Opinion of Advocate General Alber delivered on 15 May 2001

Henri Mouflin v Recteur de l'académie de Reims

Reference for a preliminary ruling: Tribunal administratif de Châlons-en-Champagne – France

Reference for a preliminary ruling - Social policy - Equal treatment for men and women - Applicability of Article 119 of the EC Treaty (Articles 117 to 120 of the EC Treaty have been replaced by Articles 136 EC to 143 EC) or Directive 79/7/EEC - French civil and military retirement pension scheme - Entitlement to a retirement pension with immediate effect for women only

Case C-206/00

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Opinion of the Advocate-General

I - Introduction

1. The present preliminary ruling proceedings were referred to the Court by the Tribunal administratif de Chalons-en-Champagne. They raise questions as to the compatibility with Community law of a rule in a Member State under which only women - therefore not men too - are allowed to take retirement when their spouse is affected by a disability or an incurable illness on account of which it is impossible for him to work at all.

II - Facts and procedure

2. The plaintiff in the main proceedings (hereinafter the plaintiff) is a teacher and in such capacity a public servant. On the basis of Article L. 24-1-3o of the Code des pensions civiles et militaires de retraite (Civil and Military Retirement Pensions Code, hereinafter Pensions Code), he applied to take immediate retirement in order to be able to care for his wife, who was suffering from an incurable illness.

3. By Order of the Inspecteur d'académie de la Marne (Education Inspector, Marne Region) of 20 October 1998, this application was initially granted. However, by an act of 10 November 1998, the Order was rescinded on the basis of a memorandum of the Minister for Education on the ground that the possibility of taking retirement in order to care for one's spouse is reserved to female public servants.

4. The plaintiff took legal action against this act before the national court. In the main proceedings, the Syndicat général de l'Éducation Nationale et de la Recherche publique CFDT de la Marne intervened in support of the plaintiff.

5. An application made by the national court to the Conseil d'État for an opinion on the compatibility of Article L. 24-1-3o of the Pensions Code with Article 6 of the Law of 13 July 1983 on the rights and obligations of public servants, which provides that public servants may not be treated differently by reason of their sex, was answered by the Conseil d'État to the effect that the Law of 13 July 1983 did not amend Article L. 24-1-3o of the Pensions Code.

6. In order to assess the compatibility of the disputed provision of the Pensions Code with Community law, the court seised to give judgment in the action made a reference for a preliminary ruling to this Court by a decision dated 25 April 2000, which was recorded in the Registry of the Court on 25 May 2000.

7. The national court refers on the one hand to Article 119 of the E(E)C Treaty (now Article 141 EC) and to Directive 86/378/EEC, which was adopted to implement it, on the implementation of the principle of equal treatment for men and women in occupational social security schemes as well as, on the other hand, to Directive 79/7/EEC on the progressive implementation of the principle of equal treatment for men and women in matters of social security, in particular to Articles 4 and 7 thereof. The national court states that the plaintiff claims that the discrimination enacted in Article L. 24-1-3o of the Pensions Code in favour of female public servants is contrary to Article 141 EC and to the objectives of Directive 79/7.

8. According to the national court, the response to that plea depends on

(1) whether the pensions provided under the French retirement pension scheme for public servants rank as pay under Article 119 of the Treaty of Rome; if so, whether Article L. 24-1-3o of the Pensions Code breaches the principle of equal pay;

(2) if Article 119 of the Treaty of Rome is not applicable, whether the provisions of Directive 79/7 preclude France's maintaining provisions such as those of Article L. 24-1-3o of the Pensions Code.

9. For that reason, the national court refers 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, is the principle of equal pay breached by the provisions of Article L. 24-1-3o 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 those of Article L. 24-1-3o of the Civil and Military Retirement Pensions Code?

10. In the proceedings before the Court, the plaintiff (together with the intervening Syndicat), the French Government and the Commission made written submissions. No oral hearing took place in the proceedings.

III - Relevant law

A - Community law

11. Article 119 of the EC Treaty reads as follows:

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 purposes 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.

12. After amendment and re-numbering of the EC Treaty by the Treaty of Amsterdam, this provision became Article 141 EC. Paragraphs 1 and 2 thereof are, to a large extent, identical in content to Article 119; paragraphs 3 and 4 were added. The present case essentially turns on paragraphs 1 and 2. The provision states:

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.

13. Article 141(4) EC derives its content from Article 6(3) of the Agreement of 1 November 1993 annexed to Protocol Number 14 on social policy. This states:

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.

14. The relevant provisions of 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 are the following.

15. Article 3(1) of the Directive, which states:

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 ...

16. Article 4(1) of the Directive, which states:

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. ...

17. Article 7(1)(a) and (2), which states:

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

(a) the determination of pensionable age for the purposes of granting old-age and retirement pensions and the possible consequences thereof for other benefits;

(b) - (e) ...

2. Member States shall periodically examine matters excluded under paragraph 1 in order to ascertain, in the light of social developments in the matter concerned, whether there is justification for maintaining the exclusions concerned.

B - National law

18. Article L. 24-1-3o of the Pensions Code translates essentially as follows:

Female public servants ... shall be entitled to the civil pension immediately:

...

(b) where it is proven in accordance with the formal requirements laid down in Article L. 31:

that they are affected by a disability or an incurable illness which makes it impossible for them to perform their former duties;

or that their spouse is affected by a disability or an incurable illness which makes it impossible for him to work at all.

IV - Submissions of the parties

1. The plaintiff

19. The plaintiff observes in the first place that the Court is concerned with identical questions relating to the status of the French retirement pension scheme for public servants as in the preliminary ruling proceedings in Case C-366/99, Griesmar. However, that case does not concern the same provision of the Pensions Code.

20. As regards the answer to the question whether pensions for French civil servants are pay within the meaning of Article 119 of the EC Treaty, now Article 141 EC, the first thing to consider is the way in which the French pension scheme works. The pension is calculated on the basis of the taxable salaries that have been paid during the period of six months preceding the end of active service. The pensions are paid by the State. They are paid to a defined category of employees, being those who work in the service of the State.

21. This satisfies the criteria set out by the Court in the case of Beune. For that reason, there is no doubt as to the nature of pensions for public servants as pay. Referring to the judgments in Bilka, Ten Oever and Moroni the plaintiff submits that in Beune the Court no longer regarded as decisive the criteria that were determinative in those judgments. It follows that the only possible decisive criterion is whether the pension is paid to the worker by reason of the employment relationship between him and his former employer, that is to say the criterion of employment based on the wording of Article 119 itself.

22. The Court formulated its findings generally, so that they may be applied to the French pension scheme. The French pensions for civil servants are therefore to be regarded as pay within the meaning of Article 119 of the EC Treaty. In addition, salaries paid while in active service and pensions are very similar as regards both administration and financing, which is another reason why Article 119 of the EC Treaty must be applicable in the same way to pensions as it is to salaries paid while in active service.

23. As regards the second part of the first question referred for a preliminary ruling, the plaintiff takes the following view. Article L. 24-1-3o of the Pensions Code allows female civil servants the possibility of taking early retirement where their spouse is affected by a disability or an incurable illness which makes it impossible for him to work at all. In this way, it places female public servants at an advantage in that they may take retirement earlier than a male public servant who finds himself in the same situation. This is a direct infringement of Article 141 EC, and the plaintiff refers to the judgments in Beune and Evrenopoulos. The provision in dispute cannot be justified either by Article 6 of Protocol Number 14 on social policy or by Article 141(4).

24. Given his view on the first question, the plaintiff makes submissions in respect of the second question in the alternative only. Under Article 4 of Directive 79/7, the principle of equal treatment means that there shall be no discrimination whatsoever on the ground of sex, in particular as concerns the calculation of benefits. It is true that Article 7 of the Directive states that the Directive is without prejudice to the right of Member States to exclude the determination of pensionable age and the possible consequences thereof for other benefits from the scope of application of the Directive. However, the present case concerns not the application of a different pensionable age but a specific advantage unconnected with age where pensionable age has not been reached based on the state of health of the spouse. Such differentiation does not fall within the scope of application of the exception in Article 7 of the Directive.

2. The French Government

25. As regards the answer to the first question, the French Government refers to its submissions in Griesmar (Case C-366/99). The question divides into two sub-questions. It concerns the connection between the retirement pension for public servants and the concept of pay, on the one hand, and, in certain circumstances, its application to the particular case of public servants on the other. On the basis of the judgment in Defrenne, the French Government observes first that pensions under a statutory social security system are not pay within the meaning of Article 119 of the EC Treaty. They fall instead within the scope of application of Directive 79/7, Article 3 of which makes express reference to them.

26. The status of the French retirement pension scheme for public servants must be considered in the light of Beune. There are similarities and differences between the French retirement pension scheme and the Dutch scheme at issue in that case. While the French Government considers the differences material, such as for example the fact that the Dutch scheme, in contrast to the French, is a supplementary scheme managed according to the principles of capitalisation and administrative parity, it accepts that the French retirement pensions for public servants are pay within the meaning of Article 119 of the EC Treaty (now Article 141 EC), noting that the Court found the relationship between the benefit and the position held alone to be decisive.

27. As regards the answer to the second part of the first question, the French Government does not take a view. It simply notes that the argument put forward in the case of Griesmar that the provision there in dispute served to compensate for career disadvantages attributable to raising children cannot be transposed to Article L. 24-1-3o of the Pensions Code, with which the present case is concerned. However, the French Government points out that the French Conseil d'État, in its judgment of 17 May 1999 in the le Briquir case on Article L. 57 of the Pensions Code, which grants the wife of a missing male public servant a temporary pension, decided that such entitlement to a temporary pension must be conferred on any spouse of a missing public servant, that is, on the husband of a missing female public servant as well. Since that judgment, the French administration has applied both Article L. 57 and Article L. 24-1-3o of the Pensions Code without discrimination. However, Article L. 24-1-3o has not yet been amended, and the French Government accordingly leaves the answer to the question to the Court. In the light of the stance adopted on the first question, there is no need to give any view on the second question.

3. The Commission

28. On the answer to the first question, the Commission too refers to its submissions in Case C-366/99 Griesmar. There, it came to the conclusion that the French retirement pension scheme for public servants falls within the scope of Article 141 EC. This follows from the judgments in Beune and Evrenopoulos. Moreover, the French Government, in a memorandum to the Commission of 11 July 2000, acknowledged that Article L. 24 of the Pensions Code can also be applied to male public servants. There is therefore no need to consider the applicability of Article 141 EC to the Pensions Code more closely.

29. It only remains to be determined whether the Barber Protocol is applicable to the present case. In the view of the Commission, it must be assumed that it is, so that the calculation of pensions for periods after 17 May 1990 must be made on an equal basis.

V – Analysis

30. The first part of the first question is in fact identical in substance with the first question referred for a preliminary ruling in Griesmar (Case C-366/99). The fact that the plaintiff has not yet retired and that he is claiming that the conditions for taking immediate retirement are not applied in a gender-neutral way may raise a preliminary issue relating to whether, irrespective of whether the French retirement pensions for public servants rank as pay, this is a case concerning equal pay at all. In this sense the case may be said to concern old-age pensions only indirectly. One might thus ask whether this is not a case concerning the application of the principle of equal treatment rather than a case concerning equal pay.

31. However, regard must be had to the fact that retiring and the grant of a pension are, in the present case, factually, legally and economically linked to one another. After all, the plaintiff does not desire to leave employment early without a pension award, but on the same conditions and with the award of the same financial benefits as are applicable to a female civil servant. Since the action is ultimately directed to the award of a pension as such, the main question is whether the principle of equal pay is infringed.

32. The principle of equal pay enshrined in Article 119 of the E(E)C Treaty was implemented by Directive 75/117/EEC, whereas the principle of equal treatment was implemented in Directive 76/207/EEC, which itself is based on Article 235 of the EEC Treaty.

33. Article 1(1) of Directive 75/117 defines the principle of equal pay, going beyond the definition already given in Article 119 of the EEC Treaty, in the following way:

The principle of equal pay for men and women outlined in Article 119 of the Treaty, hereinafter called "principle of equal pay", means, for the same work or for work to which equal value is attributed, the elimination of all discrimination on grounds of sex with regard to all aspects and conditions of remuneration.

34. If the French retirement pensions for public servants are pay for the purposes of this principle, questions in any event remain as to the conditions for the award of such pay. The salient point is therefore that raised in the case of Griesmar as to the character of the French retirement pensions for public servants as pay.

35. I delivered my Opinion in that case on 22 February 2001. Since there have been no submissions in the present proceedings that might call in question the analysis of this question in the Opinion in Griesmar, I refer to the considerations therein set out in points 46 to 61 inclusive.

36. Article 119(1) of the E(E)C Treaty requires that each Member State should ensure the application of the principle that men and women should receive equal pay for equal work. According to Article 119(2), pay for the purposes of the provision 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. Since the present case does not concern remuneration within the context of an active employment relationship, but a retirement benefit, it can relate only to other consideration which the worker receives in respect of his employment from his employer.

37. The employer of the public service is the State. In the French public service too, salaries are paid by the State and the payments are based on the Budget Law. In so far as pensions involve a general system of old-age security for public servants, the question arises as to whether the judgment in Defrenne I precludes the inclusion of these benefits in the concept of pay. The Court stated in that case that there cannot be brought within [the concept of pay] ... 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.

38. In contrast to that, however, the Court has included within the concept of pay benefits under a contractually agreed occupational pension scheme that supplement those under the generally applicable statutory social security scheme. Nor has the fact that an occupational pension is established by statute and partially replaces the general statutory scheme prevented the Court from including the pensions paid under such a scheme within the concept of pay. Even the intervening entry into force of Directive 86/378 on the implementation of the principle of equal treatment for men and women in occupational social security schemes has not changed the Court's decision that benefits under a supplementary occupational pension are pay within the meaning of Article 119 of the EEC Treaty and that differences in treatment which are apparent using the criteria of equal work and equal pay in Article 119 alone constitute unlawful discrimination.

39. The first time that the Court had to give an opinion on a civil service old-age pension scheme was in the case of Beune. That case concerned the Dutch statutory benefits scheme for the public sector. The old-age pension for the public sector was structured in such a way that retired civil servants were first awarded benefits under the general statutory pension scheme in so far as they were entitled to them, which were then supplemented by benefits under a civil service pension scheme.

40. In his Opinion in that case, Advocate General Jacobs, on the basis of the previous case-law, elucidated five criteria by which the benefit could be classified for the purposes of Article 119 of the EEC Treaty. These relate to statutory basis, consensual nature, financing, generality of the category of workers to whom the scheme applies and supplementary nature of the scheme. The Court in addition referred to the importance of the relationship between the benefit and the employees' employment.

41. When classifying the benefit in the case of Beune, the Court explained that a statutory basis is not in itself sufficient to exclude a benefit from the scope of Article 119 of the EEC Treaty. The criterion concerning agreement between employers and employee representatives is only fulfilled if it results in a formal agreement. In the public service, consultation procedures do not necessarily culminate in an agreement. Nor does the applicability of Article 119 of the EEC Treaty depend on whether a supplementary pension benefit is involved. As regards the financing of the scheme, the Court held that the pension scheme was indeed managed independently in accordance with rules similar to those applicable to occupational pension funds. These characteristics do not substantially distinguish it from schemes that fall under Directive 79/7. In this connection, the State's ability to make additional contributions is also important.

42. As regards the term general categories of workers, the Court stated that it can hardly be applied to a particular group of employees such as civil servants.

43. Ultimately, the only criterion that was decisive was whether the pension is paid to the worker by reason of the employment relationship between him and his former employer. A pension that 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 is a pension paid by the public employer that is comparable to a pension paid by a private employer to his former employees and is therefore to be regarded as pay within the meaning of Article 119 of the EEC Treaty.

44. The Court confirmed this case-law in its judgment in Evrenopoulos. This case concerned the status of a pension scheme for the employees of a public body. It was created and exclusively regulated by statute. The Court, applying the principles set out in Beune, held that a survivor's pension under this occupational pension scheme was pay within the meaning of Article 119 of the EEC Treaty.

45. In contrast to the Beune case, Evrenopoulos concerns not a pension scheme for public servants but an occupational pension scheme with employment relationships governed by private law. Only Beune can therefore ultimately be decisive for the present case, since the Court has not yet otherwise been called upon to examine a civil service pension scheme by reference to its character as pay within the meaning of Article 119 of the EEC Treaty. The Beune case can only influence the present case if the substantive features of the French retirement pension scheme correspond to the pension scheme in Beune.

46. According to the information provided, the retirement pension scheme applicable in the present case is also entirely statute-based. However, as Beune makes clear, this alone is not enough to take the scheme out of the scope of application of Article 119 of the EEC Treaty. The statutory basis of the scheme means that it does not rest on a formal agreement between employer and employee representatives, even if consultation procedures should have taken and did take place. It is undisputed that the French retirement pension scheme for public

servants is not a supplementary pension benefit, but forms the basic pension for the employees who fall under the scheme. However, according to Beune, the applicability of Article 119 of the EEC Treaty does not depend on whether the scheme provides a basic pension or a supplementary pension.

47. The financing of the retirement pension scheme is based on the Budget Law. In this respect, it is substantially different both from an occupational pension fund and from the pension scheme that fell to be judged in the case of Beune, which was managed in a way similar to an occupational pension fund. In any case, as the employer the State is also responsible for financing the retirement pension scheme, with the means available to it, which is to say, statutory regulation and implementation in the Budget Law. The financing aspect is thus different both from that of an occupational pension scheme and from that of the general pensions system, which is as a rule funded by contributions from employers and employees, though there may also be an obligation on the State to make additional contributions.

48. It is difficult to classify the retirement pension scheme as falling in or outside the concept of pay in Article 119 of the EEC Treaty on the basis of the manner in which it is financed alone. Without doubt, it is the State as employer which is responsible for financing the pensions. On the other hand, the State is not comparable to a private employer and it is public funds that are drawn on to finance benefits. The retirement pension scheme is in any event a mandatory scheme, established by statute, to provide old-age pensions for persons employed in the public service. In this respect some aspects of it are entirely comparable to the general statutory pension scheme for employees employed in the private sector.

49. As regards the question whether public servants are a general category of workers, even in Beune the Court only expressed a tentative view, stating that the particular group of employees consisting of public servants is hardly to be regarded as a general category of workers.

50. To the extent that the case concerns a mandatory old-age pension scheme for workers in the public service, doubts about equating the pensions for public servants to an occupational pension scheme are entirely justified. Since, however, the Court in the case of Beune held the employment relationship within the meaning of Article 119 of the EEC Treaty to be the sole decisive criterion, thereby qualifying the previous case-law on the individual criteria, it will be given fundamental importance here too.

51. Following that case-law, the decisive point is therefore whether the pension benefits can be classified solely on the basis of the criteria of equal work and equal pay that stem directly from Article 119 of the EEC Treaty. On the basis of the information on the French retirement pension scheme for public servants provided in the present case, the scheme must be assumed to constitute an old-age pension for a particular category of workers which is directly related to the period of service and whose amount is calculated by reference to the civil servant's last salary. For the purposes of further examination, it must therefore be assumed that the French civil service pensions are pay within the meaning of Article 119 of the E(E)C Treaty.

52. It must therefore be determined whether the disputed provision of Article L. 24-1-3o of the Pensions Code produces unequal treatment based on sex as regards the conditions for civil service pensions, which are to be regarded as pay. The second alternative in Article L. 24-1-3o(b) enables female civil servants, on the occurrence of a specified event, that is, disability or an incurable illness of the spouse which make it impossible for him to work at all, to take immediate retirement. Since this provision is directed only at female civil servants, a male civil servant who finds himself in a comparable factual situation, that is, whose wife suffers from a disability or an incurable illness which makes it impossible for her to work at all, is, formally at least, excluded from availing himself of this possibility.

53. The conditions for entitlement to the old-age pension, which is classified above as pay, therefore differ for female and male public servants solely because of their sex. To that extent there is clear discrimination based on sex. Where the facts in respect of men and women are comparable, a condition inherent in the principle of equality, there is unlawful sex discrimination. Viewed formally, the situations of a male public servant and a female public servant whose spouse is incurably ill would appear to be comparable. The purpose of the provision might then indicate whether and why the legislator provided different conditions for female and male public servants.

54. The present proceedings concern the care of an ill spouse. This, however, is not a permissible reason to differentiate because just as a woman needs time and financial freedom in order to care for her husband, so does a man caring for his wife.

55. It may well be that the economic aspect was predominant in the conception of the provision. The statutory context, in terms of the first alternative in Article L. 24-1-3o(b) of the Pensions Code, might support that view. Under that provision, a female public servant is entitled to take immediate retirement where as a result of illness she herself is no longer in a position to carry out her earlier functions. The economic aspect could therefore be decisive to both the first and second alternatives in Article L. 24-1-3o(b). But here too, the spouse's inability to work is in principle comparable for both spouses.

56. As there is thus no reason to assume that the unequal treatment in the second alternative in Article L. 24-1-3o(b) of the Pensions Code is linked to differing factual circumstances, it must be concluded that there is unlawful discrimination based on sex within the meaning of Article 119 of the EC Treaty, or Article 141 EC.

57. The question as to the meaning and purpose of the provision offers just as little reason for assessing it against the standard of Article 141(4) EC or the earlier provision in Article 6(3) of the Agreement to Protocol No 14 on social policy. The French Republic did not make any submission, nor may anything be inferred from the provision itself, as to whether and to what extent the rule could be designed and apt to make it easier for women, the under-represented sex, to pursue a vocational activity.

58. The conclusion of this assessment must therefore be that the second alternative in Article L. 24-1-3o(b) of the Pensions Code infringes the principle of equal pay established in Article 119 of the EC Treaty, now Article 141

EC, in that it reserves the possibility of taking immediate retirement under the conditions therein defined to female public servants.

59. On the basis of the considerations set out on the first question, there is no need to answer the second question. For that reason, the following comments are of a purely hypothetical nature.

60. If the Court does not regard the French retirement pensions for public servants as pay within the meaning of Article 119 of the EC Treaty, now Article 141 EC, or proceeds on the basis that the problem is not in substance one of equal pay, the question arises whether Directive 79/7 is applicable. Article 3 defines the scope of application of the Directive, and it is to be inferred from Article 3(1) that the Directive applies to statutory schemes which provide protection, inter alia, against the risk of old age. It has already been shown above that the French retirement pension scheme for public servants is statute-based.

61. A further argument for regarding a retirement pension scheme for public servants as a statutory social security scheme derives from Regulation (EC) No 1606/98 amending Regulation (EEC) No 1408/71 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community and Regulation (EEC) No 574/72 laying down the procedure for implementing Regulation (EEC) No 1408/71 with a view to extending them to cover special schemes for civil servants. The effect of this Regulation, which places special schemes for civil servants within the general context of Regulation No 1408/71, is that such schemes fall within the substantive scope of application of Regulation No 1408/71 and the statutory provisions on which they are based are to be regarded as legislation concerning ... branches of social security, within the meaning of Article 4 of Regulation No 1408/71, that relate to one of the types of benefits therein set out, namely, old-age benefits.

62. It is therefore only logical that special schemes for public servants also be regarded as statutory schemes for protection against old age within the meaning of Directive 79/7.

63. Article 4(1) of the Directive states: The principle of equal treatment means that there shall be no discrimination whatsoever on ground of sex either directly, or indirectly .... It has already been shown that the second alternative in Article L. 24-1-3o(b) of the Pensions Code produces discrimination based on sex. Article 4(1) of the Directive simply lists some examples of the application of the principle of equal treatment by way of illustration, stating:

... 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.

64. It is true that the present case concerns neither the conditions for access to the schemes nor the calculation of benefit, but the conditions of access to the benefit. However, that is not fatal since Article 4(1) of Directive 79/7 is not an exclusive but an illustrative list of situations in which the principle of equal treatment applies.

65. It is therefore possible to proceed on the basis that - in the application of Directive 79/7 to the French retirement pension scheme for public servants - the second alternative in Article L. 24-1-3o(b) of the Pensions Code produces unlawful discrimination on the ground of sex within the meaning of Article 4 of Directive 79/7. It is true that under Article 7(1)(a), the Directive is without prejudice to the right of the Member States to exclude from its scope the determination of pensionable age for the purposes of granting old-age and retirement pensions. However, the present case concerns not the determination of pensionable age but the determination of the conditions of access to immediate retirement regardless of the statutory pensionable age. The provision at issue here therefore also differs from other early retirement schemes in that such schemes are normally linked to the statutory pensionable age.

66. Since therefore the exception in Article 7 of Directive 79/7 does not apply, it must be concluded that the second alternative in Article L. 24-1-3o(b) of the Pensions Code discriminates on grounds of sex in a manner that is incompatible with the principle of equal treatment in Article 4(1) of Directive 79/7.

67. Therefore, persons of the sex which is treated less favourably must - so long as the rule that is contrary to Community law is the only valid reference point - be treated in the same way as the impugned provision provides for persons of the sex which is treated more favourably.

VI – Conclusion

68. To conclude the foregoing considerations, I propose that the questions for a preliminary ruling be answered as follows:

The pensions provided under the French retirement pension scheme for public servants constitute pay under Article 119 of the EC Treaty (now, after amendment, Article 141 EC). A provision such as Article L. 24-1-3o of the Code des pensions civiles et militaires de retraite infringes the principle of equal pay.

In the alternative:

If the pensions provided under the French retirement pension scheme for public servants are not pay under Article 119 of the EC Treaty (now Article 141 EC):

A provision such as Article L. 24-1-3o of the Code des pensions civiles et militaires de retraite infringes the principle of equal treatment established in Article 4 of Council Directive 79/7/EEC of 19 December 1978.