OPINION OF ADVOCATE GENERAL ALBER

delivered on 22 February 2001 [1]

I — Introduction

1. This reference for a preliminary ruling comes to the Court from the French Conseil d'État (Council of State). It raises questions as to the compatibility with Community law of a national rule whereby women are credited with an added year of pensionable service in respect of each of their children. The plaintiff in the main proceedings ('the plaintiff') is the father of three children and claims he is therefore entitled to three years' added service under the rule in question, which, in his view, by restricting the credited service to women, constitutes a breach of the principle of equal pay for men and women.

2. Another issue concerns whether the Community law provisions to be applied are those which were in force in 1991, when the pension entitlements were claimed, or in 1999, when the order for reference was made.

II — Facts and procedure

3. The plaintiff is a French *magistrat* [2] who, as a *conseiller* (judge) at the Cour d'Appel (Court of Appeal) de Paris, was seconded to the Ministry of Foreign Affairs to take up a post with the Legal Service of the Commission of the European Communities. He has claimed pension entitlements with effect from 15 February 1991. His pension became payable by decree (*arrêté*) of 1 July 1991 notified to him on 11 May 1992. The pension was calculated solely on the basis of his actual years of service. That basis is disputed by the plaintiff, who claims that he is entitled to a service credit of three years pursuant to Article L. 12(b) of the Code des pensions civiles et militaires de retraite (Civil and Military Retirement Pensions Code, hereinafter referred to as 'the Pensions Code'), [3] under which female civil servants receive a service credit in respect of each of their children.

4. Under the principle of equal treatment for men and women, particularly in the area of equal pay, the plaintiff argues that he too, as the father of three children, should have the benefit of the service credit.

1 — Original language: German.

2 — This is a generic term for senior civil servants, judges and officers of the *Ministère public*.

3 — For the wording of the provision, see paragraph 14 below.

Having been denied that advantage, he brought proceedings in the referring court, the Conseil d'État — which is the court of first and final instance for legal disputes involving civil servants appointed by decree, including *magistrats* — seeking the annulment of his pension decree in so far as he had been denied service credits for additional years.

5. By decision of 28 July 1999, the referring court stayed the proceedings and submitted the following questions to the Court for a preliminary ruling:

1. Do the pensions provided by the French retirement pension scheme for civil servants constitute pay within the meaning of Article 119 of the Treaty of Rome (now Article 141 of the Treaty establishing the European Community)?

   If so, in the light of the requirements of paragraph 3 of Article 6 of the Agreement annexed to Protocol No 14 on Social Policy, is the principle of equal pay breached by the provisions of Article L. 12(b) of the Civil and Military Retirement Pensions Code?

2. If Article 119 of the Treaty of Rome is not applicable, do the provisions of Directive 79/7/EEC of 19 December 1978 prevent France from maintaining in force provisions such as Article L. 12(b) of the Civil and Military Retirement Pensions Code?

6. The parties to the proceedings before the Court of Justice were the plaintiff, the French Government, the Belgian Government and the Commission.

III — The applicable law

(a) *The relevant provisions of Community law*

7. Article 119 of the EEC Treaty had the following wording (in 1991, at the time the disputed pension entitlements were claimed):

'Each Member State shall during the first stage ensure and subsequently maintain the application of the principle that men and women should receive equal pay for equal work.

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:

(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.'

8. Following amendment and renumbering by the Treaty of Amsterdam in 1997 — and thus before the reference for a preliminary ruling was made in 1999 — this became Article 141 EC. Article 141 EC provides as follows:

'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:

(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.

3. ...

4. With a view to ensuring full equality in practice between men and women in working life, the principle of equal treatment shall not prevent any Member State from maintaining or adopting measures providing for specific advantages in order to make it easier for the under-represented sex to

pursue a vocational activity or to prevent or compensate for disadvantages in professional careers.'

9. The content of Article 141(4) EC derives from Article 6(3) of the 1993 Agreement which is cited in the following paragraph.

10. In its first two paragraphs, Article 6 of the Agreement of 1 November 1993 annexed to Protocol No 14 on Social Policy, which is mentioned in the first question referred, has wording similar to that of the previous Article 119 of the EEC Treaty. The new third paragraph of the Article provides:

'This Article shall not prevent any Member State from maintaining or adopting measures providing for specific advantages in order to make it easier for women to pursue a vocational activity or to prevent or compensate for disadvantages in their professional careers.'

11. Directive 79/7/EEC, mentioned in the second question referred, is Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security. [4]

4 — OJ 1979 L 6, p. 24.

Article 3 provides:

'1. This Directive shall apply to:

(a) statutory schemes which provide protection against the following risks:

— sickness,

— invalidity,

— old age,

— accidents at work and occupational diseases,

— unemployment;

(b) social assistance, in so far as it is intended to supplement or replace the schemes referred to in (a).

2. This Directive shall not apply to the provisions concerning survivors' benefits nor to those concerning family benefits, except in the case of family benefits granted by way of increases of benefits due in respect of the risks referred to in paragraph 1(a).

3. With a view to ensuring implementation of the principle of equal treatment in occupational schemes, the Council, acting on a proposal from the Commission, will adopt provisions defining its substance, its scope and the arrangements for its application.'

12. Article 4 of the Directive provides:

'1. The principle of equal treatment means that there shall be no discrimination whatsoever on ground of sex either directly, or indirectly by reference in particular to marital or family status, in particular as concerns:

— the scope of the schemes and the conditions of access thereto,

— the obligation to contribute and the calculation of contributions,

— the calculation of benefits including increases due in respect of a spouse and for dependants and the conditions governing the duration and retention of entitlement to benefits.

2. The principle of equal treatment shall be without prejudice to the provisions relating to the protection of women on the grounds of maternity.'

13. Article 7(1)(b) provides:

'1. This Directive shall be without prejudice to the right of Member States to exclude from its scope:

(a) ...

(b) advantages in respect of old-age pension schemes granted to persons who have brought up children; the acquisition of benefit entitlements following periods of interruption of employment due to the bringing up of children;

(c) — (e)...

2....'

(b) *The national rules*

14. Article L. 12(b) of the Pensions Code provides in substance as follows:

The following service credits are to be added to the actual years of service, under the conditions laid down by administrative rules:

...

(b) A service credit granted to female civil servants ('femmes fonctionnaires') for each legitimate child, each natural child of established paternity, and each adopted child, and, subject to the condition that they have been brought up for at least nine years before reaching their twenty-first birthday, for each of the other children listed in paragraph II of Article L. 18(2).

(c) — (e)...

15. Article L. 18 of the Pensions Code, to which Article L. 12(b) refers, makes provision for family supplements payable to pensioners of both sexes. Paragraph I of Article L. 18 provides that a supplement is payable to pension recipients having brought up three or more children. Paragraph II then sets out the categories of qualifying children for the purposes of the Article. In addition to those already referred to in Article L. 12(b), these are the spouse's children from a previous marriage, the spouse's natural children of established paternity and the spouse's adopted children. There then follow three further categories of children entrusted to pension recipients' care by virtue of a court order of some kind: children over whom they exercise either parental authority or guardianship or children whom they have taken into their homes as foster children.

16. Article R. 13 of the Pensions Code further elaborates on Article L. 12(b) by providing:

'The service credit provided under Article L. 12(b) for female civil servants amounts to one year for each legitimate child, each natural child of established paternity, and each other child who, at

the date of retirement from the service, has been brought up under the conditions and for the period specified in that article.'

IV — The parties' submissions

The plaintiff

17. The plaintiff takes the view that the civil service pension in issue constitutes 'pay' within the meaning of Article 119 of the EEC Treaty or Article 141 EC. He bases this view on an analysis of the French civil service pension scheme and on the case-law of the Court. [5] As regards whether Article L. 12(b) of the Pensions Code infringes the principle of equal pay in the light of Article 6(3) of the Agreement annexed to the Protocol on Social Policy, the plaintiff argues that the latter provision has no application to the present case as the material time for determining the legal position is 1 July 1991, the date on which the pension order issued, whereas the Protocol on Social Policy was not signed until 7 February 1992 and entered into force only on 1 November 1993. The provision in question was a 'new rule' which could not be applied to pre-existing situations.

18. In order to answer the questions referred, an analysis of Article L. 12(b) of the Pensions Code is required. It is clear on the face of that provision that the service credit is granted subject to a variety of conditions. In the case of legitimate, natural and adopted children, the service credit is granted to the mother solely by virtue of the fact that she is the mother of the children, whether or not she also brought them up.

19. By contrast, in the case of the children identified by reference to Article L. 18 of the Pensions Code, entitlement to the service credit is conditional on their having been brought up for at least nine years, although there is no requirement to show that any form of career detriment had been suffered as a result. In any event, this provision does not apply to the plaintiff and so is not relevant here.

20. That the service credit in the former case is not linked to service breaks for maternity leave, which could potentially constitute a career handicap, is confirmed by the fact that it applies equally to children born before the mother acquired civil servant status, or after she has lost it, or in circumstances where she was not actually employed in the civil service. The service credit is thus not linked to any career detriment resulting from the mother

5 — Case C-7/93 *Beune* [1994] ECR I-4471, Case 170/84 *Bilka* [1986] ECR 1607, Case C-109/91 *Ten Oever* [1993] ECR I-4879 and Case C-110/91 *Moroni* [1993] ECR I-6591.

having to take maternity leave. Moreover, the service credit is also granted in respect of adopted children.

21. However, if the service credit is granted solely on the basis of parenthood there is no reason why men in their capacity as parents are excluded by the provision. The plaintiff, who was on secondment when his children were born, is entitled to the same treatment as a female civil servant who at the time of the birth of her child was not employed in the civil service but on secondment. The fact that female civil servants in that position would have had to take maternity leave from the institution to which they had been seconded could not have had an adverse effect on their careers in their home organisation.

22. The plaintiff was therefore discriminated against by reason of his sex. This is a clear breach of Article 119 of the EEC Treaty. The result would be the same even if Article 6(3) of the Agreement on Social Policy were applicable — which according to the plaintiff is not the case.

23. The plaintiff submits that the second question referred does not need to be answered. His submissions on this point are therefore purely hypothetical. As there is no doubt that Article L. 12(b) of the Pensions Code discriminates on grounds of sex, the only issue is whether it comes within the exception provided for in Article 4(2) of Directive 79/7. His analysis of Article L. 12(b) has, he claims, shown that the provision is too broad in scope to constitute a provision relating to the protection of women on grounds of maternity.

24. Article 7 of Directive 79/7 allows Member States to exclude certain provisions from the scope of the Directive. For present purposes, only Article 7(1)(b) may be relevant. The plaintiff has already shown, however, that the advantage in issue is not conditional on having 'brought up' children, but only on being a mother. The exception therefore does not apply. Article L. 12(b) of the Pensions Code is therefore also in breach of Directive 79/7.

The French Government

25. The French Government expresses doubt as to whether the pensions provided under the Pensions Code constitute 'pay' within the meaning of Article 119 of the EEC Treaty. In the light of *Defrenne*,[6] pensions provided under a statutory social security system are not pay within the meaning of Article 119 but instead fall

6 — Case 80/70 [1971] ECR 445, paragraph 7.

within the scope of Directive 79/7, in accordance with Article 3(1) thereof. It is unclear how the French civil service pensions scheme ought to be classified, as it is governed entirely by legislation and covers all civil servants, who may be regarded as a 'general category of workers' [7] both in view of their numbers and in view of the uniform nature of the legal provisions applicable to them.

26. In *Beune*, [8] the Court had held that the Netherlands pension scheme fell within the scope of Article 119 of the EEC Treaty. There are both differences and similarities between the Netherlands and French pension schemes. Unlike the Netherlands scheme, the French scheme is not merely a supplementary scheme but also provides the basic pension cover. The Netherlands pension scheme is a funded scheme in which contributions are accumulated in a fund managed by a joint pension board, whereas the French retirement benefits are paid directly out of the State budget.

27. However, the Court held that the decisive criterion was the direct link between the consideration and the employment, something which is true also of the French scheme. The French Government therefore concedes that pensions provided under the French scheme could be regarded as 'pay' within the meaning of Article 119 of the EEC Treaty.

28. The French Government then addresses the application *ratione temporis* of Article 119 of the EEC Treaty, Article 141 EC and the Agreement annexed to the Protocol on Social Policy. The original wording of Article 119 of the EEC Treaty was not altered by the Maastricht Treaty. However, annexed to the latter Treaty, which was signed on 7 February 1992 and entered into force on 1 November 1993, was Protocol No 14 on Social Policy. The provision has acquired its present form in Article 141 EC by virtue of the Treaty of Amsterdam, which was signed on 2 October 1997 and entered into force on 1 May 1999. The Protocol on Social Policy does not figure on the list of protocols repealed by the Treaty of Amsterdam under Article 6(3) thereof. One must therefore assume that the Protocol on Social Policy is still in force.

29. For the purpose of answering the questions referred, it could be argued that the applicable law is that in force on 1 July 1991, the date on which the contested pension order issued. Alternatively, it could be argued that the material time is the date of the reference, 28 July 1999. On the earlier date, Article 119 of the EEC Treaty in its original form was in force; on the later date, the applicable provisions were Article 141 EC and Article 6(3) of the Agreement annexed to Protocol No 14 on Social Policy. The French Government first

7 — *Defrenne* (cited in footnote 6), paragraph 7.
8 — Case C-7/93 (cited in footnote 5).

proceeds on the basis of the legal position as at the time of the reference. In this it bases its arguments directly on Article 141(4) EC and Article 6(3) of the Agreement on Social Policy. In the view of the French Government, Article L. 12(b) of the Pensions Code is justified in the light of both these provisions.

30. Specific advantages for women, irrespective of the proportion of women in the civil service, are justified by Article 6(3) of the Agreement annexed to the Protocol on Social Policy.[9] There are two phenomena of particular relevance in this regard. One is the take-up of parental leave and the other is a comparison of the career spans of women and men. Article 141(4) EC, for its part, allows measures providing for specific advantages to compensate for disadvantages suffered by the under-represented sex. In this regard, the French Government lays particular emphasis on the under-representation of women in senior positions and on the consequences of opting to work part-time.

31. At the hearing, the French Government argued that while Article 119 of the EEC Treaty was probably applicable to the present case, account must be taken of subsequent developments in the shape of Article 6(3) of the Agreement annexed to the Protocol on Social Policy and Article 141(4) EC. In *Abrahamsson*[10] and *Badeck*,[11] moreover, the Court judged the national rules at issue in those cases in the light of Article 141(4) EC despite their having been enacted before it.

32. With regard to Article 119, the French Government argues that, even in its original version, it permits measures compensating for career handicaps suffered by female employees. Accordingly, Article L. 12(b) of the Pensions Code is justified in any event. It is designed to address a social reality which impinges on female civil servants in their career development because of the prominent role assigned to them in bringing up children. The purpose of the measure in issue is to compensate for the career disadvantages and difficulties suffered by female civil servants who have had children, even where they have not given up work while bringing up their children.

33. The statistics annexed to the pleadings show that in the higher echelons of the civil service women are very much in a minority. The reason for this is that women who have children are regarded as being less available for work. Women's career development is consequently slower than men's because they tend not to be appointed to the same positions. This has a direct bearing on their

9 — See paragraph 10 above.

10 — Case C-407/98 *Abrahamsson and Anderson* [2000] ECR I-5539.

11 — Case C-158/97 *Badeck and Others* [2000] ECR I-1875.

pensions because of the manner in which civil service pension benefits are calculated in France. The purpose of Article L. 12(b) is to offset these differences. It is a measure calculated to compensate for real disadvantages in the area of pay observed in the working lives of women who have children.

34. The provision in question has been criticised in the course of the proceedings as being too broadly framed. In response to that, the French Government points out that it does not benefit women in general but only women who have had children. According to French civil service statistics, women with no children do not encounter the same difficulties in terms of career advancement.

35. Article L. 12(b) of the Pensions Code is thus not in breach of the principle of equal pay. This view is, the French Government submits, supported by the decisions in *Kalanke*, [12] *Marschall*, [13] *Badeck* [14] and *Abdoulaye*. [15] Only in the event that the Court should decide that civil service pensions are not 'pay' within the meaning of Article 119 of the EEC Treaty, the French Government submits that Article 7(1)(b) of Directive 79/7 should be applied. There is an explicit link between the service credit and the raising of children.

36. Only if the Court should decline to accept its arguments, the French Government asks that the temporal effects of the judgment be limited. In relation to such requests, it submits that it is the regular practice of the Court to inquire whether the Member State's misinterpretation of a rule of Community law was due to legal uncertainty. On this point, too, the French Government supports its position by reference to the judgments in *Kalanke*, [16] *Marschall*, [17] *Badeck* [18] and *Abdoulaye*. [19]

The Belgian Government

37. In order to answer the question whether a French civil service pension constitutes 'pay' within the meaning of Article 119 of the EEC Treaty, the Belgian Government cites the *Barber* judgment, [20] in which the Court stated 'that this concept... cannot encompass social security

12 — Case C-450/93 *Kalanke* [1995] ECR I-3051.
13 — Case C-409/95 *Marschall* [1997] ECR I-6363.
14 — Cited in footnote 11.
15 — Case C-218/98 *Abdoulaye and Others* [1999] ECR I-5723.
16 — Cited in footnote 12.
17 — Cited in footnote 13.
18 — Cited in footnote 11.
19 — Cited in footnote 15.
20 — Case C-262/88 *Barber* [1990] ECR I-1889, paragraph 22.

schemes or benefits, in particular retirement pensions, directly governed by legislation without any element of agreement within the undertaking or the occupational branch concerned, which are compulsorily applicable to general categories of workers'.

38. The Belgian Government goes on to point out that Regulation (EEC) No 1408/71 [21] is applicable, both *ratione personae* [22] and *ratione materiae*, to special schemes for civil servants and that Article 1 (ja) defines 'special scheme for civil servants' as 'any social security scheme which is different from the general social security scheme applicable to employed persons in the Member States concerned and to which all, or certain categories of, civil servants or persons treated as such are directly subject'.

39. As the French civil service pension scheme comes within the scope of Regulation No 1408/71, application of the criteria laid down in *Barber* means that pensions paid under this scheme are not 'pay' within the meaning of Article 119 of the EEC Treaty. With regard to the second question referred, the Belgian Government cites Article 7(1)(b) of Directive 79/7. The service credit at issue comes within this exception, which is still applicable, and therefore the contested provision does not infringe the principle of equal treatment.

The Commission

40. On the authority of *Beune* [23] and *Evrenopoulos*, [24] the Commission argues that French civil service pensions do constitute pay. As to whether Article L. 12(b) of the Pensions Code is compatible with the principle of equal pay, the Commission states that, according to the wording of that provision, the determinant criterion for the grant of the service credit is the fact of having had children. That being so, it is difficult to understand why it is not also accorded to male civil servants who are fathers. The Court has explained, in relation to Directive 76/207/EEC, [25] that workers, in their capacity as parents, include both male and female workers. [26] The Commission takes the view that crediting added service to female civil servants in their capacity as parents constitutes direct discrimination against male civil servants who are parents.

21 — Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, as amended by Regulation (EC) No 1606/98 (OJ 1998 L 209, p. 1).

22 — See Article 1(a)(i) of Regulation No 1408/71, as amended by Regulation No 1606/98.

23 — Cited in footnote 5.

24 — Case C-147/95 *Evrenopoulos* [1997] ECR I-2057.

25 — Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions (OJ 1976 L 39, p. 40).

26 — See Case 312/86 *Commission* v *France* [1988] ECR 6315.

41. The Commission then goes on to consider whether the '*Barber* Protocol' [27] is applicable. This protocol, which entered into force on 1 November 1993, provides 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 the applicable national law.'

42. It is common ground that the service credits at issue relate to the date of the pension assessment and thus to a date after 17 May 1990. The '*Barber* Protocol' is therefore not applicable *ratione temporis*. Nor can the advantage provided for under Article L. 12(b) of the Pensions Code be regarded as 'positive action' for the purposes of Article 6(3) of the Agreement annexed to the Protocol on Social Policy. The fact that only female civil servants are eligible for the benefit goes beyond the limits of the exception. The Commission therefore maintains that Article L. 12(b) of the Pensions Code is not compatible with Article 119 of the EEC Treaty or with Article 141 EC.

43. As the second question referred to the Court is to be answered only in the event that Article 119 of the EEC Treaty should be deemed not to be applicable, and as the Commission has argued that it is applicable, the Commission addresses the second question in the alternative only. The fact that Article 7(1)(b) of Directive 79/7 provides for an exception to the principle of equal treatment for those having brought up children does not mean that the same exception also applies where a Member State grants an advantage to those merely having had children.

V — Analysis

44. As a preliminary issue, it has to be determined which of the Treaty provisions referred to is applicable *ratione temporis* to the present case. According to the observations of the parties, the material time is either the date of the disputed pension decree, 1 July 1991, or the date of the reference, 28 July 1999. On the earlier date, the applicable Treaty provision was Article 119 of the EEC Treaty in its original version, in which the possibility of providing for specific advantages to compensate for disadvantages in professional careers had not yet been (expressly) provided for. On the later date, the applicable provision is Article 141 EC, paragraph 4 of which provides for this possibility. Adopting the date of the reference as the material time would also bring into play Article 6(3) of the Agreement annexed to the Protocol on Social Policy, which entered into force on 1 November 1993 and which also provides for this possibility. At the same time, however, it is not a priori excluded that

27 — Protocol No 2 concerning Article 119 of the Treaty establishing the European Communities.

this provision may be called in aid for the interpretation and understanding of Article 119 of the EEC Treaty.

45. The plaintiff's legal representative argued strongly at the hearing that the national court must make its decision in the light of the law in force at the time the disputed pension decree was issued. The questions referred should therefore first be considered by reference to the date on which the disputed pension decree was issued, that is, on the basis of the application of the original Article 119 of the EEC Treaty. This approach also seems appropriate given that the concept of pay was not fundamentally altered by the amendment of that article, which then became Article 141 EC. If the service credit can therefore be brought within the concept of pay, the preliminary question as to the applicable law will also become redundant.

46. The first paragraph of Article 119 of the EEC Treaty requires each Member State to ensure the application of the principle that men and women should receive equal pay for equal work or work of equal value. The second paragraph defines 'pay', for the purposes of the article, as 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. As the present case does not involve consideration in the sense of renumeration in respect of an active employment relationship but relates rather to retirement benefits, the only relevant heading is that of 'other consideration' received by the worker from the employer in respect of the employment relationship.

47. The employer of the civil service is the State. In France, as elsewhere, civil servants are paid by the State and the funds are provided for — as was expressly stated during the proceedings — under the budget legislation. In so far as pensions constitute a general scheme of retirement provision for civil servants, the question arises as to whether including them within the concept of pay would not run counter to the *Defrenne I* [28] judgment. In that case, the Court held that 'there cannot be brought within this concept [of pay], as defined in Article 119, social security schemes or benefits, in particular retirement pensions, directly governed by legislation without any element of agreement within the undertaking or the occupational branch concerned, which are obligatorily applicable to general categories of workers'. [29]

48. On the other hand, however, the Court has ruled that benefits provided under a contractually agreed occupational pension scheme, which supplement the general statutory social security system, do fall within the concept of pay. [30] Similarly, the

28 — See *Defrenne I* (cited in footnote 6).

29 — See *Defrenne I* (cited in footnote 6), paragraph 7.

30 — See *Bilka* (cited in footnote 5), paragraphs 20 to 22.

fact that an occupational pension scheme is prescribed by legislation and that the benefits are in part a substitute for those of the general statutory scheme did not stop the Court from finding that pensions paid under such a scheme come within the concept of pay.[31] Even the subsequent entry into force of Directive 86/378/EEC[32] on the implementation of the principle of equal treatment for men and women in occupational social security schemes did not alter the Court's view that benefits under a supplementary occupational retirement pension constitute 'pay' within the meaning of Article 119 of the EEC Treaty and that all forms of unequal treatment which may be identified solely with the aid of the criteria of 'equal work' and 'equal pay' referred to by that article, constitute prohibited discrimination.[33]

49. The Court had to consider a civil service pension scheme for the first time in *Beune*.[34] That case concerned the Netherlands statutory pension scheme for civil servants. The system of civil service pension provision in the Netherlands was structured in such a way that retired civil servants drew benefits first from the general statutory pension scheme, to the extent of their entitlements, and these were then supplemented by benefits provided under a civil service pension scheme.

50. In his Opinion in that case,[35] Advocate General Jacobs identified five criteria from previous decisions of the Court which could be used to characterise a benefit for the purposes of Article 119 of the EEC Treaty. These were whether the scheme is based on statute, whether it is in the nature of an agreement, how it is financed, whether it is applicable to general categories of employees, and whether it is supplementary in nature. The Court, in its judgment, also noted the importance of the relationship between the benefit and the employee's employment.[36]

51. In characterising the benefit in *Beune*, the Court held that a statutory basis is not sufficient to exclude a benefit from the scope of Article 119 of the EEC Treaty.[37] The criterion of negotiation between the employers and employees' representatives is satisfied only if it results in a formal agreement. In the civil service, there are various kinds of consultation between employers and employees which do not necessarily culminate in agreements.[38] Nor is the application of Article 119 of the EEC Treaty conditional upon a pension being *supplementary*.[39] With regard to the manner in which the scheme is funded, the

31 — See *Barber* (cited in footnote 20), paragraphs 16 and 30.
32 — Council Directive 86/378/EEC of 24 July 1986 (OJ 1986 L 225, p. 40).
33 — See *Moroni* (cited in footnote 5), paragraphs 22 to 26.
34 — Cited in footnote 5.
35 — See Opinion of 27 April 1994, [1994] ECR I-4474.
36 — *Beune* (cited in footnote 5), paragraph 23.
37 — Paragraph 26 of the judgment (cited in footnote 5).
38 — Paragraph 32 of the judgment (cited in footnote 5).
39 — Paragraph 37 of the judgment (cited in footnote 5).

Court noted that the pension scheme was managed independently in accordance with rules similar to those applicable to occupational pension funds. It ruled, however, that those characteristics do not substantially distinguish it from schemes covered by Directive 79/7.[40] It was also relevant in this regard, in the Court's view, that the scheme was underwritten by the State.[41]

52. With regard to the term 'general categories of workers' the Court conceded that it 'can hardly be applied to a particular group of employees such as civil servants'.[42]

53. Ultimately, the only criterion was 'whether the pension is paid to the worker by reason of the employment relationship between him and his former employer'.[43] If a pension 'concerns only a particular category of workers, if it is directly related to the period of service and if its amount is calculated by reference to the civil servant's last salary',[44] it is a pension paid by the public employer which is entirely comparable to that paid by a private employer to his former employees[45] and is therefore to be regarded as 'pay' within the meaning of Article 119 of the EEC Treaty.

54. The Court confirmed this view of the law in *Evrenopoulos*.[46] That case concerned the status of a pension scheme for employees of a State body.[47] The scheme had been created and was exclusively regulated by statute. The Court held that a survivor's pension under this 'occupational pension scheme'[48] constituted 'pay' within the meaning of Article 119 of the EEC Treaty by applying the principles established in *Beune*.[49]

55. Unlike *Beune*, the *Evrenopoulos* case was concerned not with a civil service pension scheme but with an occupational pension scheme in respect of employment relationships governed by private law. Ultimately, therefore, the only authority in point for the present case is *Beune*, since the Court has not otherwise as yet been called upon to adjudicate on whether a civil service pension scheme is in the nature of pay for the purposes of Article 119 of the EEC Treaty. The *Beune* judgment can serve as a precedent for this case only if the essential characteristics of the French pension scheme are the same as those of the pension scheme considered in *Beune*.

56. According to the information supplied, the pension scheme at issue in the present case is also entirely statute-based. However, this is not in itself sufficient, in the light of

40 — Paragraph 39 of the judgment (cited in footnote 5).
41 — Paragraph 40 of the judgment (cited in footnote 5).
42 — Paragraph 42 of the judgment (cited in footnote 5).
43 — Paragraph 43 of the judgment (cited in footnote 5).
44 — Paragraph 45 of the judgment (cited in footnote 5).
45 — Paragraph 45 of the judgment (cited in footnote 5).
46 — Case C-147/95 (cited in footnote 24).
47 — Paragraph 3 of the judgment (cited in footnote 24).
48 — Paragraph 22 of the judgment (cited in footnote 24).
49 — Paragraphs 19 and 20 of the judgment in *Beune* (cited in footnote 5).

the *Beune* judgment, to take the scheme outside the scope of Article 119 of the EEC Treaty. Being statute-based means that the scheme is not founded on a formal agreement between the employer and the employee representatives, even if consultation procedures are supposed to take place and do in fact take place. It is common ground that the French civil service pension scheme is not a supplementary system but rather the basic retirement provision for those covered by it. In any event, it was decided in *Beune* that the applicability of Article 119 of the EEC Treaty does not depend on whether the retirement benefit concerned is the basic pension or a form of supplementary cover.

57. The pension scheme is financed through the State budget legislation. In that respect, it differs materially both from an occupational pension scheme and from the pension scheme considered in *Beune*, which was none the less administered in the same way as an occupational pension scheme. In any event, the State as employer is responsible for funding the pension scheme by the mechanisms available to it — legal regulation and execution through the budget legislation. The manner of funding is thus distinguishable both from an occupational pension scheme and from the general system of retirement insurance, which as a rule is funded by contributions from employers and employees and may be underwritten by the State.

58. It is difficult to determine whether or not the pension scheme falls within the concept of pay in Article 119 of the EEC Treaty solely on the basis of the manner in which it is funded. Undoubtedly, it is the State as employer which is responsible for financing the pensions. On the other hand, the State cannot be compared to a private employer and it is public funds which are used to provide the benefits. The pension scheme is in any event a statutory system of compulsory retirement provision for those employed in the civil service. In that respect, it has definite points in common with the general statutory pension scheme for private sector employees.

59. On the question as to whether civil servants form a 'general category of workers', the Court has expressed itself only tentatively, even in *Beune*, where it conceded that the 'particular group of employees' constituted by civil servants could 'hardly' be regarded as a general category of workers.

60. Given that the scheme is a compulsory system of retirement provision for those employed in the civil service, I fully share the reservations of the French and Belgian Governments about treating civil service pensions as equivalent to an occupational pension scheme. However, as the Court ruled in *Beune* that the only decisive criterion was 'employment' within the

meaning of Article 119 of the EEC Treaty, thereby distinguishing its previous case-law on the various criteria, it is this test which will also be applied here.

61. On the basis of that judgment the decisive factor is thus whether the pension benefits can be defined solely in terms of the criteria of 'equal work' and 'equal pay', which flow directly from Article 119 of the EEC Treaty. From the description of the French civil service pension scheme in these proceedings, this would appear to constitute a retirement provision for 'a particular category of workers' which 'is directly related to the period of service' and the amount of which 'is calculated by reference to the civil servant's last salary'. [50] Accordingly, the remainder of this analysis will proceed on the basis that French civil service pensions do constitute 'pay' within the meaning of Article 119 of the EEC Treaty.

62. We must now consider whether the service credit at issue constitutes a prohibited form of unequal treatment on grounds of sex. According to the legal definition contained in the third paragraph of Article 119 of the EEC Treaty, equal pay without discrimination based on sex means:

'(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.'

63. However, the question to be answered in the present case cannot be brought within these categories. This is so for several reasons. For one thing, what is at issue is not remuneration from active employment but a retirement benefit. In addition, its amount is determined by a number of factors, such as the number of years of pensionable service and the salary received during the final six months of active employment. Finally, the system of service credits under Article L. 12 of the Pensions Code is not based directly on the employment relationship as such but rather is intended and designed to compensate for certain difficulties encountered by civil servants in the course of their careers. The contested service credit for female civil servants who have had children is thus only one of several such credits.

50 — See *Beune* (cited in footnote 5), paragraph 45.

64. Thus, Article L. 12(a) of the Pensions Code provides for credits to be granted in respect of periods served outside Europe ('bonification de dépaysement'). Article L. 12(c), L. 12(d), L. 12(e) and L. 12(f) of the Pensions Code provides for credits to be granted in respect of various types of service in time of war, in the armed forces, in occupied territory, in areas that have suffered bombing, in military operations, etc. Article L. 12(g) of the Pensions Code provides for service credits for persons deported for political reasons. Article L. 12(h) of the Pensions Code provides for additional service time to be credited to vocational teachers in respect of time spent in teaching practice ('stage professionnelle') as a condition of admission to the selection procedure by which they were appointed. Article L. 12(i) of the Pensions Code sets out details of service credits for military personnel.

65. The system of service credits is in principle open to both men and women. However, the conditions of eligibility for service credits are much more likely to be met by one sex than the other, depending on the category of credit concerned. In this regard, the system of service credits may be likened to the system of conditions for preferential admission to practical legal training considered in *Schnorbus*. [51] The criterion of having completed military service in order to gain priority access was one which under the law only men could fulfil. The Court held this to be a form of indirect discrimination on grounds of sex [52] but one which was justified in the circumstances. [53]

66. We must therefore examine Article L. 12(b) of the Pensions Code to see whether it unlawfully discriminates on grounds of sex. As it applies only to women, Article L. 12(b) of the Pensions Code formally gives rise to unequal treatment on grounds of sex. However, it is not the fact of being a woman on its own which confers entitlement to the service credits at issue. We must therefore consider in more depth the further conditions of eligibility.

67. The criterion for the service credit is motherhood, in the broadest sense. A distinction is made, however, between biological motherhood and non-biological motherhood. [54] Article L. 12(b) of the Pensions Code adheres in principle to these categories. In the case of biological children, no further proof is required, other than of the fact of motherhood, in order to qualify for the service credit. In the case of non-biological children, grant of the service credit is subject to the further condition that the child has been 'brought up' for at least nine years while still a minor.

51 — Case C-79/99 *Schnorbus* [2000] ECR I-10997.

52 — See *Schnorbus* (cited in footnote 51), paragraphs 32, 43 and 44.

53 — See *Schnorbus* (cited in footnote 51), paragraph 47.

54 — For the sake of convenience, in what follows these terms are used as generic terms covering a number of different situations.

68. There is an apparent discrepancy, however, in the case of adopted children. Under the version currently in force, which was enacted by Law No 82-599 of 13 July 1982, [55] they are treated on a par with biological children. The previous version, enacted by Law No 64-1339 of 26 December 1964, [56] maintained a clear distinction between biological children, in respect of whom it was not necessary to prove any period of bringing-up, and non-biological children, in respect of whom nine years of bringing-up was a condition of eligibility for the service credit. That distinction between biological and non-biological children returns in Article R. 13 of the Pensions Code, the provision implementing Article L. 12(b). The reasons which persuaded the legislature, in 1982, to place adopted children on the same footing as biological children were not indicated during the present proceedings. Nor need this matter detain us here.

69. In order to determine whether there is unequal treatment on grounds of sex, it is necessary to establish whether 'motherhood' within the meaning of the provision is to be understood as synonymous with 'parenthood' or whether there are objective grounds for treating motherhood differently from parenthood for purposes of pension rights. To this end, I will proceed from the distinction made between biological and non-biological children. The plaintiff, moreover, explicitly seeks parity with biological mothers, who are granted the service credit without being required to satisfy any further conditions.

70. The biological mother enjoys a special position in terms of her employment at the time before, during and after giving birth. This derives primarily from the statutory maternity protection provisions, which comprise a prohibition on employment, [57] a minimum period of maternity leave [58] and an option of extended maternity leave. [59] But during pregnancy, too, an expectant mother is already covered by special protective provisions [60] which have a restrictive effect on her occupational activity and which prevent certain duties

55 — *Journal Officiel de la République Française*, 14 July 1982, p. 2239.

56 — *Journal Officiel de la République Française*, 30 December 1964, p. 11835, where Article L. 12(b) is worded as follows:
'Bonification accordée aux femmes fonctionnaires pour chacun de leurs enfants légitimes, naturels reconnus et, sous réserve qu'ils aient été élevés pendant neuf ans au moins au cours de leur minorité, pour chacun de leurs enfants adoptifs ou issus d'un mariage précédent du mari ou ayant fait l'objet d'une délégation judiciaire des droits de puissance paternelle en application des articles 17 (1er et 3er alinéas) et 20 de la loi du 24 juillet 1889 sur la protection des enfants maltraités ou moralement abandonnés'.

57 — See Case 184/83 *Hofmann* [1984] ECR 3047, paragraph 9, Case C-207/98 *Mahlburg* [2000] ECR I-549, paragraphs 6, 7 and 29, and Case C-135/99 *Elsen* [2000] ECR I-10409, paragraph 7.

58 — See Article 8 of Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding (tenth individual Directive within the meaning of Article 16(1) of Directive 89/391/EEC), OJ 1992 L 348, p. 1.

59 — See *Hofmann* (cited in footnote 57).

60 — See Directive 76/207, Article 2(3) and (4), and Directive 92/85; see also *Mahlburg* (cited in footnote 57), paragraphs 6, 7 and 25.

being assigned to a pregnant woman.[61] Similar protective provisions also apply during the breast-feeding period[62] and these can have a similarly restrictive effect. For a woman, the physiological aspect of motherhood entails certain restrictions which are taken into account by the legislature and which have an impact on her working life.[63]

71. These factors, which are inherent in motherhood, are objective grounds justifying compensatory measures in favour of one sex which go beyond the provision of special protective measures. Pregnancy, childbirth and breast-feeding are situations which cannot arise for a man and are not comparable with a man's situation as father.[64] Giving credit for motherhood as such in calculating pension entitlements, in order to compensate for career disadvantages, does not appear therefore, on the face of it, to constitute unjustified discrimination on grounds of sex. Also, for disadvantages to have accrued it is not necessarily relevant whether motherhood occurred during the active employment relationship or, for instance, before joining the civil service. Motherhood may, for example, already have led to a delay in training,[65] thereby postponing the opportunity of entering the civil service, which must also be regarded as a career disadvantage for the female civil servant concerned. Even where a woman was already in a civil service employment relationship at the time of her maternity-related service breaks but — as posited by the plaintiff — was not occupying her post whether because of secondment or on some other grounds contemplated under the terms of employment,[66] the possibility of disadvantages being suffered due to motherhood is by no means excluded. In a secondment situation the institution of secondment will also have to apply the maternity protection provisions together with the restrictions thereby entailed. Thus, in those circumstances too, it is likely that there will be disadvantages for the woman's career as a whole. The granting of a service credit for biological motherhood in calculating pension entitlements therefore appears objectively justified.

72. However, it is also necessary to consider — although the plaintiff expressly bases his claim on the first of the cases contemplated by Article L. 12(b) of the Pensions Code — whether restricting the service credit to women is justified on objective grounds in the other qualifying cases.

73. The rationale underlying all these cases is the social aspect of motherhood. In that light, there may be merit in the plaintiff's

61 — See *Mahlburg* (cited in footnote 57).

62 — See Directive 92/85.

63 — See, for example, the list set out in *Abdoulaye* (cited in footnote 15), paragraph 19; see also the Opinion of Advocate General Alber, paragraph 56.

64 — See Case C-342/93 *Gillespie* [1996] ECR I-475, paragraph 17.

65 — There is a parallel in *Schnorbus* (cited in footnote 51), paragraph 28.

66 — In his written observations the plaintiff mentions the possibility of not being in active employment due to secondment, special assignment, early retirement or a career break (détachement, position hors cadre, mise en disponibilité, congé de convenance personnelle); see p. 13 of the plaintiff's written observations.

argument that the true criterion is parenthood.

74. By the 'social aspect of motherhood' is meant all the physical, temporal and economic demands and constraints normally entailed in bringing up children and caring for them. That it is this child-rearing responsibility which is the object of the provision is borne out by the fact that the French legislation requires proof of nine years of upbringing in the case of 'non-biological children' in order for the service credit to be granted. The child-rearing responsibility is of course equally relevant in the case of biological children. The fact that proof of years of upbringing is not required in that case can only mean that the legislature assumes that one normally brings up one's own biological children. This interpretation also explains why adopted children were placed on an equal footing with biological children by Law No 82-599 of 13 July 1982. If the service credit were granted purely on demographic grounds, that is, as a reward for the birth of a child, there would be no point in giving it to 'non-biological mothers' as well.

75. In the case of both biological and adopted children, the law takes for granted that they are brought up in the mother's household. In the case of a spouse's children from a previous relationship that cannot be automatically assumed, hence the requirement of proof of the child genuinely having been brought up for nine years. The same applies in relation to children over whom the pension recipient exercises either parental authority or guardianship or whom she has taken into her home as foster children. The time periods involved in such cases may be relatively short. Accordingly, the requirement of proof of nine years of upbringing applies also in respect of those children.

76. Before considering whether or not the granting of service credits to mothers is objectively justified, it should first be noted that compensation for the purely financial aspect of child-rearing is dealt with under Article L. 18 of the Pensions Code. That article provides for the payment of pension supplements in respect of children. This financial compensation for the expense of supporting a family is accorded without distinction as to sex and solely on the basis of the number of the pension recipient's children.

77. The service credit provided for under Article L. 12(b) of the Pensions Code has a different purpose. To begin with, the contextual setting of Article L. 12(b) of the Pensions Code shows that this provision is designed to compensate for special difficulties encountered in the course of working life.

78. The French Government adduced a variety of empirical evidence [67] to show

67 — See summary in paragraphs 32 and 33 above.

that women with children have diminished career prospects, a phenomenon that was reflected in the statistics. The cause of this is a social reality. Women with children are disadvantaged not because they are women but because they have had children.

79. As far as the analysis of the causes is concerned, it may be a factor that women with children are regarded as being less available and consequently are not offered certain senior positions. In the proceedings before the national court, one of the points made by the defendant Minister was that women with family responsibilities are often unable to prepare themselves adequately for selection competitions for senior posts.

80. The possibility of child-related service breaks, the constraints entailed by family duties encompassing child-rearing in the broadest sense, including childcare, and preconceptions as to the social role of mothers on the part of those responsible for promotion decisions are the cause of the sociological phenomenon whereby women with children have diminished career prospects. Fathers are not affected in the same way. Even where fathers assume family duties, the evidence is that — at least in the present social context — this does not have the same adverse effect on their career prospects as in the case of mothers.

81. According to the case-law of the Court, 'the principle of equal pay, like the general principle of non-discrimination of which it is a particular expression, presupposes that male and female workers whom it covers are in comparable situations'. [68] As has been shown above, however, in many respects working mothers are not in the same situation as working fathers.

82. The Court has already held on numerous occasions that the principle of equal treatment is intended to lead to an equality which is substantive rather than formal. [69] The same must also be true of the principle of equal pay, where it is invoked in relation to circumstances other than those mentioned in the third paragraph of Article 119 of the EEC Treaty, Article 141(2) EC or Article 6(3) of the Agreement annexed to Protocol No 14 on Social Policy, which concern work at time rates or piece rates.

83. Just as the Court has in the past recognised that Member States have a discretion within the framework of the equal treatment Directive [70] 'to offset the disadvantages which women, by comparison with men, suffer with regard to the

68 — See *Abdoulaye* (cited in footnote 15), paragraph 16, with further references; see also Case C-411/96 *Boyle and Others* [1998] ECR I-6401, paragraph 39.

69 — See Cases C-207/98 *Mahlburg* (cited in footnote 57), paragraph 26, and C-136/95 *Thibault* [1998] ECR I-2011, paragraph 26, *Badeck* (cited in footnote 11), paragraph 32, and *Abrahamsson* (cited in footnote 10), paragraph 48.

70 — Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions (OJ 1976 L 39, p. 40).

retention of employment',[71] it must also be possible to make allowance for the negative impact of motherhood on a woman's career profile, where that is the basis used for calculating retirement benefits.

84. The principle of equal pay thus does not preclude a rule restricting the grant of service credits to mothers where the purpose of the restriction is to compensate for the career handicaps entailed by motherhood, provided that there is sociological and statistical evidence that in terms of their career profiles mothers and fathers are not in the same situation.[72]

85. The position would be different only if the purpose was, for example, to compensate for childcare-related breaks in employment, such as parental leave, which can be claimed by fathers as well as mothers. The concrete issue then would be which of the parents actually claimed the leave and thereby incurred the risk of career disadvantages. This would also constitute an objective criterion. However, that is not the scenario we have to consider here.

86. At the hearing, counsel for the plaintiff argued that the purpose of the disputed provision, originally introduced in 1924, was to make it easier for women to leave the paid workforce. It had, counsel argued, to be seen as part of a policy to entice women away from working life and to tie them more firmly to the home. That approach is now an anachronism. For this reason, too, the provision can no longer be upheld.

87. The answer to this is that the substance of the provision may indeed date back to 1924.[73] The crucial fact, however, is that the legislation was revised in 1964[74] and finally acquired its present form in 1982.[75] It is not therefore that the French legislature 'forgot' to repeal a socially and politically anachronistic provision but rather that it expressly re-enacted that provision in a changed social environment. Consequently, the historical motives of the legislature in 1924 can hardly be used to impugn the current provision.

88. The plaintiff also argued that the Court has ruled that men and women must be treated with complete equality in their role as parents. He cited Case 312/86 in support.[76] This was a Treaty infringement

71 — See Case 184/83 *Hofmann* (cited in footnote 57), paragraph 27.

72 — See also *Abdoulaye and Others* (cited in footnote 15), paragraphs 20 and 22.

73 — Article 18 of the Law of 14 April 1924, *Journal Officiel* of 15 April 1924.

74 — Article 12 of Law No 64-1339 of 26 December 1964, *Journal Officiel* of 30 December 1964, p. 11835.

75 — Law No 82-599 of 13 July 1982, *Journal Officiel* 14 July 1982, p. 2239.

76 — *Commission* v *France* (cited in footnote 26).

action in which the Commission alleged incomplete transposition of Directive 76/207. The French amending law implementing the directive contained a provision [77] whereby the law did not prohibit 'the application of usages, terms of contracts of employment or collective agreements in force on the date on which the law was promulgated granting special rights to women'. [78] The article at issue provided that employers, groups of employers and groups of employed persons were to proceed, by collective negotiation, to bring such terms into conformity with the provisions of the Labour Code. [79] For the Commission, this did not go far enough. The Commission listed a whole series of special rights for women included in collective agreements. [80] The Commission conceded 'that some of those special rights may be covered by the exceptions to the application of the directive provided for in Article 2(3) and (4) thereof which involve, respectively, provisions concerning the protection of women, particularly as regards pregnancy and maternity, and measures to promote equal opportunity for men and women. It is of the opinion, however, that the French legislation, by its generality, makes it possible to preserve for an indefinite period measures discriminating as between men and women contrary to the directive.' [81]

89. The Court did not examine the clauses cited by the Commission individually. Instead, it made a general statement:

'As some of those examples show, *some* of the special rights preserved relate to the protection of women in their capacity as older workers or parents — categories to which both men and women may equally belong.' [82]

No inferences may be drawn from this statement, however, as to how the Court would view a rule, such as that at issue in the present case, intended to compensate for career disadvantages entailed by motherhood.

90. Finally, the plaintiff and the Commission both claimed that the provision in issue gives 'automatic' priority to women. This, it is submitted, is contrary to Community law.

77 — Paragraph 4 of the judgment (cited in footnote 26).
78 — Paragraph 4 of the judgment (cited in footnote 26).
79 — Paragraph 4 of the judgment (cited in footnote 26).
80 — Paragraph 8 of the judgment (cited in footnote 26).
81 — Paragraph 9 of the judgment (cited in footnote 26).

82 — Paragraph 14 of the judgment (cited in footnote 26), emphasis added.

91. This argument is based on the judgment in *Kalanke*, [83] in which the Court held that a performance-based quota system [84] was inconsistent with the principle of equal treatment in that it gave 'automatic' priority to female applicants. In subsequent rulings, [85] the Court has held that national rules for the promotion of women in working life, which lacked the impugned element of automaticity, were compatible with the principle of equal treatment.

92. All of those judgments, however, concerned laws to improve the lot of women as a gender group. The case in hand is not concerned with a measure of that kind. What is at issue here is compensation for disadvantages suffered by women not as a gender group but in their role as mothers. In that respect, the present case is close to *Abdoulaye*, which also concerned compensation for specific career disadvantages resulting from motherhood.

93. I therefore conclude that the contested provision is compatible with the principle of equal treatment laid down in Article 119 of the EEC Treaty. My conclusion would be no different if the case were placed in a different timeframe. If the date of the reference is taken as the material time — as described at the outset — then Article 141 EC is applicable. The principle of equal pay enshrined in that article is substantively unchanged as far as it applies to the present case. It is for that reason unnecessary to consider Article 141(4) EC further as the service credit is not a positive measure in favour of women as the underrepresented sex but rather a measure to compensate mothers who suffer career disadvantages as a result of bringing up children. Nor does Article 6(3) of the Agreement amended to Protocol No 14 on Social Policy need to be taken into account, since the solution proposed is based directly on the principle of equal treatment.

94. Only in the event that the Court should find that a civil service pension does not constitute 'pay' within the meaning of the Treaty does Directive 79/7 become applicable. Article L. 12(b) of the French Pensions Code could then be easily brought within both Article 4(2) and Article 7(1)(b).

83 — Case C-450/93 (cited in footnote 12).

84 — Paragraph 8 of the judgment (cited in footnote 12).

85 — *Marschall* (cited in footnote 13), *Badeck* (cited in footnote 11) and *Abrahamsson* (cited in footnote 10), paragraphs 60 and 61.

VI — Conclusion

95. In the light of the above considerations, I propose that the questions referred be answered as follows:

The pensions provided by the French retirement pension scheme constitute pay within the meaning of Article 119 of the EEC Treaty. Article L. 12(b) of the Code des pensions civiles et militaires de retraite (Civil and Military Retirement Pensions Code) does not infringe the principle of equal pay.