88 *Barber* v *Guardian Royal Exchange Assurance Group* [1990] ECR I-1889.

10 The Rotterdam Kantongerecht decided to stay the proceedings and refer to the Court of Justice for a preliminary ruling the same questions as those which had been put by the Utrecht Kantongerecht in Case C-128/93 *Fisscher* v *Voorhuis Hengelo and Stichting Bedrijfspensioenfonds voor de Detailhandel* [1994] ECR I-4583, with certain additions. The full 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?

(1a) Is the answer to the first question the same:

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

(b) if an automatic obligation to provide cover was provided for in the original draft Law but not in the Law as finally adopted (Tweede Kamer 1948-1949 785, No 6)?

(c) if Thuiszorg lodged no objection to the order making the cover compulsory, or did so but the Minister did not take it up?

(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?

(2a) 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?

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 2 December 1992?'

**First question**

11 This question asks in substance whether the right to join an occupational pension scheme falls within the scope of Article 119 of the Treaty and is therefore covered by the prohibition of discrimination there laid down. It also asks whether the reply to that question depends on the purpose of the national legislation enabling membership of such an occupational scheme to be made compulsory, the fact that the draft law provided for the possibility of making membership automatically compulsory, the fact that the employer lodged an objection against the decision to make such membership compulsory or the fact that an enquiry was held among employees with a view to seeking exemption from compulsory membership.

12 In Case C-57/93 *Vroege* v *Instituut voor Volkshuisvesting and Stichting Pensioenfonds NCIV* [1994] ECR I-4541 and in *Fisscher* the Court held that the right to join an occupational scheme fell within the scope of Article 119 of the Treaty and was therefore covered by the prohibition of discrimination laid down by that article.

13 *Fisscher* concerned a situation similar to that at issue in the main proceedings in this case, where membership of the occupational pension scheme had been made compulsory by the authorities. It must therefore be determined whether the circumstances mentioned by the court of reference in the question are capable of leading to a different interpretation.

14 The fact that the national legislation enabling membership of occupational pension schemes to be made compulsory was based not merely on considerations of social policy but primarily on considerations relating to competition in a particular economic sector is irrelevant, because the application of Article 119 of the Treaty to social security schemes depends on objective criteria, and those criteria were defined in *Barber*.

15 Secondly, the fact that the draft law provided for automatic compulsory membership of an occupational pension scheme does not need to be considered in view of the fact that, as stated by the national court itself, there was no such provision in the law finally adopted.

16 The question whether the employer lodged an objection to the measure making membership compulsory or conducted an enquiry among his employees with a view to obtaining exemption has no effect whatsoever as regards the application of Article 119. The conduct of an individual employer cannot affect the nature of the rules applicable throughout a sector.

17 The reply to the first question must therefore be that the right to join an occupational pension scheme falls within the scope of Article 119 and is therefore covered by the prohibition of discrimination laid down therein. That interpretation does not depend on the purposes of the national legislation enabling membership to be made compulsory or on the fact that the employer lodged an objection to the decision to make such membership compulsory or on his having conducted an enquiry among his employees with a view to seeking exemption from compulsory membership.

## Second question

18 In the light of the reply to the first question, the second must be understood as asking whether the limitation of the effects in time of the *Barber* judgment applies to the right to join an occupational pension scheme such as that at issue in the main proceedings and to the right to payment of a retirement pension where the employee was excluded from membership of such a scheme in breach of Article 119 of the Treaty.

19 In *Vroege* (paragraphs 20 to 27) and *Fisscher* (paragraphs 17 to 24) the Court stated that the limitation of the effects in time of the *Barber* judgment concerned 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, in particular those of Directive 86/378.

20 As far as the right to join an occupational scheme is concerned, it stated that there was no reason to suppose that those concerned could have been mistaken as to the applicability of Article 119. It has been clear since the judgment in Case 170/84 *Bilka-Kaufhaus* v *Karin Weber von Hartz* [1986] ECR 1607 that a breach of the

rule of equal treatment as regards recognition of such a right is caught by Article 119 (*Vroege*, paragraphs 28 and 29 and *Fisscher*, paragraphs 25 and 26).

21 The Court added that since the judgment in *Bilka* included no limitation of its effects in time, the direct effect of Article 119 could be relied upon in order retroactively to claim equal treatment in relation to the right to join an occupational pension scheme and that that could be done as from 8 April 1976, the date of the *Defrenne* judgment in which the Court held for the first time that Article 119 had direct effect, whilst limiting the effects in time of that interpretation (*Vroege*, paragraph 30 and *Fisscher*, paragraph 27).

22 On that basis, the Court held that the limitation of the effects in time of the *Barber* judgment did not apply to the right to join an occupational pension scheme (*Vroege*, paragraph 32 and *Fisscher*, paragraph 28).

23 Entitlement to a retirement pension under an occupational scheme is indissolubly linked to the right to join such a scheme. Membership would be of no interest to employees if it did not confer entitlement to the benefits provided by the scheme.

24 In *Bilka* the Court held that benefits paid to employees under an occupational pension scheme constituted consideration received by the worker from the employer in respect of his employment, as referred to in the second paragraph of Article 119 (paragraph 22), and that therefore discrimination regarding membership of such a scheme fell likewise within the ambit of Article 119 (paragraphs 27 and 31).

25 Consequently, it has been clear at least since the judgment in *Bilka* that Article 119 prohibits discrimination in the award of benefits by an occupational pension scheme which results from discrimination as regards the right to join such a scheme, so that employers and pension schemes could not reasonably have considered such discrimination permissible. As a result, the reasons which led the Court to limit the effects in time of the *Barber* judgment do not apply in this case.

26 It is true that owing to the time restriction in *Barber* members of occupational pension schemes are unable in some cases to rely on Article 119 of the Treaty where there has been discrimination in the payment of benefits attributable for periods of employment prior to 17 May 1990. However, there is no justification for such a restriction where the discrimination in payment of the benefits is the consequence of discrimination as regards the right to membership.

27 Finally, it should be noted that since the judgment in *Bilka* imposed no time restriction the direct effect of Article 119 may be relied upon retroactively as from 8 April 1976, the date of the *Defrenne* judgment, by victims of discrimination regarding the right to join an occupational pension scheme who seek payment of benefits under that scheme.

28 The reply to the second question must therefore be that the limitation of the effects in time of the *Barber* judgment does not apply to the right to join an occupational pension scheme, such as that at issue in the main proceedings, or to the right to payment of a retirement pension where the worker was excluded from membership of the scheme in breach of Article 119 of the Treaty.

## Third question

29 This question asks whether the administrators of an occupational pension scheme have the same obligation as the employer to comply with Article 119 of the Treaty and whether workers who are victims of discrimination may assert their rights directly against the administrators.

30 In *Barber* the Court held that pensions paid under contracted-out schemes fell within the scope of Article 119 regardless of whether the scheme was set up in the form of a trust and administered by trustees who were technically independent of the employer, since Article 119 also applied to consideration received indirectly from the employer (paragraphs 28 and 29).

31 In *Fisscher*, moreover, the Court held that the administrators of the pension scheme, who are called upon to pay out benefits which constitute pay within the meaning of Article 119, must comply with that provision by doing all within their powers to ensure that the principle of equal treatment is observed in this respect, and that members of the scheme must be able to rely upon it as against them. The effectiveness of Article 119 would be considerably diminished and the legal protection required to achieve real equality would be impaired if an employee could rely on that provision only as against the employer and not against the administrators of the scheme who are expressly charged with performing the employer's obligations (paragraph 31).

32 Consequently, the reply to the third question must be that the administrators of an occupational pension scheme must, like the employer, comply with Article 119 of the Treaty and workers who are discriminated against may assert their rights directly against those administrators.

## Fourth question

33 The fourth question asks whether entitlement to retroactive membership of an occupational pension scheme enables payment of contributions for that period of membership to be avoided.

34 As the Court held in *Fisscher*, the fact that a worker can claim retroactive membership of an occupational pension scheme does not enable him to avoid paying contributions for the period of membership concerned.

## Fifth question

35 By the fifth question the national court asks in substance whether the national rules relating to time-limits for bringing actions under national law may be relied on as against workers who assert their right to retroactive membership of an occupational pension scheme or to payment of a retirement pension.

36 The Court has consistently held that in the absence of Community rules on the matter the national rules relating to time-limits for bringing actions are also applicable to actions based on Community law, provided that they are not less favourable for such actions than for similar domestic actions and that they do not render the exercise of rights conferred by Community law excessively difficult or impossible in practice (see, *inter alia*, Case 199/82 *Amministrazione delle Finanze dello Stato* v *San Giorgio* [1983] ECR 3595, paragraph 12).

37 Accordingly, the reply to the fifth question is that 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 or to payment of a retirement pension, provided that they are not less favourable for such actions than for similar domestic actions and that they do not render the exercise of rights conferred by Community law excessively difficult or impossible in practice.

## Sixth question

38 This question asks in essence what the consequences may be as regards this case of, first, the draft national law on the implementation of Directive 86/378/EEC and, secondly, Protocol No 2.

39 As regards the draft national law, the Court has consistently held that in proceedings under Article 177 of the Treaty it is not for the Court to interpret national law and assess its effects within the framework of proceedings under Article 177 of the Treaty (see, *inter alia*, Case 52/76 *Benedetti* v *Munari* [1977] ECR 163, paragraph 25). That applies *a fortiori* in the case of a mere draft law.

40 As regards Protocol No 2, the Court held in *Vroege* and *Fisscher* that it does not affect the right to join an occupational pension scheme, which is governed by the judgment in *Bilka*.

41 For the reasons given in connection with the reply to the second question the same conclusion applies as regards the right to payment of a retirement pension where

the worker was excluded from membership of an occupational pension scheme in breach of Article 119 of the Treaty.

42 The reply to the sixth question is therefore that Protocol No 2 does not affect the right to join an occupational pension scheme or the right to payment of a retirement pension where the worker was excluded from membership of the occupational scheme in breach of Article 119 of the Treaty, those rights being governed by the judgment in *Bilka*.

## Costs

43 The costs incurred by the Government of the United Kingdom and the Commission of the European Communities, 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 (Sixth Chamber),

in answer to the questions referred to it by the Rotterdam Kantongerecht, by order of 18 October 1993, hereby rules:

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 therein. That interpretation does not depend on**

the purposes of the national legislation enabling membership to be made compulsory or on the fact that the employer lodged an objection to the decision to make such membership compulsory or on his having conducted an enquiry among his employees with a view to seeking exemption from compulsory membership.

2. The limitation of the effects in time of the *Barber* judgment (Case C-262/88) does not apply to the right to join an occupational pension scheme, such as that at issue in the main proceedings, or to the right to payment of a retirement pension where the worker was excluded from membership of the scheme in breach of Article 119 of the Treaty.

3. The administrators of an occupational pension scheme must, like the employer, comply with Article 119 of the Treaty and workers who are discriminated against may assert their rights directly against those administrators.

4. The fact that a worker can claim retroactive membership of an occupational pension scheme does not enable him to avoid paying contributions for 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 or to payment of a retirement pension, provided that they are not less favourable for such actions than for similar domestic actions and that they do not render the exercise of rights conferred by Community law excessively difficult or impossible in practice.

6. Protocol No 2 on 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 or the right to draw a retirement pension where the worker was excluded from membership of the occupational scheme in breach of Article 119 of the Treaty, those rights being governed by the judgment in *Bilka*.

Mancini Murray Kapteyn

Delivered in open court in Luxembourg on 24 October 1996.

R. Grass G. F. Mancini

Registrar President of the Sixth Chamber