

JUDGMENT OF THE COURT
6 October 1993 *

In Case C-109/91,

REFERENCE to the Court under Article 177 of the EEC Treaty by the Kanton-gerecht (Magistrate's Court), Utrecht (Netherlands), for a preliminary ruling in the proceedings pending before that court between

Gerardus Cornelis Ten Oever

and

Stichting Bedrijfspensioenfonds voor het Glazenwassers-en Schoonmaakbedrijf

on the interpretation of Article 119 of the EEC Treaty and of the limitation of the effects in time of the judgment of the Court of Justice of 17 May 1990 in Case C-262/88 *Barber v Guardian Royal Exchange Assurance Group* [1990] ECR I-1889,

THE COURT,

composed of: O. Due, President, C. N. Kakouris, G. C. Rodríguez Iglesias, M. Zuleeg, J. L. Murray (Presidents of Chambers), G. F. Mancini, R. Joliet, F. A. Schockweiler, J. C. Moitinho de Almeida, F. Grévisse, M. Diez de Velasco, P. J. G. Kapteyn and D. A. O. Edward, Judges,

Advocate General: W. Van Gerven,

Registrar: H. von Holstein, Deputy Registrar, and D. Loutermann-Hubeau, Principal Administrator,

after considering the written observations submitted on behalf of:

* Language of the case: Dutch.

- Mr Ten Oever, by I. P. M. Boelens, of the Stichting De Ombudsman,

- the Stichting Bedrijfspensioenfonds voor het Glazenwassers-en Schoonmaakbedrijf, by M. van Empel and O. W. Brouwer, of the Amsterdam Bar,

- the Netherlands Government, by T. P. Hofstee, Deputy Secretary-General at the Ministry of Foreign Affairs, acting as Agent,

- the United Kingdom, by R. Caudwell, of the Treasury Solicitor's Department, acting as Agent,

- the German Government, by E. Röder, Regierungsdirektor at the Federal Ministry of Economic Affairs, and C. D. Quassowski, Oberregierungsrat at the same ministry, acting as Agents,

- the Commission of the European Communities, by K. Banks and B. J. Drijber, of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Mr Ten Oever, the Stichting Bedrijfspensioenfonds voor het Glazenwassers-en Schoonmaakbedrijf, the Netherlands Government, represented by J. W. de Zwaan, and T. Heukels, Deputy Legal Adviser at the Ministry of Foreign Affairs, acting as Agents, the United Kingdom, represented by Sir Nicholas Lyell QC, Attorney General, S. Richards and N. Paines, Barristers, and by J. Collins, Assistant Treasury Solicitor, acting as Agent, the German Government and the Commission, at the hearing on 26 January 1993,

after hearing the Opinion of the Advocate General at the sitting on 28 April 1993,

gives the following

Judgment

1 By order of 28 March 1991, received at the Court on 9 April 1991, the Kantongerecht (Magistrate's Court), Utrecht (Netherlands), referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty two questions on the interpretation of Article 119 of that Treaty with regard to the survivor's pension provided for by an occupational pension scheme and on the interpretation of the judgment of the Court of 17 May 1990 in Case C-262/88 *Barber v Guardian Royal Exchange Assurance Group* [1990] ECR I-1889 regarding the limitation of its effects in time.

2 Those questions were raised in proceedings between Gerardus Cornelis Ten Oever and the Stichting Bedrijfspensioenfonds voor het Glazenwassers-en Schoonmaakbedrijf (hereinafter 'the Pension Fund') concerning the grant of a widower's pension.

3 Until her death on 13 October 1988 Mr Ten Oever's wife was a member of an occupational pension scheme funded by employers and employees. At that time, the rules of the scheme provided for a survivor's pension for widows only. It was not until 1 January 1989 that this entitlement was extended to widowers.

4 Following the death of his wife Mr Ten Oever requested the grant of a widower's pension. This was refused by the Pension Fund on the ground that it was not provided for in the rules of the scheme at the time when Mrs Ten Oever died. In reply to an argument of Mr Ten Oever based on the judgment in *Barber*, to the effect that the pension he requested was to be treated as pay within the meaning of Article 119 of the Treaty and that no discrimination between men and women was therefore permissible, the Pension Fund said that the judgment in *Barber* had been delivered after the death of Mrs Ten Oever and that its effects had been limited in time.

5 The Kantongerecht, to which Mr Ten Oever had applied for a declaration that the Pension Fund was obliged to grant him the pension in question, decided to stay

the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

I. Must “pay” within the meaning of Article 119 of the EEC Treaty be understood as covering the payment of non-statutory benefits to surviving relations (such as in this case the payment of a widower’s pension)?

II. In the event that Question 1 is answered in the affirmative, does Article 119 of the EEC Treaty apply in relation to the plaintiff with the result that he can claim payment of a widower’s pension:

(a) with effect from the date of his wife’s death (13 October 1988); or

(b) with effect from the Court’s judgment of 17 May 1990; or

(c) not at all because his wife died before 17 May 1990?’

6 Reference is made to the Report for the Hearing for a fuller account of the facts of the case, the procedure and the written observations submitted to the Court, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

The first question

7 By its first question the national court seeks to ascertain whether a survivor’s pension, such as that in question in this case, falls within the concept of pay within the meaning of Article 119 of the Treaty with the result that it is subject to the prohibition of discrimination laid down by that provision.

8 It is settled law that the concept of pay, within the meaning of the second paragraph of Article 119, comprises any consideration, whether in cash or in kind, whether immediate or future, provided that the worker receives it, albeit indirectly, in respect of his employment from his employer. The fact that certain benefits are paid after the end of the employment relationship does not prevent them from being pay within the meaning of Article 119 (see, in particular, the judgment in *Barber*, paragraph 12).

9 However, the concept of pay as thus defined cannot cover social security schemes or benefits such as, for example, retirement pensions, which are directly governed by legislation without any element of agreement within the undertaking or the occupational branch concerned and which are obligatorily applicable to general categories of workers. These schemes assure for the workers the benefit of a statutory scheme, to whose financing workers, employers and, possibly, the public authorities contribute in a measure determined less by the employment relationship between the employer and the worker than by considerations of social policy (Case 80/70 *Defrenne v Belgium* [1971] ECR 445, paragraphs 7 and 8).

10 In the present case, it is apparent from the documents before the Court that the rules of the pension scheme in question were not laid down directly by law but were the result of an agreement between both sides of the industry concerned. All the public authorities did was, at the request of such employers' and trade union organizations as were considered to be representative, to declare the scheme compulsory for the whole of the industry concerned.

11 It is also established that this pension scheme is funded wholly by the employees and employers in the industry concerned, to the exclusion of any financial contribution from the public purse.

12 It must be inferred from all those factors that the survivor's pension in question falls within the scope of Article 119 of the Treaty.

13 This is so notwithstanding that, by definition, a survivor's pension is not paid to the employee but to the employee's survivor. Entitlement to such a benefit is a consideration deriving from the survivor's spouse's membership of the scheme, the pension being vested in the survivor by reason of the employment relationship between the employer and the survivor's spouse and being paid to him or her by reason of the spouse's employment.

14 The answer to the first question referred to the Court must therefore be that a survivor's pension provided by an occupational pension scheme having the characteristics of that in question in the main proceedings falls within the scope of Article 119 of the Treaty.

The second question

15 In essence, the second question asks the Court to state the precise scope of the limitation of the effects in time of the *Barber* judgment.

16 The precise context in which that limitation was imposed was that of benefits (in particular, pensions) provided for by private occupational schemes which were treated as pay within the meaning of Article 119 of the Treaty.

17 The Court's ruling took account of the fact that it is a characteristic of this form of pay 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.

18 The Court also took into consideration 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.

19 Given the reasons explained in paragraph 44 of the *Barber* judgment for limiting its effects in time, it must be made clear that equality of treatment in the matter of occupational pensions may be claimed only in relation to benefits payable in respect of periods of employment subsequent to 17 May 1990, the date of the *Barber* judgment, subject to the exception in favour of workers or those claiming under them who have, before that date, initiated legal proceedings or raised an equivalent claim under the applicable national law.

20 The answer to the second question submitted to the Court must therefore be that by virtue of the judgment of 17 May 1990 in Case C-262/88 *Barber v Royal Guardian Exchange* the direct effect of Article 119 of the Treaty may be relied upon, for the purpose of claiming equal treatment in the matter of occupational pensions, only in relation to benefits payable in respect of periods of employment subsequent to 17 May 1990, subject to the exception in favour of workers or those claiming under them who have, before that date, initiated legal proceedings or raised an equivalent claim under the applicable national law.

Costs

21 The costs incurred by the United Kingdom, by the German and Netherlands Governments and by the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT,

in answer to the questions submitted to it by the Kantongerecht, Utrecht, by order of 28 March 1991, hereby rules:

1. A survivor's pension provided for by an occupational pension scheme having the characteristics of that in question in the main proceedings falls within the scope of Article 119 of the EEC Treaty.
2. By virtue of the judgment of 17 May 1990 in Case C-262/88 *Barber v Guardian Royal Exchange* the direct effect of Article 119 of the EEC Treaty may be relied upon, for the purpose of claiming equal treatment in the matter of occupational pensions, only in relation to benefits payable in respect of periods of employment subsequent to 17 May 1990, subject to the exception in favour of workers or those claiming under them who have, before that date, initiated legal proceedings or raised an equivalent claim under the applicable national law.

Due	Kakouris	Rodríguez Iglesias	Zuleeg	Murray
	Mancini	Joliet	Schockweiler	Moitinho de Almeida
Grévisse		Diez de Velasco	Kapteyn	Edward

Delivered in open court in Luxembourg on 6 October 1993.

J.-G. Giraud

O. Due

Registrar

President