

OPINION OF ADVOCATE GENERAL

JACOBS

delivered on 27 October 2005<sup>1</sup>

1. This appeal concerns the calculation of the number of years of pensionable service credited to a Council official under the Community pension scheme following the transfer of the flat-rate redemption value of her retirement pension rights acquired under a national scheme. It raises however certain fundamental questions of equal treatment.

2. The calculation in issue was made in accordance with the relevant provisions of the Staff Regulations and of the Council's implementing rules.

3. Before the Court of First Instance, the appellant challenged the decision embodying the calculation, pleading the illegality of those provisions on the ground that they infringed, in particular, the principle of equal treatment.

4. The aspects to which the appellant objects are principally that:

— the actuarial values used in the calculation discriminate against women;

— those actuarial values also discriminate on grounds of age, since they progressively affect all officials adversely as their age on recruitment increases; and

— the two variants of the currency conversion formula used for calculating the equivalent in euro of an amount determined in another currency may give rise to differences in treatment, to the disadvantage of officials who contributed to a pension scheme in a Member State with a strong currency.

<sup>1</sup> — Original language: English.

## Legislative framework

by reference in particular to marital or family status, in particular as concerns:

### *Prohibition of discrimination*

5. Article 12 EC prohibits discrimination on grounds of nationality within the scope of application of the Treaty.

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

— the obligation to contribute and the calculation of contributions,

6. Article 141 EC requires Member States to apply the principle of equal pay for men and women for equal work. Pay for that purpose includes any consideration received by a worker, directly or indirectly, in respect of his employment, from his employer.

— 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.<sup>7</sup>

7. Council Directive 79/7/EEC<sup>2</sup> applies to, inter alia, statutory old-age pension schemes. Article 4(1) provides:

8. Council Directive 86/378/EEC<sup>3</sup> applies to, inter alia, occupational pension schemes. Article 5(1) provides:

‘The principle of equal treatment means that there shall be no discrimination whatsoever on ground of sex either directly, or indirectly

‘Under the conditions laid down in the following provisions, the principle of equal treatment implies that there shall be no

2 — Of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security (OJ 1979 L 6, p. 24).

3 — Of 24 July 1986 on the implementation of the principle of equal treatment for men and women in occupational social security schemes (OJ 1986 L 225, p. 40), amended by Council Directive 96/97/EC of 20 December 1996 (OJ 1997 L 46, p. 20).

discrimination on the basis of sex, either directly or indirectly, by reference in particular to marital or family status, especially as regards:

— the scope of the schemes and the conditions of access to them;

— the obligation to contribute and the calculation of contributions;

— the calculation of benefits, including supplementary benefits due in respect of a spouse or dependants, and the conditions governing the duration and retention of entitlement to benefits.'

(h) setting different levels of benefit, except in so far as may be necessary to take account of actuarial calculation factors which differ according to sex in the case of defined-contribution schemes.

In the case of funded defined-benefit schemes, certain elements (examples of which are annexed) may be unequal where the inequality of the amounts results from the effects of the use of actuarial factors differing according to sex at the time when the scheme's funding is implemented;

...

9. Under Article 6(1):

'Provisions contrary to the principle of equal treatment shall include those based on sex, either directly or indirectly, in particular by reference to marital or family status, for:

...

10. Examples of elements which may be unequal, in respect of funded defined-benefit schemes, as referred to in Article 6(1)(h) and given in the annex, include 'transfer of pension rights'.

11. However, the Community pension scheme is neither a statutory nor an occupational scheme; it is set up by the Staff

Regulations of Officials of the European Communities ('the Staff Regulations')<sup>4</sup>

rules governing which are contained in Annex VIII to the Staff Regulations.

12. Article 1a(1) of the Staff Regulations provided, at the material time in the present case: 'Officials shall be entitled to equal treatment under these Staff Regulations without reference, direct or indirect, to race, political, philosophical or religious beliefs, sex or sexual orientation, without prejudice to the relevant provisions requiring a specific marital status.'<sup>5</sup>

14. Under Article 77, the amount of pension was at the material time essentially 2% of the official's final salary for each year of service, up to a maximum of 70%. Under Article 83, benefits are charged to the budget of the Communities and payment is jointly guaranteed by the Member States; officials however contribute one third of the cost of financing the scheme.

### *Relevant pension provisions*

#### General

13. Article 77 et seq. of the Staff Regulations set up a pension scheme for officials, detailed

15. That contribution takes the form of a deduction from salary of a percentage which is the same for all officials and is fixed from time to time so that the total in respect of all officials amounts as closely as possible to one third of the cost of the pensions paid out.<sup>6</sup>

4 — Regulation (EEC, Euratom, ECSC) No 259/68 of the Council of 29 February 1968 laying down the Staff Regulations of Officials and the Conditions of Employment of Other Servants of the European Communities and instituting special measures temporarily applicable to officials of the Commission (OJ, English Special Edition 1968(I), p. 30), as amended on numerous occasions. Article 1a was introduced by Council Regulation (EC, ECSC, Euratom) No 781/98 of 7 April 1998 amending the Staff Regulations in respect of equal treatment (OJ 1998 L 113, p. 4).

5 — The equivalent provision since 1 May 2004 is Article 1d(1), which reads: 'In the application of these Staff Regulations, any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age, or sexual orientation shall be prohibited.'

6 — An amount equivalent to the total is entered as 'staff contributions to the pension scheme' in the revenue section of the budget of the European Union (although it is not true revenue but rather a reduction in expenditure), together with transfers of pension rights, purchases of pension rights and contributions by staff on (unpaid) leave on personal grounds (all of which are true revenue). It is in fact the total of all those categories which is intended to amount to one third of the cost of the pensions paid out, although by far the greatest proportion is accounted for by contributions from salary.

16. Thus, Article 83(4)<sup>7</sup> of the Staff Regulations provided at the material time:

— pursuing an activity in an employed or self-employed capacity;

‘Should an actuarial assessment of the pension scheme, carried out by one or more qualified experts at the request of the Council, show the contributions of officials to be insufficient to finance one third of the benefits payable under the pension scheme, the budgetary authorities shall ... determine what changes are to be made to the rates of contributions or to the retirement age.’

shall be entitled upon establishment to have paid to the Communities either the actuarial equivalent or the flat-rate redemption value [<sup>8</sup>] of retirement pension rights acquired by virtue of such service or activities.

Transfer of pension rights to the Community scheme

In such case the institution in which the official serves shall, taking into account his grade on establishment, determine the number of years of pensionable service with which he shall be credited under its own pension scheme in respect of the former period of service, on the basis of the amount of the actuarial equivalent or sums repaid as aforesaid.’

17. At the material time, Article 11(2) of Annex VIII read as follows:

‘An official who enters the service of the Communities after:

Calculation of entitlement following a transfer

— leaving the service of a government administration or of a national or international organisation; or

18. The general rules implementing Article 11(2) of Annex VIII to the Staff Regulations are in essence common to the different

7 — Now repealed and replaced by Article 83a, with detailed implementing rules, including those providing for a five-yearly actuarial assessment by Eurostat, in Annex XII.

8 — This somewhat opaque term, in English, seems to be unknown outside the Communities’ Staff Regulations, and may be a translation of the French ‘forfait de rachat’. It is perhaps best to be understood as the lump-sum value of an individual’s accrued rights in a pension scheme.

institutions. Under Article 10(2) of those adopted by the Council on 13 July 1992, the number of pensionable years credited is to be calculated on the basis of the total amount transferred, subject to deduction of simple interest of 3.5% per annum for the period from the date of the official's establishment to the date of the actual transfer (with the exception of periods during which that amount was not revalued or interest did not accrue under the transferring national scheme).

19. Article 10(3) of the Council's implementing rules reads, in so far as is relevant:

'The number of pensionable years to be credited shall be calculated by converting:

- the amount transferred (A) into a notional pension (P), varying with the actuarial values (V) laid down by the budgetary authorities under Article 39 of Annex VIII to the Staff Regulations ..., according to the formula  $P = A/V$ ,

- this pension (P) into pensionable years for the purposes of the Staff Regulations (Y) in accordance with the basic annual salary (S) which corresponds to the grade of establishment of the official ..., according to the formula  $Y = P \times 100 / S \times 2$ .

...'

20. The actuarial values to be used, which appear in Annex II to the implementing rules, are in all cases higher for women than for men, reflecting differing life expectancy statistics. The values, and the difference between those for men and for women, increase with age.

21. It will be seen from the above formulas that, for a given amount A transferred, the notional pension P will decrease as the actuarial value V increases, since P equals A divided by V. In addition, the number of pensionable years Y will decrease as the basic salary in the grade of establishment S increases, since Y is in effect a multiple of P divided by S.

#### Currency conversion formulas

22. Article 10(4) of the same implementing rules concerns the procedure for conversion of the amount transferred in a currency other than, originally, the Belgian franc (now,

the euro). The relevant passages are in the third and fourth subparagraphs of Article 10(4)(b), and read as follows:

‘the part sum corresponding to the period following 31 December 1971 shall be converted on the basis of the average updated rate fixed by the Commission for the period from 1 January 1972 to the date of the official’s establishment ...

However, at the request of the official ..., the amount (A) taken into account for the purposes of calculation shall be converted on the basis of the updated rate in force on the date of transfer. In this case, the salary (S) and actuarial value (V) to be taken into account in calculating the number of pensionable years to be credited shall be the remuneration corresponding to the grade of establishment of the official ... in force on the date of the transfer and the actuarial value corresponding to the official’s ... age on that date’.

23. The first of those conversion formulas has been referred to in the present proceedings as ‘variant (i)’ and the second as ‘variant (ii)’.

24. If the value of the currency from which the amount A is transferred has fallen, as against the currency into which it is converted, over the period of contributions to

the previous pension scheme, the official in question could be disadvantaged. Variant (i) is thus designed to compensate for that in so far as it applies an average exchange rate over the period. Variant (ii) allows an official to opt however for the exchange rate at the date of transfer, which is likely to be advantageous if the value of the original currency has increased, although the advantage may be offset to some extent because the salary S and actuarial value V are calculated at the date of transfer and may thus be higher than those at the date of establishment.

#### **Facts and administrative procedure**

25. Ms Lindorfer, the appellant in the present case, is an Austrian national who joined the Council’s staff as a probationary official in September 1996 and was established in grade A5 in June 1997.

26. Before joining the Council, she had worked and contributed to a pension scheme in Austria for 13 years and three months. In 1999 and 2000, she took the relevant steps to have her Austrian pension entitlement transferred to the Community scheme. On 7 November 2000, she received a note (‘the

contested decision')<sup>9</sup> informing her of the number of pensionable years with which she would be credited. The actuarial values referred to above had been used, and variant (ii) was employed for currency conversion purposes, resulting in a total of five years, five months and eight days.

former since on appeal she criticises only the way in which the Court of First Instance dealt with certain of her arguments on the implementing rules. The relevant passages may be summarised as follows.

27. Ms Lindorfer submitted a complaint challenging that decision, arguing that Articles 11(2) of the Staff Regulations and 10(3) and (4) of the implementing rules were unlawful in so far as they conflicted with rights and principles under Community law, and should therefore be disapplied. The complaint was rejected on 31 May 2001, and Ms Lindorfer brought an action before the Court of First Instance.<sup>10</sup>

*Reference to age and salary in the calculation*

29. Ms Lindorfer submitted that the calculation under variant (ii) refers to the official's age and salary on the date of the transfer, rather than on the date of establishment as for variant (i), discriminating between officials according to which variant was used.

## Judgment under appeal

28. In that action, Ms Lindorfer again pleaded the illegality of Articles 11(2) of the Staff Regulations and 10(3) and (4) of the general implementing rules. It is not however necessary to consider the aspects of the judgment under appeal relating to the

30. The Court of First Instance dealt with that argument first at paragraph 69 of its judgment. It was based — as was 'noted' by the applicant at the hearing — on a misreading of Article 10(4)(b) of the implementing rules, under which the relevant salary is that for the grade in which the official was established, updated as of the date on which the transfer is actually made, and not that for the grade actually held by the official at that date.

<sup>9</sup> — Dated 3 November 2000.

<sup>10</sup> — Case T-204/01 *Lindorfer v Council* [2004] ECR-SC I-A-83 and II-361.

31. Then, in paragraphs 88 and 89, the Court of First Instance stated that it was logical in variant (ii) for age and salary to be those on the date of transfer and in variant (i) for all parameters to be fixed on the same date (that of establishment), pointing out that in variant (i) simple interest of 3.5% per annum is deducted from the amount transferred for the period from the date of the official's establishment to the date of the actual transfer (with the exception of periods during which the amount was not revalued or interest did not accrue under the transferring national scheme), whereas no such interest is deducted if variant (ii) is used.

forward did not compare like with like, in that the situations compared with her own differed in the significant characteristics of age, sex and grade of recruitment, and were distorted by the use of inconsistent premisses; and that the effect complained of was the consequence not of the two variants in the implementing rules but of the underlying currency fluctuations themselves.

*Conversion from 'strong' and 'weak' currencies*

*Use of actuarial values*

32. Ms Lindorfer argued that the regular use of variant (i) for conversion from weak currencies and variant (ii) for conversion from strong currencies leads to more years of pensionable service being credited in the former case than in the latter, contrary to the principle of equal treatment.

33. The Court of First Instance dismissed that argument in paragraphs 76 and 77 of its judgment, essentially on the ground that the detailed figures which the applicant put

34. Ms Lindorfer submitted that the use of actuarial values in the calculation under Article 10(3) of the implementing rules gives rise to discrimination on the basis of sex and age, since they are higher for women and increase with age. That difference in treatment has no objective justification, nor is it required under the Community pension scheme, which makes no reference to such actuarial values with regard to contributions from official's salaries or to the age of retirement.

35. The Court of First Instance dealt with those arguments in paragraphs 82 and 83 of its judgment. First, it stated in paragraph 82 that an official transferring pension rights acquired elsewhere is in an objectively different situation from one contributing to the Community pension scheme by virtue of employment with an institution.

36. Paragraph 83 is worded as follows:<sup>11</sup>

‘Secondly, and in any event, the use of factors which vary according to sex and age in order to calculate the number of additional pensionable years credited is objectively justified by the need to ensure sound financial management of the Community pension scheme. An official who, pursuant to Article 11(2) of Annex VIII to the Staff Regulations, transfers to the Community budget the actuarial equivalent or flat-rate redemption value of pension rights acquired before joining the staff of the Communities, obtains

in exchange a right to future benefits under the Community pension scheme in the form of additional pensionable years credited, the extent of the right being dependent on the number of those additional pensionable years. In order to determine the current value of that right the Community institution concerned must take account of a series of factors, including the probable length of time during which the capital transferred will be present in the Community budget, the official’s expected career progress, the likelihood that the benefits in question will be paid out and the probable length of time over which such payments will be made. It is clear that those factors are dependent in particular on the official’s sex and on his or her age at the time of joining the Community pension scheme. On the one hand, it is an established fact that, statistically, women live longer than men. On the other, the likelihood that a person who enters the Community’s service long before retirement age will die before reaching that age is greater than in the case of a person recruited at an age close to that at which he or she will be able to claim pension benefits. Furthermore, such a person will leave the capital transferred at the disposal of the Community budget for longer than an official nearer retirement age. In other words, factors such as the duration of service between date of recruitment and date of retirement and the probable length of time, calculated on a statistical basis, during which the official will receive a Community retirement pension have a direct influence on the Community’s financial responsibility towards each official individually concerned, and sound financial management of the Community pension scheme requires those factors to be taken into account and properly assessed. The Council is therefore right to take account in its conversion formula of

<sup>11</sup> — My translation; the judgment exists only in French, the language of the case.

actuarial factors connected with the official's age and sex.'

## Assessment

### *Preliminary remarks*

37. In her present appeal against that judgment, Ms Lindorfer alleges essentially that in the passages summarised or cited above the Court of First Instance failed to apply the prohibition of discrimination (with reference inter alia to Article 141 EC) correctly, and failed to give proper reasons for the conclusions it reached. She makes those allegations separately in respect of each of the passages concerned. The Council treats the passages collectively, addressing first the allegation with regard to prohibition of discrimination and second the alleged inadequacy of reasoning.

38. In an appeal, it is not for the Court of Justice to reconsider the whole case or to scrutinise of its own motion aspects of the judgment — other perhaps than those involving issues of public policy — which are not challenged by the appellant. Rather, its role is to examine each of the grounds of appeal put forward and to determine whether it is founded.

39. In the present case, I have some difficulty in following that latter approach strictly in view of the way in which the appellant's and respondent's arguments have been presented. I find it preferable to restructure to some extent the grounds of appeal when examining whether the appellant has identified any errors in law or defects in reasoning on the part of the Court of First Instance.

40. Essentially, Ms Lindorfer's case at first instance was that the implementing rules embodied unlawful discrimination on grounds of sex, age and nationality (in so far as the latter may result from different treatment of different national currencies), and discrimination resulting from the determination of age and salary as at different points in time according to which variant of the conversion formula is used. She now alleges inadequacies in the judgment under appeal in relation to each of those grounds. I shall deal with them in turn.

### *Discrimination on grounds of sex*

41. On appeal, Ms Lindorfer has referred to Article 141 EC and to various Council

Directives in the field of equal treatment. However, she alleges also breach of the general principle of non-discrimination — of equal treatment or equality — on which she based her action at first instance.

42. Equal treatment is one of the fundamental principles protected by the Community legal order, of which Article 141 EC is a specific expression.<sup>12</sup> Clearly the principle of equal pay enshrined in that article is relevant to Ms Lindorfer's argument, since pensions are a form of deferred pay in so far as they are paid by virtue of a former employment relationship.<sup>13</sup> And although, like the directives mentioned, the Treaty article imposes obligations on the Member States rather than on the Community institutions, it is clear that there would be unacceptable incoherence in the law if the institutions were able to practise discrimination of kinds which must be prohibited by the Member States.

43. The Court stated moreover in *Razzouk and Beydoun*<sup>14</sup> that 'in relations between the Community institutions ... and their employees ..., the requirements imposed by the principle of equal treatment are in no way limited to those resulting from [Article 141 EC] or from the Community directives adopted in this field.' And in *Weiser*<sup>15</sup> it confirmed that the general principle must be observed specifically in relation to rules governing the transfer of pension rights into the Community scheme.

44. Even more relevant is the explicit requirement of 'equal treatment ... without reference ... to ... sex' laid down in Article 1a(1) of the Staff Regulations,<sup>16</sup> although that provision has not been expressly invoked in the proceedings.

45. The alleged discrimination is that which derives from the use of actuarial factors which operate to the disadvantage of women because, statistically, women on average live longer than men.

12 — See, for example, Case C-13/94 *P* [1996] ECR I-2143, paragraph 18; Joined Cases C-270/97 and C-271/97 *Stievers and Schwage* [2000] ECR I-929, paragraphs 56 and 57; and Case C-256/01 *Allonby* [2004] ECR I-873, paragraph 65.

13 — See Joined Cases C-4/02 and C-5/02 *Schönheit and Becker* [2003] ECR I-12575, at paragraphs 56 to 59, together with the case-law cited there.

14 — Joined Cases 75/82 and 117/82 [1984] ECR 1509, at paragraph 17; see, for a recent confirmation by the Court of First Instance, Case T-181/01 *Hectors* [2003] ECR-SC I-A-19 and II-103.

15 — Case C-37/89 [1990] ECR I-2395, at paragraph 13.

16 — See point 12 and footnote 5 above.

46. At paragraph 83 of its judgment, the Court of First Instance considered that the difference in treatment was objectively justified by the need to ensure sound financial management of the pension scheme, a factor in the calculations necessary for that purpose being the probable length of time over which benefits would be paid, which is statistically longer in the case of women.

47. Ms Lindorfer objects that there is no equivalent differential treatment of men and women in regard to contributions deducted from active officials' salaries. Yet those contributions too must be calculated with a view to sound financial management, taking actuarial assessments into account.<sup>17</sup> Consequently, sound financial management of the pension scheme cannot require differential treatment of men and women officials with regard to contributions in the form of transfers from other schemes.

48. Essentially, I agree with that argument.

49. First, the need for sound financial management taking account of the probable length of time over which pensions will be

paid cannot itself require a difference of treatment with regard to transfers of pension rights. If the different actuarial values for men and women at any given age were averaged to provide a 'unisex' actuarial value — as appears to be the case when adjustments are made to contribution rates — men would receive slightly fewer additional pensionable years than they now do for a given sum transferred and women would receive slightly more, but the income and expenditure of the scheme would remain unchanged.<sup>18</sup>

50. Second, even if a different correlation between contributions and benefits for men and women could be justified on the basis of differences in life expectancy, such justification could not apply in respect of only one of two types of contribution unless it could further be shown that there were objective differences between the two, which rendered the justification valid for only one of them.

51. The judgment under appeal merely states in paragraph 82 that an official transferring pension rights acquired else-

<sup>17</sup> — Article 83(4) of the Staff Regulations; see point 16 above.

<sup>18</sup> — It is true that a temporary increase in cost may occur if the current rules are found unlawful; that however would have nothing to do with the financial management of the scheme but would result from the original failure to ensure sound legal management.

where is in an objectively different situation from one contributing to the Community pension scheme by virtue of employment with an institution. In Ms Lindorfer's submission that is not a sufficient explanation, and I agree.

sex, a very powerful reason indeed would in my view be needed to justify the difference in treatment in issue, and I even doubt whether it is legally capable of justification.

52. True though it may be that transfers of pension rights are objectively different from contributions from salary, neither the judgment under appeal nor the Council in its submissions provides any explanation as to how the differences may be relevant to the issue of distinguishing between the situations of male and female officials.

55. This is not a case of indirect discrimination, but of direct discrimination on grounds of sex. In other words, the only criterion which distinguishes between members of the two categories is that of sex; the difference in treatment does not flow from possession of other characteristics which may be mainly or overwhelmingly, but not exclusively, held by persons of one sex or the other.

53. Consequently, the fact that benefits are likely to be paid over a longer period to women than to men, even taken together with the need for sound financial management of the pension scheme, does not provide adequate justification for the use of actuarial factors based on sex with regard to transfers of pension rights alone, and the Court of First Instance's finding in that regard cannot be upheld.

56. According to the Court's case-law, a difference in treatment on grounds of sex does not constitute unlawful discrimination if it is 'justified by objective factors unrelated to any discrimination based on sex'.<sup>19</sup> Clearly, that can be the case only when the discrimination is indirect, not when it is by its very nature based on sex.<sup>20</sup>

54. Moreover, given the very clear requirement of equal treatment without reference to

19 — See, for example, Case C-167/97 *Seymour-Smith and Perez* [1999] ECR I-623, paragraphs 60 and 65.

20 — See also my Opinion in Case C-79/99 *Schnorbus* [2000] ECR I-10997, at point 30 et seq.

57. Here, as the United States Supreme Court stated in *Manhart*<sup>21</sup> in circumstances in many ways comparable to those of the present case, 'one cannot say that an actuarial distinction based entirely on sex is "based on any other factor other than sex". Sex is exactly what it is based on'.

58. Cases of this kind, it was pointed out, involve a generalisation which is 'unquestionably true: Women, as a class, do live longer than men. ... It is equally true, however, that all individuals in the respective classes do not share the characteristic that differentiates the average class representatives. Many women do not live as long as the average man and many men outlive the average woman'.<sup>22</sup>

59. In other words, discrimination of the kind in issue involves ascribing to individuals average characteristics of a class to which they belong. In relation to the individual, I do not think that such average characteristics can in any way be described as 'objective'. What is objectionable (and thus prohibited) in such discrimination is the reliance on

characteristics extrapolated from the class to the individual, as opposed to the use of characteristics which genuinely distinguish the individual from others and which may justify a difference in treatment.

60. In order to see such discrimination in perspective, it may be helpful to imagine a situation in which (as is perfectly plausible) statistics might show that members of one ethnic group lived on average longer than those of another. To take those differences into account when determining the correlation between contributions and entitlements under the Community pension scheme would be wholly unacceptable, and I cannot see that use of the criterion of sex rather than ethnic origin can be any more acceptable.<sup>23</sup>

61. Nor, to return to the notion of pensions as deferred pay, could it ever be acceptable to draw up tables showing the average length of service with the Community institutions for men and women respectively, and to pay higher salaries to members of one sex than to those of the other on the pretext that they would otherwise receive less than members of the other sex over the whole course of their career. That would not only discrimi-

21 — *Los Angeles Department of Water and Power v Manhart* (1978) 435 US 702, at 712 and 713.

22 — *Ibid.*, at 707 and 708.

23 — I am aware that such an approach would have a further objectionable characteristic in that assignment of individuals to ethnic groups would be highly arbitrary, but the example remains valid even if that aspect is disregarded.

nate unfairly between individuals on the basis of average values for their class but would fail to accord equal value to equal service. Yet it is a very similar justification that is advanced with regard to the differential treatment of transfers — of deferred salary — into the Community pension scheme.

62. It is true that certain Community provisions prohibiting unequal treatment in particular areas exclude from the prohibition certain specific types of treatment. Of those cited, Directive 86/378 authorises differential treatment as regards transfers of pension rights in relation to funded defined-benefit pension schemes.<sup>24</sup>

63. However, even if the directive itself were applicable — it is addressed to the Member States and applies to occupational social security schemes — the exception could not be applicable because the Community pension scheme is not a funded scheme.

24 — See points 8 to 10 above.

64. In any event, it seems to me that the prohibition of discrimination on grounds of sex is so fundamental<sup>25</sup> that any exceptions to it must be construed very strictly, and can apply only in those limited areas where they are explicitly provided for. Here, in contrast to the situation under Directive 86/378, there is no such explicit authorisation, nor is any justification given in the implementing rules.

65. Finally, I cannot agree with the Council's assertion that to remove the difference in treatment in issue here would be to discriminate against men because retired male officials, by reason of their shorter lives, would as a class receive less overall by way of pension than would retired female officials, in respect of the same amount transferred into the Community scheme (assuming all other factors to be equal).

25 — See, for example, recital 4 in the preamble to Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (OJ 2000 L 303 p. 16): "The right of all persons to equality before the law and protection against discrimination constitutes a universal right recognised by the Universal Declaration of Human Rights, the United Nations Convention on the Elimination of all forms of Discrimination Against Women, United Nations Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights and by the European Convention for the Protection of Human Rights and Fundamental Freedoms, to which all Member States are signatories."

66. First, that reasoning if valid would also have to apply to the contributions deducted from active officials' salaries — the percentage would have to be higher for female staff — and that is not I think what the Council intended.

67. More significantly, however — and this seems a fundamental misapprehension in both the Council's argument and perhaps in the judgment under appeal — the Council is confusing the cost to the scheme with the benefit to recipients.

68. It is undeniable that the final cost of paying a pension (as opposed to a lump sum on retirement, an option which is not available under the Community scheme) increases the longer the recipient lives. Since women on average live longer than men, it is likely that as a class they will cost more to the pension scheme. For each recipient of either sex, however, a pension is for life. Its value depends entirely on its weekly, monthly or yearly amount, its whole purpose being to provide a certain level of regular income for as long as the recipient<sup>26</sup> lives. The total paid

out by the time of the recipient's death is completely irrelevant in that regard.

69. Consequently, I reach the view that the contested provisions of the Council's implementing rules discriminate on grounds of sex and cannot be justified. They infringe both the general principle of equality and its specific expressions in the principle of equal pay and in the requirement of equal treatment without reference to sex laid down in Article 1a(1) of the Staff Regulations, and Ms Lindorfer's original plea of illegality should be upheld in that regard.

70. Finally, however, I should make it clear that the analysis above concerns the Staff Regulations and the Community pension scheme. Even if many of the considerations are of general application, it cannot be ruled out that they may lead to different conclusions in other circumstances. National pension schemes are subject to the rules in the directives mentioned rather than those in the Staff Regulations, and are likely to be funded differently from the Community scheme; my analysis here does not in my view call into question, for example, the judgments in *Coloroll*<sup>27</sup> or *Neath*.<sup>28</sup> Even further removed

26 — And, as the case may be, his or her surviving spouse.

27 — Case C-200/91 [1994] ECR I-4389.

28 — Case C-152/91 [1993] ECR I-6935.

are the businesses of motor insurance or life assurance, where very different factors may have to be taken into account.

by a woman aged 35 would appear to give rise to a notional pension of EUR 9 032, and of the same amount by a woman aged 55 to a notional pension of EUR 6 664.<sup>31</sup>

### *Discrimination on grounds of age*

71. Ms Lindorfer's challenge concerns the use of actuarial values which are always higher for, and thus less favourable to, older officials,<sup>29</sup> and is comparable to the issue of sex discrimination dealt with above.

72. The effect of the increase in actuarial values according to age is that, for an identical amount transferred into the Community scheme from the same national scheme, and all other factors such as sex and grade being equal, an older official will be credited with fewer additional pensionable years — and thus, in the final event, a smaller pension — than a younger official. For example, using the actuarial values in issue and the formula in Article 10(3) of the disputed implementing rules,<sup>30</sup> the transfer of EUR 100 000 to the Community scheme

73. At paragraph 83 of its judgment, the Court of First Instance considered such difference in treatment justified essentially by factors having a direct influence on the Community's financial responsibility towards each official individually concerned, which sound management requires to be taken into account. Its reasoning on this point follows on from the consideration at paragraph 82 that an official transferring capital into the Community scheme is in an objectively different situation from one contributing by virtue of employment with an institution.

74. Ms Lindorfer's objections largely coincide with those she raises with regard to sex discrimination: the Court of First Instance did not explain how the factors referred to above were relevant or how, if they were relevant, an objective distinction could be drawn between contributions by way of

29 — See points 18 and 19 above.

30 — *Ibid.*

31 — To the nearest integer; the actuarial values are 11.071 for a woman aged 35 and 15.007 for a woman aged 55. The notional pension would of course then have to be converted into pensionable years in accordance with the second part of the formula, but the initial calculation demonstrates the difference between the two results where all other parameters are equal.

transfers of capital and contributions by way of deductions from salary, the actuarial values being used only when calculating entitlements resulting from the former.

75. I have already examined those criticisms with regard to the reasoning justifying the discrimination on grounds of sex, and in several regards my analysis is comparable as regards the issue of discrimination on grounds of age.

76. Most importantly, officials of all ages are treated identically as regards pension contributions in the form of deductions from salary. If differing treatment according to age is to be justified in the case of transfers to the Community scheme, it must therefore be established that there is an objective difference between such transfers and contributions from salary.

77. The factors listed in the Court of First Instance's reasoning are (i) the probable length of time during which the capital transferred will be present in the Community budget, (ii) the official's expected career progress, (iii) the likelihood that the benefits in question will be paid out and (iv) the probable length of time over which such payments will be made.

78. Of those four factors, (iii) and (iv) can clearly be linked to life expectancy statistics as reflected in actuarial values, and are relevant to estimating the extent of the Community scheme's future liability. However, there is no indication in the judgment under appeal as to why they might be relevant with regard to transfers and not with regard to contributions by way of deductions from salary; and it seems to me doubtful whether such a distinction can be drawn on objective, rather than policy, grounds.

79. The official's likely career progress (ii) is again a factor which may be relevant to the overall cost of the pension finally to be paid out, since that pension is a percentage of final salary. However, it does not seem clear that, all other factors in the transfer calculation being equal,<sup>32</sup> an official recruited later in life will normally attain a higher final salary. Rather, if anything, it is perhaps the younger official who is likely, by virtue of a longer career, to attain the higher salary and thus to receive more in pension benefits. And the fact that a longer career will involve more contributions in the form of deductions from salary is irrelevant to the treatment of contributions in the form of

<sup>32</sup> — Bearing in mind that the actuarial values distinguish simply on the criterion of age, factors such as grade of recruitment being introduced later in the calculation.

transfers from national pension schemes, since the number of pensionable years determined by the former is wholly independent of the number of additional pensionable years determined on the basis of the latter.

80. Finally, the reference to the probable length of time during which the capital transferred will be present in the Community budget (i) seems to me to be doubtful. In the absence of a fund, it is difficult to reason on the basis of capital remaining at the disposal of the budget, in which revenue and expenditure must be in balance<sup>33</sup> and which is subject to the fundamental principle of 'annuality', which essentially requires revenue and appropriations to be determined on a yearly basis.<sup>34</sup>

81. However, it must be acknowledged that, on the one hand, pension rights transferred into the Community budget are true revenue as opposed to mere savings in expenditure as is the case for contributions from salary and that, on the other hand, the requirements of a balanced budget and the principle of annuality are not so stringent as to preclude amounts being carried over from one year to the next.<sup>35</sup> There is therefore a certain

capital which may be invested and carried over, so that there may be a sense in which sums paid in can be said to remain at the disposal of the budget for a greater or lesser period.

82. Although it might be possible to challenge the Court of First Instance's reasoning on that count by means of a more detailed financial analysis, I do not think that Ms Lindorfer can be said to have done so.

83. Moreover, I think it necessary to consider the nature of age discrimination and its prohibition, as compared with sex discrimination.

84. Sex is essentially a binary criterion, whereas age is a point on a scale. Sex discrimination based on actuarial tables is thus an extremely crude form of discrimination, involving very sweeping generalisations, whereas age discrimination may be graduated and may rely on more subtle generalisations.

85. Moreover, in law and in society in general, equality of treatment irrespective

33 — Article 268 EC.

34 — Article 6 et seq. of the current Financial Regulation (Council Regulation (EC, Euratom) No 1605/2002 of 25 June 2002, OJ 2002 L 248, p. 1) and the corresponding provisions, in particular Articles 1(2) and 6, of the 1977 Financial Regulation (of 21 December 1977, OJ 1977 L 356, p. 1).

35 — In 2004, for example, the surplus available from the previous financial year was some EUR 5.7 billion.

of sex is at present regarded as a fundamental and overriding principle to be observed and enforced whenever possible, whereas the idea of equal treatment irrespective of age is subject to very numerous qualifications and exceptions, such as age limits of various kinds, often with binding legal force, which are regarded as not merely acceptable but positively beneficial and sometimes essential.

86. In particular, age is a criterion inherent in pension schemes, and some distinctions according to age are inevitable in that context.

87. In Community law, prohibition of age discrimination is not only set about with far more numerous provisos and limitations than is sex discrimination, it is also a much more recent phenomenon.

88. Whereas the principle of equal pay for equal work as between men and women was already enshrined in Article 119 of the original EEC Treaty (now Article 141 EC) in 1957, the first reference to age discrimination in the treaties was in Article 6a of the EC

Treaty (now Article 13 EC), introduced in 1997 by the Amsterdam Treaty, which entered into force in 1999. That provision moreover simply allows the Council to take appropriate action to combat discrimination on grounds of, *inter alia*, age.

89. On 27 November 2000, the Directive on equal treatment in employment<sup>36</sup> was adopted, laying down a general prohibition of discrimination on the basis of, *inter alia*, age in the field of employment, but with numerous limitations.<sup>37</sup> On 7 December of the same year, Article 21 of the Charter of Fundamental Rights solemnly proclaimed at Nice in December 2000 by the Parliament, the Council and the Commission<sup>38</sup> prohibited any discrimination based on any ground such as, *inter alia*, age. And on 1 May 2004 a specific prohibition of age discrimination was included in the Staff Regulations.<sup>39</sup>

90. However, it will be recalled that the contested decision in the present case was

<sup>36</sup> — Cited in footnote 25.

<sup>37</sup> — In particular, Article 6(2) allows Member States to 'provide that the fixing for occupational social security schemes of ages for admission or entitlement to retirement or invalidity benefits, including the fixing under those schemes of different ages for employees or groups or categories of employees, and the use, in the context of such schemes, of age criteria in actuarial calculations, does not constitute discrimination on the grounds of age, provided this does not result in discrimination on the grounds of sex'.

<sup>38</sup> — OJ 2000 C 364, p. 1; Article 21.

<sup>39</sup> — See footnote 5 above. This followed, *inter alia*, the abandonment of age limits in recruitment in 2002, following objections from the European Ombudsman.

taken on 3 November 2000,<sup>40</sup> and thus predated the three last-mentioned measures.

should be quashed in this regard. However, it should not be assumed that the present scheme is immune to challenge based on the clear prohibition of age discrimination now contained in the Staff Regulations.

91. In the light of all the above considerations, I take the view that Ms Lindorfer has identified certain flaws in the Court of First Instance's reasoning with regard to the justification for the difference in treatment according to age which is undoubtedly present in the calculation of transferred pension rights. In particular, it seems difficult to justify that difference on the basis of the official's expected career progress, the likelihood that benefits will be paid out or the probable length of time over which payments will be made.

*Discrimination on grounds of nationality*

92. However, as regards the probable length of time during which the capital transferred will be present in the Community budget, I do not think that Ms Lindorfer has demonstrated that the justification is untenable, even though some doubt has been cast on it.

94. If automatic use in each case of the more favourable of the two conversion formulas (variants (i) and (ii)) systematically leads to better 'value for money' in the case of conversion from some national currencies than for others, any discrimination involved would appear to be on grounds of nationality. Although not all officials transferring sums from a given currency will possess the nationality of the State whose currency it is, there is clearly a very high probability that that will be so in the great majority of cases.

93. Taking that possible justification into account along with the fact that the legislative prohibition of age discrimination was not as clearly established at the time of the contested decision as it is now, I do not consider that the judgment under appeal

95. At first instance, Ms Lindorfer produced comparative tables purporting to demonstrate such discrimination. The Council disputed the accuracy and/or relevance of the figures involved, and replied in writing to questions put by the Court of First Instance in that regard.

40 — See point 26 above.

96. On that basis, the Court of First Instance found that the tables in question showed inconsistencies, that they concerned situations not comparable in several regards to that of Ms Lindorfer and that they were thus not relevant. It also noted that the exchange rate fluctuations underlying the differences in treatment were factors beyond the Community's control.

97. Ms Lindorfer submits that the Court of First Instance drew incorrect conclusions from the facts and that its reasoning was thus erroneous. Her comparison with the real case of a Spanish official should not be discounted because of differences in age, sex and grade. What mattered rather was the near-identity in actuarial value and amount transferred. The Court of First Instance moreover ignored her striking calculations of the results of transferring the same amount from other currencies.

98. I would agree with the Court of First Instance that, because they use varying parameters, the tables in question do not clearly demonstrate the existence or extent of a difference in treatment.

99. On the other hand, it might be thought that that Court, as the final arbiter in

disputes of a factual nature, should have analysed the figures more closely, since they are certainly suggestive of such a difference.

100. Moreover, it seems to me that some of the rules governing variant (i) may be questionable. For example, if contributions to the national scheme were made between 1985 and 1995, why should exchange rates between 1972 and 1984 be taken into account? And it seems difficult at first sight to justify — certainly if sound financial management is a criterion — a rule whereby (as in the case of the Spanish official presented by Ms Lindorfer), if the number of additional pensionable years arrived at in the Community scheme following the use of an average exchange rate exceeds the number of years of contributions in the national scheme, the corresponding excess portion of the amount transferred, after conversion, is simply paid over to the official concerned.

101. However, even if Ms Lindorfer has identified defects in the conversion methods, as a result of which officials transferring amounts from some currencies receive better 'value for money' than those transferring from other currencies, and even if those

defects were not examined as closely as they might have been by the Court of First Instance, I do not think that any discrimination capable of challenge has been identified.

102. As I have pointed out above,<sup>41</sup> variant (i) is advantageous to the official concerned if over the period of contribution the currency of the national scheme has lost in value against the euro (or previously the Belgian franc), and variant (ii) is advantageous if the national currency has gained in value. It may be added that neither variant is advantageous or disadvantageous if the value has remained constant. The possibility of choice (or in practice the automatic application of the more favourable variant) means that each official is entitled to the better of the two options available.

103. The essence of discrimination is that similar situations are treated differently, or different situations are treated in the same way, without any objective and relevant justification.<sup>42</sup> However, in order to found a challenge to discrimination it must in my view also be established that a party has suffered a disadvantage as a result of the treatment accorded.

104. Here, the very fact that Ms Lindorfer would have been worse off under variant (i), and the Spanish official whose case she compares with her own would have been worse off under variant (ii), demonstrates on the one hand that there is indeed an objective and relevant difference between their two situations and on the other that neither of them can complain of suffering any disadvantage, since each received the more favourable treatment.

*Determination of age and salary as at different points in time*

105. Finally, Ms Lindorfer takes issue with the Court of First Instance's treatment of her argument that the use of two variants when calculating the equivalent in euro of the amount to be transferred from another currency gave rise to unjustified discrimination because variant (i) uses the official's age and salary at the date of establishment, whereas variant (ii) uses the age and salary at the date of the actual transfer. In the latter case, the age and actuarial value (V) are necessarily higher and the salary (S) may be higher; thus affecting the final calculation downwards.

106. Although Ms Lindorfer appears to claim that the judgment under appeal did not deal with that argument, the Council submits that it did so, at paragraph 89, by

41 — At point 24.

42 — As is recalled in the judgment under appeal, at paragraph 64.

pointing out that in variant (i) simple interest of 3.5% per annum is deducted from the amount transferred for the period from the date of the official's establishment to the date of the actual transfer (with the exception of periods during which the amount was not revalued or interest did not accrue under the transferring national scheme),<sup>43</sup> whereas no such interest is deducted if variant (ii) is used.

107. Clearly, if that is so, the disadvantage resulting from reference to a higher actuarial value, and possibly a higher salary, in the latter case is at least attenuated to a considerable extent, and might even become an advantage. Although it does not appear to me to be evident from the wording of Article 10(2) to (4) of the implementing rules that interest is deducted only in variant (i), that finding by the Court of First Instance was based on a statement made by the Council in response to a written question and does not appear in itself to be challenged by Ms Lindorfer.

108. In those circumstances, I conclude that Ms Lindorfer has not identified any flaw in the judgment under appeal as regards the alleged discrimination deriving from the fact that age and salary are determined at different points in time in variants (i) and (ii).

<sup>43</sup> — See point 18 above.

### *Final considerations*

109. I thus reach the conclusion that the judgment under appeal was based on inadequate reasoning in so far as it found that there was no discrimination on grounds of sex, and should be quashed to that extent.

110. The case has been fully argued, and the state of the proceedings is thus such that the Court of Justice may itself give final judgment in accordance with Article 61 of its Statute. It should therefore uphold Ms Lindorfer's plea of illegality of the Council's implementing rules in so far as the use of actuarial values entails discrimination on grounds of sex, and annul the contested decision accordingly.

111. Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Ms Lindorfer has applied for costs both at first instance and on appeal.

## **Conclusion**

112. I am therefore of the opinion that the Court should:

- quash the judgment in Case T-204/01 in so far as it dismissed the application on the ground that there was no prohibited discrimination on grounds of sex;
  
- declare Article 10(3) of the general rules implementing Article 11(2) of Annex VIII to the Staff Regulations, adopted by the Council on 13 July 1992, invalid in so far as it provides for the use of actuarial values which differ according to sex;
  
- annul the contested decision of the Council of 3 November 2000;
  
- order the Council to pay the costs, both at first instance and on appeal.