OPINION OF ADVOCATE GENERAL RUIZ-JARABO COLOMER

delivered on 16 March 2000 *

I — Introduction

1. As is well known to observers of Community law and, in particular, those familiar with the case-law of this Court in matters of social policy, this is not the first time that litigation between the Belgian national airline (Sabena SA) and one of its employees has given rise to a reference for a preliminary ruling.

Nor is it the first time that the Brussels Cour du Travail has referred a question under Article 177 of the EC Treaty (now Article 234 EC) in one of those cases. [1] On this occasion it seeks the interpretation of the Protocol on Article 119 of the Treaty establishing the European Community [2] (hereinafter 'the Protocol').

2. The EC Treaty, including its annexes and protocols, was amended, according to Article 6 of the Treaty of Amsterdam, [3] in order to delete lapsed provisions and to adapt the text of certain of the provisions. Accordingly, Article 12 of the Treaty of Amsterdam provided for the articles of the EC Treaty to be re-numbered in accordance with the equivalence tables set out in the Annex.

As a result of this renumbering, Articles 117 to 120 of the EC Treaty have been replaced by Articles 136 EC to 143 EC and the Protocol on Article 119 of the EC Treaty has become the Protocol on Article 141 of the Treaty constituting the European Community.

II — Facts in the main proceedings

3. Collective Labour Agreement No 17 of 19 December 1974 concluded within the National Labour Council, [4] lays down in

* Original language: Spanish.

1 — It was this court which referred the preliminary question in case 43/75 *Defrenne* v *Sabena* [1976] ECR 455.

2 — Protocol (No 2) annexed to the Treaty on European Union, signed in Maastricht on 7 February 1992, which came into force on 1 November 1993 (OJ 1992, C 191, p. 68).

3 — It amended the Treaty on European Union, the Treaties establishing the European Communities and other related acts. It was signed on 2 October 1997 in Amsterdam and came into force on 1 May 1999.

4 — The Agreement was rendered compulsory by a Royal Decree of 16 January 1975.

Belgium a scheme of additional payments for workers who are aged 60 years or more, if they are made redundant, on condition that they receive unemployment benefit, payable by their last employer. The amount of the payment is equal to half the difference between the net reference wage and the unemployment benefit.

4. The Collective Labour Agreement of 23 May 1984, agreed by Joint Sub-Committee No 315.1 (Sabena), and concluded in Agreement No 17 states that male workers over 55 years of age and female workers over 53 who take voluntary redundancy have the right to an additional allowance to be paid by the employer if they receive unemployment benefits. This additional allowance is paid to the men until they are 65 and to the women until they are 63. The scheme was set up to counter underemployment arising out of the development of labour techniques specific to the commercial aviation sector and to protect jobs for younger workers.

5. In June 1960, Ms Defreyn, the appellant in the main proceedings, started work as an employee of Sabena, the respondent airline. In November 1984, she requested the application of the additional payments scheme. The company informed her that it was granting her request and gave her two years' notice which expired on 31 December 1986.

The company agreed to pay her, from 1 January 1987 until November 1991, when she would turn 60, the unemployment benefit supplement, which normally consisted of 1% of the last gross monthly salary per year of employment. However there is an exception in favour of workers of 25 years or more service, by which the total of the unemployment benefit and the additional payment, including the non-statutory personal pension contribution, rises to 82% of the net payment of the month preceding the date upon which the pre-retirement payment should take effect.

6. Until her 60th birthday, in November 1991, Ms Defreyn received the unemployment benefit supplement, and thereafter she received her old age pension.

7. In the judgment of 17 February 1993,[5] in infringement proceedings against Belgium, this Court ruled that the additional payment payable by the last employer, granted to workers made redundant at a certain age with rights to unemployment benefit, is a payment for the purposes of

5 — Case C-173/91 *Commission* v *Belgium* [1993] ECR I-673.

Article 119 of the EC Treaty and, consequently, female workers over 60 years of age should not be deprived of this benefit when the male workers are able to receive it until they are 65 years of age.

8. Having learned of this judgment, in June 1993 Ms Defreyn asked to receive the additional payment up to her 65th birthday, in November 1996.

9. When the company refused this request, she brought an action against it in the Tribunal du Travail in September 1993. She requested that Sabena be ordered to pay her, for the period from December 1991 to November 1996, the payment supplementing unemployment benefit, thereby guaranteeing her 82% of the net salary received in the final month of employment together with interest and costs. The value of the additional payment claimed was BEF 1 624 380.

10. At first instance, the Tribunal du Travail declared the application admissible but unfounded and ordered Ms Defreyn to pay costs. It took the view that the payments supplementing unemployment benefits were covered by the Protocol, which limited the temporal scope of Article 119 of the Treaty relating to the benefits under an occupational social security scheme. It did not dispute that Ms Defreyn's claims related to a period of employment prior to 17 May 1990 and that she initiated proceedings after that date.

III — The questions referred for a preliminary ruling

11. The Brussels Cour du Travail, which must decide the appeal brought by Ms Defreyn, refers the following questions to this Court for a preliminary ruling pursuant to Article 177 of the EC Treaty:

'(1) Can the additional pre-retirement payment provided for by Collective Agreement No. 17, rendered compulsory by the Royal Decree of 16 January 1975 and provided for in the Collective Labour Agreement of 23 May 1984 concluded with in Joint Sub-committee No 315.1, be treated as an allowance payable under an occupational social security scheme to which the Protocol on Article 119 of the Treaty establishing the European Community applies?

(2) Are the provisions of Collective Labour Agreement No 17 and the Collective Labour Agreement of 23 May 1984 concluded within Joint Sub-committee

No 315.1 compatible with Article 5 of Directive 76/207/EC in that they exclude female workers over the age of 60 from the benefit of pre-retirement payments which constitute additional redundancy payments, granted in addition to unemployment benefit, whereas such payments are guaranteed for male workers until the age of 65?

(3) If the above two questions are answered in the affirmative, does the application of the Protocol on Article 119 of the Treaty preclude the action brought by Ms Defreyn from succeeding inasmuch as it is founded on breach of Article 5 of Directive 76/207?'

IV — The applicable Community legislation

12. Article 119 of the Treaty lays down the principle that men and women should receive equal pay for equal work. The second paragraph defines the pay in the following terms:

'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.'

13. The Protocol is intended to clarify the temporal effects of Article 119 of the Treaty on occupational social security schemes and provides 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'. [6]

6 — Following the renumbering of the Treaty articles within the framework of the Treaty of Maastricht, the text of the Protocol reads as follows: 'For the purposes of Article 141 of this Treaty, the 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'.

14. Article 5 of Directive 76/207/EEC [7] (hereinafter 'Directive 76/207'), the interpretation of which is also sought by the national court, reads as follows:

'1. Application of the principle of equal treatment with regard to working conditions, including the conditions governing dismissal, means that men and women shall be guaranteed the same conditions without discrimination on grounds of sex.'

V — Procedure before the Court of Justice

15. Sabena, the Belgian government and the Commission submitted written observations in this case within the period prescribed for this purpose by Article 20 of the EC Statute of the Court of Justice. Counsel for Ms Defreyn, Sabena, the Belgian Government, the United Kingdom Government and the Commission presented oral argument at the hearing of 24 February 2000.

16. Ms Defreyn submits that the Protocol is not applicable to her particular case in so far as she claims payment of the unemployment benefit supplement, which the Court defined in Case C-173/91 [8] as 'pay' within the meaning of Article 119 of the Treaty rather than a social security payment.

17. Both Sabena and the Belgian Government consider that the additional pre-retirement payment claimed by Ms Defreyn is 'pay' within the meaning of Article 119 and that the scheme which provides for the payment of this benefit is, without any doubt, a social security scheme organised on an occupational basis and created to supplement a pre-existing social security scheme. However, she is not entitled to 'pay' until her 65th birthday because her situation falls directly within the ambit of the Protocol which limits in time the application of the definition of 'pay' to benefits under an occupational social security scheme. Both consider that the application of the Protocol is not limited to payments made under an old-age pension, but includes any payment made under an occupational social security scheme and, thus, the additional payment claimed by Ms Defreyn. For this reason they propose that the reply to the national court should be that the contested payment is made under an occupational social security scheme to which the Protocol applies.

They maintain that, should the Court find otherwise, it would have to be concluded

7 — Council Directive of 9 February 1976 on the application 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).

8 — Cited at footnote 5 above.

that the Protocol does not affect the contested payment, in which case the judgment in Case C-173/91 should be applied, [9] and the applicant's claim upheld. The Belgian Government adds that, in that case, there would be a considerable risk of a flood of claims for the payment of additional pre-retirement benefits which, should it happen, would result in a financial imbalance which would have wide repercussions upon the economy given the fact that pre-retirement benefits provided under agreements is widespread in Belgium.

18. The United Kingdom Government states that the additional payment falls under an occupational social security scheme to which the Protocol is applicable. It cites various reasons in support of this statement: firstly, the wording of the Protocol does not limit its application to retirement pensions; secondly, the payment requested is payable by the undertaking and is intended to supplement the unemployment benefit paid under the general social security scheme; thirdly, the fact that the Protocol does not differentiate between different benefits indicates that it is intended to be applicable to all benefits under occupational social security schemes; and finally, the benefit requested by Ms Defreyn is attributable to periods of employment prior to 17 May 1990, given that entitlement is acquired as a result of the number of years spent working for the undertaking and its value is calculated as a percentage of the final salary received by the worker.

19. The Commission is in no doubt as to the nature of the benefit. It considers this to be 'pay' within the meaning of Article 119 of the Treaty and consequently, this benefit should be paid to men and women under the same conditions. It considers that the scheme as applied to Ms Defreyn is contrary to that article by virtue of the fact that the additional payment is made to women up to the age of 60 years and to men to the age of 65 years.

The Commission considers that the period for which Ms Defreyn claims the additional payment, from 1 December 1991, when she turned 60, to 30 November 1996, when she reached 65, cannot be considered a period of employment in the strict sense. It reaches the conclusion that the Protocol is not applicable in this particular case because the benefits claimed cover a period after 17 May 1990 and because the abovementioned judgment of the Court of Justice in Case C-173/91, in which Belgium was censured for non-compliance, does not contain any limit on its effects in time.

9 — Cited at footnote 5 above.

VI — Examination of the questions referred for a preliminary ruling

A — *Preliminary observations and background*

20. In order to reply to the national court, one must go back to 13 May 1986, the date of the judgment in *Bilka*. [10] The Court of Justice ruled that an additional pensions scheme, set up by an agreement between the undertaking and the workers' committee, which was intended to supplement the social security benefits payable under general national legislation through other benefits financed solely by the undertaking and which were considered an integral part of employment contracts, did not constitute a social security scheme governed directly by statute and thus was outside the scope of Article 119. On the contrary, the benefits paid to employees under the scheme constitute consideration received by the worker from the employer in respect of his employment, in accordance with the second paragraph of Article 119, and therefore the conditions which the employers imposed upon the admission of their employees to such a scheme fell within the scope of Article 119 of the Treaty. [11]

21. Notwithstanding this decision, the Council, some months later, adopted Directive EEC/86/378 [12] (Hereinafter, 'Directive 86/378'), intended to regulate the application of the principle of equal treatment between men and women in occupational social security schemes. Article 9 enables the Member States to defer the compulsory application of the principle of equal treatment with regard to, among other matters, the determination of pensionable age for the granting of pension, either until the date on which such equality is achieved in statutory schemes, or, at the latest, until such equality is required by a directive, although none has, thus far, been adopted. [13]

22. On 17 May 1990, the Court of Justice gave judgment in the case of *Barber* [14] which, as is known, continues the precedent first laid down in 1976 in the judgment in *Defrenne*, [15] and continued in 1986 with the judgment in *Bilka*, [16] which was a landmark in the development of community social policy specifically with regard to the interpretation of the principle of equal

10 — Case 170/84 [1986] ECR 1607.

11 — Ibid., paragraphs 20 and 22.

12 — Council Directive of 24 July 1986, concerning the application of the principle of equal treatment of men and women in occupational social security schemes (OJ 1986 L 225, p. 40).

13 — On 27 October 1987, the Commission gave the Council a draft directive supplementing the application of the principle of equality of treatment between men and women in legal and occupational social security schemes [COM(87) 494 final] (OJ C 309, p. 10). Paragraph 1 of Article 9 stated, subject to certain transitional provisions: 'when a retirement age is fixed for the payment of retirement and old age pensions, the age should be the same for both sexes'. However, this proposal was not adopted.

14 — Case 262/88, [1990] ECR I-11889.

15 — Cited at footnote 1 above.

16 — Cited at footnote 10 above.

pay for men and women applied to retirement pensions under an occupational social security scheme.

23. For the purposes of this case, the judgment in *Barber* presents two important aspects. The first is that the Court of Justice confirmed its case-law that a retirement pension paid under a company pension plan, which in that particular case was 'contracted out' from the general social security scheme, [17] was a benefit paid by the employer to the worker by virtue of the working relationship, and therefore included within the scope of Article 119 of the Treaty. [18]

24. The second aspect of the judgment is the limitation which the Court of Justice placed upon its effects in time. In the observations submitted in the proceedings for a preliminary ruling, the Commission raised that possibility, while the United Kingdom Government underlined the significant economic consequences which would follow if Article 119 of the Treaty was interpreted to include pensions paid by a company pension scheme, in view of the fact that in that State there was a large number of workers affiliated to such schemes, which often contained exceptions to the principle of equal treatment, particularly in determining different retirement ages for men and women. [19]

25. In its judgment, the Court of Justice took account of the fact that Article 7(1)(a) of Council Directive 79/7/EEC, [20] which concerns social security schemes, authorised Member States to defer the compulsory implementation of the principle of equal treatment with regard to the determination of pensionable age for the granting of old age pensions and that, as indicated above, this exception was also incorporated in Article 9 of Directive 86/378 in relation to occupational social security schemes. It considered that, in the light of these provisions, the Member States and interested parties were reasonably entitled to

17 — 'Contracted out' under the Social Security Pensions Act 1985. This means that the occupational scheme replaces the general retirement pensions scheme as regards contributions and payments linked to the salary of each employer. The members only pay reduced contributions to the general scheme, corresponding to the basic pension, which is the same for all, and which the general scheme provides to all workers irrespective of their salary.

18 — Cited at footnote 14 above, at paragraph 28.

19 — The Member States took more than six and a half years before amending the provisions of Directive 86/378 in line with this decision. Council Directive EC 96/97, of 20 December 1996 amends Directive 86/378 (OJ L 46, p. 5).

20 — Council Directive 79/7/EEC of 19 December 1978, concerning the progressive application of the principle of equal treatment between men and women in social security matters. (OJ 1979 L 6, p. 24).

consider that Article 119 did not apply to pensions paid under contracted-out schemes and that derogations from the principle of equality between men and women were still permitted in that sphere.

26. For those reasons, it was held, in paragraph 45 of the judgment, 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 that judgment, except in the case of workers or those claiming under them who, before that date had initiated legal proceedings or raised an equivalent claim under the applicable national law.

27. As a result of that judgment, The British Petroleum Company Plc, Barclays Bank Plc and Mars U.K. Limited, among others, brought an action against the Council and the Commission before the Court of Justice,[21] seeking a ruling on the non-contractual liability of the European Economic Community for damage caused by its institutions in the performance of their duties. The undertakings alleged, first, that they were misled by the two institutions, principally by Directive 86/378, adopted without taking account of the interpretation given to Article 119 of the Treaty in the judgment in *Bilka*, and, secondly, that, as a consequence of the judgment in *Barber*, they had to incur additional costs in respect of their pensions schemes.[22]

28. Of all the interpretations which flowed from paragraph 45[23] of the *Barber* judgment,[24] the Member States adopted that which appears in the Protocol, in force since 1 November 1993, which states that, for the purposes of Article 119 of this Treaty, benefits under occupational social security schemes are not to 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 pro-

21 — OJ 1992 C 24, p. 5.

22 — Cases transferred to the Court of First Instance on 27 September 1993.

23 — 'Paragraph 45 has exercised the minds of lawyers throughout the Community. Attempts have been made to analyse the precise meaning of pension scheme documents in order to determine how and when entitlement arises [...]'. Hudson, C.: 'Some reflections on the implications of the Barber decision', *European Law review*, 1992, pp.163 to 171, particularly p. 168.

24 — The authors did not agree on the number of possible interpretations. Traversa, E., 'Prohibition on discrimination between male and female workers, judgment of 17 May, 1990', *Revue Trimistrielle de droit européen*, 1991, pp. 426 et seq., in particular 429, proposes three possible interpretations; Deakin, C., 'Equality in Pensions Law — The Limits of Barber', *The Cambridge Law Journal*, 1994, pp. 239 to 239, in particular p. 237; Moore, S., '"Justice Doesn't Mean a Free Lunch": The Application of the Principle of Equal Pay to Occupational Pension Schemes', *European Law Review*, 1995, pp. 159 et seq., in particular p. 163; Binon, J.-M., 'L'égalité de traitement entre hommes et femmes dans les régimes professionnels de sécurité sociales: La "valse-hesitation" du droit européen', *Cahiers de Droit Européen*, 1996, pp. 663 to 721, in particular pp. 664 to 665, and De Vos, M., 'La notion de "rémunération" au sens de l'article 119 du Traité de Rome et son application dans le temps au regard de l'arrêt Barber et des arrêts postérieurs de la Cour de justice des Communautés Européennes', *Revue de droit social*, 1995, pp. 156 tp 205, in particular p. 184, put forward four, and Honeyball, S and Shaw, J., 'Sex, law and the retiring man', *European Law Review*, 1991, pp. 47 et seq., in particular p. 56, identify at least five.

ceedings or introduced an equivalent claim under the applicable national law. [25]

B — *The answer to the first question. The applicability of the Protocol on Article 119 of the EC Treaty to the disputed additional allowance.*

29. In the first question referred for a preliminary ruling, the Brussels Cour du Travail seeks to establish whether a benefit intended to supplement unemployment benefits, paid by the employer as a result of a collective agreement to workers over a certain age who take voluntary redundancy, should be treated as an allowance payable under an occupational social security scheme to which the Protocol on Article 119 of the Treaty is applicable.

30. Directive 79/7 regulates those statutory schemes which provide protection against the following risks: sickness, invalidity, old age, accidents at work, occupational diseases and unemployment. It also applies to the provisions relating to social assistance in so far as they are intended to supplement or replace the above schemes.

31. In its judgment in *Dufrenne*, the Court of Justice distinguished the statutory social security schemes from those to which Article 119 applied. [26] The former relate to general categories of workers; their retirement pensions are directly governed by legislation without any element of agreement within the undertaking or the occupational branch concerned; and they assure for the workers the benefit of a legal scheme, the financing of which workers, employers and possibly the public authorities contribute in a measure determined less by the employment relationship between the employer and the workers than by considerations of social policy. In these schemes the worker receives the benefits legally prescribed, not by reason of the employer's contribution but solely because the worker fulfils the legal conditions for the grant of benefit. [27]

25 — The companies which had challenged the Council and the Commission withdrew their action on 18 May 1995 when they realised that the legal framework existing when they had initiated proceedings had been amended by the coming into force of the Protocol and as a consequence of the interpretations by the Court of Justice in a number of decisions. Removed from the register by the Court of First Instance on 12 July 1995.

26 — Chapter III of the opinion of Adovcate General Dutheillet de Lamothe in this case is devoted to an examination of the diversity and complexity of the pension schemes in the Member States. It distinguishes, on the one hand, those general and particular statutory social security schemes which it considers are outside the scope of Article 119 of the Treaty and, on the other hand, those pensions schemes whose benefits are paid directly by the company and those described as 'supplementary' which are contractual in origin and whose benefits, which supplement the general scheme, are paid by the occupational sector or group of such sectors, which he considers to be included within the application of the said Article.

27 — Case 80/70 *Defrenne* v *Belgium* [1971] ECR 445, paragraphs 8 and 10.

32. In contrast, those schemes to which Article 119 of the Treaty applies are characterised by being financed entirely by the undertaking or the undertaking in conjunction with the workers, without assistance from public authorities, and by being applicable only to workers employed in certain undertakings or sectors. They are included among the occupational social security schemes to which Directive 86/378 applies and which defines them at Article 2 in the following terms: occupational schemes are those which are not governed by Directive 79/7 whose purpose is to provide workers, whether employees or self-employed, in an undertaking or group of undertakings, area of economic activity or occupational sector or group of such sectors with benefits intended to supplement the benefits provided by statutory social security schemes or to replace them, whether membership of such schemes is compulsory or optional.

Article 4 of Directive 86/378 states that it applies both to occupational schemes which provide protection against sickness, invalidity, old age, including early retirement, industrial accidents, occupational diseases and unemployment, and to occupational schemes which provide for other social benefits, in cash or in kind, and in particular survivors' benefits and family allowances, if such benefits are accorded to employed persons, and thus constitute a consideration paid by the employer to the worker by reason of the latter's employment.

33. The contested benefit is not paid under a social security scheme directly governed by legislation, nor is it applicable to general categories of workers. As I stated above, this Court, in C-173/91,[28] rejected the arguments of the Belgian Government that it should be considered as a social security benefit because it formed an inseparable part of the unemployment benefit, known as a 'contractual early-retirement pension'.

34. In contrast, the present case concerns a benefit created by collective agreement payable to the workers of a company and intended to supplement the statutory benefit and to provide protection against unemployment to those workers made redundant at a certain age, the payment of which is the responsibility of the last employer who pays it by reason of the employment relationship given that the amount is based on the number of years worked.

35. Accordingly, this additional payment comes within the scope of Article 119 of

28 — Cited at footnote 5 above.

the Treaty and it is payable under the occupational social security scheme.

36. It remains to be considered whether the Protocol applies to it, given that the Court, in C-173/91, was silent with regard to the argument of the Belgian Government that, if the additional payment created by Collective Agreement No 17 was included within the scope of Article 119 of the Treaty, it would be necessary to refer to the Protocol, which limits the scope of that article in time when applied to benefits under an occupational social security scheme.

37. In the order for reference, the Brussels Cour du Travail expresses doubts as to the applicability of the Protocol in this case. I propose to dispel these doubts as I deal with them.

38. First, it does not seem clear whether the limitation on the temporal scope of Article 119, as provided for in the Protocol, applies only to those pensions schemes which fulfil the criteria laid down by the Court of Justice in the *Barber* judgment and later cases, or whether the limitation extends, in accordance with the formula used in the Protocol, to all benefits paid under an occupational social security scheme.

39. I am of the opinion that, by now, there can be no doubt over whether the Protocol applies exclusively to pensions or to all benefits paid under an occupational social security scheme. Although it is true that in the *Barber* judgment the Court of Justice held that Article 119 of the Treaty could not be relied on to invoke a right to a pension with effect from a date prior to its enactment, account must be taken of the fact that the applicant in the main proceedings requested only that her entitlement to a retirement pension be recognised, with no discussion of other benefits. However, in the *Ten Oever*[29] judgment, which was the next in the series, in which the applicant requested recognition of his entitlement to a survivor's pension, the Court, using the same reasoning used to justify the limit of the effects in time in the *Barber* judgment, held that equal treatment in occupational pension schemes could only be relied on for benefits due for periods of employment after 17 May 1990.[30]

This particular point was clarified by the Court of Justice in paragraph 49 of the judgment in *Fisscher*[31] which states: 'the Protocol is linked to the *Barber* judgment, since it refers to the date of that judgment, 17 May 1990. That judgment declares unlawful discrimination as between men

29 — Case C-109/91 [1993] ECR I-4879.
30 — Ibid., paragraph 19.
31 — Case C-128/93 [1994] ECR I-4583.

and women resulting from an age condition for entitlement to a retirement pension upon dismissal for economic reasons which varies according to sex. There have been divergent interpretations of the *Barber* judgment which limits, with effect from the date of the judgment, namely 17 May 1990, the effect of its interpretation of Article 119 of the Treaty. Those divergences were removed by the judgment in *Ten Oever*, cited above, which was delivered before the entry into force of the Treaty on European Union. While extending it to all benefits payable under occupational social security schemes and incorporating it in the Treaty, Protocol No 2 essentially adopted the same interpretation of the *Barber* judgment as did the *Ten Oever* judgment. It did not, on the other hand, any more than the *Barber* judgment, deal with, or make any provision for, the conditions of membership of such occupational schemes.'

40. Secondly, the national court making the reference is of the view that most of the criteria adopted by the Court in rulings on the interpretation of the Protocol, inspired by the concern to safeguard the financial balance of pensions schemes, are not applicable to schemes set up by collective agreement concluded within the Sabena Joint Sub-committee which lays down the rules for the grant of the contested additional payment. Those criteria, which were set out by the Court in paragraphs 17 and 18 of the *Ten Oever* judgment,[32] are: the characteristic of this form of pay is that there is a time-lag between the accrual of entitlement to the pension, which occurs gradually throughout the employee's working life, and its actual payment, which is deferred until a particular age; and the way in which occupational pension funds are financed and thus of the accounting links existing in each individual case between the periodic contributions and the future amounts to be paid.

However, in its opinion: (i) the additional pre-retirement payment has no causal link with 'periods of employment prior to 17 May 1990'; (ii) there is no link between its amount and the number of annual contributions paid; (iii) there is no 'time lag' in this case between the accrual of entitlement to the pension and actual payment; and (iv) the pre-retirement payment does not involve the same financial mechanisms as those governing occupational pensions.

41. I would disagree with the view that in the case before me a causal link does not exist between the benefit and the periods of employment prior to the date of the Barber decision ((i)). In fact, Sabena was paying the contested additional payment as last employer of Ms Defreyn, who worked for that undertaking between June 1960 and December 1986. This benefit was thus paid by reason of the employment relationship between the parties, which ended prior to 17 May 1990.

Whatever the case, even assuming that the national court is correct and that the contested additional payment lacked a causal link with the periods of employment

32 — See note 29 above.

prior to 17 May 1990, the Court of Justice ruled, in paragraph 60 of the *Coloroll* judgment,[33] that the limitation of the effects in time of the *Barber* judgment is applicable to benefits not linked to the length of the active service, only where the operative event occurred before 17 May 1990.[34] In the instant case, the operative event, which was the dismissal, occurred before that date.

42. Nor can I agree with the statement that there is no link between the amount of the benefit and the contributions paid ((ii)), given that the amount is determined by the number of years of employment at a rate of 1% of the final gross annual salary and that, in the case of more than 25 years of service, 82% of this amount is guaranteed. It is in fact during the years in which the worker is active that the greater part of the contributions to both statutory and occupational social security schemes are paid.

43. So far as concerns the-time lag between the accrual of entitlement to the pensions and its actual payment ((iii)), which is a typical, although not exclusive, characteristic of pension schemes, I do not believe that it can be claimed, as the national court does, that it should not be granted in the case of the contested additional benefit.

It is true that the grant of the abovementioned benefit, which was created as an incentive to free positions occupied by older workers of a certain age in order to protect the jobs of younger workers, is unlike that of a retirement pension which accrues progressively throughout the working life and to which all workers are entitled in time.[35]

In spite of this, it seems to me that it is evident that there is a time-lag since this is a benefit which requires that the employment with the undertaking should have ceased for it to be received, as is the case with old-age and unemployment benefits. This time-lag does not exist in the case of invalidity benefits due to illness or industrial accidents, for example, which are received only while the worker is of employment age, requiring no break between the accrual of the entitlement and payment of the benefit.

44. Admittedly the additional payment is not governed by the same financial

33 — Case C-200/91 [1994] ECR I-4389.

34 — It should however be noted that, in that decision, the Court of Justice was referring precisely to benefits as the payment of a global amount due to the death of a worker during his employment.

35 — In the case of the additional benefit, neither all the workers of the requisite age seek the benefit, nor do all those who seek it receive it as the company may refuse to grant it, and other workers who have not asked for it may find themselves obliged to accept it if they are dismissed and if the collective Agreement is applicable to them.

mechanisms as the occupational pensions ((iv)), in which the periodic contributions and the future payments are linked. However, this is not a sufficiently convincing reason to conclude that the Protocol should not be applicable to it. In fact, this is a benefit which, in view of the age the beneficiaries have to reach, could be referred to as a pre-retirement pension, intended to supplement unemployment benefit in the case of dismissal, the period during which it is payable being linked to retirement age, which in Belgium is different for men and women. Member States were allowed to maintain this age difference defined by sex under Article 9 of Directive 86/378. Thus, the respondent undertaking should be one of the interested parties who might reasonably have assumed that Article 119 did not apply to this benefit and made their calculations accordingly when shedding staff. I believe, therefore, that if it now found itself obliged to apply the principle of equality of payment for this benefit to statutory situations which have already exhausted their effects in time, the economic balance of the scheme created by that collective agreement could be seriously affected.

45. Nor do I agree with the Commission when it states that the Protocol is not applicable to Ms Defreyn's claim for payment of the additional payment for the period from December 1991 to November 1996, a period after 17 May 1990. One only has to read the Protocol to know that it is the periods of employment which must be subsequent to that date and not the periods during which there is entitlement to receive the benefit.

46. Finally I would note that Ms Defreyn ceased working for Sabena in December 1986 and the undertaking paid her the additional payment until her 60th birthday in November 1991. Since, by applying Article 9 of the collective working agreement, the contribution continues to be paid for the occupational pension scheme as though the worker were still in employment, I have asked myself whether I need to consider, as a period of employment or a similar period, the period between 17 May 1990 and 30 November 1991 during which time Ms Defreyn accrued rights to the benefit in relation to which she could claim the direct effect of Article 119 to require equality of treatment.

I believe I should reply in the negative. Under Article 4 of the abovementioned agreement, the additional payment continues to be paid by the undertaking to their former employee until retirement age even if the former employee ceases to have rights to unemployment benefits by taking up employment in another undertaking. Thus, if despite receiving this benefit, the beneficiary can work for another undertaking, the period during which it is received cannot be considered as a period of employment with Sabena.

47. I must conclude, therefore, that the contested additional payment is a benefit granted under an occupational social security scheme to which the Protocol to Article 119 of the Treaty establishing the European Community is applicable.

C — *The second and third questions referred for preliminary rulings — Whether Directive 76/207 applies to the instant case.*

48. In the second and third questions the Brussels Cour du Travail is essentially asking whether Article 5 of Directive 76/207 precludes the contested benefit being paid to women to the age of 60 when it is paid to men to the age of 65 and whether, if the Protocol is applicable in this case, Ms Defreyn may base her action on that article.

49. Directive 76/207 provides for the implementation of the principle of equal treatment between men and women in relation to access to employment, vocational training and promotion, and working conditions. According to the second recital in the preamble, this Directive is not concerned with pay. The Court of Justice stated, at paragraph 24 of the judgment in *Gillespie*, [36] that, when a benefit comprises payment made directly or indirectly by the employer to the employee by reason of the employment relationship, it is covered by Article 119 of the Treaty and cannot also be covered by Directive 76/207.

Given that the contested benefit is, without any doubt, pay within the meaning of Article 119, the provisions of Directive 76/207 cannot be relevant for resolving this dispute and there is, therefore, no need to reply to these two questions.

36 — Case C-342/93 [1996] ECR I-475.

VII — Conclusion

50. In light of the foregoing arguments, I propose that the Court of Justice should reply to the Brussels Cour du Travail as follows:

(1) The additional payment provided for in Collective Agreement No 17, which became compulsory by Royal Decree on 16 January 1975, and established in the Collective Agreement of 23 May 1984 concluded within Joint Sub-committee No. 315.1, is a benefit under an occupational social security scheme to which the Protocol to Article 119 of the Treaty establishing the European Community applies.

(2) Given that the contested additional payment is pay within the meaning of Article 119 of the Treaty, there is no need to reply to the second and third questions.