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OPINION OF ADVOCATE GENERAL
TANCHEV
delivered on 28 March 2019¹

Case C-171/18

Safeway Ltd
v
**Andrew Richard Newton,
Safeway Pension Trustees Ltd**

(Request for a preliminary ruling from the Court of Appeal (United Kingdom))

(Article 157 TFEU and equal pay for male and female workers — Implementation of the *Barber* ruling on equal pay with respect to pensionable age — Determination of the date of closing the *Barber* ‘window’ — Scope of the prohibition under EU law on retroactive levelling down of pensionable age while the *Barber* window is open — Absence of a time limit under Member State law for bringing proceedings to enforce unequal treatment with respect to pensionable age — Remedial autonomy of Member State law and the right to an effective remedy under Article 47 of the Charter)

¹ Original language: English.

1. The main proceedings furnish an unusual opportunity for the Court to rule on what is required under EU law to secure the effective enforcement of the principle of equal pay for equal work between men and women, in circumstances in which Member State law provides no time limit for instituting proceedings to challenge its alleged breach, and enforcement of equal pay law is being sought by one private party against another. More specifically, the parties are, in essence, at odds as to whether measures taken by a pension fund in 1991, in the wake of the judgment of the Court in *Barber*,² were adequate to comply with rules established in that judgment on equal pay with respect to pensions. The broader requirement under EU law for rights to be accompanied by effective remedies is also relevant to the dispute.

2. The Court of Appeal of England and Wales (‘the referring court’) questions whether an amendment of a Trust deed governing the pension scheme in issue which occurred in 1996 (a trust being the legal form in which occupational pension schemes are generally set up in the United Kingdom),³ but which reflected the 1991 changes to its administration, is consistent with the prohibition set in the court’s case-law⁴ on retroactive levelling down,⁵ through equalisation of the retirement age of men and women by imposing on the latter the retirement age of men, pending implementation of the Court’s judgment in *Barber*.

I. Legal framework

A. EU law

3. Article 157(1) and (2) TFEU state:

‘1. Each Member State shall ensure that the principle of equal pay for male and female workers for equal work or work of equal value is applied.

2. For the purpose of this Article, “pay” means the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives directly or indirectly, in respect of his employment, from his employer.

Equal pay without discrimination based on sex means:

² Judgment of 17 May 1990, *Barber* (C-262/88, EU:C:1990:209).

³ Judgment of 28 September 1994, *Coloroll Pension Trustees* (C-200/91, EU:C:1994:348, paragraph 3).

⁴ See in this regard the judgments of 28 September 1994, *Coloroll Pension Trustees* (C-200/91, EU:C:1994:348); *Avdel Systems* (C-408/92, EU:C:1994:349); *Fischer* (C-128/93, EU:C:1994:353); and *Vroege* (C-57/93, EU:C:1994:352).

⁵ The meaning of this term is explained at point 11 below.

- (a) that pay for the same work at piece rates shall be calculated on the basis of the same unit of measurement;
- (b) that pay for work at time rates shall be the same for the same job.’

B. Member State law

4. Clause 19 of the Trust deed governing the Safeway Pension Scheme (‘the Scheme’) of 1 April 1984 states as follows:

‘The Principal Company may at any time and from time to time with the consent of the Trustees by Supplemental Deed executed by the Principal Company and the Trustees alter or add to any of the trusts powers and provisions of the Scheme including this Trust Deed and the Rules and all Deeds and other instruments in writing supplemental to this Trust Deed and the Deeds specified in the Second Schedule hereto and may exercise such powers so as to take effect from a date specified in the Supplemental Deed which may be the date of such Deed or the date of any prior written announcement to Members of the alteration or addition or a date occurring at any reasonable time previous or subsequent to the date of such Deed so as to give the amendment or addition retrospective or future effects as the case may be.’

II. The facts in the main proceedings and the question referred for a preliminary ruling

5. The main proceedings are concerned with determination of the date upon which Normal Pension Ages (‘NPA’s) applicable under the occupational pension scheme for employees of the Safeway Group, (the Scheme referred to above) were equalised to 65 for both men and women, having been set previously at 60 years for women and 65 years for men.

6. Safeway Limited (‘the Appellant’), which is the principal employer under the scheme, contends that the NPA equalisation occurred on 1 December 1991, that being the date on which scheme members were notified of the equalisation of treatment of men and women, through introduction of an NPA of 65 years for both sexes by written announcement, and the date by reference to which a subsequent formal amendment to the Scheme was stated to be retrospectively effective.

7. The first respondent, Andrew Newton, a member of the scheme, asserts that NPA equalisation to 65 did not occur until 2 May 1996, that being the date of execution of the deed under which the Scheme was formally amended. If this were correct, no equalisation of the NPA for men and women took place for the period between December 1991 and May 1996, so that the rights enjoyed by men should have, during that period, been the same as the rights of the advantaged class, namely women. According to the first respondent, the NPA of women remained 60 until formal amendment on 2 May of 1996, so that men were also entitled to this NPA until that date.

8. The referring court states that, if this were correct, the aggregate financial consequence of the determination of this issue is estimated to amount to in excess of 100 million pounds (GBP).

9. According the written observations of Safeway Pensions Trustees Ltd, the second respondent, their position in the main proceedings is neutral.

10. The change in NPA was made as a result of the judgment of 17 May 1990, in *Barber*,⁶ in which it was held that it was unlawful, pursuant to Article 119 EC (now Article 157 TFEU) to discriminate against men within pension schemes by providing different NPAs for men and for women. The NPAs in issue in *Barber* were 65 for men and 60 for women.

11. However, the temporal effect of the judgment was suspended, and it was held by the Court in *Barber* that the direct effect of Article 119 EC, now Article 157 TFEU, could not be relied upon to claim a pension entitlement by reason of that discrimination with effect prior to the publication of the ruling in *Barber* on 17 May 1990. The judgment therefore had prospective effect only.⁷ While pension funds were free, prospectively, to respond to the *Barber* ruling by 'levelling down' which meant increasing the NPA of women to that of men (and in the main proceedings 65),⁸ before such measures were taken, the disadvantaged class, namely men, had to be treated in the same way as the advantaged class, namely women. Thus, from 17 May 1990, the date of the ruling in *Barber*, to the institution of measures by a pension fund to secure equal pay for equal work between men and women by applying the same NPA to both sexes, men were to be treated as favourably as women.⁹ This has come to be termed 'levelling up' and the

⁶ C-262/88, EU:C:1990:209.

⁷ *Ibid.*, paragraph 45, where it was held that 'the direct effect of Article 119 of the Treaty may not be relied upon in order to claim entitlement to a pension with effect from a date prior to that of this judgment, except in the case of workers or those claiming under them who have before that date initiated legal proceedings or raised an equivalent claim under the applicable national law'. This was followed by Protocol (No 2) concerning Article 119 of the Treaty establishing the European Community annexed to the Treaty on European Union of 7 February 1992, the text of which is as follows: '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 applicable national law.'

⁸ Order for reference point 24. See also judgment of 28 September 1994, *Avdel Systems* (C-408/92, EU:C:1994:349, paragraph 21).

⁹ Order for reference, *ibid.*. See also judgments of 28 September 1994, *Coloroll Pension Trustees* (C-200/91, EU:C:1994:348, paragraph 32), and *Avdel Systems* (C-408/92, EU:C:1994:349, paragraph 17).

period has come to be known, at least in the United Kingdom, as the ‘*Barber window*’.¹⁰

12. On 1 September 1991 the announcement mentioned above was published to all members of the scheme (‘the 1991 Announcement’) to the effect that the Trustee had decided to amend the Scheme by introducing a single NPA for men and women set at age 65, in response to the *Barber* ruling, for periods of service undertaken from 17 May 1990. By letter dated 1 December 1991 to those of its employees who were members or eligible to become members of the Scheme, the Appellant confirmed that the changes to pension benefits described in the 1991 Announcement, to take effect from 1 December 1991.

13. The following are extracts from the 1991 Announcement:

‘Changes to Your Scheme Benefits

This announcement brings you advance news of ... significant changes to the Safeway Pension and Family Benefits Scheme which the Company and Trustee intend to introduce with effect from 1 December 1991 ... A common Normal Pension Age for men and women of 65 – Treating men and women differently in employment practices has long been outlawed. Surprisingly, in the pensions area it has been possible to allow different treatment, especially with regard to pension ages. A recent case in the European Court is set to change all that ...

European Court blazes new pensions trail

You may have heard about a case recently which involved Guardian Royal Exchange (GRE) and one of their former employees, a Mr Barber. He claimed he had been a victim of sex discrimination when refused a pension from GRE following redundancy at an age when a woman would have received one. After a lengthy battle which ended up at the European Court, the case was settled in favour of Mr Barber. This is an important judgment as it means that changes are now inevitable in many company pension schemes with regard to different retirement ages for men and women. It is still somewhat uncertain as to how the court decision will work in practice. However, the Company and the Trustee have decided that it is right to act now to equalise Normal Pension Age. They are continuing to monitor the situation and will make any further changes which may be required as a result of clarification of the effects of the judgment.’

14. The 1991 Announcement contained the following footnote:

‘It is emphasised that the Trust Deed and Rules are the legal basis of [the Scheme], and that this announcement is intended only for the purpose of general guidance

¹⁰ Order for reference *ibid.* and at point 38.

and information. You should note that the changes described in this leaflet represent an alteration to your Terms and Conditions of employment.’

15. According to the referring court, from the beginning of December 1991 the Scheme was administered on the basis that the previously different NPAs for men and women had indeed been equalised by the adoption of a common NPA of 65. Thus, members’ benefits were calculated on that basis. Payments to members retiring thereafter were made on the basis of an NPA of 65 for both men and women, as were transfer payments, and payments following members’ death in service.

16. However, as mentioned above, no corresponding amendment was made by deed, until 2 May 1996, when the appellant and the Trustee executed a further Trust Deed and Rules for the Scheme (‘the 1996 Deed’). The Rules, which constituted the Second Schedule to the 1996 Deed, provided for a common NPA of 65 years for men and women. The equalisation of NPAs was to have retrospective effect from 1 December 1991, the date identified in the 1991 Announcement as the effective date for equalisation of NPAs.

17. In January 2009, concerns were raised by an independent advisor to the Trustees with respect to the five year time lag between the 1991 Announcement and the entry into force of the 1996 Deed. Proceedings were commenced in the High Court several years later, there being no time limit under Member State law to a claim for a right to a benefit under a Trust where the Trust still has assets,¹¹ with

¹¹ This was stated by the Appellant at the hearing, and uncontested by the Respondents, as resulting from section 21 of the Limitation Act 1980. The provision states as follows.

‘Time limit for actions in respect of trust property.

(1) No period of limitation prescribed by this Act shall apply to an action by a beneficiary under a trust, being an action—

(a) in respect of any fraud or fraudulent breach of trust to which the trustee was a party or privy; or

(b) to recover from the trustee trust property or the proceeds of trust property in the possession of the trustee, or previously received by the trustee and converted to his use.

(2) Where a trustee who is also a beneficiary under the trust receives or retains trust property or its proceeds as his share on a distribution of trust property under the trust, his liability in any action brought by virtue of subsection (1)(b) above to recover that property or its proceeds after the expiration of the period of limitation prescribed by this Act for bringing an action to recover trust property shall be limited to the excess over his proper share.

This subsection only applies if the trustee acted honestly and reasonably in making the distribution

(3) Subject to the preceding provisions of this section, an action by a beneficiary to recover trust property or in respect of any breach of trust, not being an action for which a period of limitation is prescribed by any other provision of this Act, shall not be brought after the expiration of six years from the date on which the right of action accrued.

the first respondent to the main proceedings alleging breach of the principle of equal pay for equal work between men and women under Article 157 TFEU, as elaborated upon by the ruling of the Court in *Barber*.¹² On 29 February 2016, the High Court found in their favour. This judgment was appealed to the referring court.

18. The referring court states that there was no disagreement between the parties that implementing measures to close the ‘*Barber* window’ were not taken until 2 May 1996, the date of the making of the 1996 Deed, rather than 1 December 1991, the date of notification of the 1991 Announcement.¹³ As explained above (point 11), under *Barber*, until measures are taken to implement the principle of equal pay in the context of NPAs (with respect to periods of service undertaken after that judgment, namely 17 May 1990), the disadvantaged class (men) are to be treated during this ‘window’ in the same way as the advantaged class (women) so that treatment is levelled up. However, after closure of the ‘*Barber* window’ equalisation can include an NPA of 65 for both men and women. In other words, levelling down is permissible under *Barber* during this period only.

19. The referring court adds that ‘the benchmark for ascertaining, during the period when the *Barber* window is open ... is to be found by reference to the trust deed and rules of the relevant scheme, because that provides the sole and exclusive system or frame or point of reference for the purposes of achieving equal treatment’.¹⁴

20. However, the referring court harbours doubts as to whether the High Court correctly applied the Court’s case-law precluding the retroactive levelling down of the rights of the advantaged class to those of the disadvantaged class, pending the introduction of measures to comply with *Barber*¹⁵ and the closure of the window. The referring court explains that, as a matter of Member State law, the right that

For the purposes of this subsection, the right of action shall not be treated as having accrued to any beneficiary entitled to a future interest in the trust property until the interest fell into possession.

(4) No beneficiary as against whom there would be a good defence under this Act shall derive any greater or other benefit from a judgment or order obtained by any other beneficiary than he could have obtained if he had brought the action and this Act had been pleaded in defence.’

¹² Judgment of 17 May 1990, *Barber* (C-262/88, EU:C:1990:209).

¹³ See *Safeway Limited v Andrew Newton and Safeway Pension Trustees Limited* [2017] EWCA Civ 1482, paragraph 41.

¹⁴ *Ibid.*, paragraph 39, referring to judgments of 20 March 1984, *Razzouk and Beydoun v Commission* (75/82 and 117/82, EU:C:1984:116); of 4 December 1986, *Federatie Nederlandse Vakbeweging* (71/85, EU:C:1986:465); and of 7 February 1991, *Nimz* (C-184/89, EU:C:1991:50). See discussion of these cases below at points 38 to 40.

¹⁵ Judgment of 17 May 1990, *Barber* (C-262/88, EU:C:1990:209).

women enjoyed to an NPA of 60 was a ‘defeasible’ (amendable retrospectively)¹⁶ right, because for the whole of the period from 1 December 1991 to 2 May 1996, the 1991 Announcement was in place on increasing the NPA of women to 65, and this was capable of implementation under Member State law. Indeed, the scheme was administered during this period on that basis.

21. Thus, the referring court wonders whether the retroactive affirmation, in the Trust Deed of 2 May 1996, of the change in practice instituted by the 1991 Announcement, and putting into effect a common NPA for men and women of 65, is in fact permissible under the Court’s case-law, on the basis that the prohibition on retroactive levelling down during the *Barber* window is applicable only to rights that are ‘indefeasible’ (fixed).

22. Further, the referring court points out that, during the *Barber* window, EU law does not require the conferral on the disadvantaged class of more generous rights than those enjoyed by the advantaged class. Conferring an indefeasible right on men, between 1991 and 1996, to an NPA of 60, would exceed the rights of women during this period, given that they had only a defeasible right to retire at 60.

23. All this being so, the referring court stayed the proceedings, and sent the following question for a preliminary ruling:

‘Where the rules of a pension scheme confer a power, as a matter of domestic law, upon the amendment of its Trust deed, to reduce retrospectively the value of both men’s and women’s accrued pension rights for a period between the date of a written announcement of intended changes to the scheme and the date when the Trust deed is actually amended, does Article 157 of the Treaty on the Functioning of the European Union (previously and at the material time Article 119 of the Treaty of Rome) require both men’s and women’s accrued pension rights to be treated as indefeasible during that period, in the sense that their pension rights are protected from retrospective reduction by the use of the domestic law power?’

24. Written observations were filed at the Court by the Appellant, both respondents, and the European Commission. All participated at a hearing which took place on 4 February 2019.

III. Analysis

A. Introduction

25. The genesis of the dispute that falls for consideration in the main proceedings would seem to spring from two features that are particular to the Member State legal system. The first is the absence of a time limit to enforce the right to a benefit under

¹⁶ The representative of the first respondent stated at the hearing that this was the meaning of a ‘defeasible right’ under English law. This went uncontested.

a Trust.¹⁷ The second is what appears to be a lack of clarity under Member State law on the legal status and effect of the 1991 Announcement.

26. I will commence by analysing these two features of the case, before explaining why the key to resolving the dispute lies in determining the date on which the *Barber* window was closed; a question which is for the referring court to assess, but in the light of all relevant principles of EU law. That being so, I will advise the Court to reformulate the question referred in conformity with the suggestion detailed in section F below. The path to this reformulation is as follows.

B. Absence of a time limit for bringing proceedings

27. It is worth recalling that, when EU law vests individuals with rights that the Member State courts have a duty to protect by virtue of obligations inherent in the second subparagraph of Article 19(1) TEU, this does not extend to an entitlement, as far as EU law is concerned, for such rights to be judicially enforceable in perpetuity. Rather, in accordance with the Court's consistent case-law, in the absence of EU law concerning procedural requirements, reasonable time limits for bringing proceedings set by Member State law attach to claims based on EU law, provided that the same time limits apply to analogous claims of a purely domestic nature (principle of equivalence) and that the limitation period in issue does not render the EU rights concerned impossible in practice or excessively difficult to enforce (principle of effectiveness). In the interests of legal certainty, laying down reasonable time limits is compatible with EU law.¹⁸

28. Indeed, the Court has held that national rules relating to time limits for bringing actions under national law may be relied on against workers who assert their right to join an occupational pension scheme to secure equal pay for equal work under Article 157 TFEU, subject to the principles of equivalence and effectiveness.¹⁹

29. The case-law of the European Court of Human Rights is similarly receptive to temporal restrictions to the enforcement of claims. That court has held that 'the right to a fair hearing before a tribunal as guaranteed by Article 6(1) of the Convention [for the Protection of Human Rights and Fundamental Freedoms] must be interpreted in the light of the preamble to the Convention which, in its relevant

¹⁷ Footnote 11 above.

¹⁸ E.g. recently judgment of 22 February 2018, *INEOS Köln* (C-572/16, EU:C:2018:100, paragraph 47 and the case-law cited). See also, with respect to the principles of equivalence and effectiveness, paragraphs 42 to 46 and the case-law cited of the same judgment. This is subject to limited exceptions that do not appear to be pertinent to the main proceedings, e.g., judgment of 1 December 1998, *Levez* (C-326/96, EU:C:1998:577, paragraph 34), where a national temporal limitation with respect to claiming arrears was inapplicable, because delay was 'attributable to the fact that the employer deliberately misrepresented to the employee the level of remuneration received by persons of the opposite sex performing like work'.

¹⁹ Judgment of 28 September 1994, *Fischer* (C-128/93, EU:C:1994:353, paragraph 40).

part, declares the rule of law to be part of the common heritage of the Contracting States. One of the fundamental aspects of the rule of law is the principle of legal certainty'.²⁰ The established case-law of the European Court of Human Rights confirms that time limits for bringing proceedings aim at ensuring the good administration of justice,²¹ so that incoherent or unclear time limits governing civil proceedings fall short of the standards of fairness set by Article 6(1) ECHR.²²

30. The case-law of the European Court of Human Rights further provides that time limits for bringing proceedings protect the rights of the defence and circumvent evidential difficulties. They prevent the institution of late claims, and injustices that can arise when courts are called on to adjudicate on events that have occurred in the distant past, and with respect to evidence that may have become stale.²³ While the European Court of Human Rights has acknowledged that prosecution of grave violations of human rights, such as war crimes, crimes against humanity,²⁴ abductions and unlawful killings, should not be prevented by an overly prescriptive application of time limits,²⁵ civil proceedings comprised of an employment dispute do not fall within this category.²⁶

31. In accordance with the parameters set by the European Court of Human Rights, assessment of the conduct of proceedings as a whole,²⁷ with due account taken of the fact that the overarching right to a fair hearing is a core democratic

²⁰ ECtHR, 24 July 2003, *Ryabykh v. Russia* (CE:ECHR:2003:0724JUD005285499, paragraph 51).

²¹ ECtHR, 20 April 1999, *Valin v. Spain* (CE:ECHR:2001:1011JUD004779299, paragraph 22).

²² ECtHR, 16 December 1992, *de la Pradelle v. France* (CE:ECHR:1992:1216JUD001296487, paragraph 35).

²³ ECtHR, 22 December 1996, *Stubbings v. United Kingdom* (CE:ECHR:2009:0707JUD000106207, paragraph 51).

²⁴ ECtHR, 24 April 2011, *Association '21 December 1989' v. Romania*, (CE:ECHR:2011:0524JUD003381007, paragraph 144). See also the UN General Assembly Convention on the Non-application of Statutory Limitations to War Crimes and Crimes Against Humanity Convention, 26 November 1968, A/RES/2391 (XXIII), and the European Convention on the Non-Applicability of Statutory Limitation to Crimes against Humanity and War Crimes, which entered into force in 2003, ETS No. 082.

²⁵ ECtHR, 18 December 2012, *Aslakhanova and Others v. Russia* (CE:ECHR:2012:1218JUD000294406).

²⁶ In note that, according to the Bulgarian Constitutional Court, the principle underpinning statutes of limitation is based upon several premises. First, that a substantive lapse of time leads to material procedural difficulties. Second, that prescription periods create incentives for the interested party to take action in a timely fashion. Third, an exception to this principle is acceptable only in extreme circumstances that are stipulated explicitly in the Constitution, such as crimes against humanity (Decision No 12, 13 Oct 2016, case No 13/2015; Решение №12 от 13 октомври 2016 по конституционно дело 13/2015).

²⁷ ECtHR, 7 June 2012, *Centro Europa 7 and Di Stefano v. Italy*, (CE:ECHR:2012:0607JUD003843309, paragraph 197).

principle underpinning the rule of law,²⁸ would be required to determine if the absence of a time limit to institute civil proceedings in the circumstances of a given case is compatible with fairness requirements inherent in Article 6(1) ECHR.

32. This question does not arise for assessment in the main proceedings. However, the absence of a time limit for instituting proceedings under Member State law to enforce equal treatment with respect to NPA's renders precise determination of the date on which the *Barber* window was closed all the more important. As mentioned above, this question requires due consideration of all relevant principles of EU law.

C. The legal effect of the 1991 announcement

1. *The disagreement between the parties with respect to the consequences of the 1991 announcement*

33. The discord between the parties on this issue is pivotal to the resolution of the dispute in the main proceedings. I take the view that, as a matter of EU law, the date on which the *Barber* window is closed is the date that measures which are fully legally enforceable are taken to equalise the NPA of men and women. Such measures are to be embedded in a legal regime that complies with the right to an effective remedy under Article 47 of the Charter of Fundamental Rights of the European Union and Article 19(1) TEU. They must otherwise be in conformity with general principles of law that are relevant to this right (see further below, sections D to F).

34. At the hearing, the Appellant referred to paragraph 20 of the order for reference, and argued that, as a result of the 1991 Announcement, which took effect from 1 December 1991, the employer company and the trustees had a legal right to amend the pension scheme and confer an NPA for both men and women of 65 from 1 December 1991, and that this had legal effect and was legally valid under Member State law. Prior to 2 May 1996, no employee, man or woman, could have insisted on an NPA of 60. If they had, pled the representative of the Appellant at the hearing, they would have been met by an amendment to the scheme.

35. The first respondent, however, argued that the trustees needed to enter into a Trust Deed for the change in NPAs to be legally enforceable, and that this did not occur until 2 May 1996. The Rules of the Scheme continued to apply an NPA of 60 for women and 65 for men until that Deed was issued on 2 May 1996. The first

²⁸ ECtHR, 21 February 1975, *Golder v. United Kingdom*, (CE:ECHR:1975:0221JUD000445170, paragraph 34).

respondent referred at the hearing to, inter alia, paragraphs 21, 24 and 30 of the judgment of the referring court.²⁹

2. *The referring court and the 1991 Amendment*

36. At the same time, as noted above (point 19), the referring court has stated that ‘the benchmark for ascertaining, during the period when the *Barber* window is open ... is to be found by reference to the trust deed and rules of the relevant scheme, because that provides the sole and exclusive system or frame or point of reference for the purpose of achieving equal treatment’.³⁰ The referring court also states (see point 18 above) that there was no disagreement between the parties that the *Barber* window closed on 2 May 1996.³¹ However, when the 1991 Announcement was published in September of 1991, it stated that employees ‘should note that the changes described in this leaflet represent an alteration to your Terms and Conditions of employment’ (see point 14 above).

37. Given that the boundary between (obligatory) levelling up and (optional) levelling down results from interpretation by the Court of the scope of equal pay for equal work between men and women under Article 157 TFEU, the date of effective implementation of the obligation on employers to provide men and women with the same NPA, with respect to periods of service undertaken after 17 May 1990 (the date of issue of the *Barber* judgment) does not fall outside the purview of EU law. The rulings of the Court relied on by the referring court in determining the date of closure of the *Barber* window do not amount to a full picture of the extent of EU legal principle that is relevant to this question.

38. In *Razzouk and Beydoun v Commission*³² two widowers were refused survivors pensions with respect to contributions made by their deceased wives as officials of the European Community. At the time the conditions for the payment of survivor’s pensions for widowers were different from the conditions applicable to widows. The Court held that equal treatment was to be given to widowers and widows with respect to survivor’s pensions, given that equal treatment between men and women was a fundamental principle of EU law.

²⁹ See *Safeway Limited v Andrew Newton and Safeway Pension Trustees Limited* [2017] EWCA Civ 1482. The second respondent stated at the hearing that it viewed it as inappropriate to make submissions on this point due to the disagreement between the appellant and the first respondent.

³⁰ *Ibid.*, paragraph 39, referring to judgments of 20 March 1984, *Razzouk and Beydoun v Commission* (75/82 and 117/82, EU:C:1984:116); of 4 December 1986, *Federatie Nederlandse Vakbeweging* (71/85, EU:C:1986:465); and of 7 February 1991, *Nimz* (C-184/89, EU:C:1991:50).

³¹ Assertions made by the Appellant at the hearing and reproduced at points 6 and 34 above are difficult to square with this.

³² Judgment of 20 March 1984 (75/82 and 117/82, EU:C:1984:116).

39. In *Federatie Nederlandse Vakbeweging*³³ the Court held that married women, excluded by the operation of national legislation from a benefit, acquired an entitlement to the benefit under the same conditions available to men due to the direct effect of Article 4(1) of 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.³⁴

40. And *Nimz*³⁵ concerned indirect discrimination on the basis of sex and unfavourable treatment of part-time workers as opposed to full time, and nearly full time, workers, and the obligation on Member State courts to set aside Member State laws responsible for the indirect discrimination in issue.

41. However, as foreshadowed above (point 37) these three cases do not reflect the full gamut of legal principle that is relevant to determining the date on which the *Barber* window closed.

D. Principles of EU law relevant to determining the closure of the *Barber* window

1. Court rulings on Article 157 TFEU and NPAs

42. While I acknowledge that the Court has held that Article 157 TFEU only places an obligation as to result on employers, so that ‘neither that article nor any other provisions of Community law regulates the way in which that obligation is to be implemented by employers or by the trustees of an occupational pensions scheme’,³⁶ the Court has equally held that the effectiveness of Article 157 TFEU is not to be compromised, and ‘the legal protection required to ensure real equality’ is not to be impaired.³⁷ Thus, trustees are bound to do everything within the scope of their powers to comply with the principle of equal treatment,³⁸ including recourse to national courts if this is necessary to amend the provisions of the pension scheme or of the trust deed.³⁹ Application by employers of Article 157 TFEU ‘must be immediate and full’,⁴⁰ and national courts are bound to set aside ‘any

³³ Judgment of 4 December 1986 (71/85, EU:C:1986:465).

³⁴ OJ 1979 L 6, p. 24.

³⁵ Judgment of 7 February 1991 (C-184/89, EU:C:1991:50).

³⁶ Judgment of 28 September 1994, *Coloroll Pension Trustees* (C-200/91, EU:C:1994:348, paragraph 38).

³⁷ *Ibid.*, paragraph 23.

³⁸ *Ibid.*, paragraph 22.

³⁹ *Ibid.*, paragraph 28.

⁴⁰ Judgment of 28 September 1994, *Avdel Systems* (C-408/92, EU:C:1994:349), paragraph 25).

discriminatory provision of national law, without having to request or await its prior removal'.⁴¹

2. *The role of the Charter*

43. The main proceedings concern horizontal enforcement of equal pay requirements set by Article 157 TFEU by one private party against another, and the Court has recently held that Article 47 of the Charter is fully enforceable in such circumstances, even when Member State laws are in direct conflict with it.⁴²

44. That being so, Article 52(3) of the Charter comes into play, because, as pointed out in the Explanations accompanying Article 47, the first paragraph corresponds to Article 13 ECHR.⁴³ Pursuant to Article 52(3) of the Charter, in such circumstances 'the meaning and scope of those rights shall be the same', so that due account must be afforded to pertinent case-law of the European Court of Human Rights, to ensure that EU law meets the minimum standard of protection set by this case-law.⁴⁴

45. I note that, although Article 51(1) of the Charter states that the 'provisions of this Charter are addressed to ... the Member States only when they are implementing Union law', the Court has taken a different direction from the proposition of one Advocate General to the effect that private parties 'are not directly bound' by the Charter due to the wording of Article 51(1).⁴⁵ The Court has now established that a broader range of legal persons are obliged to comply with the Charter, and held that it applies to 'a field covered by EU law',⁴⁶ including circumstances in which such 'fields' extend to the imposition of obligations horizontally.⁴⁷ The principle of equal pay for equal work between men and women

⁴¹ Ibid., paragraph 16.

⁴² Judgment of 17 April 2018, *Egenberger* (C-414/16, EU:C:2018:257). Cf. the Opinion of Advocate General Bobek in *Cresco Investigation* (C-193/17, EU:C:2018:614). The Court issued its ruling on 22 January 2019 (C-193/17, EU:C:2019:43).

⁴³ Judgment of 30 June 2016, *Toma and Biroul Executorului Judecătoresc Horațiu-Vasile Cruduleci* (C-205/15, EU:C:2016:499, paragraph 40).

⁴⁴ Ibid, paragraph 41.

⁴⁵ See notably the Opinion of Advocate General Trstenjak in *Dominguez* (C-282/10, EU:C:2011:559, paragraph 83).

⁴⁶ Judgment of 17 April 2018, *Egenberger* (C-414/16, EU:C:2018:257, paragraph 76). See also the judgment of 6 November 2018, *Bauer and Willmeroth* (C-569/16 and C-570/16, EU:C:2018:871, paragraph 85).

⁴⁷ Ibid.

under Article 157 TFEU has long since had horizontal direct effect between private parties,⁴⁸ and is therefore, incontestably, a ‘field covered by EU law’.

46. As mentioned above (point 33), Article 47 of the Charter is to be read in the light of Article 19(1) TEU. Pursuant to this provision, Member State courts are bound to supply a comprehensive system of effective judicial protection.⁴⁹

3. *Content of pertinent substantive rules*

47. The Court has already held that the principle of effective judicial protection provided for in Article 47 of the Charter comprises various elements; in particular the principle of equality of arms and right of access to a court.⁵⁰ For present purposes, the essence of Article 47 of the Charter, as established in the Court’s case-law, lies in ensuring that a legal remedy exists to ensure respect for EU rights.⁵¹

48. Similarly, the European Court of Human Rights has held that Article 13 ECHR requires provision of a domestic remedy to deal with the substance of an arguable complaint and to grant appropriate relief, and that remedy must be effective in practice as well as in law.⁵²

49. And it is long established in this Court’s case-law that ‘a mere practice or administrative circular ... are not sufficient for the purposes of correctly transposing a directive since, unlike authentic legislative sources, they do not guarantee legal certainty, *binding obligations* and publicity’.⁵³

50. In addition to this, general principles of EU law requiring effective remedies to be available to enforce EU rights are also pertinent.

⁴⁸ Judgment of 8 April 1976, *Defrenne* (43/75, EU:C:1976:56, paragraph 39).

⁴⁹ Judgment of 27 February 2018, *Associação Sindical dos Juizes Portugueses* (C-64/16, EU:C:2018:117, paragraphs 33 to 36).

⁵⁰ Judgment of 30 June 2016, *Toma and Biroul Executorului Judecătoresc Horațiu-Vasile Cruduleci* (C-205/15, EU:C:2016:499, paragraph 42).

⁵¹ Judgment of 13 March 2007, *Unibet* (C-432/05, EU:C:2007:163).

⁵² The Opinion of Advocate General Sharpston in *Ghezelbash* (C-63/15, EU:C:2016:186, point 83). The Advocate General refers to ECtHR, 6 June 2013, *Mohammed v. Austria*, CE:ECHR:2013:0606JUD000228312, paragraphs 69 and 70. See also my Opinion in *National Iranian Tanker Company v Council* (C-600/16 P, EU:C:2018:227, points 118 and 119).

⁵³ My emphasis. See the Opinion of Advocate General Tizzano in *Commission v France* (C-292/99, EU:C:2001:384, point 52). The Advocate General refers to judgments of 2 December 1986, *Commission v Belgium* (239/85, EU:C:1986:457, paragraph 7); of 17 October 1991, *Commission v Germany* (C-58/89, EU:C:1991:391, paragraph 13); judgment of 10 December 1991, *Commission v Greece* (C-306/89, EU:C:1991:463, paragraph 19); and of 20 March 1997, *Commission v Germany* (C-96/95, EU:C:1997:165, paragraph 38).

51. As already noted above (point 27), in the context of national time limits for bringing proceedings, remedies and procedures under Member State law must not render rights conferred by EU law impossible in practice or excessively difficult to enforce. The remedies supplied to enforce rights afforded under EU law must be the same as those of analogous claims of a purely domestic nature.⁵⁴

E. Approach to resolving the dispute in the main proceedings

52. In the light of the above, I have therefore reached the conclusion that the key to resolving the dispute arising in the main proceedings lies in adopting an approach intimated at by the Commission at the hearing. That is, it is first necessary to ascertain whether the facts arising precipitate a situation of retroactivity at all.

53. The answer to this will be in the negative if the 1991 Announcement had full legally binding force,⁵⁵ so that, at this point in time, a remedy was provided to secure a common NPA of 65 that was effective both in practice and in law, in conformity with legal obligations reflected in Article 47 of the Charter and Article 19(1) TEU. In accordance with the case-law discussed above, levelling down so that men and women share an NPA of 65, is perfectly lawful after closure of the *Barber* window, so that the first respondent's case would seem to fall away because retroactivity does not arise.

54. On the other hand, if no effective remedy was put in place until 2 May 1996, the date of the pertinent Trust Deed, the *Barber* window remained open until this point, so that, in conformity with the Court's prohibition on retroactive levelling down, men, (the disadvantaged class) had to be treated in the same way as women (the advantaged class) and accorded an NPA of 60 until 2 May 1996. Under this scenario, the first respondent's case would seem to succeed.

55. As already intimated, these are questions for the referring court to decide, subject the limits set by relevant case-law of the Court.

F. Reformulation of the question referred and proposed answer

56. In the context of the procedure established by Article 267 TFEU providing for cooperation between national courts and the Court of Justice, it is for the latter

⁵⁴ For an example see, e.g. judgment of 6 October 2015, *Orizzonte Salute* (C-61/14, EU:C:2015:655). For a critique alleging a lack of care on the part of the Court in distinguishing between the right to an effective remedy under Article 47 of the Charter and the principles of effectiveness and equivalence, see, e.g. Krommendijk, J., 'Is there light on the horizon? The distinction between "Rewe effectiveness" and the principle of effective judicial protection in Article 47 of the Charter after *Orizzonte*', 53 (2016) *Common Market Law Review*, 1395, particularly at 1408 and following.

⁵⁵ See above points 47 to 49. I note that Advocate General van Gerven in his Opinion in *Avdel Systems* (C-408/92 and C-28/93, EU:C:1994:183) referred at point 15 to a requirement for compliance 'in full with the principle of equal treatment', and at point 24 to the 'direct (and, in principle, immediate) application of Article 119 to "horizontal" schemes'.

to provide the national court with an answer which will be of use to it and enable it to determine the case before it. With this in mind, the Court may have to reformulate the questions referred.⁵⁶

57. Given that the point in time at which the *Barber* window was closed is essential to resolving the dispute in the main proceedings, I suggest that the Court reformulate the question referred as follows.

58. ‘What factors are to be taken into account in determining the date on which a pension fund has taken prospective measures concerning periods of service that have taken place after the judgment of 17 May 1990, *Barber* (C-262/88, EU:C:1990:209), to enforce the principle of equal pay for equal work between men and women under Article 157 TFEU with respect to normal pension age? During the period prior to this occurring, and in which the *Barber* window remains open, is the prohibition under EU law on retroactive levelling down, which precludes imposition of a retirement age for women (the advantaged class) that is the same as that for men (the disadvantaged class), applicable when the rules of a pension scheme confer a power, as a matter of domestic law, upon the amendment of its Trust deed, to reduce retrospectively the value of both men’s and women’s accrued pension rights for a period between the date of a written announcement of intended changes to the scheme and the date when the Trust deed is actually amended?’

59. With regard to the first part of this question, due regard is to be afforded to the combined effects of Article 19(1), second subparagraph, TEU and Article 47 of the Charter, pursuant to which Member State law must ensure equal treatment with respect to NPAs is a binding obligation that is fully enforceable both in practice and in law (see points 47 to 49 above). The right to equal pay under Article 157 TEU with respect to NPAs must not be impossible in practice or excessively difficult to enforce. At the same time, the remedial scheme to secure equal treatment with respect to NPAs must be the same as that applicable to analogous claims of a purely domestic nature (see point 51 above).

60. With regard to the answer to the second half of the above question, I have reached the conclusion that the defeasible (amendable retroactively) or indefeasible (fixed) nature of the right of women to retire at 60 is immaterial to the application of the prohibition in the Court’s case-law on levelling down, which lasts so long as the *Barber* window remains open. I have reached this conclusion for the following reasons.

61. I do not accept arguments in the written observations of the Appellant to the effect that applying the prohibition on levelling down to the main proceedings interferes with the discretion of Member State law to determine what the benefits

⁵⁶ E.g. judgment of 30 June 2016, *Toma and Biroul Executorului Judecătoresc Horațiu-Vasile Cruduleci* (C-205/15, EU:C:2016:499, paragraph 30 and the case-law cited).

of the advantaged class are.⁵⁷ The case-law of the Court provides unequivocally that, in order to secure compliance with Article 157 TFEU, pensionable age of men and women is to be the same. This is a requirement that cannot be disturbed by the nuances of Member State law, since the Court has held that ‘the principle of equal pay is one of the foundations of the Community’.⁵⁸

62. This approach does not drift into interpretation of Member State law and assessment of its effects. Preventing dilution of the primacy of a long since established directly effective Treaty article like Article 157 TFEU is paramount. As pointed out in the written observation of the first respondent, in its judgment in *Coloroll* the Court states that employers ‘and trustees cannot ... be allowed to rely on the rules of their pension scheme, or those contained in the trust deed, in order to evade their obligation to ensure equal treatment in matter of pay’.⁵⁹

63. Nor do I agree, as argued in the written observations of the Appellant, that application of the prohibition on levelling down while the *Barber* window is open, results, on the facts arising in the main proceedings, in conferral of an *indefeasible* right for men to a retirement age of 60, when women are conferred with an *defeasible* right only to retire at 60, under English law, so that men are afforded greater rights than those enjoyed by women. I note that the case-law of the Court precludes conferral of treatment more favourable on the disadvantaged class than that conferred on the advantaged class.⁶⁰

64. Yet, it is not disputed that, at the time of the ruling in *Barber*, the NPA for women who were members of the Safeway Pension Trust was 60. It is established in the Court’s case-law that, given the foundational status of equal pay in EU law, the ‘meaning and scope of that principle cannot therefore be determined by reference to a formal criterion, which is itself dependent upon the rules or practices followed in the Member States. The need to ensure uniform application of the Treaty throughout the Community requires [Article 157 TFEU] to be interpreted independently of those rules or practices.’⁶¹

65. As further pointed out in the written observations of the first respondent, it makes no sense to construe restrictively the leading judgment of the Court

⁵⁷ In this regard, the Appellant relies on the judgments of 20 March 1984, *Razzouk and Beydoun v Commission* (75/82 and 117/82, EU:C:1984:116); of 4 December 1986, *Federatie Nederlandse Vakbeweging* (71/85, EU:C:1986:465); of 7 February 1991, *Nimz* (C-184/89, EU:C:1991:50); and of 28 September 1994, *Fischer* (C-128/93, EU:C:1994:353).

⁵⁸ Judgment of 28 September 1994, *Coloroll Pension Trustees* (C-200/91, EU:C:1994:348, paragraph 26).

⁵⁹ Judgment of 28 September 1994, *Coloroll Pension Trustees* (C-200/91, EU:C:1994:348, paragraph 27).

⁶⁰ Judgment of 28 September 1994, *Fischer* (C-128/93, EU:C:1994:353, paragraphs 35 and 36).

⁶¹ Judgment of 28 September 1994, *Beune* (C-7/93, EU:C:1994:350, paragraph 28).

precluding retroactive levelling down,⁶² and as deciding only that it was impermissible under EU law to retrospectively lower benefits if this was also impermissible under Member State law, due to the absence of a facility in a trust arrangement for this to occur. The respondent is right to contend that, if the Court were to accept this argument, the line of case-law precluding levelling down during the period in which the *Barber* window is open would be devoid of any effect.⁶³ The prohibition would only apply when it was not needed, because retroactive levelling down was already precluded under Member State law.

IV. Conclusion

66. I therefore propose responding to the referring Court as follows.

In determining the point in time at which a pension fund has taken prospective measures concerning periods of service that have taken place after the judgment of 17 May 1990 in *Barber* (C-262/88, EU:C:1990:209), to enforce the principle of equal pay for equal work between men and women under Article 157 TFEU with respect to normal pension age, which is a question for the referring court to decide, due regard is to be afforded to the fact that, under the combined effects of Article 19(1), second subparagraph TEU, and Article 47 of the Charter of Fundamental Rights of the European Union, Member State law must ensure that equal treatment with respect to normal pension age is a binding obligation that is fully enforceable both in practice and in law, and that the legal remedies provided by Member State law to guarantee equal pay under Article 157 TFEU with respect to normal pension age do not render this right impossible in practice or excessively difficult to enforce. At the same time, the remedial scheme to secure equal treatment with respect to normal pension age must be the same as that applicable to analogous claims of a purely domestic nature.

During the period prior to this occurring, and in which the *Barber* window remains open, the prohibition under EU law on retroactive levelling down, which precludes imposition of a retirement age for women (the advantaged class) that is the same as that for men (the disadvantaged class), applies even when the rules of a pension scheme confer a power, as a matter of domestic law, upon the amendment of its Trust deed, to reduce retrospectively the value of both men's and women's accrued pension rights for a period between the date of a written announcement of intended changes to the scheme and the date when the Trust deed is actually amended.

⁶² Judgment of 28 September 1994, *Avdel Systems* (C-408/92, EU:C:1994:349).

⁶³ In this regard the first respondent relies on the Opinion of Advocate General Van Gerven in Joined Cases *Ten Oever* (C-109/91, C-110/91, C-152/91 and C-200/91, EU:C:1993:158, point 19, footnote 4, and the case-law referred to therein.