JUDGMENT OF THE COURT
28 September 1994 *

In Case C-57/93,

REFERENCE to the Court under Article 177 of the EEC Treaty by the Kantongerecht (Cantonal Court) Utrecht (Netherlands) for a preliminary ruling in the proceedings pending before that court between

Anna Adriaantje Vroege

and

(1) NCIV Instituut voor Volkshuisvesting BV,

(2) Stichting Pensioenfonds NCIV,

on the interpretation of Article 119 of the EEC Treaty with regard to the right to join an occupational pension scheme, 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 and the Protocol concerning Article 119 of the Treaty establishing the European Community annexed to the Treaty on European Union of 7 February 1992,

THE COURT,

composed of: O. Due, President, G. F. Mancini (Rapporteur), J. C. Moitinho de Almeida, M. Diez de Velasco and D. A. O. Edward (Presidents of Chambers),

* Language of the case: Dutch.

C. N. Kakouris, R. Joliet, F. A. Schockweiler, G. C. Rodríguez Iglesias, F. Grévisse, M. Zuleeg, P. J. G. Kapteyn and J. L. Murray, Judges,

Advocate General: W. Van Gerven,
Registrar: L. Hewlett, Administrator,

after considering the written observations submitted on behalf of:

— Mrs Vroege, by T. P. J. de Graaf, of the Utrecht Bar,

— the German Government, by E. Röder, Ministerialrat at the Federal Ministry of Economic Affairs, and C.-D. Quassaoski, Regierungsdirektor at the same Ministry, both acting as Agents,

— the Belgian Government, by J. Devadder, Director of Administration at the Ministry of Foreign Affairs, acting as Agent,

— the United Kingdom, by J. E. Collins, Assistant Treasury Solicitor, acting as Agent, assisted by N. Paines, Barrister,

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

having regard to the Report for the Hearing,

after hearing the oral observations of Mrs Vroege, represented by M. Greebe, of the Utrecht Bar, NCIV Instituut voor Volkshuisvesting BV and the Stichting Pensioenfonds NCIV, represented by E. Lutjens, of the Utrecht Bar, the German Government, the United Kingdom and the Commission at the hearing on 26 April 1994,

after hearing the Opinion of the Advocate General at the sitting on 7 June 1994,

gives the following

Judgment

By judgment of 17 February 1993, received at the Court on 2 March 1993, the Kantongerecht (Cantonal Court) Utrecht referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty four questions on the interpretation of Article 119 of that Treaty with regard to the right to join an occupational pension scheme, 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 (hereinafter referred to as 'the *Barber* judgment') and the Protocol concerning Article 119 of the Treaty establishing the European Community annexed to the Treaty on European Union of 7 February 1992 (hereinafter referred to as 'Protocol No 2').

Those questions have been raised in proceedings between Mrs Vroege and NCIV Instituut voor Volkshuisvesting BV and Stichting Pensioenfonds NCIV concerning her membership of the last-named pension fund.

3 Since 1 May 1975 Miss Vroege has worked on a part-time basis (25.9 hours a week) at NCIV Instituut voor Volkshuisvesting BV ('NCIV').

4 Article 20 of the collective labour agreement which applies within NCIV provides that workers in the service of that institution are to be members of an occupational pension scheme, the Stichting Pensioenfonds NCIV, which entitles them to a retirement pension, an invalidity pension and a widow's and orphan's pension.

5 Before 1 January 1991, NCIV's pension scheme rules provided that only men and unmarried women employed for an indeterminate period and working at least 80% of the normal full day could be members of the scheme.

6 Since Mrs Vroege never worked more than 80% of the full day, she was not allowed to pay contributions into the scheme and was therefore unable to acquire pension rights.

7 On 1 January 1991 new pension scheme rules came into force, providing that employees of both sexes who have reached 25 years of age and work at least 25% of normal working hours can join the scheme.

8 Article 23(5) of the pension scheme rules also provides that women who were not members before 1 January 1991 can purchase additional years of membership, provided, however, that they had reached the age of 50 on 31 December 1990. The maximum number of years which may be purchased may not exceed the number

of years between the date on which the member in question attained the age of 50 and 1 January 1991.

9 Since she had not reached the age of 50 on 31 December 1990 Mrs Vroege could not rely on that transitional provision and therefore could begin to accrue pension rights only as from 1 January 1991. Consequently, she challenged the new pension scheme rules on the ground that since they did not give her the right to be a member of the pension scheme in respect of periods of service prior to 1 January 1991 they involved discrimination incompatible with Article 119 of the Treaty. She therefore claims membership with retroactive effect from 8 April 1976, the date of the judgment in Case 43/75 *Defrenne* v *Sabena* [1976] ECR 455, in which the Court held for the first time that Article 119 has direct effect.

10 When Miss Vroege's action was brought before it the Kantongerecht Utrecht decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Does the right to equal pay within the meaning of Article 119 of the EEC Treaty also include a right to join an occupational pension scheme?

(2) If Question 1 is answered in the affirmative, does the temporal limitation imposed by the Court in the *Barber* case with regard to a pension scheme of the kind at issue in that case ("contracted-out schemes") also apply to a claim to join an occupational pension scheme of the kind at issue in this case?

(3) Are there grounds for making the possible applicability of the principle of equal pay set out in Article 119 of the EEC Treaty subject to a temporal lim-

itation in respect of claims to participate in an occupational pension scheme of the kind at issue in this case and, if so, from which date?

(4) Do the Protocol concerning Article 119 of the Treaty establishing the European Community appended to the Treaty of Maastricht ("the *Barber* Protocol") and (the draft law amending) transitional Article III of Draft Law 20890, which is intended to implement the Fourth Directive, affect the assessment of this case, which was lodged at the registry of the Kantongerecht by application of 11 November 1991, having regard in particular to the date on which the proceedings were instituted?'

The first question

11 By its first question the national court asks whether the right to join an occupational pension scheme falls within the scope of Article 119 of the Treaty and is therefore covered by the prohibition of discrimination there laid down.

12 In its judgment of 13 May 1986 in Case 170/84 *Bilka-Kaufhaus GmbH* v *Hartz* [1986] ECR 1607, the Court has already held that if a pension scheme, although adopted in accordance with the provisions laid down by national legislation, is based on an agreement with the employees or their representatives and if the public authorities are not involved in its funding, such a scheme does not constitute a social security scheme governed directly by statute and thus falls outside the scope of Article 119, and that benefits paid to employees under the scheme constitute consideration received by the employees from the employer in respect of their employment, as referred to in the second paragraph of Article 119 (paragraphs 20 and 22).

13 Those principles were confirmed by the *Barber* judgment with regard to contracted-out occupational pension schemes governed by United Kingdom law and by the judgment of 6 October 1993 in Case C-109/91 *Ten Oever* v *Stichting Bedrijfspensioenfonds voor het Glazenwassers- en Schoonmaakbedrijf* [1993] ECR I-4879.

14 In that judgment, the Court held Article 119 to be applicable to benefits payable under a Dutch occupational scheme similar to that in question in the present case. It pointed out in particular that the rules of the pension scheme were not laid down directly by law but were the result of negotiation between both sides of the industry concerned and that all that 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 (paragraph 10).

15 It also follows from the *Bilka* judgment, cited above, that Article 119 covers not only entitlement to benefits paid by an occupational pension scheme but also the right to be a member of such a scheme.

16 The reasoning behind that finding is that if, as can be seen from the judgment of 31 March 1981 in Case 96/80 *Jenkins* v *Kingsgatge (Clothing Productions) Ltd* [1981] ECR 911, a pay policy which consists of setting a lower hourly rate for part-time work than for full-time work may in certain cases entail discrimination between men and women, the same applies where part-time workers are refused a company pension. Since such a pension falls within the concept of 'pay', within the meaning of the second paragraph of Article 119, it follows that, hour for hour, the total remuneration paid by the employer to full-time workers is higher than that paid to part-time workers (paragraph 27).

17 It follows that an occupational pension scheme which excludes married women from membership entails discrimination directly based on sex, contrary to Article 119 of the Treaty. As regards the exclusion concerning part-time workers, Article 119 is contravened only if the exclusion affects a much greater number of

women than men unless the employer shows that it may be explained by objectively justified factors unrelated to any discrimination on grounds of sex (see the *Bilka* judgment, cited above).

18 The answer to the first question must therefore be that the right to join an occupational pension scheme falls within the scope of Article 119 of the Treaty and is therefore covered by the prohibition of discrimination laid down by that article.

The second and third questions

19 By these questions the national court asks whether the limitation of the effects in time of the *Barber* judgment also applies to the right to join an occupational pension scheme such as that in question in the main proceedings and whether in any event a limitation of the same kind should be laid down in the present case.

20 In order to reply to this question, it is important to remember the context in which it was decided to limit the effects in time of the *Barber* judgment.

21 According to its established case-law, the Court may exceptionally, having regard to the general principle of legal certainty inherent in the Community legal order and the serious difficulties which its judgment may create as regards the past for legal relations established in good faith, find it necessary to limit the possibility for interested parties, relying on the Court's interpretation of a provision, to call in question those legal relations (see the *Defrenne* judgment, cited above). The Court

was therefore concerned to establish that the two essential criteria were fulfilled for deciding to impose such a limitation, namely that those concerned should have acted in good faith and that there should be a risk of serious difficulties.

22 As regards the first criterion, the Court found first of all (in paragraph 42) that Article 9(a) 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 (OJ 1986 L 225, p. 40), provided for the possibility of deferring the compulsory implementation of the principle of equal treatment with regard to the determination of pensionable age, as did the exception provided for in Article 7(1)(a) of 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).

23 The Court went on to hold that in the light of those provisions the Member States and the parties concerned were reasonably entitled to consider that Article 119 did not apply to pensions paid under contracted-out schemes and that derogations from the principle of equality between men and women were still permitted in that sphere (paragraph 43).

24 In this connection, the Court in its judgment of 14 December 1993 in Case C-110/91 *Moroni* v *Collo GmbH* [1993] ECR I-6591, after referring to and confirming the principles stated in the *Defrenne*, *Bilka* and *Barber* judgments, cited above, explained that *Barber* dealt for the first time with the question how unequal treatment arising from the setting of different retirement ages for the two sexes was to be viewed under Article 119 (paragraph 16).

25 As regards the criterion of serious difficulties, the Court also held in the *Barber* judgment that if any male worker concerned could, like Mr Barber, retroactively

assert the right to equal treatment in cases of discrimination which, until then, could have been considered permissible in view of the exceptions provided for in Directive 86/378, the financial balance of many occupational schemes might be upset retroactively (paragraph 44).

26 In those circumstances the Court ruled that 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 service subsequent to 17 May 1990, except in the case 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 (paragraph 45 of the *Barber* judgment, as clarified in the *Ten Oever* judgment).

27 It follows, in particular, from the foregoing that the limitation of the effects in time of the *Barber* judgment concerns only those kinds of discrimination which employers and pension schemes could reasonably have considered to be permissible owing to the transitional derogations for which Community law provided and which were capable of being applied to occupational pensions.

28 It must be concluded that, as far as the right to join an occupational scheme is concerned, there is no reason to suppose that the professional groups concerned could have been mistaken about the applicability of Article 119.

29 It has indeed been clear since the judgment in the *Bilka* case that a breach of the rule of equal treatment committed through not recognizing such a right is caught by Article 119.

30 Moreover, since the Court's judgment in the *Bilka* case included no limitation in time, the direct effect of Article 119 can be relied upon in order retroactively to claim equal treatment in relation to the right to join an occupational pension scheme and this may be done as from 8 April 1976, the date of the *Defrenne* judgment in which the Court held for the first time that Article 119 has direct effect.

31 Finally, as regards specifically the last part of the question, the Court has consistently held that a limitation of the effects in time of an interpretative preliminary ruling can only be in the actual judgment ruling upon the interpretation sought (see, in particular, the judgment of 16 July 1992 in Case C-163/80 *Administration des Douanes et Droits Indirects* v *Legros and Others* [1992] ECR I-4625, paragraph 30). Consequently, if the Court had considered it necessary to impose a limit in time on the rule that the right to be a member of an occupational pension scheme is covered by Article 119, it would have done so in the *Bilka* judgment.

32 The answer to the second and third questions must therefore be that the limitation of the effects in time of the *Barber* judgment does not apply to the right to join an occupational pension scheme and that, in this context, there is no scope for any analogous limitation.

The fourth question

33 By the fourth question the national court wishes to know what effect the draft national Law designed to implement Directive 86/378, on the one hand, and Protocol No 2, on the other hand, may have in the context of the present case.

34 As regards the draft national Law, the Court has consistently held that in proceedings under Article 177 of the Treaty it is not for the Court to interpret national law

and assess its effects (see, in particular, the judgment of 3 February 1977 in Case 52/76 *Benedetti* v *Munari F.lli s. a. s.* [1977] ECR 163, paragraph 25).

35 Protocol No 2 which, by virtue of Article 239 of the Treaty, is an integral part of the Treaty is worded as follows:

'For the purposes of Article 119 of this Treaty, benefits under occupational social security schemes shall not be considered as remuneration if and in so far as they are attributable to periods of employment prior to 17 May 1990, except in the case of workers or those claiming under them who have before that date initiated legal proceedings or introduced an equivalent claim under the applicable national law.'

36 The file and the pleadings show that the crucial point is whether Protocol No 2 is intended only to clarify the limitation of the effects in time of the *Barber* judgment, as set out above, or whether it has wider scope.

37 According to the United Kingdom, the broad wording of Protocol No 2 indicates that it applies to every kind of discrimination based on sex which may exist in occupational pension schemes, including discrimination concerning the right to join such schemes.

38 The plaintiff in the main proceedings, the German Government and the Commission take the opposite view and submit that, despite the very general terms in

which it is worded, Protocol No 2 must be read in conjunction with the *Barber* judgment and cannot have a scope wider than the limitation of its effects in time.

39 Since it is in general terms, Protocol No 2 is applicable to the benefits paid under an occupational pension scheme.

40 That conclusion must, however, be qualified. It relates only to benefits — being all that is mentioned in Protocol No 2 — and not to the right to belong to an occupational social security scheme.

41 It is clear that Protocol No 2 is linked to the *Barber* judgment, since it refers to the date of that judgment, 17 May 1990. That judgment declares unlawful discrimination as between men and women resulting from an age condition that varies according to sex for the purposes of entitlement to a retirement pension following dismissal for economic reasons. There have been divergent interpretations of the *Barber* judgment which limits, with effect from the date of the judgment, namely 17 May 1990, the effect of its interpretation of Article 119 of the Treaty. Those divergences were removed by the judgment in *Ten Oever*, cited above, which was delivered before the entry into force of the Treaty on European Union. While extending it to all benefits payable under occupational social security schemes and incorporating it in the Treaty, Protocol No 2 essentially adopted the same interpretation of the *Barber* judgment as did the *Ten Oever* judgment. It did not, on the other hand, any more than the *Barber* judgment, deal with, or make any provision for, the conditions of membership of such occupational schemes.

42 The question of membership is thus governed by the judgment in *Bilka*, cited above, in which it was held that Article 119 of the Treaty had been infringed by an undertaking which, without objective justification unrelated to any discrimination on grounds of sex, accorded different treatment to men and women by excluding a

category of employees from a company pension scheme. It should be noted that *Bilka* does not limit the temporal effects of its interpretation of Article 119 of the Treaty.

43 The answer to the fourth question must therefore be that Protocol No 2 does not affect the right to join an occupational pension scheme, which continues to be governed by the *Bilka* judgment.

Costs

44 The costs incurred by the Belgian and German Governments, the United Kingdom and 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 proceedings 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 referred to it by the Kantongerecht Utrecht by judgment of 17 February 1993, hereby rules:

1. The right to join an occupational pension scheme falls within the scope of Article 119 of the Treaty and is therefore covered by the prohibition of discrimination laid down by that article.

2. The limitation of the effects in time of the *Barber* judgment does not apply to the right to join an occupational pension scheme and in this context there is no scope for any analogous limitation.

3. The Protocol concerning Article 119 of the Treaty establishing the European Community, annexed to the Treaty on European Union, does not affect the right to join an occupational pension scheme, which continues to be governed by the judgment of 13 May 1986 in Case 170/84 *Bilka-Kaufhaus GmbH* v *Hartz*.

Due Mancini Moitinho de Almeida

Diez de Velasco Edward Kakouris Joliet

Schockweiler Rodríguez Iglesias Grévisse

Zuleeg Kapteyn Murray

Delivered in open court in Luxembourg on 28 September 1994.

R. Grass O. Due

Registrar President