

Judgment of the Court (Sixth Chamber) of 17 April 1997

Dimossia Epicheirissi Ilektrismou (DEI) v Efthimios Evrenopoulos

Reference for a preliminary ruling: Dioikitiko Efeteio Athinon - Greece.

Social policy - Men and women - Equal treatment Applicability of Article 119 of the EC Treaty or Directive 79/7/EEC –

Insurance scheme of a State electricity company - Survivors' pensions - Protocol No 2 annexed to the Treaty on European Union - Meaning of 'legal proceedings'

Case C-147/95

In Case C-147/95,

REFERENCE to the Court under Article 177 of the EC Treaty by the Diikitiko Efeteio Athinon (Greece) for a preliminary ruling in the proceedings pending before that court between

Dimosia Epicheirisi Ilektrismou (DEI)

and

Evthimios Evrenopoulos

on the interpretation of Article 119 of the EC Treaty, the Protocol concerning Article 119 of the Treaty establishing the European Community, and 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),

THE COURT

(Sixth Chamber),

composed of: G.F. Mancini, President of the Chamber (Rapporteur), J.L. Murray, C.N. Kakouris, P.J.G. Kapteyn and H. Ragnemalm, Judges,

Advocate General: F.G. Jacobs,

Registrar: L. Hewlett, Administrator,

after considering the written observations submitted on behalf of:

- Dimosia Epicheirisi Ilektrismou (DEI), by Konstantinos Papadimitriou, of the Athens Bar,

- Evthimios Evrenopoulos, by Sofia Spyliotopoulou-Koukouli, of the Athens Bar,

- the Greek Government, by Panagiotis Kamarineas, State Legal Adviser with the State Legal Council, Kyriaki Grigoriou, legal representative to the State Legal Council, and Ioanna Galani-Maragkoudaki, Deputy Special Legal Adviser in the Special Community Legal Affairs Department of the Ministry of Foreign Affairs, acting as Agents,

- the United Kingdom Government, by John E. Collins, of the Treasury Solicitor's Department, acting as Agent, and Nicholas Paines, Barrister,

- the Commission of the European Communities, by Dimitrios Gouloussis, Legal Adviser, and Marie Wolfcarius, of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Dimosia Epicheirisi Ilektrismou (DEI), represented by Konstantinos Papadimitriou, of Mr Evrenopoulos, represented by Sofia Spyliotopoulou-Koukouli, of the Greek Government, represented by Ioanna Galani-Maragkoudaki and Vassilios Kontolaimos, Assistant Legal Adviser in the State Legal Council, the United Kingdom Government, represented by John E. Collins, and Nicholas Paines, Barrister, and of the Commission, represented by Dimitrios Gouloussis, at the hearing on 21 November 1996,

after hearing the Opinion of the Advocate General at the sitting on 16 January 1997,

gives the following

Judgment

Grounds

1 By judgment of 30 March 1995, received at the Court on 12 May 1995, the Diikitiko Efeteio Athinon (Administrative Appeal Court, Athens) referred to the Court for a preliminary ruling under Article 177 of the EC Treaty several questions on the interpretation of Article 119 of the EC Treaty, the Protocol concerning Article 119 of the Treaty establishing the European Community (hereinafter 'Protocol No 2'), and 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, hereinafter 'the Directive').

2 Those questions were raised in proceedings between Mr Evrenopoulos and Dimosia Epicheirisi Ilektrismou (State Electricity Company, hereinafter 'the DEI') concerning the grant of a survivor's pension.

3 The DEI is a State body sui generis, having legal personality and being governed for most purposes, including in its capacity as employer, by private law. The DEI insurance scheme, covering pensions, health and welfare assistance, was directly created, and is exclusively regulated, by Law No 4491/1966 (hereinafter 'the Law'). The scheme is administered by a special department set up by decision of the DEI Administrative Board and termed, by virtue of Article 1 of the Law, the 'Insurance Department'.

4 Under Article 2 of the Law, all persons connected to the DEI by an employment relationship, together with members of their families, are compulsorily subject to that insurance scheme.

5 Article 4 of the Law established an 11-member Insurance Board, which operates within the DEI and is empowered to certify insurance periods credited to those insured, take decisions concerning the award of benefits provided for under the Law and make proposals to the DEI Administrative Board for the adoption of any measures necessary to improve the conditions under which the protection available to DEI staff under the Law is granted.

6 In accordance with Article 8 of the Law, the level of retirement pension granted under the scheme is calculated on the basis of the recipient's pay during the final year of service and is directly related to length of service, since the requisite period of insurance for the award of a pension corresponds to the period of service with the DEI.

7 Article 9(1)(a) of the Law (hereinafter 'the provision at issue') provides that 'in the event of the death of the pensioner or person insured ... the widow, or, where the person insured was a woman, the widower - if he is without means and totally unfit for work and was maintained by the deceased throughout the five years preceding her death - is entitled to a pension'.

8 Mr Evrenopoulos' wife worked for the DEI. On her death, he applied by letter of 20 January 1989 to the Director of DEI Staff Insurance (hereinafter 'the Director') for a survivor's pension.

9 On receiving no reply from the Director for three months thereafter, Mr Evrenopoulos brought an action before the Diikitiko Protodikio Athinon on 12 June 1989 for annulment of the implied rejection of his claim.

10 On 21 September 1989 the Director rejected Mr Evrenopoulos' claim on the ground that he did not meet the requirements laid down by the provision at issue. In his submissions to the Diikitiko Protodikio Athinon, Mr Evrenopoulos extended his action for annulment to cover that express rejection.

11 By judgment of 26 November 1990, the Diikitiko Protodikio Athinon held that the action contesting the implied rejection, connoted by the Director's failure to reply, was admissible, but dismissed the action contesting the express rejection on the ground that Mr Evrenopoulos had not first lodged an objection against the Director's decision with the Insurance Board. However, since the Director had not informed Mr Evrenopoulos of the need to lodge such an objection, the court granted him a period of three months, as from 26 November 1990, in which to do so.

12 Mr Evrenopoulos' objection, which was lodged with the Insurance Board on 4 February 1991, was rejected on 26 March 1991 on the same grounds as those set out in the Director's decision.

13 On 2 May 1991 Mr Evrenopoulos challenged the Insurance Board's decision before the Diikitiko Protodikio Athinon (Administrative Court of First Instance, Athens). By judgment of 16 April 1992, that court declared that the provision at issue was unlawful and could not be applied, on the ground that it contravened the prohibition on sex discrimination embodied in Articles 4 and 116 of the Greek Constitution and in Community law. The court accordingly annulled the DEI Insurance Board's decision.

14 The DEI appealed to the Diikitiko Efetio Athinon, which decided to stay the proceedings and to refer the following questions to the Court of Justice:

'(1) Is the DEI insurance scheme ... an occupational or a statutory scheme?

(2) Does Article 119 of the EC Treaty or Directive 79/7/EEC apply to the scheme, in particular to the survivors' benefits for which it provides?

(3) Is Article 9(1)(a) ... of Law No 4491/1966 contrary to Article 119 of the Treaty?

(4) Is its maintenance in force permitted by any other Community provision?

(5) Does Article 119 of the Treaty apply to the case in point in the light of Protocol No 2 to the Treaty on European Union and the fact that the respondent brought his original action before 17 May 1990, that is to say, on 12 June 1989, but that action was, however, dismissed by Decision No 8361/1990 of the Diikitiko Protodikio Athinon, because no objection had been lodged (quasi-judicial action) against the decision of the Director of Staff Insurance, and in the decision a period of three months was granted for lodging such an objection?

(6) If the answers to Questions 3 and 5 are in the affirmative, is a widower who does not receive a pension or other survivor's benefits on the basis of that provision [Article 9(1)(a) of Law No 4491/1966] entitled to a pension and survivor's benefits under the same conditions as those laid down for widows?'

Questions 1 and 2

15 The first question asked by the Diikitiko Efetio Athinon is essentially whether benefits granted under a pension scheme such as the DEI insurance scheme fall within the scope of Article 119 of the Treaty.

16 Both the DEI and the Greek Government maintain that the DEI insurance scheme is a statutory scheme which does not fall within the purview of Article 119. The DEI emphasizes that the scheme was directly created, and is exclusively regulated, by statute and that, in operating such a scheme, the DEI acts as a body governed by public law. It adds that the scheme was not created either by a unilateral decision on the part of the employer or after negotiation or agreement between management and staff; that the detailed rules for its operation are linked to social policy and not to an employment relationship; and, lastly, that its role is not to supplement another general insurance scheme, since the benefits paid are not substitutes, wholly or in part, for those paid by any general insurance scheme. In the light of those considerations, the DEI and the Greek Government take the view that the

scheme does not satisfy the criteria defined by the Court when construing the meaning of 'pay' as used in Article 119.

17 They consider that the Directive is likewise not applicable in the main proceedings, since Article 3(2) thereof excludes survivors' pensions from its scope.

18 Mr Evrenopoulos, the United Kingdom Government and the Commission also maintain that the Directive is not applicable to the main proceedings, but they argue that the DEI insurance scheme falls within the scope of Article 119. Since it is reserved for a particular category of workers and since the benefit at issue is directly related to length of service and its amount is calculated by reference to the final year of service, the scheme essentially arises out of the employment relationship and accordingly the pensions which it grants satisfy the criteria determining pay within the meaning of Article 119 of the Treaty.

19 On this point, it should be recalled that the Court has stated on several occasions 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 (Case C-7/93 *Beune v Bestuur van het Algemeen Burgerlijk Pensioenfonds* [1994] ECR I-4471, paragraph 43).

20 Admittedly, the Court has recognized that the employment criterion cannot be regarded as exclusive, since pensions paid under statutory social security schemes may reflect, wholly or in part, pay in respect of work (*Beune*, cited above, paragraph 44).

21 On the other hand, considerations of social policy, of State organization, 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*, cited above, paragraph 45).

22 Furthermore, 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 (Case C-109/91 *Ten Oever v Stichting Bedrijfspensioenfonds voor het Glazenwassers- en Schoonmaakbedrijf* [1993] ECR I-4879, paragraphs 13 and 14, and Case C-200/91 *Coloroll v Russell and Others* [1994] ECR I-4389, paragraph 18).

23 It follows from the foregoing that a survivor's pension paid under an occupational pension scheme of the kind in issue in the main proceedings, which essentially arises from the employment of the beneficiary's spouse, is linked to the latter's pay and falls within the scope of Article 119 of the Treaty.

24 It should therefore be stated in reply to Questions 1 and 2 that the benefits granted under a pension scheme such as the DEI insurance scheme, including survivors' benefits, fall within the scope of Article 119 of the Treaty.

Questions 3 and 4

25 By these questions, the *Diikitiko Efetio Athinon* asks whether, in the case of a survivor's pension falling within the definition of pay for the purposes of Article 119 of the Treaty, Article 119 precludes the application of a provision of national law which makes the award of such a pension to a widower subject to special conditions which are not applied to widows, and whether there is any rule of Community law which permits such a provision to be maintained in force.

26 In that regard it is sufficient to note that Article 119 prohibits any discrimination in matters of pay as between men and women, whatever the system which gives rise to such inequality (Case C-262/88 *Barber v Guardian Royal Exchange Assurance Group* [1990] ECR I-1889, paragraph 32).

27 It is clear from the documents before the court in the main proceedings that the provision at issue directly discriminates against men in that the award to a widower of a pension falling within the meaning of 'pay' as used in Article 119 is subject to specific conditions which are not applied to widows.

28 Clearly, there is no rule of Community law under which the maintenance in force of such a discriminatory provision could be justified.

29 It should therefore be stated in reply to Questions 3 and 4 that, where a survivor's pension falls within the definition of pay for the purposes of Article 119 of the Treaty, that article precludes the application of a provision of national law which makes the award of such a pension to a widower subject to special conditions which are not applied to widows, and that there is no rule of Community law which could justify the maintenance in force of such a provision.

Question 5

30 By this question the *Diikitiko Efetio Athinon* essentially asks whether, on a proper construction of Protocol No 2, Article 119 of the Treaty may be relied on in proceedings initiated before 17 May 1990 - the date of the judgment in *Barber*, cited above - in order to obtain benefits under an occupational social security scheme, even if the original action was dismissed on the ground that the applicant had not lodged a prior objection.

31 The DEI argues that Article 119 cannot be relied on in a case such as this on account of the temporal limitation placed on the effects of the judgment in *Barber*, incorporated in Protocol No 2. By initiating proceedings before the *Diikitiko Protodikio* on 12 June 1989, without first lodging an objection with the DEI Insurance Board, Mr Evrenopoulos failed to comply with the procedural requirements laid down by national law and, accordingly, the action could not be regarded as 'legal proceedings or ... an equivalent claim under the applicable national law' for the purposes of Protocol No 2. According to the DEI, the main action must therefore be regarded as having been initiated, at the earliest, on 4 February 1991 - the date on which Mr Evrenopoulos lodged his objection with the DEI Insurance Board - and hence after the judgment in *Barber* was delivered.

32 Mr Evrenopoulos, whose argument on this point the Commission supports, maintains that he initiated legal proceedings for the purposes of Protocol No 2 on 12 June 1989, when he challenged the Director's implied rejection

before the Diikitiko Protodikio Athinon. That is a fact, according to Mr Evrenopoulos, which is not affected by the delay in lodging an objection with the Insurance Board. While Mr Evrenopoulos acknowledges that Greek law barred him from bringing an action directly before the competent national court without first eliciting a positive or a negative response from the Director, he argues that, in the absence of a response from the Director, he ought to be entitled to bring an action for annulment of that failure to act, which is deemed an implied refusal to award a pension.

33 The Commission argues that, even though the first action was dismissed on procedural grounds, the fact remains that Mr Evrenopoulos had impugned the infringement of his rights under Article 119 before the national courts before 17 May 1990, since the Diikitiko Protodikio had held the action brought on 12 June 1989 to be admissible in so far as it concerned the Director's implied rejection. Mr Evrenopoulos should therefore be able to benefit from the exception provided for by Protocol No 2.

34 The United Kingdom Government initially maintained that, since Mr Evrenopoulos had not complied with the time-limits laid down by the national rules of procedure, he could not invoke the exception provided for by Protocol No 2, unless under the applicable national rules he could appeal against the dismissal of his earlier action. At the hearing, the United Kingdom Government advanced the view that, if indeed Mr Evrenopoulos had always followed the procedure prescribed by Greek law, subsequent decisions by the Greek courts must be regarded as stages in a procedure which was originally initiated on 12 June 1989. On that analysis, the temporal limitation of the effects of Barber has no bearing on Mr Evrenopoulos' application.

35 At paragraphs 44 and 45 of the judgment in Barber, cited above, the Court stated that, in view of overriding considerations of legal certainty, the direct effect of Article 119 of the Treaty cannot be relied upon in order to claim entitlement to a pension with effect from a date prior to 17 May 1990. The Court nevertheless made an exception in the case of persons who had taken steps in good time to defend their rights, namely workers or those claiming under them who had before that date initiated legal proceedings or raised an equivalent claim under the applicable national law.

36 That limitation is also specified in Protocol No 2, which states that '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'.

37 As the Advocate General pointed out at point 40 of his Opinion, it is clear that the proceedings or equivalent claims on account of which, by virtue of Barber and Protocol No 2, the temporal limitation laid down therein may not apply must be initiated in accordance with the procedural rules applicable in the Member State concerned.

38 As regards the main action in this case, although the first action brought by Mr Evrenopoulos challenged the implied rejection of his pension claim and was dismissed by the national court of first instance in so far as the scope of that action had been extended to cover the Director's express refusal, the court granted Mr Evrenopoulos a period of three months in which to lodge an objection against that decision with the Insurance Board, which he did, and Mr Evrenopoulos subsequently brought a second action challenging the Board's rejection of that objection. It is the decision of the national court of first instance in respect of the second action which was appealed against to the Diikitiko Efetio Athinon.

39 It follows that the judicial proceedings between Mr Evrenopoulos and the DEI commenced with the original action, which was brought before the Diikitiko Protodikio on 12 June 1989, and hence before 17 May 1990, the date of the judgment in Barber.

40 It should therefore be stated in reply to Question 5 that, on a proper construction of Protocol No 2, Article 119 of the Treaty may be relied upon in proceedings initiated before 17 May 1990 in order to obtain benefits under an occupational social security scheme, even if the action was declared inadmissible on the ground that the applicant had not lodged a prior objection, where the national court has granted an extension of the period prescribed for lodging such an objection.

Question 6

41 By this question, the Diikitiko Efetio Athinon essentially asks whether Article 119 of the Treaty requires that widowers discriminated against in breach of that provision be awarded a pension or other survivor's benefit under the same conditions as widows.

42 In Coloroll, cited above, paragraph 32, the Court stated that once it has found that discrimination in relation to pay exists and so long as measures for bringing about equal treatment have not been adopted by the scheme, the only proper way of complying with Article 119 is to grant the persons in the disadvantaged class the same advantages as those enjoyed by the persons in the favoured class.

43 Consequently, a widower in the same situation as Mr Evrenopoulos must be awarded benefits under the same conditions as those laid down for widows.

44 It should therefore be stated in reply to Question 6 that Article 119 of the Treaty requires that widowers discriminated against in breach of that provision be awarded a pension or other survivor's benefit under the same conditions as widows.\$

Decision on costs

Costs

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45 The costs incurred by the Greek Government, the United Kingdom Government 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 action pending before the national court, the decision on costs is a matter for that court.

Operative part

On those grounds,

THE COURT

(Sixth Chamber),

in answer to the questions referred to it by the Diikitiko Efetio Athinon by judgment of 30 March 1995, hereby rules:

1. The benefits granted under a pension scheme such as the insurance scheme of the Dimosia Epicheirisi Ilectrismou, including survivors' benefits, fall within the scope of Article 119 of the EC Treaty.
2. Where a survivor's pension falls within the definition of pay for the purposes of Article 119 of the Treaty, Article 119 precludes the application of a provision of national law which makes the award of such a pension to a widower subject to special conditions which are not applied to widows, and there is no rule of Community law which could justify the maintenance in force of such a provision.
3. On a proper construction of the Protocol concerning Article 119 of the Treaty establishing the European Community, that article may be relied upon in proceedings initiated before 17 May 1990 in order to obtain benefits under an occupational social security scheme, even if the action was declared inadmissible on the ground that the applicant had not lodged a prior objection, where the national court has granted an extension of the period prescribed for lodging such an objection.
4. Article 119 of the Treaty requires that widowers discriminated against in breach of that provision be awarded a pension or other survivor's benefit under the same conditions as widows