The European Legal Forum

Forum iuris communis Europae

Bittner, Claudia

**Direct claims under Article 119 of the EC Treaty (now Article 141 EC) against pension funds -
Consequences of the ECJ decision of 9 October 2001 - C-379/99 - Hans Menauer**

The European Legal Forum (E) 1-2003, 48 - 50

Seen in this way, a demand for relief that is only presented in the alternative must trigger European lis pendens irrespective of the procedural law conception of the *lex fori* of the court concerned. Once the claim is introduced, whether the Court reaches a decision on it is contingent upon the course of proceedings. If the conditions exist for the Court to reach the subsidiary claim, the Court must then decide upon that claim as well. In other words, a petition for relief made in the alternative *can* trigger a decision of the Court that would have to be recognised in the other Member States and therefore would give rise to a conflict with a contrary decision in the other Member State concerning the same subject matter, thus creating a barrier to recognition.

A petition for relief that is presented only in the alternative therefore triggers the safety catch of lis pendens, as the Landgericht has correctly decided.

T.S.

INTERNATIONAL AND EUROPEAN LABOUR AND SOCIAL SECURITY LAW

Direct claims under Article 119 of the EC Treaty (now Article 141 EC) against pension funds – Consequences of the ECJ decision of 9 October 2001 – C-379/99 – *Hans Menauer*

Priv.-Doz. Dr. Claudia Bittner, LL.M. (Harvard)[*]

It was inevitable. In its decision of 9 October 2001,[1] the European Court of Justice determined that pension funds organised under German law are also bound by the precept of equal pay and must assure equal treatment of men and women in the provision of benefits. This is not surprising, since such an obligation has already been affirmed with regard to trustees under English law[2] as well as for administrators of occupational pension schemes under Netherlands law.[3/4]

Germany's Bundesarbeitsgericht (Federal Labour Court, hereinafter "BAG") based its request for a preliminary ruling on the fact that the application of the equal pay principle to independent pension funds established under German law would lead to lacunae in the system which are not necessary for effective legal protection from discrimination.[5] In its role as sole arbiter of European law, the ECJ has turned a deaf ear to such argumentation based on particularities in the national systems. Yet Community law does not govern the means by which the obligation of equal treatment of men and women with respect to salaries is to be fulfilled within the domestic legal systems of the Member States.[6] Consequently, the ECJ has not staked out a position on this issue. From its perspective (which is confined to European law), the fact that institutions such as pension funds under German law are entrusted with providing benefits in an occupational pension scheme – consistently treated in case law as "pay" within the meaning of Article 119 of the EC Treaty (now Article 141 EC) – is sufficient to trigger the application of the equal pay principle. The ECJ gives no consideration to the implications of this stance for the internal functioning of German law on company pensions. However, the effects on the national legal system take on great importance for the acceptance of the ECJ's jurisprudence within the legal orders of Member States.[7]

Why, then, in its preliminary ruling of 23 March 1999[8] did the BAG regard the legal protection against discrimination as effective – even though the active benefit provider is not directly liable to fulfil equal treatment obligations, while holding that an application of the principle of equal pay to independent pension funds would result in anomalies in German law?

1. Effective legal protection

Under the German law for company pensions, a distinction must be made between the employer's basic labour law obligation and the means selected to implement this obligation. The two overlap only when the employer implements an occupational pension scheme by means of a direct pension commitment.

In the case of all indirect means of benefits implementation (provident funds, public pension schemes [*Pensionskassen*], direct insurance, or pension funds [*Pensionsfonds*]), employees and/or their survivors have claims against the secondary benefits provider that are parallel to substantively identical claims under labour law against employers. Employers are obliged to cover pension payments themselves in the event that the body entrusted with providing benefits does not furnish the old age

---

[*] *Lecturer at the University of Freiburg (D).*

1 ECJ 9 October 2001 – C-379/99 – *Hans Menauer* [2001] ECR I-7275.

2 ECJ 28 September 1994 – C-200/91 – *Coloroll* [1994] ECR I-4389.

3 ECJ 28 September 1994 – C-128/93 – *Fisscher* [1994] ECR I-4583.

4 See also *Kollatz*, Selbständige Rententräger und das Lohngleichheitsgebot in der „Post-Barber"-Rechtsprechung des EuGH, [1996] NJW 1658 et seq.

5 BAG (D) 23 March 1999, 3 AZR 631/97 (A), [2000] NZA 90, 92; in the meantime, the final judgment has been issued, BAG (D) 19 November 2002, 3 AZR 631/97, Pressemitteilung Nr. 82/02.

6 *Coloroll* (*supra* note 2), paras 38 et seq., 41 et seq.

7 For harsh reaction to an ECJ ruling in the area of labour law (in this case, the decision of ECJ 4 June 1992 – C-360/90 – *Monika Bötel* [1992] ECR I-3589), see e.g. *Heinze*, Europarecht im Spannungsverhältnis zum nationalen Arbeitsrecht – Von formaler Verdichtung zur offenen Arbeitsrechtsordnung, [1992] ZfA 331, 353; *Buchner,* Die Rolle des Europäischen Gerichtshofs bei der Entwicklung des Arbeitsrechts, [1993] ZfA 279, 326 et seq.; *Blomeyer*, Der Einfluß der Rechtsprechung des EuGH auf das deutsche Arbeitsrecht, [1994] NZA 633, 637 et seq.; *Kaiser*, Entzweiung von europäischem und deutschem Arbeitsrecht, Abschied vom Systemdenken?, [2000] NZA 1144, 1147 et seq.

8 BAG (D) 23 March 1999 (*supra* note 5), 90 et seq.

pension by the intended means.[9] In accordance with the case law of the BAG, this claim to performance is insulated from insolvency above and beyond the duty of guarantee of indemnification funds as carriers of insolvency insurance.[10]

In the concrete case, the selected means of implementation took the form of a pension fund commitment – an indirect, insurance-like mechanism under which the benefit assumes the form of life insurance.[11] As assurer, the pension fund itself agrees to payment of the benefit as set out in its rules. But the employer also owes the benefit directly based on its pension obligation.[12] Widowers, excluded from the survivor pensions through the underlying collective pension agreement, are thereby not only entitled to a claim for damages, but also an insolvency-protected claim to performance vis-à-vis the decedent's employer.

Here, if the insurance conditions laid out in the rules of the pension fund fall short of the benefits owed by the employer based on the equal pay requirement of labour law, the employer must make good this shortfall itself. This right is secured in the event of insolvency.[13] The remarkable feature of this insolvency protection is that the employer has paid no contributions to the indemnification fund as holder of mandatory insolvency insurance. This is because the means of implementation via a German pension fund (*Pensionskasse*) does not require insolvency insurance. There is no correspondence between the duty to pay contributions and the duty to pay benefits. This gap in the system of insolvency protection is taken into account in the case law and the additional burden falls upon the group of employers that are required to be insured in indemnification funds.

In the present case, however, none of this was of use to the widower concerned vis-à-vis the employer because the claim against the employer was erroneously dismissed in the first instance – a decision that became final after the plaintiff lodged no appeal against it. Consequently, the plaintiff here also shares the blame for the failure of the effective legal protection, which the BAG had seen as an argument against the extension of the equal pay requirement to the employer. The possibility remained however for the plaintiff to sue his lawyer and his lawyer's malpractice insurer.[14] Therein one may see the guarantee of effective legal protection with the BAG. However, the ECJ considers the practical effectiveness of the principle of equal pay impaired the moment the pension fund falls out as the "normal debtor" and the number of persons against whom rights under the equal pray principle can be enforced thereby becomes limited.[15] This approach of the ECJ is completely in line with its other case law relating to *effet utile*.

[9] BAG (D) 7 March 1995, 3 AZR 282/94, AP Nr. 26 zu § 1 BetrAVG Gleichbehandlung; BAG (D) 14 October 1998, 3 AZR 385/97, [2000] NZA 874, 875.

[10] BAG (D) 29 August 2000, 3 AZR 201/00, [2001] NZA 163 = [2001] DB 932; BAG (D) 23 March 1999 (*supra* note 5), 90, 92.

[11] *Blomeyer/Otto*, BetrAVG, 2nd ed., Munich (D), 1997, introductory para. 106.

[12] This is evident from the current wording of the third sentence of § 1(1) BetrAVG, which has incorporated the prevailing jurisprudence of the BAG.

[13] BAG (D) 29 August 2000 (*supra* note 10), 163 = [2001] DB 932.

[14] BAG (D) 23 March 1999 (*supra* note 5), 90, 93.

[15] *Menauer* (*supra* note 1), paras 30, 31.

2. First gap in the system: Faulty correspondence between duty to pay contributions and duty to pay benefits

Where are the system breakdowns that the BAG fears will result from the application of the principle of equal pay to claims against pension funds?

In the present case, the fund's rules did not generally exclude widower's pensions. The pension was coupled, however, with the provision that the deceased must have been the family's primary wage earner. Extending the equal pay principle to the pension fund can lead to a gap in the system insofar as the pension fund must supply insurance benefits for which it received no contributions.[16] That is to say, if, in accordance with the entirely separate principle of equal treatment under insurance law, smaller contributions were paid for female employers than for male employees on the basis of the restricted claim available for a widower's pension, the rationale of an unrestricted claim to a widower pension breaches the correspondence of the duty to pay contributions and the duty to pay benefits.

However, as just pointed out, the case law of the BAG allows a comparable gap in the system in the area of insolvency insurance by leaving the indemnity fund to answer for claims to performance against the employer on the basis of pension fund commitments in the event the employer becomes insolvent, although there existed no corresponding duty to pay contributions. However, in cases of a bare claim for damages against the employer, one of the chief arguments put forward by the BAG in its rejection of insolvency protection by means of indemnification funds is the absent correspondence between the duties to pay contributions and to pay benefits.[17] One can only gather that the argument relating to the correspondence of duties to pay contributions and to pay benefits is a persuasive, albeit not convincing one, even in the eyes of the BAG.

3. Second gap in the system: Additional strain on present employees required to pay contributions

The more drastic of the possible system breaks discussed by the BAG consists of the fact that present employees can be made to bear the burden instead of employers in the event of adjustments to a pension fund arising from the equal pay principle. If the pension fund must pay benefits for an insured event not foreseen in its rules (in this case, widowers' pensions when the deceased female employee was not the primary breadwinner of her family), these benefits can be financed either by an increase in contributions or by a curtailment of future benefits with contributions remaining constant, depending on how the fund is set up.[18]

[16] See also *Schlachter*, Kurzkommentar zum Vorlagebeschluss des BAG (D) v. 23. 3. 1999, [2000] EWiR 21, 22.

[17] BAG (D) 17 November 1992, 3 AZR 31/92, AP Nr. 1 zu § 7 BetrAVG Lebensversicherung. However, some writers have suggested that damages owing to losses resulting from premium payments arrears are also protected against insolvency. See e.g. *Blomeyer/Otto* (*supra* note 11), § 7 para. 6 et seq., 185 et seq. with further references.

[18] A reduction of current occupational pensions is impossible. An adjustment to current pensions is possible only within the limits of § 16 BetrAVG.

a) Mere commitments to provide benefits

The increase in contributions made necessary by the additional burden created by a commitment to provide benefits affects those individuals paying contributions. It must be determined on a case by case basis who is liable for contributions. A duty to pay contributions can exist for the employee alone, for the employer alone, or for both the employee and the employer.

The additional burden would be limited to employers only in the case of commitments to provide benefits that are financed exclusively through an obligation of the employer to pay contributions. It was this way in the case presented, in which the employer shouldered the sole burden of making contributions to the pension fund on the basis of a collective agreement referred to in a clause of an individual employment contract, which thus formed part of the contract.

In contrast, were the employees as insured parties required to pay contributions as well, they must also finance the widowers' pensions not provided for in the rules of the pension fund. The principle of equal pay in this case effects the current workforce that is paying contributions. The raise in contributions does not result in a corresponding increase in benefits since the higher contributions are channelled to fund the widowers' pensions not covered by contributions. The BAG sees therein a violation of the entirely separate principle of equal treatment under insurance law.[19]

However, the BAG considers this lacuna as essentially unproblematic as long as the additional stress affects only the employers.[20] In reality, the BAG's problem is not based on the need to balance out the additional strain caused by increased contribution payments, but rather on the fact that the principle of equal pay in the case of the duty of employees to pay contributions operates by burdening other employees. The question of whether this is a desirable consequence in the framework of the principle of equal pay is not one for the German occupational pension system, however. Instead, it presents a question of European law: specifically, the interpretation of Article 119 of the EC Treaty, which the ECJ has affirmed.

b) Contribution-oriented pension systems

In the case of contribution-oriented pension systems in which benefits are computed subject to defined contributions, the additional stress of widowers' pensions excluded by the pension fund's rules leads to a reduction in benefits. Here also the result is based in the logic of the principle of equal pay, according to which each case sees an upward adjustment. With a financing volume defined by certain contributions, the acceptance of corresponding benefit reductions in the future is the logical consequence of granting widowers' pensions not financed by contributions. The burden is thereby shifted from past to current employees, to the detriment of the latter. The ECJ regards even this outcome as compatible with the principle of equal pay.

[19] BAG (D) 23 March 1999 (*supra* note 5), 90, 92; *Schlachter* (*supra* note 16), 21, 22.

[20] Ibid.

4. Possible corrections under national law?

To the contrary, the BAG made clear in its reference its concern with the additional burden on current employees; it saw this additional strain on employers arising from the principle of equal pay as an acceptable result. It is thus conceivable that the Court deduces a direct claim of the current employees against the employer to bear the additional burden arising from the equal pay requirement, which employees would ordinarily experience in terms of increased contributions and or a reduction of future claims. In the first case, that could be by means of an exemption claim; in the second, by means of a claim to compensation for the difference between the benefits with and without financing of the claims to be expected from the equal pay principle. Whether such claims can be eventually constructed in order to shift the equal pay burden to the employer is solely a question of German law.[21]

European law does not necessitate such a development in the law. The core of the ECJ's judgment in *Menauer* is that the financing of the harmonisation of wages advanced by the equal pay requirement can also be implemented in company pension law at the expense of current employees.

[21] *Menauer* (*supra* note 1), para. 26.

ECJ 9 October 2001 – C-379/99 – Pensionskasse für die Angestellten der Barmer Ersatzkasse V.V.a.G. v Hans Menauer
Article 119 of the EC Treaty (Articles 117 to 120 of the EC Treaty have been replaced by Articles 136 EC to 143 EC) – Equal pay for men and women – Occupational pensions – Pension funds entrusted with carrying out the employer's obligation as regards payment of a supplementary pension – Survivor's pension

Article 119 of the EC Treaty (Articles 117 to 120 of the EC Treaty have been replaced by Articles 136 EC to 143 EC) must be interpreted to the effect that bodies such as German pension funds ('Pensionskassen') entrusted with providing benefits under an occupational pension scheme are required to ensure equal treatment between men and women, even if the employees discriminated against on the basis of sex have, as against those directly liable, namely their employers in their capacity as parties to their employment contracts, a protected right in the event of insolvency that excludes all discrimination.

Facts: The plaintiff's wife was employed by the Barmer Ersatzkasse (Barmer Private Sickness Insurance Fund) from 1 September 1956 until her death on 12 November 1993. The wife's employment contract was governed by the Ersatzkassentarifvertrag (Private Sickness Insurance Funds' Collective Agreement, hereinafter 'EKTV'). Under the provisions of the EKTV, the Barmer Ersatzkasse must pay contributions to the pension fund on behalf of its male and female employees and pro-