OPINION OF ADVOCATE GENERAL MISCHO

delivered on 20 January 2000 *

Facts and procedure

1. For 35 years Mrs Podesta, a senior executive in the pharmaceutical industry, paid contributions in respect of a supplementary retirement pension to the Caisse de Retraite par répartition des Ingénieurs Cadres & Assimilés (CRICA), the Union Interprofessionelle de Retraite de l'Iindustrie et du Commerce (UIRIC) and the Caisse Générale Interprofessionelle de Retraite pour Salariés (CGIS), funds which affiliated to the Association Générale des Institutions de Retraite des Cadres (AGIRC) or to the Association des Régimes de Retraite Complémentaire (ARRCO) ('the pension funds').

2. Following his wife's death on 3 December 1993, Mr Podesta applied to the pension funds for payment of a survivor's pension corresponding to half of the retirement pension due to his wife. The funds to which he applied refused his application on the ground that he could not claim that pension since he had not yet reached the age of 65, the age prescribed for widowers to be entitled to the reversion of their spouses' retirement pension.

3. On 18 November 1996, Mr Podesta thus brought an action against the pension funds for an order that they pay him, in particular, the survivor's pension, with retroactive effect from the date of his wife's death.

4. Considering that the resolution of the dispute depended on an interpretation of Article 119 of the EC Treaty (Articles 117 to 120 of the EC Treaty have been replaced by Articles 136 EC to 143 EC), the Tribunal de Grande Instance, Paris, stayed proceedings by judgment of 12 January 1999 and referred the following question to the Court for a preliminary ruling:

'Is Article 119 of the Treaty of Rome, which lays down the principle of equal pay for men and women, applicable to the AGIRC and ARRCO supplementary retirement pension schemes and does it prohibit them from discriminating between men and women in respect of the age at which they are entitled to a survivor's pension following the death of their spouse?'

* Original language: French.

National provisions

5. The relevant national provisions are outlined below.

6. Article L. 921-1 of the French Code de la Sécurité Sociale (Social Security Code), as amended by the Law of 29 December 1972, the 'Loi de genéralisation des retraites complémentaires' (Law on the general application of supplementary retirement pensions) requires the affiliation of all employees to the ARRCO and AGIRC supplementary retirement pension schemes.

7. Article L. 921-4 of the same code provides as follows:

'The supplementary retirement pension schemes for employees covered by this chapter shall be established by national inter-occupational agreements, as extended and broadened in accordance with the provisions of Title 1 of this book.

They shall be implemented by supplementary retirement pension institutions and federations of those institutions. The federations shall provide cover for the transactions undertaken by the supplementary retirement pension institutions which are federation members.'

8. Article L. 913-1 of that code provides that any provision included in the conventions, agreements and unilateral decisions covered by Article L. 911-1 which gives rise to discrimination on the ground of sex shall be void. However, that prohibition does not preclude provisions relating to the protection of women on the ground of maternity and does not apply to provisions relating to determination of the retirement age or to the conditions for granting survivors' pensions.

9. The first paragraph of Article 12 of Annex I to the national collective agreement of 14 March 1947 on executives' retirement and pensions, as amended on 9 February 1994, states:

'The widow of a member employee shall be entitled ...

(a) in the event of death before 1 March 1994, to a survivor's benefit, from the age of 50, calculated by reference to the number of points corresponding to 60% of those of the deceased member,

(b) in the event of death on or after 1 March 1994, to a survivor's benefit, from the age of 60, calculated by reference to the number of points corresponding to 60% of those of the deceased member.'

10. The first paragraph of Article 13c of the same annex states:

'The widower of a member employee shall be entitled

(a) in the event of death before 1 March 1994, to a survivor's benefit, from the age of 65, calculated by reference to the number of points corresponding to 60% of those of the deceased member ...

(b) in the event of death on or after 1 March 1994, to a survivor's benefit calculated in accordance with subparagraph (b) of the first paragraph of Article 12.'

11. Under an amending agreement of 1994, widows and widowers of member employees of the AGIRC scheme may, in respect of deaths on or after 1 March 1994, obtain the survivor's pension at the full rate when they reach the age of 60 (or at a reduced rate from the age of 55). An agreement of 1996 also harmonised the conditions for paying survivors' pensions under the ARRCO scheme at 55 years in relation to deaths on or after 1 July 1996.

Community provisions

12. Article 2(1) 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 [1] states:

'"Occupational social security schemes" means schemes not governed by Directive 79/7/EEC whose purpose is to provide workers, whether employees or self-employed, in an undertaking or group of undertakings, area of economic activity, occupational sector or group of 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.'

13. When Mrs Podesta died Article 9 thereof provided:

'Member States may defer compulsory application of the principle of equal treatment with regard to:

1 — OJ 1986 L 225, p. 40.

(a) determination of pensionable age for the purposes of granting old-age or retirement pensions, and the possible implications for other benefits:

— 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;

(b) survivors' pensions until a directive requires the principle of equal treatment in statutory social security schemes in that regard.'

14. Article 1(5) of Council Directive 96/97/EC of 20 December 1996, amending Directive 86/378,[2] limits the scope of Article 9 to self-employed workers.

15. The first sentence of Article 2(1) of Directive 96/97 provides:

'Any measure implementing this directive, as regards paid workers, must cover all benefits derived from periods of employment subsequent to 17 May 1990 and shall apply retroactively to that date, without prejudice to workers or those claiming under them who have, before that date, initiated legal proceedings or raised an equivalent claim under national law.'

16. Article 3 provides that 'Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this directive by 1 July 1997. They shall forthwith inform the Commission thereof'.

The submissions put before the Court

17. The pension funds contend that the schemes which they administer do not fall within the scope of Article 119 of the Treaty.

2 — OJ 1997 L 46, p. 20.

18. In this respect, they rely, first, on a series of arguments to demonstrate the quasi-statutory nature of the schemes in question which are therefore not occupational schemes for the purposes of that provision.

19. Thus they point out that membership of those schemes was made compulsory by law. Those schemes were not established for the benefit of a specific category of employees with a homogeneous status, but for a general category of employees. Membership of those schemes is not dependent on the employment link with a particular employer, but on the simple fact that a person is covered by the general social security scheme.

20. In that regard, the pension funds draw attention to the fact that more than 10% of the member employees of the ARRCO and AGIRC schemes acquire rights in particular situations although they do not have, at that time, an employment link with an employer.

21. They add that the 'extending' and 'broadening' procedures provided for in the Code de la Sécurité Sociale give rise to a process for the general application of supplementary retirement pensions to a general category of employees who do not all have a homogeneous status and are not all bound to an undertaking by an employment link.

22. The pension funds conclude that, by ensuring general solidarity between employees in that general category, French law lays down a social policy, which is illustrated, moreover, by the fact that the law expressly vested the institutions and federations managing supplementary retirement pension schemes with a task in the general interest. In addition, the public authorities intervene significantly in the financing of those schemes.

23. It is clear from the case-law of the Court of Justice [3] that a retirement pension scheme does not fall within the scope of Article 119 of the Treaty unless it is an occupational scheme whose principal characteristics are the following: such a scheme is the result of consultation between employers and employees or of a unilateral decision by the employer, is financed by the employer and/or the employee but not in any way by the public authorities, is not compulsorily applicable to general categories of workers, since membership of those schemes is a necessary consequence of the employment relationship with a particular employer.

24. It follows, therefore, in the view of the pension funds, that, given the characteristics of the schemes in question, which were outlined above, those schemes cannot be regarded as occupational schemes and are, consequently, necessarily excluded from the scope of Article 119 of the Treaty.

3 — They cite, in particular, Case C-7/93 *Bestuur van het Algemeen Burgerlijk Pensioenfonds* v *Beune* [1994] ECR I-4471; Case C-262/88 *Barber* [1990] ECR I-1889; and Case C-109/91 *Ten Oever* [1993] ECR I-4879.

25. The pension funds rely, second, on an argument based on the concept of 'pay' to show that the schemes which they manage are not covered by Article 119 of the Treaty. According to the case-law of the Court of Justice, retirement pension benefits fall within the scope of that provision only where they can be regarded as deferred pay.

26. That is true of what are called 'defined-benefit' schemes, which establish a right for those in retirement to receive a benefit at a level which is, or may be, fixed in advance. The employer therefore has an obligation to guarantee to his employee a level of benefit which is, or may be, fixed, calculated by reference to the length of service and the last salary. There is, in that case, a direct link between the employment, both from the point of view of length and pay, and the retirement pension benefit. It is thus logical to regard that benefit as forming a part, albeit deferred, of the pay, which is covered necessarily therefore by Article 119 of the Treaty.

27. The situation in the present case is completely different.

28. The ARRCO and AGIRC schemes are 'defined contribution', schemes which do not impose any obligation on the employer to guarantee to former employees any particular level of benefits. Employees are not, therefore, entitled to obtain a fixed benefit. Consequently, we cannot speak of deferred pay in this case.

29. Furthermore, those schemes are run on a 'pay-as-you-go' basis, that is to say that the benefits paid to those in retirement are financed by those currently in employment as a result of the payment of their contributions.

30. The amount of the benefit does not therefore depend on the contribution paid by the person in retirement but on the capacity of those in employment to generate the finance. Accordingly, the requirement, which was set by the Court of Justice in *Neath* and *Coloroll*, [4] of a direct correlation between 'the periodic contributions' and 'the future amounts to be paid' is not satisfied.

31. The Commission reaches a conclusion which is diametrically opposed to that put forward by the pension funds. In its view, it is clear from the case-law of the Court of Justice that the AGIRC and ARRCO schemes satisfy all the requirements set by Community law for the application of Article 119 of the Treaty.

32. In this respect, the Commission states that it is not a question of general social

4 — Case C-152/91 *Neath* v *Steeper* [1993] ECR I-6935; and Case C-200/91 *Coloroll* [1994] ECR I-4389.

security schemes, that they apply to employees and have an inter-occupational scope, and that they provide benefits designed to supplement those of old-age insurance and social security.

33. The Commission states further that compulsory membership of the scheme is not a valid ground for falling outside the scope of Community law.

34. Finally, the Commission disputes the relevance of the arguments put forward by the pensions funds on the subject of the specific nature of schemes run on a 'pay-as-you-go' basis. It is clear from *Evrenopoulos*[5] that Article 119 of the Treaty is equally applicable to 'pay-as-you-go' schemes.

Assessment

35. I subscribe to the Commission's analysis. It is true that the schemes at issue present — as the pension funds rightly contend — a whole series of characteristics which make them similar to statutory schemes. In my view, however, those characteristics are not decisive, given the importance of the factors which tip the balance the other way.

5 — Case C-147/95 *DEI* v *Evrenopoulos* [1997] ECR I-2057.

36. In *Barber* and subsequent cases, the Court of Justice has inferred from Article 119 of the Treaty the principle that male employees must qualify for their pension or survivors' pension rights at the same age as their female colleagues, thereby precluding the application of Article 9 of Directive 86/378 to employees. This has led the national court to ask its question by reference to Article 119 of the Treaty.

37. It remains the case that, at Community level, it is Directive 86/378 which governs occupational social security schemes.

38. It is therefore necessary to refer both to the case-law of the Court of Justice and to that directive.

39. Furthermore, since Directive 96/97 came into force, the rules of Directive 86/378 have been entirely coterminous with the principles identified by the Court of Justice from Article 119 in the above-mentioned cases. Since that time, that directive has no longer afforded Member States the possibility of deferring the application of the principle of equal treatment for men and women with regard to the pensionable age for employees and their survivor's pensions.

40. In addition, Article 2 of Directive 96/97 requires that '[a]ny measure implementing this directive, as regards paid workers, must cover all benefits derived from periods of employment subsequent to 17 May 1990'. [6]

41. The crux of the problem before us is therefore whether survivors' pension schemes, such as those at issue in the present case, constitute statutory social security schemes, as the pension funds contend, which would place them within the scope of Directive 79/7/EEC, [7] or whether occupational schemes covered by Article 119 of the Treaty and Directive 86/378 are concerned.

42. Under Article 2 of Directive 86/378,

'"Occupational social security schemes" means schemes not governed by Directive 79/7/EEC 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'.

43. It follows from that definition that retirement pension schemes which are not restricted to a single undertaking, but which cover a group of undertakings, an entire area of economic activity or even an entire occupational sector or group of such sectors, none the less constitute 'occupational schemes'.

44. The purpose of such schemes is to supplement the benefits provided by statutory schemes or to replace them. It is not disputed that in France there exists, moreover, a statutory scheme of old-age insurance which supplements the benefits paid by the defendants in the main proceedings.

45. It also follows from the definition cited above that the compulsory nature of the membership of those schemes does not turn them into statutory schemes.

46. Furthermore, Directive 86/378 does not preclude such schemes from being

6 — The date of *Barber*, cited above.

7 — Council Directive of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security (OJ 1979 L 6, p. 24).
Article 7 of that directive states that:
'This directive shall be without prejudice to the right of Member States to exclude from its scope:
(a) the determination of pensionable age for the purposes of granting old-age and retirement pensions and the possible consequences thereof for other benefits;
...
(c) the granting of old-age or invalidity benefit entitlements by virtue of the derived entitlements of a wife'.

directly regulated by statute. The Court of Justice itself, which had attached importance to that criterion in *Defrenne I*,[8] abandoned it in *Bilka*.[9]

47. The Court of Justice also held, in paragraph 38 of the judgment in *Beune*, that 'nor does [a] criterion relating to the arrangements for funding and managing a pension scheme... make it possible to decide whether the scheme falls within the scope of Article 119'. Nor does the definition in Directive 86/378 establish a criterion in this regard.

48. Finally, once it is accepted that occupational schemes can be directly regulated by statute, nor is the fact that the national legislature extends the applicability of the scheme to various categories of employees sufficient to take the schemes at issue outside the scope of Article 119 or of Directive 86/378, if it is clear that those schemes are intended in principle for current or former employees of the undertakings concerned.

49. That is true in the present case. The pension funds themselves concede that only 10% of member employees do not have a current employment link with the undertaking. Those members include the unemployed and persons who have been declared physically unfit, thus two categories which are not alleged to have had no employment link with the member employers.

50. Admittedly, it is true that managing directors, a category also covered by the schemes concerned, are not in principle in an employment relationship, for the purpose of employment law, with the undertakings. The fact remains, however, that their activity presents a real and immediate link with that of those undertakings. Moreover, it is doubtful that a significant category in terms of the number of persons concerned is involved, as compared with the total number of members in the scheme.

51. The arguments which the pension funds base on the general application of the schemes do, however, raise a question. It is clear from the case-law cited by the pension funds that a scheme cannot be regarded as an occupational scheme if it applies to 'general categories of workers'. It is quite conceivable, however, that a scheme initially intended for particular categories of workers may have been extended over time to such a number of different categories of persons that it finally took on a general nature, such as to make it an instrument of social policy analogous to the statutory social security scheme, rather than an occupational scheme, even in the broad sense of that concept.

52. Several factors lead me to conclude, however, that that is not true in the present case.

8 — Case 80/70 *Defrenne* v *Belgian State* [1971] ECR 455.
9 — Case 170/84 *Bilka* v *Weber von Hartz* [1986] ECR 1607.

53. Thus, the documentation from the pension funds themselves, which is annexed to the observations of the applicant in the main proceedings, states that it is not a question of schemes designed for the whole population or even for all those in employment. AGIRC is intended only for executives in undertakings affiliated to a scheme which is itself part of that federation. As for ARRCO, it seems to be an association of schemes to which only employees, and therefore not self-employed persons, are affiliated. Furthermore, it should be noted that the two bodies are associations of a large number of schemes. It does not follow that those schemes, considered individually, are not intended for particular categories of workers.

54. Finally, the approach of the Court of Justice in *Beune* should be noted. In that case, the Court successively considered different criteria arising from its case- law, such as the degree of State intervention, the financing, or even the statutory origin, and concluded that the only criterion which must be regarded as decisive is that of the employment link.

55. It held, in paragraph 43 of its judgment, that 'the only possible decisive criterion is whether the pension is paid to the worker by reason of the employment relationship between him and his former employer, that is to say the criterion of employment based on the wording of Article 119 itself'. It has been seen in paragraph 48 above that that factor is indeed present in this case, since the schemes in question are applicable to employees, whether current or former, of affiliated undertakings.

56. In addition, contrary to what the pension funds contend, the operation of schemes run on a 'pay-as-you-go' basis is not incompatible with the concept of deferred pay. Even if the link between the contributions paid and the benefits obtained is not absolute, it is none the less crucial.

57. It follows from the explanations provided by the pension funds themselves, as stated, moreover, by the applicant in the main proceedings, that the benefits paid to the member employee depend, admittedly, in part on the value of the points accumulated by that employee, a value which is not, and may not, be fixed in advance, but also on the number of those points which is, by contrast, dependent on the value of the sums paid by way of contribution. The schemes' brochures annexed to his pleadings by the applicant in the main proceedings are, moreover, absolutely explicit on this point, since they state that the benefits are related to the last salary.

58. There exists, therefore, a sufficient link with the employee's pay even if the benefits payable are not, for example, mathematically determined by the level of the last salary.

59. It is, moreover, interesting to note, in passing, the development in the arguments of the pension funds, which first of all minimise the importance, in their schemes, of the period of contribution, only then to insist that, if Article 119 were to be applied to the facts of the present case, the periods of contribution to be taken into account would clearly have to be strictly limited.

60. Finally, as the Commission points out, in *Evrenopoulos*, the Court of Justice already regarded Article 119 of the Treaty as applicable to an occupational scheme run on a 'pay-as-you-go' basis.

61. In the light of the foregoing, I take the view that the characteristics of the AGIRC and ARRCO schemes are not such as to exclude them from the scope of Article 119 of the Treaty.

62. In the alternative, the defendants in the main proceedings contend that the schemes which they manage observe the principle of equal treatment in matters of social security. They submit that, given the wording used by the Community legislature in Directives 79/7, 86/378 and even 96/97, it was reasonable for operators to believe that the question of survivors' pensions was covered by the principle of equal treatment in matters of social security. It is only as from the adoption of Directive 96/97 that the Community legislature articulated a contrary position and set the deadline of 1 July 1997 for adapting schemes which had hitherto been regarded as covered by the principle of equal pay.

63. The AGIRC and ARRCO schemes complied with that time-limit. In accordance with the principle of the protection of legitimate expectations, Article 119 of the Treaty should not be capable of operating against them before that date.

64. In that regard, it should be noted, first, that an operator cannot rely on the fact that Council directives have adopted a certain interpretation of the Treaty, which is different from that eventually given by the Court of Justice, to argue that it has a legitimate expectation. Such expectations can arise only from a lawful situation. [10]

65. It is true that, as the Court of Justice itself noted in *Barber*, [11] Article 7(1) of Directive 79/7, as well as Article 9 of Directive 86/378 (former version), could have led interested parties to believe that benefits of the type at issue in the main

10 — See Case 188/82 *Thyssen* v *Commission* [1983] ECR 3721.
11 — Paragraph 42.

proceedings were not within the scope of Article 119 of the Treaty.

66. The reasoning used by the Court in that case shows us incontrovertibly, however, the consequences which should be drawn from the fact that operators may have been misled about the scope of that provision. It is not by recourse to the concept of legitimate expectations that the problem should be tackled.

67. The interests of operators, faced with the ambiguity which may have existed as to the legal position, are taken into account by the Court's limiting the temporal scope of its judgment.

68. In that way the Court takes account of all the circumstances, including the terms of the directives cited above, which are explicitly referred to in that regard in *Barber* and may have led the bodies concerned to think that they had fulfilled their obligations under Community law.

69. I would add that, in the present case, the pension funds are all the more misguided in relying on the principle of the protection of legitimate expectations, because *Barber*, which was decided, let us recall, on 17 May 1990, should have resolved any uncertainty that they may have had as to the impact of Article 119 on the schemes which they manage.

70. The arguments which the pension funds seek to base on the principle of the protection of legitimate expectations should accordingly be rejected.

71. The pension funds themselves, moreover, raise the question of the temporal effect of the interpretation of Article 119 of the Treaty.

72. In that regard, the pension funds submit, in 'the last alternative', that given the effect which the application of the principle of equal pay could have on the financial equilibrium of the schemes at issue, it is appropriate in the present case to operate a limitation in time of the effects of *Barber*, the scope of which has been clarified by the case-law of the Court of Justice and the Protocol concerning Article 119 of the Treaty establishing the European Community annexed to the Maastricht Treaty.

73. That case-law limited the extent to which Article 119 of the Treaty may be relied on by distinguishing according to whether the event giving rise to the pension right takes place before or after 17 May 1990. In schemes run on a 'pay-as-you-go' basis, such as those at issue in the present case, it is the member employee's death which constitutes the event giving rise to the pension right.

74. Reliance on Article 119 of the Treaty should therefore be allowed if the member employee died after 17 May 1990, which was true in the present case. Furthermore, in accordance with the case-law of the Court of Justice, [12] the principle may be relied only in relation to benefits payable in respect of periods of service subsequent to 17 May 1990.

75. It follows that, in practice, Mr Podesta is entitled in the present case to a pension, calculated, however, solely on the basis of periods of service subsequent to 17 May 1990.

76. That argument must be accepted.

77. It should be noted, first, as the Court pointed out in paragraph 37 of *Barber*, that Article 119 of the Treaty has a direct effect where discrimination may be identified solely with the aid of the criteria of equal work and equal pay referred to by that article.

78. That is true in the present, since there is no doubt about the fact that it is solely because he is a man that the applicant in the main proceedings cannot yet obtain payment of a survivor's pension by virtue of his wife's death. In the same situation, a woman would have been entitled to obtain that payment.

79. According to the case-law of the Court of Justice, [13] retirement pension schemes which, like those in the present case, belong to the category of occupational schemes for the purpose of that case-law, were required to achieve equal treatment as from 17 May 1990.

80. As the Court has stated on several occasions, [14] that obligation therefore covers all benefits payable in respect of periods of employment subsequent to 17 May 1990.

81. In the present case, that means that the applicant in the main proceedings is entitled to the pension which he claims only to the extent of the part payable in respect of periods of employment subsequent to 17 May 1990.

12 — See *Ten Oever*.

13 — See Case C-28/93 *Van den Akker and Others* [1994] ECR I-4527, paragraph 12 et seq.

14 — See *Ten Oever*.

Conclusions

82. For the reasons already stated, I propose that the Court give the following answer to the question referred by the Tribunal de Grande Instance, Paris:

Article 119 of the EC Treaty (Articles 117 to 120 of the EC Treaty have been replaced by Articles 136 EC to 143 EC) is applicable to supplementary retirement pension schemes of the type managed by the Association Générale des Institutions de Retraite des Cadres (AGIRC) and by the Association des Régimes de Retraite Complémentaire (ARRCO) and prohibits them, as from 17 May 1990, from discriminating between men and women in respect of the age at which they are entitled to a survivor's pension following the death of their spouse.

Equal treatment is required for all benefits payable in respect of periods of employment subsequent to 17 May 1990.