INTERNATIONAL ENCYCLOPAEDIA FOR LABOUR LAW AND INDUSTRIAL RELATIONS

Case Law 7

EDITOR IN CHIEF

PROF. DR. R. BLANPAIN

KLUWER

317. Jean-Marie Podesta

v.

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

(Social policy – Equal pay for men and women – Private, inter-occupational, supplementary retirement pension scheme based on defined contributions and run on a 'pay-as-you-go basis – Survivors' pensions for which the age conditions for grant vary according to sex)

Case C-50/99, 25 May 2000

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234 EC) a question on the interpretation of Article 119 of the EC Treaty (Articles 117 to 120 of the EC Treaty have been replaced by Articles 136 EC to 143 EC).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-ageinsurance 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 per cent 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 per cent of those of the deceased member.'

14. The first paragraph of Article 13(c) 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 per cent 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-0000, 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.

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.

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 survivors pension following the death of their spouse?'

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 généralisation 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 per cent 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 per cent of those of the deceased member.'

10. The first paragraph of Article 13(c) 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 per cent 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 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:
(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, 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.

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 per cent 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 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.

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*, 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 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 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.

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 abovementioned 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.

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

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 per cent 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.

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