OPINION OF ADVOCATE GENERAL TIZZANO

delivered on 27 March 2001 [1]

1. By order of 23 March 1999 the Bundesarbeitsgericht (Federal Labour Court) (Federal Republic of Germany) referred a question to the Court of Justice for a preliminary ruling pursuant to Article 177 of the EC Treaty (now Article 234 EC), relating to the interpretation of Article 119 of the EC Treaty (Articles 117 to 120 of the EC Treaty have been replaced by Articles 136 EC to 143 EC). The German court wished to know in particular whether the concept of employer in that provision includes a pension fund appointed by that employer to manage its occupational pension scheme, and whether that fund is consequently obliged to meet all the obligations arising from the principle, laid down in Article 119 of the EC Treaty, of equal treatment for men and women as regards pay.

Legislative context

Community law

2. As is well-known, the principle of equal pay for men and women is laid down in Article 119 of the EC Treaty (now Article 141 EC). That article provides that each Member State is to ensure that the principle is applied for the same work or for work of equal value.

Paragraph 2 of that article states that:

'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.'

German Law on the Enhancement of Occupational Old-Age Pensions ('BetrAVG')

3. According to the order for reference and the written observations of the German Government, in the Federal Republic of

1 — Original language: Italian.

Germany the benefits relating to occupational old-age pension schemes are provided according to various methods. The simplest method is where the employer takes on such obligations directly. However, the other methods rely on outside bodies to fulfil these obligations. Therefore, the employer does not pay any benefits, but makes provision for it indirectly, by means of: a 'Direktversicherung', that is insurance operating under a free market regime, taken out by the employer in favour of the employee; an 'Unterstützungskasse', that is a provident or assistance fund; or, as in this case, a 'Pensionskasse', that is a pension fund entrusted by the employer with administering its occupational pension scheme and financed by contributions paid by it.

4. With reference to the last option, it should be noted that, pursuant to Paragraph 1(3) of the Gesetz zur Verbesserung der betrieblichen Altersversorgung (Law on the Enhancement of Occupational Old-Age Pensions; hereinafter 'the BetrAVG'), the Pensionskasse is a social security institution with a legal personality of its own, which pays an employee or his survivors the benefits due to them, assuming the relevant pension risks in the same way as an insurance undertaking.

5. Although the employer does not pay any benefits directly, as the pension fund is used for that purpose, he does remain liable for insurance benefits, as he is obliged to do so by virtue of the underlying employment relationship. In particular, as stated by the referring court itself, pursuant to the fourth sentence of Paragraph 1(1) of the BetrAVG, if the insurance conditions fixed under the statute of the Pensionskasse provide for treatment which is inferior to that stated in the contract of employment, the employer must make good the shortfall, complying with his own contractual obligations in accordance with the principle of equal treatment.

6. Finally, the referring court emphasises that the right of the employee is protected in the event of insolvency of the employer under Paragraph 7 of the BetrAVG. In those circumstances, the public body set up for that purpose, the Pensions-Sicherungs-Verein a.G., is liable for the employer's payments.

The Statute of the Pensionskasse für die Angestellten der Barmer Ersatzkasse

7. With reference to the case before us, it should also be noted that Paragraph 11 of the Statute of the Pensionskasse für die Angestellten der Barmer Ersatzkasse (hereinafter 'the Pensionskasse' or 'the Pension Fund'), that is, the pension fund for employees of the Barmer Ersatzkasse,

which is the employer, provides as follows, *inter alia:*

'Types of benefits

The following benefits are paid to members who leave the service of the BEK on materialisation of the insured risk:

1. ...

2. A survivor's pension on cessation of pension payments to members or payments of salary:

   (a) a widow's pension to the widow of a deceased member. A widower's pension is paid to a husband on the death of a wife who was a member where the deceased was the main breadwinner in the family.'

Facts of the case and procedure

8. The current proceedings arise from a dispute pending before the German courts between Hans Menauer, claimant and respondent on a point of law, and the Pensionskasse on the question whether the pension fund is liable for payment of a widower's pension to the claimant.

9. Mr Menauer is the widower of Mrs Margitta Menauer, who was employed at the Regional Administrative Office of the Barmer Ersatzkasse in Straubing from 1 September 1956 until her death on 12 November 1993. The collective agreement applicable to the Barmer Ersatzkasse was applicable to the employment relationship of Mrs Menauer, in accordance with a reference in her individual agreement. Under that agreement, the Barmer Ersatzkasse was liable for the payment of benefits in respect of the occupational old-age pensions of its own employees, both male and female. Those benefits comprised a retirement allowance, payable by the employer, and a pension, paid by the Pensionskasse, to male and female employees who are members of the Pension Fund. Under the abovementioned collective agreement, the Barmer Ersatzkasse had to pay contributions to the Pensionskasse for its own employees, both male and female.

10. Mrs Menauer was a member of the defendant pension fund throughout her employment. After her death, her widower,

Mr Menauer, unsuccessfully claimed payment of a survivor's pension from the Barmer Ersatzkasse and the Pensionskasse.

11. Mr Menauer then decided to apply to the Arbeitsgericht (Labour Court) to claim payment of the pension from the Barmer Ersatzkasse and the Pensionskasse. He argued that the condition laid down in the statute of the Pensionskasse for granting the survivor's pension — namely, that the deceased was the main breadwinner — was unlawful on the ground of breach of the principle of equality, inasmuch as it only applied in the case of female employees.

12. The Arbeitsgericht upheld Mr Menauer's claim *vis-à-vis* the Pensionskasse, but dismissed it in so far as it concerned the Barmer Ersatzkasse. The Pensionskasse brought an appeal against that judgment, which was dismissed by the Landesarbeitsgericht (Regional Labour Court). The appeal of the Pensionskasse was then brought before the Bundesarbeitsgericht (Federal Labour Court).

Question referred for a preliminary ruling

13. The German court does not display any doubts concerning the incompatibility between Paragraph 11(2)(a) of the Statute of the Pensionskasse, to the extent that it subjects the widower's benefit to the condition that the deceased employee was the main breadwinner, and the principle of equal pay laid down in Article 119 of the Treaty. Since the survivor's pension is one of the 'other considerations' which constitute 'pay' under that provision, the discriminatory nature of Paragraph 11(2)(a) of the Pensionskasse statute is clear, in so far as that provision subjects the right of the widower to the survivor's pension of the female employee to a restrictive condition for which there is no equivalent in the case of the same pension payable to the widow of a male employee. The referring court therefore stated that the German provision was incompatible with Article 119 of the Treaty and, in view of the case-law of the Court,[2] the provision must be disapplied for the purposes of the decision in this case.

14. However, in this case, the Bundesarbeitsgericht wonders whether Mr Menauer can rely on the right to the survivor's pension as against the Pensionskasse, as well as against the employer; more generally it wonders whether the principle of equal pay laid down in Article 119 of the Treaty applies as against an entity such as the Pensionskasse, not only on account of the legal independence of that fund, but also because, as already stated, the fund is of the nature of an insurance undertaking; as such, it is subject to supervision by the

2 — See Case 43/75 *Defrenne II* [1976] ECR 455, paragraph 40, and Case C-184/89 *Nimz* [1991] ECR I-297, paragraph 21.

insurance supervisory bodies under the Versicherungsaufsichtsgesetz (Law on the supervision of insurance transactions and companies) and to the separate principle of equal treatment under insurance law, a principle which requires that equal insurance benefits be paid in return for the same contributions.

15. Specifically for these reasons, the referring court observes, the majority of German legal writers do not accept that a pension fund can be directly liable for the obligations arising from a breach of the principle of equal treatment, even though it assumes, as an insurer, responsibility for certain social security and assurance related risks under Paragraph 1(3) of the BetrAVG, (see above, point 4). If the volume of the fund's insurance obligations under its statute were increased, the resulting additional expenditure would have to be offset, under the principle of equal treatment under insurance law, by a parallel increase in contributions; this would have repercussions on the salaries of members if the employer has not taken full responsibility for payment of the employees' contributions, which is not unusual.

16. In this situation, the Bunderarbeitsgericht points out, to extend the application of Article 119 of the Treaty to the entities in question would give rise to serious anomalies in the German system, without such extension actually being necessary in order to guarantee protection for the employee against discrimination on grounds of sex. It is necessary to distinguish, in German law, the basic relationship between employer and employee, which is subject to the rules of employment law, from the relationship between the employer and the pensions provider, which is subject to insurance law. According to the referring court, it is precisely this distinction that enables the principle stated in Article 119 of the Treaty to be complied with, because, as I have already pointed out, the employer remains liable for the pension payments in favour of the employee. Therefore, whenever the pensions entity offers benefits which do not comply with the principle of equal pay, the employer will have to supplement the payment due so as to ensure compliance with that principle. Moreover, as I mentioned earlier, the employee is also covered in the event of insolvency of the employer.

17. Under these circumstances, therefore, according to the Bundesarbeitsgericht, it is not necessary also to bring into play the responsibility of an entity external to the relationship between employer and employee in order to protect the rights of the employee against breaches of Article 119 of the Treaty. However, given that, in view of the case-law of the Court in the *Coloroll* and *Fisscher* cases,[3] that conclusion was not at all certain, as we shall see shortly, the Bundesarbeitsgericht referred the following question to the Court for a

3 — Case C-200/91 *Coloroll Pension Trustees* [1994] ECR I-4389 and Case C-128/93 *Fisscher* [1994] ECR I-4583.

preliminary ruling, pursuant to Article 177 of the EC Treaty:

'Must Article 119 of the EC Treaty be interpreted as meaning that pension funds must be considered to be employers and obliged to treat men and women equally as regards payments of occupational old-age pensions, even though disadvantaged employees have an entitlement, which is secured against insolvency and excludes discrimination, against the body directly responsible for provision of a pension, that is to say their employer as a party to the employment contract?'

Legal assessment

Preliminary observations

18. Moving on to the case before us, I must emphasise at once, as the Commission and the Netherlands Government did in their respective observations, that the answer to the arguments stated in the order for reference and summarised above is to be found to a large extent in the case-law of the Court, as the Bundesarbeitsgericht confirms to some degree. I shall therefore proceed to examine those arguments, with ample recourse to that case-law.

Significance of the legal nature of the pension funds

19. As we have already seen, one of the main arguments put forward by the Bundesarbeitsgericht, and also by the Pensionskasse and the German Government, to exclude the application of Article 119 of the Treaty to pension funds, concerns the legal nature of those funds and the negative implications that such application would mean in the German legal system.

20. I should like to state first of all on this point, in very general terms at this stage, that while those implications exist, the argument could not be conclusive because it is a settled principle of Community law that the transposition of that law into the legal systems of the Member States may not be impeded by the difficulties or incompatibilities which may arise from that transposition. [4]

4 — *Ex multis* and with specific reference to this argument, see *Coloroll*, cited above, paragraph 41 et seq.

21. But there are in the case-law of the Court more specific and appropriate points of reference that support the argument that Article 119 of the Treaty applies to pension funds. Firstly, I would recall that, according to a consistant line of authority, an old-age benefit paid under an occupational scheme set up under a collective agreement, constitutes 'pay' for the purposes of the prohibition of discrimination laid down in Article 119 of the Treaty. That pension is in fact paid with reference to the preceding employment relationship, irrespective of whether the occupational scheme has replaced the statutory scheme or is supplementary to it. [5]

22. It is also settled case-law that a survivor's pension falls within the concept of 'other consideration', contained in Article 119 of the Treaty, paid by the employer to the employee in respect of his employment through the instrument of an occupational pension scheme. Even though that pension is not paid to the employee, but to the surviving spouse, the pension benefit is a consideration which arises from the survivor's spouse's membership of the occupational pension scheme. [6]

23. Finally, and this is the point which concerns us primarily, I would point out that the fact that the pension is not paid by the employer himself, but through an external entity which has been set up by him and is legally independent, does not preclude the occupational pension from being 'pay'; therefore, according to the Court, such a scheme also falls within the scope of Article 119 of the Treaty. [7]

24. That approach had been taken in the judgment in *Barber*, in which the applicability of the principle of equal pay for men and women was affirmed also with respect to private occupational pension schemes '... set up in the form of a *trust* and administered by *trustees* who are technically independent of the employer, since Article 119 also applies to consideration received indirectly from the employer'. [8] It was then followed, as the Bundesarbeitsgericht also points out, in the subsequent judgments in *Coloroll* and *Fisscher*, in which the Court held that while both the *trustees* under United Kingdom law and the directors of an occupational pension scheme under Netherlands law are technically independent of the employer and are '... not party to the employment relationship, [they] are called upon to pay out benefits which constitute pay within the meaning of Article 119', with the result that '... they must

5 — See Case 170/84 *Bilka* [1986] ECR 1607, paragraph 20; Case C-262/88 *Barber* [1990] ECR I-1889, paragraph 28, and Case C-110/91 *Moroni* [1993] ECR I-6591, paragraph 15 et seq.

6 — See Case C-109/91 *Ten Oever* [1993] ECR I-4879, paragraph 8 et seq.; *Coloroll*, cited above, paragraph 18, and Case C-147/95 *Evrenopoulos* [1997] ECR I-2057, paragraph 22.

7 — See *Barber*, cited above, paragraphs 28 and 29; *Coloroll*, cited above, paragraph 20, and *Fisscher*, cited above, paragraph 31.

8 — *Barber*, cited above, paragraph 29; emphasis added.

comply with that provision, by doing all within their powers to ensure that the principle of equal treatment is observed in this respect'. [9]

25. In my view, it can be inferred generally from that case-law that third parties entrusted by the employer with administering the occupational scheme, irrespective of their legal form and the way in which they are assigned the task of managing the pension rights of the employee arising from his employment relationship, must comply with the principle laid down in Article 119 of the Treaty. Even in the cases just cited the third party entrusted by the employer with administering its own occupational pension fund — such as the Pensionskasse in this case — is technically independent with respect to the employer, but that was not considered by the Court to be sufficient for it to avoid the application of Article 119 of the Treaty. Similarly, the legal form which the pensions entity may have, because of the specific nature of each national legal system, was not considered to be a determining factor. On the contrary, the Court considered the fact that those entities were 'called upon to pay out benefits which constitute pay within the meaning of Article 119' to be a determining factor. [10] I therefore conclude that the legal independence of the Pensionskasse with respect to the employer and its nature as an insurance entity are not sufficient for it to avoid compliance with that fundamental principle, while the fact that the Pensionskasse was entrusted by the employer with the payment of the occupational pension benefits means, in my opinion, that in carrying out that activity it was obliged to comply with that same principle.

26. Nor do I think that this conclusion can be avoided through another argument mentioned above, according to which, given that the principle of equality in force in insurance law requires the payment of insurance benefits equal to the contributions paid, the application of Article 119 of the Treaty to the Pensionskasse might result in an increase in contributions. I would point out in that regard that that objection had already been dealt with, and dismissed, in the judgment in *Coloroll*. The Court stated in that case that 'the fact that there are difficulties in applying the principle of equal pay because the funds held by the *trustees* are insufficient or the employer cannot provide additional funds is a problem to be resolved in accordance with national law', with the result that 'any problems arising because the funds held by the *trustees* are insufficient to equalise benefits must be resolved on the basis of national law in the light of the principle of equal pay', therefore, in full compliance with Article 119 of the Treaty. [11]

27. I do not think that in the present case arguments have been put forward which

9 — *Fisscher*, cited above, paragraph 31, and *Coloroll*, cited above, paragraph 22.

10 — *Fisscher*, cited above, paragraph 31.

11 — *Coloroll*, cited above, paragraphs 42 and 43; emphasis added.

might call for departure from that conclusion. Moreover, as the Commission pointed out in its written observations, even accepting that the application of the principle stated in Article 119 of the Treaty may entail an increase in contributions, that cannot justify a restriction on the application of the general principle; if necessary the pension fund will have to take note of that consequence and provide additional financing.

Subjective scope of Article 119 of the Treaty

28. To avoid those objections, both the Bundesarbeitsgericht and the German Government have recourse to other arguments, also mentioned above. Above all, they emphasise the fact that, in the case of the Pensionskasse, the employer remains liable for the pension benefits, being obliged to do so by virtue of the underlying contract of employment. Accordingly, where the benefits laid down in the statute of the pension fund remain below the amount the employer is obliged to ensure under that contract, the employee will be able to obtain a supplementary pension benefit by having recourse to the person primarily liable for payment of that pension, that is the employer himself. In addition, it will be remembered that under the German system the right of the employee or the persons claiming under him is protected also against the risk of insolvency of the employer.

29. Beginning with the first argument, I must first make the general point that the case-law of the Court has clearly affirmed 'that the principle of equal pay is one of the foundations of the Community and that Article 119 creates rights for individuals which the national courts must safeguard'. [12] The Court has drawn from that affirmation the inference that the effectiveness of that provision is not restricted to vertical relationships, between public authorities and the individual, but extends to all agreements which govern employment collectively, as well as contracts between private individuals.

30. That point having been made, there seems to me to be no doubt that such contracts must include agreements entered into by the employer with third parties responsible for administering pension schemes. The Court itself endorsed that inference when it stated that 'the effectiveness of Article 119 would be considerably diminished and the legal protection required to ensure real equality would be seriously impaired if an employee or an employee's dependants could rely on that provision only as against the employer, and not against the *trustees*, who are expressly charged with performing the employer's obligations'. [13] If that were not the case, the employer would be able to 'avoid the obligations incumbent on him under Arti-

12 — See *Defrenne II*, cited above, paragraphs 12 and 39; Case C-33/89 *Kowalska* [1990] ECR I-2591, paragraph 12; *Coloroll*, cited above, paragraph 26.

13 — *Coloroll*, cited above, paragraph 23; in the same vein, with reference to the directors of a pension scheme, *Fisscher*, cited above, paragraph 31; emphasis added.

cle 119 by setting up the occupational pension scheme in the legal form of a *trust*'. [14]

31. In the case before us, those obligations would perhaps not be avoided, given that, as I have stated, the employer must be responsible for them; however, to force the beneficiary of the survivor's pension to apply to the employer would undoubtedly have the effect of weakening the effectiveness of Article 119 of the Treaty. As the Commission pointed out, on one hand, the pension fund appears to the employee (or his survivors) as logically and to some extent naturally liable for payment of the pension, with the result that he will have to apply directly to it to obtain payment; on the other hand, the uniform and general application of the principle of equal pay can only be achieved if the entity responsible for paying the pension ensures compliance with the principle directly and on its own initiative, without forcing the survivor to claim the pension from the employer or even to have recourse to the courts.

32. Nor, in my view, is the other argument mentioned above of any relevance, namely that even if the employer were to become insolvent the legal protection of an employee belonging to the category discriminated against would not be weakened or restricted, as the public entity set up to provide legal protection against the insolvency of the employer, the Pensions-Sicherungs-Verein a.G., is liable for the employer's payments in the event of his insolvency. The fact that the protection of the pension rights of the employee remains guaranteed in that circumstance too does not appear to me to be of any consequence for present purposes and in any event does not justify exempting the pension fund from compliance with the principle of equal pay enshrined in Article 119 of the Treaty. It is my view, instead, that the system of legal protection against the insolvency of the employer should be considered for what it actually is, that is to say, additional cover for the rights of the employee, established in accordance with the relevant provisions of Community law [15] and national law, but it has nothing to do with the question of the applicability of Article 119 of the Treaty to pension funds.

33. Finally, I consider that, as stated by the Netherlands Government in its observations, such applicability finds indirect confirmation in Article 6(2) of Council Directive 86/378/EEC. [16] That provision provides that when the payment of an addi-

14 — *Coloroll*, cited above, paragraph 21; emphasis added.

15 — See Council Directive 80/987/EEC of 20 October 1980 on the approximation of the laws of the Member States relating to the protection of employees in the event of the insolvency of the employer (OJ 1980 L 283, p. 23).

16 — 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). That provision was interpreted in this way by Advocate General Van Gerven in the Opinion delivered on 28 April 1993 in the cases already cited, *Ten Oever* and *Coloroll* ([1993] ECR I-4893, paragraph 57). In the version in Council Directive 96/97/EC of 20 December 1996, amending Council Directive 86/378/EEC on the implementation of the principle of equal treatment for men and women in occupational social security schemes (OJ 1996 L 46, p. 20), it is also stated that the scheme management bodies 'must take account of the principle of equal treatment'.

tional or replacement occupational pension is left to the discretion of the scheme management bodies, 'they must take account of the principle of equal treatment'.

34. For the foregoing reasons, I consider that the employee and the persons claiming under him should be able to rely on Article 119 of the Treaty in respect not only of the employer but also the third parties entrusted by him with occupational pension schemes, such as the pension fund.

Conclusion

35. In view of the foregoing considerations, I therefore propose that the Court should answer the question from the Bundesarbeitsgericht as follows:

Article 119 of the EC Treaty (Articles 117 to 120 of the EC Treaty have been replaced by Articles 136 EC to 143 EC) must be interpreted as meaning that pension funds which pay benefits in respect of occupational old-age pensions must be considered as if they were employers and are obliged to comply with the principle of equal treatment for male and female employees, even though the employer remains liable to them for payment of their pension benefits and disadvantaged employees have an entitlement which is secured against insolvency and excludes discrimination.