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**Equal Treatment**  
**Barber - The Pace Warms Up**

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It is now nearly two years since the European Court ruled in the Barber v GRE case (on 17 May 1990) that men and women must receive equal treatment for pension purposes. During this period, much effort has been directed by many organisations in the UK towards clarifying the meaning of the judgment, lobbying both the European Commission and the UK Government, and amending scheme rules to provide equal benefit structures in so far as is possible. What progress has been achieved?

Clarification of the European Court Judgment

The European Court Judgment left many matters unresolved. The primary concern was that it was unclear whether it applied (and if so to what extent) to benefits accrued for service before 17 May 1990, but there are other issues which must also be resolved. These concern, for example, the implications of the judgment for money purchase and survivors' benefits, actuarial factors, options and also whether the liability to comply with Article 119 rests solely on the employer or also on the trustees

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and whether equalisation can be achieved, where necessary, by reducing the benefits for one sex for past as well as future service.

The first question (concerning the retrospective effect) was of primary importance because of the cost implications if benefits for past service were affected. This is why Member States took the unusual action, at Maastricht, of agreeing a Protocol which stated that Article 119 applies only to service after 17 May 1990. I will return to the Protocol later but would like to look first at the various attempts made so far to clarify the judgment not only in relation to its retrospective effect but also concerning the other areas of uncertainty.

A wide range of opinions has been obtained as to the degree of retrospection implied by the judgment, which hinged on the meaning of the phrase "acquisition of entitlement to benefit" which was a crucial part of the text of the judgment. The opinion from legal Counsel obtained by the UK National Association of Pension Funds, that only service after 17 May 1990 is affected, is in line with the Maastricht Protocol but contrasted with the "Doomsday" scenario that all pension payments made after 17 May 1990 must be non-discriminatory. While a variety of sources, including Industrial Tribunals and EC officials writing in a private capacity, have demonstrated their enthusiasm for one view or another, only further decisions of the European Court can produce a definitive interpretation, although ratification of the Maastricht Protocol would make it of almost academic interest.

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Following the Barber judgment a natural hiatus emerged while the Government, the Equal Opportunities Commission and various trade unions searched for appropriate cases to adopt. At the present time some five cases of import in clarifying Barber have been referred to the European Court, one from Germany, one from Holland and three from the UK. These, with their main areas of concern, are as follows:

**A. Michael Moroni v Firma Collo GmbH (referred 14 February 1991) (German case)**

Where a male member left service prior to 17 May 1990 with entitlement to a deferred pension which had not been brought into payment prior to that date, is it necessary to bring the deferred pension into payment from the same normal pension age, and using the same method of calculation, as for a female member?

**B. G C ten Oever v Stichting Bedrijfspensioensfonds vor het Glazenwassers-en Schoonmaskbedrijf (referred 28 March 1991) (Dutch case)**

Where a member died before 17 May 1990, can her survivor claim a spouse's pension with effect from either the date of death or that of the Barber judgment? This case is particularly interesting because an industry-wide Dutch pension scheme, and not the employer, is the defendant. It is to be hoped that the issue of whether Article 119 applies direct to pension schemes rather than just to the employer will be

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raised in the submissions on this case rather than being ignored and then possibly settled by default.

**C. David Neath v Hugh Steeper Ltd (referred 13 May 1991) (UK case)**

Where a male member was made redundant after 17 May 1990 with entitlement to a deferred pension, must that pension be equal to that payable to a woman in the same circumstances and must any transfer and commutation payments in respect of service prior to and/or after the date of the Barber judgment be calculated on the basis of unisex actuarial factors and pension ages?

**D. Coloroll Group Pension Schemes (referred 25 July 1991) (UK case)**

Do members and beneficiaries of pension schemes have the right to bring claims under Article 119 against the trustees of their scheme rather than the employer? If so, does Article 119 override the rules of the scheme or merely require trustees to use what powers they have under their rules to ensure equal treatment? In either case, may equality be achieved by reducing the rights of the other sex? What are the respective liabilities of the trustees and the employer and what service is affected?

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In this case the detailed questions asked are too numerous to list in full. They cover the entitlement of contingent beneficiaries, the use of unequal actuarial factors, the effect on transfer credits and the extent to which contracted-in schemes and benefits deriving from employees' contributions are affected. Such wide-ranging questions arise because the trustees of the various funds involved are seeking guidance on what benefits to pay on winding-up when the employer involved is in liquidation.

**E. Mrs Roberts v Birds Eye Walls Ltd (referred early 1992) (UK case)**

Where a bridging pension is payable until State pension age to take account of the absence of a State pension, may it cease at age 60 (the female state pension age) if payable to a woman, when a man's bridging pension would continue to be paid until age 65 because the State pension for a man is not payable until that date?

It is hoped that most or all of these cases will be heard together by the European Court; however, judgment is unlikely to be forthcoming until late 1992 and could be delayed still further if the Court decides to defer the hearings until after the Maastricht Protocol has been ratified.

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## Government Action

Initially, the UK Government did no more than equalise the ages at which Protected Rights could be paid under money purchase contracted-out schemes. Intensive lobbying, however, by employers and pension schemes alike, persuaded the Government to make a policy statement in this area which included the following:

- lobbying the EC generally on the adverse consequences for British industry of any interpretation which applied to past service
- supporting the Coloroll case
- issuing a discussion paper on the ways of equalising State pension ages
- legislation to require compliance by schemes in respect of service accrued since 17 May 1990
- consulting on necessary changes to the contracting-out arrangements; and
- delaying implementation of the Limited Price Indexation pension increase requirements until schemes' liabilities in the light of the Barber judgment have been clarified.

At this stage much of the promised consultation is still awaited although there have been meetings with the representative organisations and the discussion paper on equalising State pension ages has been released, with comments on the possible alternatives

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set out therein being required by 30 June 1992. There has, however, so far been total silence concerning any help from the Government with amending contracts of employment and scheme rules. Moreover, although the Inland Revenue's revised requirements for new schemes are generally unisex it seems that at present the Inland Revenue is unwilling to relax those requirements which restrict freedom of existing schemes to comply with Article 119 (even in respect of service after 17 May 1990) until the Barber judgment has been clarified. The most urgently required changes to Revenue requirements are:

- harmonisation of existing pension ages below age 60 and early retirement ages below age 50, with permission to provide a full pension to men at the lower pension age applicable to women
- permission to pay "bridging" pensions to women from 60 to 65, if necessary
- permission for members to commute a proportion of their contingent spouses' pensions at the same time as their own, in order to ease the introduction of unisex commutation factors. Indeed, at present it is impossible to obtain Inland Revenue agreement to unisex commutation factors which are more generous than the maximum male single life factors under previous guidance

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- permission to retain all or part of any surplus in excess of the Inland Revenue's 5% limit without tax penalty, if it is likely to be required for liabilities arising from the Barber judgment (now less likely, following the approval of the Maastricht Protocol).

On the employment front it would be helpful to see Government proposals for legislation to:

- enable employers to change members' rights under scheme rules or contracts of employment by, for example, raising the female pension age
- exclude from a claim for breach of contract or unfair dismissal changes made by an employer to comply with Article 119; and
- (if the Barber judgment is retrospective) establish a statutory compensation scheme for the sex whose rights are worsened, in order to ease compliance with Article 119; this should not be so necessary if the Maastricht Protocol is ratified.

#### Schemes' Response

What action has been taken by UK pension schemes in response to the Barber judgment? Where pension age has not already been equalised, there is a tendency, particularly amongst medium and larger sized schemes, to move to a flexible period of retirement with little or no actuarial reduction between the old male and female pension ages. In some cases, the flexible

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retirement period relates only to service before 17 May 1990, with the later of the two pension ages being adopted for service after that date. In few, if any, cases has a scheme with significant numbers of pensioners attempted to equalise benefits for pensions currently in payment and very few schemes have attempted to compensate for the effect of unequal Guaranteed Minimum Pensions (GMPs).

A significant proportion of schemes has still taken no action in response to the Barber judgement, even in respect of service accrued after 17 May 1990. This may reflect a reluctance to make changes until the precise requirements are known and until the contracting-out requirements have been equalised. However, inaction now will not only mean that back payments are required in due course in respect of retirements and deaths since 17 May 1990 but will also involve a higher risk of legal action in the meantime. Failure to equalise terms for new entrants also perpetuates the problems unnecessarily.

One particular risk concerns benefits provided in respect of transfer payments received. In the case of *Kear, Roberts & Seale v Gullick Dobson Ltd*, the Manchester Industrial Tribunal decided that service credits granted on a transfer-in should be treated in the same way as years accrued from actual service with the present employer. Thus a service credit calculated on the assumption of a (higher) male pension age may need to be paid from the (lower) female pension age even though this latter age would have given rise to a lower service credit if it had

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been taken into account in the original calculation. The cost seems to fall on the receiving scheme. However, this was only an Industrial Tribunal decision and does not constitute a legal precedent. As this is one of the areas dealt with in the Coloroll case, the European Court will have an opportunity to provide a definitive answer before too long.

### Lobbying

Throughout 1991 there were protracted attempts by organisations, individual firms and Governments of Member States to influence the European institutions regarding the interpretation of the phrase "acquisition of entitlement to benefit". This was important both because the EC Commission would be making submissions in the various European Court of Justice test cases and because EC officials are now working on a new draft Directive to replace both the 1986 Directive and that proposed as a means of completing the process of implementing equal treatment in State and occupational pension schemes. Indeed some companies went further and initiated action to sue the EC Commission for any costs incurred as a result of the misleading 1986 Directive which suggested that unequal pension ages were acceptable.

Concern over the impact of the judgment was inevitably spread very unevenly across the community. Thus while comparatively little support could be expected from the Mediterranean countries, Germany, Netherlands and to a lesser extent Belgium and the Republic of Ireland were significantly affected, with estimated costs for the Netherlands exceeding those of the UK. It seems

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however to have been effective, with an amendment to the Treaty of Rome being adopted at the Maastricht summit on 11 December 1991, in the form of a Protocol. The implications of this Protocol are discussed below but until it has been ratified - and clearly accepted by the European Court - it would be too early for the lobbying to cease.

### Direct Application

A further area of doubt, which was referred to earlier, is whether the Barber judgment has direct effect on pension schemes. The verdict in that case was against the company concerned and, as Article 119 is concerned with pay, it is arguable that the pension scheme, as an independent third party, cannot be directly involved. If so, any discrepancy in the overall treatment of male and female scheme members falls to be made good by the company. Two of the cases already referred to the European Court raise this issue. In the Coloroll case, the various employers are in liquidation and the request for clarification has been brought by the trustees, while in the ten Oever case the Dutch courts did not challenge the right to bring the action against the Dutch industry-wide scheme rather than the relevant employer but chose instead to regard the scheme as a third party.

There is obviously a danger that the absence of an employer in the Coloroll case may influence the Court in favour of direct application of Article 119 to schemes because in such cases lack of direct application to the scheme could mean that there is no

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remedy for the continuing discrimination. If the Court does indeed take this line, it will be necessary to establish whether the scheme always has a liability to equalise benefits or only when the employer is non-existent, or unable, or perhaps unwilling, to equalise. In most cases, the practical effect will be the same - changes made to the scheme to eliminate discrimination. Where, however, there is more than one scheme in relation to the employment, there could be difficulties if each scheme must 'level up' and the employer cannot merely ensure that the aggregate benefits are equal, and where there is no employer discrimination will continue if the trustees are unaffected. Whichever view is taken, there can be little doubt that the answers will keep the pensions industry occupied for some considerable time to come.

#### Money Purchase

As already stated, another major area of doubt concerns the effect of Article 119 on money purchase schemes. Should contributions paid in respect of members be equal; should the final benefits be equal; or (the worst scenario) is equality required for both contributions and benefits? Unless the insurance industry is to be required to provide only unisex annuity rates it is difficult to see how this last scenario could apply in practice.

#### Maastricht Protocol

I have already referred to this important development: at the Maastricht Summit on 11 December 1991 a Protocol was approved, which reads as follows:

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"For the purposes of Article 119 of the Treaty establishing the European Community, benefits under occupational social security schemes shall not be considered as remuneration if and insofar 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."

The amended Treaty, including the above Protocol, will need to be ratified as a whole by the national governments of the twelve EC member states and it is expected that this process will take at least twelve months. We cannot yet be sure that it will be ratified (it is understood that a UK Labour Government would be concerned that the amendment would take away employees' rights) but the fact that the Treaty must be ratified as a whole may help to ensure this. If it is ratified, it would seem that Article 119 would then require equal treatment in respect of only those pension scheme benefits accruing after 17 May 1990. In the meantime, however, apart from the question of ratification itself, there remains a number of uncertainties:

- if the European Court of Justice accepts that the Protocol applies, the Court will be limited to ruling on post 17 May 1990 benefits; the Coloroll and Roberts cases will stand, but the Moroni and ten Oever cases may simply fail; moreover the Neath case could also fail because Mr Neath's deferred benefits for service after 17 May 1990 have already been equalised

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- if the European Court defers judgment until the Protocol is in force there will be a delay in clarifying the other areas of doubt and the Court may be reluctant to apply the Protocol to claims which were made before Maastricht, especially if the effect of the Protocol is challenged (see below); and
  
  - if the effect of the Protocol is to remove people's rights retrospectively, it might be challenged as being in breach of the European Convention on Human Rights; this is an area in which the European Commission and European Court can be expected to interest themselves - hence the need for continued lobbying.

The mere initial approval of the Protocol has not therefore yet fully clarified the question of retrospection. Furthermore, many other issues, including the applicability of Article 119 to pension scheme trustees (as opposed to the sponsoring employer) and the use of gender based actuarial factors, which were not addressed in the Protocol, have still to be resolved.