JUDGMENT OF THE COURT (Fifth Chamber)

25 May 2000 *

In Case C-50/99,

REFERENCE to the Court under Article 177 of the EC Treaty (now Article 234 EC) by the Tribunal de Grande Instance, Paris, for a preliminary ruling in the proceedings pending before that court between

Jean-Marie Podesta

and

Caisse de Retraite par répartition des Ingénieurs Cadres & Assimilés (CRICA) and Others,

on the interpretation of Article 119 of the EC Treaty (Articles 117 to 120 of the EC Treaty have been replaced by Articles 136 EC to 143 EC),

* Language of the case: French.

THE COURT (Fifth Chamber),

composed of: D.A.O. Edward, President of the Chamber, L. Sevón, P.J.G. Kapteyn (Rapporteur), P. Jann and M. Wathelet, Judges,

Advocate General: J. Mischo,
Registrar: L. Hewlett, Administrator,

after considering the written observations submitted on behalf of:

— Mr Podesta, by B. Canciani, of the Paris Bar,

— the Caisse de Retraite par répartition des Ingénieurs Cadres & Assimilés (CRICA) and Others, by B. Serizay, of the Paris Bar,

— the Commission of the European Communities, by A. Aresu, of its Legal Service, acting as Agent,

having regard to the Report for the Hearing,

after hearing the oral observations of Mr Podesta, represented by S. Formé, of the Paris Bar, of the Caisse de Retraite par répartition des Ingénieurs Cadres & Assimilés (CRICA) and Others, represented by B. Serizay, and of the Commission, represented by H. Michard, of its Legal Service, acting as Agent, at the hearing on 9 December 1999,

after hearing the Opinion of the Advocate General at the sitting on 20 January 2000,

gives the following

Judgment

1 By judgment of 12 January 1999, received at the Court of Justice on 16 February 1999, the Tribunal de Grande Instance, Paris, referred to the Court for a preliminary ruling under Article 177 of the EC Treaty (now Article 234 EC) a question on the interpretation of Article 119 of the EC Treaty (Articles 117 to 120 of the EC Treaty have been replaced by Articles 136 EC to 143 EC).

2 That question has been raised in proceedings between Mr Podesta and the Caisse de Retraite par répartition des Ingénieurs Cadres & Assimilés (CRICA), the Union Interprofessionnelle de Retraite de l'Industrie et du Commerce (UIRIC), the Caisse Générale Interprofessionnelle de Retraite pour Salariés (CGIS), the Association Générale des Institutions de Retraite des Cadres (AGIRC) and the Association des Régimes de Retraite Complémentaire (ARRCO) ('the pension funds').

Community law

3 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) was amended by Council Directive 96/97/EC of 20 December 1996 (OJ 1997 L 46, p. 20).

4 The 14th recital in the preamble to Directive 96/97 provides that the judgment in Case C-262/88 *Barber* [1990] ECR I-1889 'automatically invalidates certain provisions of ... Directive 86/378 ... in respect of paid workers'.

5 Article 2(1) of Directive 86/378, as amended by Directive 96/97, 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.'

6 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.'

7 Under Article 3 of Directive 96/97, Member States were to bring into force the laws, regulations and administrative provisions necessary to comply with that directive by 1 July 1997 and forthwith to inform the Commission thereof.

National law

8 Article L. 921-1 of the French Code de la Sécurité Sociale (Social Security Code) provides that '[c]ategories of employees who are compulsorily subject to old-age insurance under the general social security scheme or under agricultural social insurance schemes and former employees in the same category, who are not covered by a supplementary retirement pension scheme managed by a supplementary retirement pension institution authorised under this title or under Article 1050(I) of the Code Rural (Rural Code), shall be compulsorily affiliated to one of those institutions'.

9 Under Article L. 921-4 of the Code de la Sécurité Sociale, supplementary retirement pension schemes for employees are to be established by national inter-occupational agreements and implemented by supplementary retirement pension institutions and federations of those institutions. Furthermore, the federations are to provide cover for the transactions undertaken by the supplementary retirement pension institutions which are federation members.

10 Article L. 922-4 of that code provides:

'The federations of supplementary retirement pension institutions are non-profit-making legal persons governed by private law, carrying out a task in the general interest, which are administered jointly by their member undertakings and member employees, as defined in Article L. 922-2, or by their respective representatives.

They shall be authorised to operate by order of the minister responsible for social security.

Their purpose shall be to implement the provisions laid down by the agreements referred to in Article L. 921-4 and the decisions taken to apply them by the employer and employee representatives who signed those agreements, meeting for that purpose in a joint committee, and, in particular, to provide cover for the transactions undertaken by the supplementary retirement pension institutions which are members of them.'

11 Article L. 913-1 of the Code de la Sécurité Sociale 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.

12 Article 2 of the national collective agreement of 14 March 1947 on executives' retirement and pensions ('the 1947 Collective Agreement'), as amended on 9 February 1994, states:

'With effect from 1 April 1947, all undertakings within a federation affiliated to the MEDEF [Mouvement des Entreprises de France] shall:

— ...

— pay to the institution in question the totality of the contributions defined in Article 6 of the Agreement and Article 36 of Annex I to that agreement, and the participants shall have deducted from their pay the contribution imposed on them by those articles.'

13 The first paragraph of Article 12 of Annex I to the 1947 Collective Agreement, as amended, 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.'

14 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.'

15 Article 1 of the agreement of 8 December 1961 provides:

'The member undertakings of an organisation belonging to the MEDEF, the CGPME or the UPA, and undertakings to which the present agreement applies by virtue of orders of extension or enlargement ... shall affiliate their employees to a supplementary retirement pension institution ...'

16 Under an amending agreement of 1994, widows and widowers of member employees of the AGIRC scheme may, in respect of a death 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.

Facts and question referred

17 For 35 years Mrs Podesta, a senior executive in the pharmaceutical industry, paid to the pension funds contributions in respect of a supplementary retirement pension.

18 Following her death on 3 December 1993, her husband, Mr Podesta, applied to the pension funds, as an entitled claimant, for payment of the survivor's pension, namely half of the retirement pension due to his wife.

19 The bodies to which he applied refused to grant his application on the ground that he had not yet reached the age of 65, the age prescribed for widowers to be entitled to the reversion of their spouses' retirement entitlement.

20 In those circumstances, by writ of 18 November 1996, Mr Podesta brought an action before the national court for an order requiring the pension funds to pay him the survivor's pension, with retroactive effect from the date of his wife's death, and the interest and ancillary sums prescribed by law. He claimed that the provisions of Annex I to the 1947 Collective Agreement, as amended, under which widowers must have reached the age of 65 in order to be entitled to the reversion of their spouses' retirement pensions, whereas the age fixed for widows is 60, are in breach of the principle of equal pay for men and women.

21 In reply, the pension funds contended that the supplementary retirement pension scheme in question was not covered by Article 119 of the Treaty. In their submission, it is an inter-occupational 'pay-as-you-go' scheme, which is compulsory for all employees and meets considerations of social policy and not those of a particular occupation (namely, the need for solidarity between those in employment and those in retirement).

22 Considering that the resolution of the dispute before it depended on the interpretation of Article 119 of the Treaty, the Tribunal de Grande Instance decided to stay proceedings and to refer 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?'

The first part of the question

23 By the first part of its question, the national court asks, in substance, whether Article 119 of the Treaty applies to supplementary retirement pension schemes such as the one at issue in the main proceedings.

24 According to settled case-law, the concept of pay, as defined in Article 119 of the Treaty, does not encompass social security schemes or benefits, in particular retirement pensions, directly governed by legislation (*Barber*, paragraph 22; and Case C-7/93 *Beune* v *Bestuur van het Algemeen Burgerlijk Pensioenfonds* [1994] ECR I-4471, paragraph 44).

25 On the other hand, benefits granted under a pension scheme, which essentially relates to the employment of the person concerned, form part of the pay received by that person and come within the scope of Article 119 of the Treaty (see, in particular, to that effect, Case 170/84 *Bilka* v *Weber von Hartz* [1986] ECR 1607, paragraph 22; *Barber*, paragraph 28; *Beune*, paragraph 46; and Joined Cases C-234/96 and C-235/96 *Deutsche Telekom* v *Vick and Conze* [2000] ECR I-799, paragraph 32).

26 As the Court has repeatedly held, 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 of the Treaty itself (*Beune*, paragraph 43; and Case C-147/95 *DEI* v *Evrenopoulos* [1997] ECR I-2057, paragraph 19).

27 Furthermore, the Court has also explained that a survivor's pension provided for by an occupational pension scheme is an advantage deriving from the survivor's spouse's membership of the scheme and accordingly falls within the scope of Article 119 of the Treaty (*Evrenopoulos*, paragraph 22).

28 Finally, Directive 86/378, as amended by Directive 96/97, excludes the possibility for Member States to postpone application of the principle of equal pay for men and women as regards employees' retirement age and their survivors' pensions.

29 It is in the light of those considerations that the first part of the question referred must be answered.

30 The pension funds contend that the supplementary retirement pension scheme at issue in the main proceedings does not come within the scope of Article 119 of the Treaty. In this respect, they contend, first, that it is a quasi-statutory scheme which is compulsory for all employees and meets considerations of social policy and not those of a particular occupation.

31 It should be recalled that, according to Article 2(1) of Directive 86/378, as amended by Directive 96/97, the term 'occupational social security schemes'

means schemes not governed by Council Directive 79/7/EEC 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), whose purpose is to provide workers, employed or self-employed, in an undertaking or a group of undertakings, in an area of economic activity, an occupational sector or a 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.

32 First of all, it is clear from the very wording of that provision that an occupational social security scheme may be characterised by compulsory membership.

33 Next, it is clear from the national court's file that the present case does not involve social security schemes designed for the whole population or all workers. AGIRC is intended only for executives in undertakings affiliated to a scheme which is itself part of that federation, while ARRCO is an association of schemes to which only employees are affiliated.

34 As the Advocate General explains in points 48 to 50 of his Opinion, the fact that the national legislature extends the applicability of occupational schemes to various categories of employees is not sufficient to take those schemes outside the scope of Article 119 of the Treaty or of Article 2 of Directive 86/378, as amended by Directive 96/97, if it is established that those schemes are intended in principle for current or former employees of the undertakings concerned.

35 Finally, as regards the argument that the supplementary retirement pension scheme at issue in the main proceedings meets considerations of social policy and not those of a particular occupation, it should be noted that, according to settled

case-law, considerations of social policy, of State organisation, of ethics, or even budgetary concerns which influenced, or may have influenced, the establishment by the national legislature of a particular scheme cannot prevail if the pension concerns only a particular category of workers, if it is directly related to length of service and if its amount is calculated by reference to the last salary (*Beune*, paragraph 45; and *Evrenopoulos*, paragraph 21).

36 The pension funds further contend that the scheme at issue in the main proceedings is a 'pay-as-you-go' scheme, which implies a necessary balance between the amount of the contributions and that of the benefits.

37 In this respect, it is sufficient to note that the criterion relating to the arrangements for funding and managing a pension scheme does not make it possible to determine whether such a scheme falls within the scope of Article 119 of the Treaty (*Beune*, paragraph 38).

38 Moreover, as the Court held in *Evrenopoulos*, Article 119 of the Treaty applies to an occupational scheme run on a 'pay-as-you-go' basis.

39 Lastly, the pension funds contend that the scheme at issue in the main proceedings is a scheme based on defined contributions and not defined benefits, which means that the employer has no obligation to guarantee to his former employees a level

of benefits which is, or may be, fixed, calculated by reference to the length of service and the last salary.

40 In this respect, it is sufficient to note, as does the Advocate General at points 57 and 58 of his Opinion, that, according to the explanations supplied by the pension funds themselves and their brochures annexed to Mr Podesta's pleadings, the benefits granted are related to the last salary.

41 It follows from all the foregoing that Article 119 of the Treaty applies to supplementary retirement pension schemes such as the one at issue in the main proceedings.

The second part of the question referred

42 By the second part of its question, the national court asks whether Article 119 of the Treaty precludes discrimination between men and women in respect of the age at which their spouses are entitled to a survivor's pension following the death of the male or female employees concerned.

43 It is common ground that, in the present case, the applicant in the main proceedings, since he has not yet reached the age of 65, cannot claim payment of a survivor's pension in respect of his spouse's death, whereas the age at which widows may claim it is 60.

44 In this respect, it should be recalled that, according to settled case-law, the equal treatment in the matter of occupational pensions required by Article 119 of the Treaty may be relied on in relation to benefits payable in respect of periods of service subsequent to 17 May 1990, the date of the *Barber* judgment (see, to that effect, Case C-28/93 *Van Den Akker and Others* [1994] ECR I-4527, paragraph 12).

45 It follows that occupational pension schemes were required to achieve equal treatment as from 17 May 1990 (*Van Den Akker and Others*, paragraph 14).

46 The answer must therefore be that Article 119 of the Treaty applies to supplementary retirement pension schemes, such as that at issue in the main proceedings, and precludes those schemes from discriminating, as from 17 May 1990, between men and women in respect of the age at which their spouses are entitled to a survivor's pension following the death of those employees.

Costs

47 The costs incurred by the Commission, which has 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 (Fifth Chamber),

in answer to the question referred to it by the Tribunal de Grande Instance, Paris, by judgment of 12 January 1999, hereby rules:

Article 119 of the EC Treaty (Articles 117 to 120 of the EC Treaty have been replaced by Articles 136 EC to 143 EC) applies to supplementary retirement pension schemes, such as that at issue in the main proceedings, and precludes those schemes from discriminating, as from 17 May 1990, between men and women in respect of the age at which their spouse is entitled to a survivor's pension following the death of those employees.

Edward Sevón Kapteyn

Jann Wathelet

Delivered in open court in Luxembourg on 25 May 2000.

R. Grass

Registrar

D.A.O. Edward

President of the Fifth Chamber