Opinion of Advocate General Ruiz-Jarabo Colomer delivered on 29 March 2000

Commission of the European Communities v Hellenic Republic

Failure to fulfil obligations - Directive 96/97/EC - Implementation of the principle of equal treatment for men and women in occupational social security schemes - Failure to transpose

Case C-457/98

European Court reports 2000 Page I-11481

Opinion of the Advocate-General

I. Purpose of the action and administrative phase

1 In this action, which is brought under Article 169 of the EC Treaty (now Article 226 EC), the Commission seeks a declaration from the Court of Justice that the Hellenic Republic has failed to fulfil its obligations under the Treaty in that it failed to bring into force and, in addition, failed to communicate to the Commission within the time-limit laid down, the laws, regulations and administrative provisions necessary to comply fully with Directive 96/97/EC (1) (`Directive 96/97').

2 The purpose of Directive 96/97 is to amend the provisions 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 (2) (`Directive 86/378') to accord with the case-law arising from the Court's judgment in Barber. (3) Under Article 3(1) of Directive 96/97, Member States have a duty to bring into force the laws, regulations and administrative provisions necessary to comply with the directive by 1 July 1997 and to inform the Commission of the measures adopted immediately.

3 Since no communication was received from the Greek Government regarding the incorporation of Directive 96/97 into national law, and since it had no information at its disposal enabling it to ascertain whether any such transposition had been effected, the Commission took the view that the Hellenic Republic had failed to fulfil its obligations under Article 3(1) of the said directive and took the decision to commence proceedings under Article 169 of the EC Treaty. The Commission, in a letter of formal notice dated 9 September 1997, reminded the Hellenic Republic of its obligations under Directive 96/97 and the EC Treaty, and allowed it two months within which to submit observations.

4 The Greek authorities failed to reply to the letter of formal notice. Accordingly, on 12 January 1998, the Commission sent the Hellenic Republic a reasoned opinion which reiterated the observations made in the letter of formal notice and allowed it two months to adopt the measures necessary to comply with the obligations imposed by the directive.

5 As a result of the Greek authorities' failure to respond to the breaches identified in the reasoned opinion, the Commission commenced these proceedings on 15 December 1998.

II. Arguments of the parties

6 The Commission alleges that the Hellenic Republic is in breach of Article 189 and Article 5 of the EC Treaty (now Article 249 EC and Article 10 EC) in that it has failed to adopt the measures necessary to transpose the directive fully into national law.

7 The Greek Government denies there has been a breach. First, it states that, in principle, `occupational social security schemes', for the purposes of Directives 86/378 and 96/97, do not exist under Greek law.

Having stated that Community law does not provide a clear definition of the schemes in question, the Greek Government goes on to explain that Greek social security schemes are regulated by statute. All individuals falling ratione personae within the scope of the legislation at issue are necessarily and automatically included in the social security programme.

The national social security system in Greece was established through special schemes for each occupational sector. For its part, the General Social Security Scheme for employees, under the administration of the Idrima Koinonikon Asfaliseon, covers workers who are not insured under a special scheme. The Greek Government contends that both the general and the special schemes are `statutory schemes' with the result that they are governed by Regulation (EEC) No 1408/71. (4)

The statutory nature of these schemes is demonstrated by the fact that the decisions regarding their establishment and operation are taken without consultation between workers and employers. The situation is the same as regards the fixing of contribution rates and the size of pension a worker receives. Moreover, workers and employers have very limited scope for regulating pensions in collective agreements, as is apparent, in particular, from Article 3 of Law No 1876/1990, (5) as amended by Law No 1902/1990. (6)

In its rejoinder, the Greek Government adds that the statutory nature of Greek social security schemes also follows from Article 22(4) of the Greek Constitution (7) as it has been interpreted by the Simvoulio tis Epikratias (Council of State). (8) Likewise, the Greek Government refers to Article 22 of Law No 2084/1992, (9) which provides for the social security contribution rates paid by employers, workers and the State to be uniform across all the social security schemes, and for the amounts to be fixed by law.

8 Second, the Greek Government contends that legislative measures have already been taken to transpose Directive 96/96 into national law, despite the difficulties posed by the abovementioned absence of social security schemes in Greece.

The Greek Government makes specific reference to Law No 2676/1999, (10) Article 81 of which adds a third paragraph to Article 5 of Law No 1414/1984, (11) providing that:

`3. Any clause in a collective agreement or in an undertaking's internal rules which makes a distinction on the grounds of a worker's sex for the purposes of occupational social security schemes shall be void.' (12)

9 Third, the Greek Government states that the Greek authorities are continuing to study carefully the possibility of including other schemes, whether these are already in existence or may be created in the future, within the scope of Directive 96/97. In short, the Greek Government is of the view that Directive 96/97 could perhaps apply to collective private insurance contracts between employers and workers in certain business sectors. It asserts, however, that these contracts do not, in any event, contain clauses which discriminate on grounds of sex.

10 Finally, the defendant Government draws attention to the possible adverse consequences of defining Greek social security schemes as `occupational schemes'.

On the one hand, this would prevent full harmonisation with social security schemes in the other Member States under Regulations Nos 1408/71 and 574/72, (13) which would impede the free movement of persons. In that regard, the Greek Government points out that all Greek social security schemes fall within the material scope of those Regulations, which is why recent Directive 98/49/EC (14) does not apply in Greece, in line with the statement made by the Hellenic Republic to the Council Working Party on Social Questions while the preparatory work was being carried out.

On the other hand, there would be disruption, which could even take effect retrospectively, both to national policies and to all Greek social security scheme budgets.

III. Legal analysis

11 I find the Greek Government's arguments unconvincing, for reasons which I shall explain below.

12 With regard to the alleged non-existence under Greek law of `occupational social security schemes' for the purposes of the Community directives, I should first like to point out that the Greek Government does not appear to be very convinced by its own argument. I say this because it states in its written defence to the application that `"occupational social security schemes," as defined in Directive 86/378/EEC and Directive 96/97/EC, do not exist in principle under Greek law.' In the rejoinder, it reiterates that `the vast majority - if not all - social security schemes in Greece are "statutory" schemes.' (15)

All that can be inferred from these statements is that the majority of Greek social security schemes are statutory schemes. Conversely, one can also infer that there are other schemes in existence - described by the Greek Government as `special' schemes - which could fall within the scope of the directive.

13 In fact, as the Commission rightly points out, the existence of occupational social security schemes in the Hellenic Republic for the purposes of the directive was confirmed unequivocally by the Court in Evrenopoulos, (16) which concerned the Dimossia Epicheirissi Ilektrismou (State Electricity Company; `DEI') insurance scheme.

14 In that case, both the DEI and the Greek Government maintained that the DEI insurance scheme was a statutory scheme which did not fall within the scope of Article 119 of the EC Treaty (Articles 117 to 120 of the EC Treaty have been replaced by Article 136 EC and Article 143 EC). In that regard, the DEI emphasised that the scheme had been directly created, that it was regulated exclusively by statute and that the DEI, in operating such a scheme, was acting as a body covered by public law. It added that the scheme was created neither by a unilateral decision on the part of the employer nor after negotiation or agreement with representatives of the workforce; that the rules for its operation were linked to social policy and not to an employment relationship; and, lastly, that its role was not to supplement another general insurance scheme, since the benefits paid were not substitutes, wholly or in part, for those paid by any general insurance scheme. In the light of these considerations, the DEI and the Greek Government took the view that the scheme did not satisfy the criteria laid down by the Court when construing the meaning of `pay' as used in Article 119 of the EC Treaty.

15 The Court did not accept those arguments. It recalled 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, in other words the criterion of employment based on the wording of Article 119 itself. Furthermore, the Court stated that, although that 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, 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. On the other hand, the Court recalled 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. (17)

16 The Court concluded from the foregoing that a survivor's pension paid under an occupational pension scheme of the kind provided by the DEI, 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.

17 Without question, one can infer from this judgment that, contrary to the Greek Government's contention, occupational social security schemes do exist in Greece for the purposes of Directives 86/378 and 96/97. It is my view, therefore, that the Greek Government's first argument should be dismissed.

18 With regard to the Greek Government's second argument, based on the adoption of Law No 2676/1999, it should be pointed out that, irrespective of whether the provisions of this law can be regarded as serving sufficiently to transpose Directive 96/97 into national law, (18) suffice it to say, for the purposes of this case, that the law was published in the Official Journal of the Hellenic Republic on 5 January 1999, in other words after expiry of the time-limit laid down for Member States in Directive 96/97 and after the Commission had commenced these proceedings. It is settled case-law that the Court of Justice cannot take account of measures adopted by a Member State in order to comply with its obligations, once an action for failure to fulfil those obligations has been commenced. (19)

19 Similarly, it is also clear from the case-law of the Court that the fact that a Member State specifies for the first time, during the course of proceedings before the Court, the national provisions which, in its opinion, ensure implementation of the directive, does not amount to compliance with an obligation imposed on Member States by a provision in a directive requiring them immediately to supply the Commission with all necessary information concerning the measures which have been taken to amend national law. (20)

20 For these reasons, I believe that the Greek Government's second argument should be dismissed.

21 The Greek Government's third argument also warrants dismissal. In my view, the `careful study' which the Greek Government is apparently conducting in order, should the need arise, to implement Directive 96/97 in relation to other schemes, whether these are already in existence or may be created in the future, does not amount to compliance with the directive. Nor do I find convincing the general statement that collective private insurance contracts between employers and workers in certain business sectors, to which the Greek Government is of the opinion that Directive 96/97 could possibly apply, do not contain clauses which discriminate on the grounds of sex. As the Court has held, `each Member State must implement directives in a manner which fully meets the requirement of legal certainty and must consequently transpose their terms into national law as binding provisions.' (21)

22 With regard to the Greek Government's final argument, which is founded on the possible consequences for Greek social security schemes of implementation of the provisions of Directive 96/97, I should like to make the following observations.

23 First, although it may appear self-evident, I should point out that a judgment delivered by the Court against the Greek Government would not, under any circumstances, require the Greek authorities to apply the directive to statutory social security schemes. What the Greek authorities are under an obligation to do is to adopt the relevant measures to ensure implementation of Directive 96/97 with regard to occupational schemes, defined according to the provisions of the directive.

24 The Greek Government regrets that it may be unable to continue applying Regulations Nos 1408/71 and 574/72 to social security schemes which, depending upon the terms of the Court's judgment, will have to be construed as falling within the scope of Directive 96/97. With this argument, the Greek Government appears to suggest that it would be more appropriate not to implement the rules laid down in Directives 86/378 and 96/97 in order to guarantee equal treatment for men and women in occupational social security schemes with a view to safeguarding the free movement of persons.

25 It is my personal view that Member States have a duty to implement correctly the provisions of Community law. Regulations Nos 1408/71 and 574/72 apply to all the statutory social security schemes which fall within their substantive scope, in accordance with the definition in Article 4 of Regulation No 1408/71, and to those schemes alone. Likewise, the amendments made to Directive 86/378 by Directive 96/97 apply to all occupational social security schemes fulfilling the requisite conditions for them to be defined as such and falling within the substantive scope of these directives, as set out in Article 4 of Directive 86/378. Describing an occupational social security scheme as a statutory scheme with the aim of promoting the free movement of persons not only amounts to an infringement of Directive 96/97 but also of Regulations Nos 1408/71 and 574/72, since the latter apply solely to statutory social security schemes.

26 The same can be said with regard to Directive 98/49. Without embarking on an analysis of the statement that this directive does not apply in Greece, in accordance with the Greek Government's assertion that it made a declaration to that effect to the Council, something which is not the subject of these proceedings, (22) suffice it to say that the aforementioned directive's material scope differs from that of Directive 96/97.

27 Nor is it possible to accept the Greek Government's argument founded on the repercussions for national policies and for all Greek social security scheme budgets in the event of the Court finding against it. In this respect, I should recall, in accordance with the case-law of the Court, that a Member State cannot plead practical or administrative difficulties in order to justify its failure to comply with the obligations and time-limits laid down in Community directives. The same also applies to economic difficulties, which it is the responsibility of Member States to overcome by adopting the appropriate measures. (23)

28 Despite the fact that the Court has not ruled out that the absolute impossibility of fulfilling the obligations arising from a directive could justify a failure to comply with it, (24) the Greek Government has not proved absolute impossibility in this case.

IV. Costs

29 Since the Commission's application should be granted, liability to pay the costs should fall to the defendant, pursuant to Article 69(2) of the Rules of Procedure.

V. Conclusion

30 In the light of the foregoing considerations, I propose that the Court of Justice, in granting this application, should:

(1) declare that, by failing to bring into force, and to communicate to the Commission within the time-limit laid down, the laws, regulations and administrative provisions necessary to comply fully with Council Directive 96/97/EC of 20 December 1996 amending Directive 86/378/EEC on the implementation of the principle of equal treatment for men and women in occupational social security schemes, the Hellenic Republic has failed to fulfil its obligations under the EC Treaty;

(2) order the Hellenic Republic to pay costs.

(1) - Council Directive 96/97/EC of 20 December 1996 amending Directive 86/378/EEC on the implementation of the principle of equal treatment for men and women in occupational social security schemes (OJ 1997 L 46, p. 20).

(2) - OJ 1986 L 225, p. 40.

(3) - Case C-262/88 Barber [1990] ECR I-1889. In this case the Court held that pensions paid by private occupational schemes, characterised by the fact that they were created as a result either of an agreement between workers and employers or of a unilateral decision taken by the employer, since they are wholly financed by the employer or by both the employer and the workers, since the law, with the worker's consent, allows for them to substitute in part the statutory scheme, and since they only apply to workers employed by certain undertakings, constitute consideration paid by the employer to the worker in respect of his employment and consequently fall within the scope of Article 119 of the Treaty (see paragraphs 25 to 28).

(4) - Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community (OJ, English Special Edition 1971 (II), p. 416).

(5) - Law No 1876/1990 of 8 March 1990 on collective negotiations (Official Journal of the Hellenic Republic, 8 March 1990, Fascicle A(27)).

(6) - Law No 1902/1990 of 12 October 1990 on pensions (Official Journal of the Hellenic Republic, 17 October 1990, Fascicle A(138)). This provision states that collective agreements relating to pensions shall not be capable of regulating adjustments, whether direct or indirect, to the ratio between the worker's and employer's respective contributions to the fund, to the total or partial transfer of ordinary contributions for the purpose of recognising the periods of insurance covered, or to the creation of special funds or accounts for financing periodic pensions or one-off lump-sum payments by the employer.

(7) - This provision states that `the State is responsible for the social security system for its workers, in accordance with statutory provisions.'

(8) - The Greek Government cites case 5024/11987.

(9) - Law No 2084/1992 of 7 October 1992 on reform of the social security system (Official Journal of the Hellenic Republic, 7 October 1992, Fascicle A(165)).

(10) - Law No 2676/1999 of 5 January 1999 on reforming the organisation and administration of social security institutions (Official Journal of the Hellenic Republic, 5 January 1999, Fascicle A(1)).

(11) - Law No 1414/1984 of 1 February 1984 on the implementation of the principle of equality of the sexes in industrial relations (Official Journal of the Hellenic Republic, 2 February 1984, Fascicle A(10)).

(12) - The preamble to Law No 2676/1999 states: `The purpose of this amendment is to transpose Directive 96/97/EC ... into Greek law. Occupational social security schemes means those schemes not governed by Directive 79/7, 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.' This definition of `occupational social security schemes' transcribes almost verbatim the one set out in Article 2(1) of Directive 86/378.

(13) - Regulation (EEC) No 574/72 of the Council of 21 March 1972 fixing the procedure for implementing Regulation No 1408/71 (OJ, English Special Edition 1972 (1), p. 159).

(14) - Council Directive 98/49/EC of 29 June 1998 on safeguarding the supplementary pension rights of employed and self-employed persons moving within the Community (OJ 1998 L 209, p. 46).

(15) - Emphasis added.

(16) - Case C-147/95 [1997] ECR I-2057.

(17) - Ibid., paragraph 16 and paragraphs 19 to 24 of the judgment.

(18) - The Commission rejects this in its reply.

(19) - Case C-71/97 Commission v Spain [1998] ECR I-5991, paragraph 18.

(20) - Case 300/81 Commission v Italy [1983] ECR 449, paragraphs 5 to 7, and Case 301/81 Commission v Belgium [1983] ECR 467, paragraphs 14 to 16.

(21) - Case 239/85 Commission v Belgium [1986] ECR 3645, paragraph 7.

(22) - In any event, the directive itself does not contain any mention of this matter.

(23) - Case C-187/98 Commission v Greece [1999] ECR I-7713, paragraph 45.

(24) - Case C-198/97 Commission v Germany [1999] ECR I-3257, paragraph 41.