# JUDGMENT OF THE COURT
14 December 1993 *

In Case C-110/91,

REFERENCE to the Court under Article 177 of the EEC Treaty by the Arbeitsgericht (Labour Court) Bonn for a preliminary ruling in the proceedings pending before that court between

**Michael Moroni**

and

**Collo GmbH**

on the interpretation of Article 119 of the EEC Treaty, 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) 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, G. F. Mancini, J. C. Moitinho de Almeida and M. Diez de Velasco (Presidents of Chambers), C. N. Kakouris, R. Joliet, F. A. Schockweiler, G. C. Rodríguez Iglesias, M. Zuleeg, P. J. G. Kapteyn and J. L. Murray, Judges,

Advocate General: W. Van Gerven,
Registrar: H. von Holstein, Deputy Registrar, and D. Louterman-Hubeau, Principal Administrator,

* Language of the case: German

after considering the written observations submitted on behalf of:

— Michael Moroni, by M. Hohlfeld, Rechtsanwälte, Bonn,

— Collo GmbH, by the Bundesvereinigung der Deutschen Arbeitgeberverbände (Federal Confederation of German Employers' Associations),

— the German Government, by E. Röder, Ministerialrat at the Federal Ministry of Economic Affairs, acting as Agent,

— the Netherlands Government, by B. R. Bot, 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, and S. Richards, Barrister,

— the Irish Government, by L. J. Dockery, Chief State Solicitor, acting as Agent,

— the Commission of the European Communities, by K. Banks and B. Jansen, of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of the German Government, the Netherlands Government, represented by J. W. de Zwaan and T. Heukels, Deputy Legal Advisers at the Ministry of Foreign Affairs, both acting as Agents, the United Kingdom, represented by Sir Nicholas Lyell QC, Attorney-General, S. Richards N. Paines, Barristers, and J. E. Collins, of the Treasury Solicitor's Department, acting as Agent, the Irish Government, represented by J. Cooke SC and A. O'Caoimh BL, 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 14 February 1991, received at the Court on 11 April 1991, the Arbeitsgericht (Labour Court) Bonn referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty three questions on the interpretation of Article 119 of that Treaty, 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, hereinafter referred to as 'Directive 86/378') and 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 regarding the limitation of its effects in time.

2 The questions were raised in proceedings between Michael Moroni and the company Collo GmbH ('Collo') concerning the rules on the granting of a company pension.

3 Mr Moroni, who was born in 1948, was an employee of Collo between 1968 and 1983 and by virtue of that employment was a member of the company's occupational old-age pension scheme. Under that scheme, which was supplementary to the statutory scheme, male workers may not claim a company pension before the age of 65 whilst female workers may receive such a pension from the age of 60 provided that at that time the employee, male or female, had worked in the undertaking for at least ten years.

4 Under the Gesetz zur Verbesserung der betrieblichen Altersversorgung (Law on the Enhancement of Old-Age Pensions ('BetrAVG')), an employee who leaves the undertaking before reaching retirement age retains the pension rights acquired during the period of service and those rights may be asserted at the age of 65 or 60, depending on whether the employee is a man or a woman. The amount of the pension is then calculated by applying to the pension which ought to have been acquired upon normal retirement age a reduction coefficient equal to the proportion which the employee's actual length of service bears to total theoretical service. Since women have to serve fewer years before reaching retirement age, their pensions are reduced less than those of their male counterparts.

5 Relying on Article 119 of the Treaty, Mr Moroni argued before the Arbeitsgericht Bonn that he should be entitled to a company pension at the age of 60 like female employees and that his pension rights should therefore be reduced only on the basis of the number of years between the time when his service ended and his 60th birthday.

6 Collo considers Article 119 to be inapplicable in this case and refers to Directive 86/378, which provides that the revision of the provisions of occupational schemes contrary to the principle of equal treatment, which is to be completed by 1 January 1993, must not necessarily have a retroactive effect (Article 8) and that the Member States may defer application of the principle of equal treatment with regard to the determination of pensionable age for the purposes of granting old-age or retirement pensions 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 (Article 9). In any event, account had to be taken of the limitation of the effects in time of the Barber judgment.

7 In those circumstances, the Arbeitsgericht Bonn decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'1. Does an occupational pension scheme in the form of a direct entitlement conferring an occupational pension on a male employee at the age of 65 but on a female employee at the earlier age of 60 already now infringe Article 119 of the EEC Treaty, regard being had to Directive 86/378/EEC as well?

2. If the answer is affirmative, are the legal consequences of infringement already those that are envisaged in Directive 86/378/EEC only from 1993? May a male employee covered by such a pension scheme claim an occupational pension as soon as he reaches the age of 60, and must that pension be paid without any reduction even though the claim precedes accrual of the direct entitlement?

3. At present, does an infringement of Article 119 of the EEC Treaty still have no consequences — having regard also to Directive 86/378/EEC —

(a) if the employee has left, or will leave, his employer's service prematurely, after acquiring an indefeasible right vested in interest to a pension but before notification of Directive 86/378/EEC, before delivery by the Court of Justice of its judgment of 17 May 1990 in Case C-262/88 (*Barber* v *Guardian Royal Exchange Assurance Group*), or before the date of 1 January 1993 specified by Directive 86/378/EEC;

or only

(b) if the former employee was already in receipt of an occupational pension on one of the determining dates listed as alternatives;

or only in so far as

(c) the claims to an occupational pension were already met by one of the alternative dates, with the result that in respect of future pension rights an increase may still be demanded;

or

(d) does the issue presented in the above alternatives as to the effect of Article 119 of the EEC Treaty *ratione temporis* remain, in circumstances such as the present, a matter for the national court to decide?'

8 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

9 By its first question, the Arbeitsgericht seeks to ascertain whether there is a breach of Article 119 of the Treaty if a worker is able to claim a company pension under a supplementary occupational pension scheme only at a higher age than a female worker in the same situation owing to the setting of different retirement ages for the two sexes.

10 It should be recalled in this regard that in the Barber judgment (paragraph 32) the Court held that Article 119 prohibits any discrimination with regard to pay as between men and women, whatever the system which gives rise to such inequality, and, in particular, the imposition of an age condition which differs according to sex in respect of pensions paid under a contracted-out occupational scheme, even if the difference between the pensionable ages for men and women is based on the one provided for by the national statutory scheme.

11 The Court reached this conclusion after holding in the same judgment that occupational pensions were pay within the meaning of the second paragraph of Article 119, the concept of pay comprising, according to settled law, 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 not preventing them from being pay within the meaning of Article 119 (see, in particular, paragraph 12).

12 As the national court points out, it is true that the facts underlying the Barber judgment concerned a contracted-out occupational scheme governed by English

law and not a supplementary occupational scheme such as that in question in the main proceedings.

13 However, it must be pointed out that in ruling that pensions paid under this type of scheme fall within the scope of Article 119, the Court applied the same criteria as those to which it had referred in its earlier case-law to distinguish statutory social security schemes from occupational pension schemes.

14 In paragraphs 7 and 8 of its judgment in Case 80/70 *Defrenne* [1971] ECR 445 the Court held that the concept of pay could not cover social security schemes or benefits, such as, for example, retirement pensions, directly governed by legislation without any element of agreement within the undertaking or the occupational branch concerned, which are obligatorily applicable to general categories of workers. Those schemes 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 worker than by considerations of social policy.

15 In its judgment in Case 170/84 *Bilka-Kaufhaus* [1986] ECR 1607, which likewise concerned a German occupational scheme, the Court held that the scheme in question, although adopted in accordance with the provisions laid down by German legislation for such schemes, was based on an agreement between the employer and the representatives of its employees, was supplementary to the statutory social security scheme and did not receive any public funding. A scheme having such characteristics therefore falls within the scope of Article 119 of the Treaty.

16 Moreover, in its judgment in the *Barber* case the Court considered for the first time the question how the unequal treatment arising from the setting of different retirement ages for the two sexes was to be viewed under Article 119. It is established, however, that such a difference does not constitute a particular characteristic of contracted-out occupational schemes; on the contrary, it is to be found in the other types of occupational schemes and has the same discriminatory effects.

17 It follows that the scope of the principles stated in the *Barber* judgment cannot be regarded as being limited to contracted-out occupational schemes and that those principles also apply to supplementary schemes of the type in question in the main proceedings.

18 The German Government points out that under the old-age insurance scheme applicable in Germany a male worker may obtain early payment of his statutory pension from the age of 60. In this case, under the BetrAVG the male worker is entitled at the same time to payment of his occupational pension. In its view, those provisions make clear how the statutory scheme and the private occupational scheme are closely and directly interlocked.

19 That argument cannot be accepted. First of all, an obligation imposed by a national provision to pay the occupational pension at the same time as the statutory pension cannot have the effect of excluding the occupational scheme from the scope of Article 119 of the Treaty. Secondly, it must be concluded that the national provision referred to has no effect on the discriminatory character of the reduction in question which arises only from the contractual provisions of the occupational scheme in question on the setting of different retirement ages for men and women.

20 The reply to be given to the first question submitted to the Court must therefore be that, as may be concluded from the *Barber* judgment, it is contrary to Article 119 of the Treaty if under a supplementary occupational pension scheme a male employee is entitled to claim a company pension only at a higher age than a female employee in the same situation owing to the setting of different retirement ages for men and women.

## The second question

21 By its second question, the national court wishes to know whether or not Article 8(1) of Directive 86/378 prevents the legal consequences of the incompatibility with Article 119 of the Treaty of the setting of different retirement ages for men and women for the purposes of the payment of company pensions from being

drawn before 1 January 1993, the date by which the Member States had, pursuant to the said provision, to have taken all the necessary steps to comply with the directive.

22 This question is essentially concerned with the relationship between Article 119 and Directive 86/378.

23 It is sufficient to point out in this regard that it is settled law that Article 119 applies directly to all forms of discrimination which may be identified solely with the aid of the criteria of equal work and equal pay referred to by that article, without national or Community measures being required to define them with greater precision in order to permit their application (see, in particular, paragraph 37 of the *Barber* judgment).

24 Since with the aid of the constitutive elements of the pay in question and of the criteria laid down in Article 119 discrimination may be directly identified as arising from the setting of different retirement ages for men and women in the matter of company pensions, the effects of the directive do not matter, for its provisions cannot in any way restrict the scope of Article 119.

25 It follows that, subject to what is stated in reply to the third question submitted to the Court, a worker who is discriminated against by the setting of different retirement ages for men and women may in principle assert his rights to payment of the company pension at the same age as his female counterpart and any reduction in the event of early departure from the service of the undertaking must be calculated on the basis of that age.

26 The answer to be given to the second question submitted to the Court must therefore be that, subject to what is stated in reply to the third preliminary question, Council Directive 86/378/EEC cannot prevent Article 119 of the Treaty from being relied upon directly and immediately before national courts.

## The third question

27 In essence, the third question asks the Court to state the precise scope of the limitation of the effects in time of the Barber judgment.

28 As the Court has already indicated in its judgment of 6 October 1993 in Case C-109/91 *Ten Oever* [1993] ECR I-4879, 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.

29 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.

30 The Court also took into the 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.

31 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.

32 In view of the point raised in part (d) of the third question, it must be pointed out that only the Court may, exceptionally, limit the possibility for the persons concerned to rely upon the interpretation which it gives of a provision of Community law by way of a preliminary ruling.

33 The answer to be given to the third question referred to the Court must therefore be that by virtue of the judgment in Case C-262/88 *Barber* the direct effect of Article 119 of the Treaty may be relied on in order to claim equal treatment in the matter of occupational pensions only in relation to benefits payable in respect of periods of service 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

34 The costs incurred by the United Kingdom, by the German, Irish 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 Arbeitsgericht Bonn, by order of 14 February 1991, hereby rules:

**1. As may be concluded from the judgment of 17 May 1990 in Case C-262/88 *Barber*, it is contrary to Article 119 of the EEC Treaty if under a supplementary occupational pension scheme a male employee is entitled to claim a company pension only at a higher age than a female employee in the same situation owing to the setting of different retirement ages for men and women.**

2. **Subject to what is stated in reply to the third preliminary question, 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 cannot prevent Article 119 of the Treaty from being relied upon directly and immediately before national courts.**

3. **By virtue of the judgment of 17 May 1990 in Case C-262/88 *Barber*, the direct effect of Article 119 of the Treaty may be relied on in order to claim equal treatment in the matter of occupational pensions only in relation to benefits payable in respect of periods of service 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 Mancini Motinho de Almeida Diez de Velasco

Kakouris Joliet Schockweiler

Rodríguez Iglesias Zuleeg Kapteyn Murray

Delivered in open court in Luxembourg on 14 December 1993.

J.-G. Giraud O. Due

Registrar President