OPINION OF ADVOCATE GENERAL ALBER

delivered on 21 February 2002 [1]

I — Introduction

1. These proceedings have been instituted by the Vakuutusoikeus (Insurance Court), a Finnish social security court (hereinafter: the referring court), for a preliminary ruling. The referring court seeks to ascertain whether the pension scheme under the Valtion eläkelaki (State Pensions Law) falls within the scope of Article 141 EC or of Council Directive 79/7/EEC on the progressive implementation of the principle of equal treatment for men and women in matters of social security. [2] In the case of the Treaty provision, the principle of equal treatment applies without exception whilst, in accordance with Article 7 of Directive 79/7/EEC, the directive is without prejudice to the right of Member States to exclude from its scope the determination of pensionable age for the purposes of granting old-age pensions. Member States are accordingly free to maintain a different pensionable age for men and women. This particular case concerns a transitional arrangement for persons employed in the defence forces which stipulates a different retirement age for men and women. On reaching retirement age, such persons are entitled to receive a pension.

II — Legal framework

A — *Relevant Community legislation*

2. Article 119 of the EC Treaty (Articles 117 to 120 of the EC Treaty have been replaced by Articles 136 EC to 143 EC) originally read as follows: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.

1 — Original language: German.

2 — Council Directive of 19 December 1978, OJ 1979 L 6, p. 24.

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. Following amendment and renumbering by the Treaty of Amsterdam in 1997, that provision became Article 141 EC. Article 141(1) and the first sentence of Article 141(2) EC read:

'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...'.

The second sentence of Article 141(2) EC is identical to the second sentence of the second paragraph of Article 119 of the EC Treaty.

4. Protocol No 2 on Article 119, the 'Barber Protocol', was annexed to the EC Treaty by the Maastricht Treaty. The protocol reads:

'For the purposes of Article 119 of this Treaty, benefits under occupational social security schemes shall not be considered as remuneration if and in so far as they are attributable to periods of employment prior to 17 May 1990, except in the case of

workers or those claiming under them who have before that date initiated legal proceedings or introduced an equivalent claim under the applicable national law.'

5. 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 [3] (hereinafter: Directive 79/7/EEC).

6. Article 3 reads:

'1. This Directive shall apply to:

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

— sickness,

— invalidity,

— old age,

— accidents at work and occupational diseases,

— unemployment;

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

2. ...

3. ...'

7. Article 4 of the directive reads:

'1. The principle of equal treatment means that there shall be no discrimination whatsoever on grounds 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,

3 — OJ 1979 L 6, p. 24.

— the obligation to contribute and the calculation of contributions,

(c) ...

(d) ...

— 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.

(e) ...

...'

2. ...'

8. Article 7(1)(a) reads:

'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;

...

9. Article 5(1) of Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions [4] reads:

'Application of the principle of equal treatment with regard to working conditions, including the conditions governing dismissal, means that men and women shall be guaranteed the same conditions without discrimination on grounds of sex.'

B — *National legislation*

10. The referring court describes the pension scheme at issue as follows: Before the

4 — Council Directive of 9 February 1976, OJ 1976 L 39, p. 40.

Valtion eläkelaki was enacted in 1966, the State was responsible for the livelihood of its public servants even after termination of their service. Previously better than employment pensions in the private sector, the pension benefits under the Valtion eläkelaki have since 1993 corresponded to them. Employment pension schemes in the private sector are likewise governed by statute. In Finland, all employment is compulsorily covered by a statutory employment pension scheme.

11. Persons in an official or employment relationship with the State are covered by the pension scheme under the Valtion eläkelaki. The amount of the pension under the Valtion eläkelaki is determined on the basis of years of employment and established income level. Each year of employment increases the pension by 1.5%. The established income level is determined on the basis of the income earned during the last years of employment. The general pensionable age under the Valtion eläkelaki now stands at 65.

12. For certain categories of workers, however, a pensionable age lower than that general pensionable age has been laid down. Such a pensionable age lower than the general pensionable age is laid down in the legislation concerning the relevant department or establishment. The following arrangements are or were respectively in place as regards the defence forces: Previously, persons enlisted in those forces were covered by a pension scheme in which the retirement age for women was 60 and for men 50. The scheme was amended by a law of 1994 with effect from 1 January 1995. Under the scheme now in force, the posts of persons employed in the Finnish army are classified according to the nature of their respective functions, neutrally as regards sex, as professional military posts and civilian posts. In professional military posts the retirement age is 55, and in civilian posts 65, irrespective of sex in both instances. At retirement age, these employees must leave the service and are subsequently entitled to receive a pension. In practice, retirement age is the same as pensionable age. The new pension scheme applies to service relationships which began on or after 1 January 1995.

13. For service relationships which began before 1 January 1995, as in the case at issue here, retirement age is determined in accordance with special transitional provisions. Under those transitional provisions, the retirement age in such earlier service relationships for men employed in the defence forces is 50 to 55 and for women 60. However, regardless of sex, persons who began their service before 1 January 1995 are entitled to a pension where their length of service in such posts is at least 30 years.

14. The parties to the proceedings are agreed that the following provisions are

applicable: Paragraph 4 and Paragraph 8(1)(2) and (4) of the Valtion eläkelaki in the version of Law No 1994/638 of 15 July 1994, Paragraph 56(1)(3) of the Asetus puolustusvoimista (Regulation on the defence forces) and the implementing provisions of Regulation No 1994/1032 of 28 November 1994 amending the abovementioned regulation (hereinafter: Regulation No 1994/1032).

15. The substance of those provisions is as follows:

The first sentence of Paragraph 4(1) of the Valtion eläkelaki sets pensionable age at 65.

Under Paragraph 8(1)(2) and (4) of that law, it is not essential, however, to reach pensionable age in order to qualify for a pension. Under those provisions, a pension is awarded

— where a public servant employed as a border protection officer or as a professional soldier in the defence forces has, on reaching the age of 55, completed at least 30 pensionable years in such a post, including a minimum of six months' uninterrupted service directly before leaving the service or three years in the course of the last five years prior to leaving the service;

— where the beneficiary *has reached retirement age.* [5]

16. Under Paragraph 56(1)(3) of the Asetus puolustusvoimista, the retirement age for public servants is ordinarily set at 65. However, for employees in the defence forces who have performed certain functions described in detail in the abovementioned regulations, for instance professional soldiers, the retirement age is 55. The implementing provisions of Regulation No 1994/1032 provide for a derogation from the retirement age set at 55.

III — Facts and main proceedings

17. In the main proceedings Mrs Niemi (hereinafter: the claimant) is seeking clarification as to the age from which she is entitled to an old-age pension. Since

5 — Emphasis added.

1 April 1969 she has been enlisted in the service of the Finnish defence forces and is therefore covered by the pension scheme under the Valtion eläkelaki. Her retirement age is determined in accordance with the Asetus puolustusvoimista,[6] more specifically by way of the transitional provisions laid down in Regulation No 1994/1032.[7]

18. To obtain clarification on her pensionable age, Mrs Niemi applied to the Valtiokonttori (State Treasury), the department responsible for implementing the Valtion eläkelaki, for a binding advance ruling on the age from which she would be entitled, on the basis of her years of service, to receive a pension. An advance ruling of that kind is binding on a pension decision made in respect of the person who is the subject of that advance ruling.

19. On 26 April 1995 the Valtiokonttori issued a decision in which it took the view that the claimant was not entitled to receive a pension until she had reached the retirement age of 60 years. She turned 60 on 1 November 1998. According to the Valtiokonttori's decision, she was entitled to receive a pension as from 1 December 1998. She would have completed 30 years of service on 31 March 1999. The claimant appealed against that decision.

6 — See point 16 above.

7 — Regulation No 1994/1032 of 28 November 1994.

IV — The preliminary ruling procedure

20. The referring court considers that the pension scheme at issue is not contrary to Finnish national law. However, it is uncertain in its view whether a pension payable under the Valtion eläkelaki falls within the scope of Article 141 EC and whether the pension scheme at issue might be contrary to the prohibition of discrimination laid down in that article.

21. The Vakuutusoikeus refers to the judgment of the Court of 28 September 1994 in Case C-7/93 *Beune*.[8] In that judgment the Court had held that a pension scheme resembling the scheme governed by the Valtion eläkelaki fell within the scope of Article 141 EC.

22. The Finnish employment pension scheme, according to the referring court, as a statutory and compulsory insurance scheme, covers all occupational activities, in both the public and the private sector, including activities as a self-employed person. It differs from almost all other employment pension schemes operating in the countries of the European Community because it statutorily covers all of the abovementioned activities.

8 — [1994] ECR I-4471.

23. On account of the special features of the Finnish employment pension scheme and the difference between the Finnish and Netherlands employment pension schemes which was the subject-matter of the judgment in *Beune*, it was uncertain, according to the referring court, whether the Court's decision in *Beune* [9] was to be construed in such as way that it could be regarded as corresponding to the present case, and whether the provisions of the EC Treaty could be interpreted likewise in this case as they were in that case.

24. The Vakuutusoikeus has therefore referred the following question for a preliminary ruling:

Does the pension scheme under the Valtion eläkelaki fall within the scope of Article 141 EC or of Council Directive 79/7/EEC?

25. The *claimant*, the Finnish Government and the Commission have submitted observations in these proceedings before the Court.

9 — Cited in footnote 8.

V — Observations of the participants in the proceedings

26. The *claimant* first points to the fact that the Valtion eläkelaki *per se* does not contain any discrimination in respect of pensionable age. However, regulations subordinate to that law provide for a scheme under which discriminatory retirement ages are applied. [10] For men enlisted in the service of the defence forces as at 31 December 1994 who on 1 January 1995 had become military professionals, retirement age was between 50 and 55. When calculating a person's years of service, not only the years spent in military posts but also those spent as a civilian in the public service are taken into account. However, in otherwise identical circumstances, the retirement age for female members of the professional military is invariably 60. A uniform retirement age of 55 applies only to military professionals recruited after 1 January 1995.

27. The claimant submits that the retirement age set by the regulations concerning military professionals determines when they must leave the service. On reaching retirement age, those persons have to retire

10 — The regulations concerned are Regulation No 1994/1032 of 28 November 1994 amending the Asetus puolustusvoimista (Regulations on the defence forces) which entered into force on 1 December 1994; the provisions which are relevant in this case did not enter into force until 1 January 1995.

from service and are then entitled to receive the pension benefits accumulated during their years of service. After retiring, they are entitled to take up other employment, with a private employer for instance, in which case they will be drawing a pension and a salary concurrently.

28. In order to illustrate her argument, the claimant describes the respective situations of a man and a woman, each serving as military professionals and sharing the same career path, which show clearly, she submits, that men serving in such posts may, on otherwise equal terms, retire on a pension 10 years earlier in some cases than their female counterparts. The sole basis for that distinction is sex. From 1 December 1997 at the latest, such discrimination on grounds of sex has been also contrary to Finnish law.

29. The retirement age for military professionals is a fundamental condition of service and the accompanying pension is a benefit comparable with pay. That benefit falls within the scope of Article 141 EC.

30. Irrespective of whether one prefers to regard the requirement to leave the service on reaching retirement age as an advantage or a disadvantage, discrimination as between male and female military professionals is contrary to Community law.[11] The claimant refers in this regard to the judgment of the Court of 26 February 1986 in *Marshall*.[12]

31. The *Finnish Government* first describes the Finnish pension scheme as part of the statutory social security scheme: State pensions, which are essentially regulated by the Valtion eläkelaki, form part of the general employment pension scheme, to which persons employed in the defence forces are also closely linked. Employment pensions, along with national pensions, are one of the pillars of social security in Finland. The Finnish Government states that employment pensions provide a basic level of protection for employed and self-employed persons. National pensions on the other hand are paid only to persons receiving a very small pension on account of the duration of their employment or to those who have never been in gainful employment.

32. The employment pension scheme is, according to the Finnish Government, a self-contained, comprehensive package, and membership of it is compulsory. A person's entire employment record is always taken into account in determining the amount of pension payable.

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

12 — Case 152/84 *Marshall* v *Southampton and South-West Hampshire Area Health Authority* ('*Teaching*') [1986] ECR 723.

33. Pension schemes are financed by slightly different methods depending on whether they are State, municipality, or private-sector pension schemes. These schemes share a common feature in that they all involve the payment of contributions by employers and employees alike. Contributions are levied when salaries are paid. 4.5% is the uniform rate payable by all employees. There is no connection between the contributions paid and the pension subsequently received.

34. Pensions are, according to the Finnish Government, paid out of the national budget. However, to make provision for financing pensions in the future, employees' and employers' contributions are paid into a State pension fund separate from the budget. Every year money is transferred from the fund to the national budget in order to cover the pension costs. The costs are approximately 2.5 times the revenue from the fund. The greater proportion of the costs is, therefore, borne directly by the national budget.

35. Persons employed in the defence forces are covered by a scheme corresponding to the Valtion eläkelaki. Apart from a few particular features reflecting the special nature of their duties, only their pensionable age and the amount of pension received are different. In the military profession, pensionable age is 55 provided that the beneficiary has completed at least 30 years' service since the age of 22. Prior to the 1993 and 1995 reforms, there had been no general pensionable age. Pension claimants were entitled to draw a pension if they had completed a certain number of years of service (usually 20 or 25).

36. According to the Finnish Government, pensionable age in the defence forces is determined on the basis of the functions performed. It is lower than the general pensionable age for public servants and lower than the age at which claimants are entitled to an old-age pension. The respective retirement ages are laid down in the legislation relating to the departments and institutions concerned. There is, therefore, no direct relationship between retirement age and general pensionable age; retirement age is the age at which the individual concerned has to leave the service. As persons who have reached retirement age can no longer serve, they are entitled to receive a pension corresponding to the length of their service.

37. As regards the transitional arrangement [13] applicable in the context of the main proceedings, the Finnish Government argues that since the retirement age for men

13 — See the provisions implementing Amending Regulation No 1994/1032 of 28 November 1994.

has been set at between 50 and 55 depending on the number of years they have served and at 60 for women, it has as a rule been raised for men whereas for women it has remained unchanged. When the transitional scheme was set up, the underlying purpose was to make it possible for beneficiaries to receive a full pension. A lowering of the retirement age for women would in most cases have resulted in a reduction in the amount of pension received. Immediate alignment of the retirement age for women with that for men would have meant that all women between the ages of 50 and 60 would have had to leave the service with immediate effect. However, women were not recruited until the 1960s, so that, for most of them, their pension would not have been a full one. In most cases they have not been entitled to a full pension even at the age of 60.

38. As regards the answer to the question referred, the Finnish Government submits that the fact that employment pensions are regulated by different laws depending on the employment sector concerned does not make the schemes under which they are paid occupational or supplementary pension schemes as defined in the case-law of the Court. [14] A pension paid under the State pension scheme is not linked to a particular employment or servic relationship; on the contrary, it encompasses all the employment or service relationships entered into. The pensions set up under the different schemes are harmonised. These are schemes based on a social-policy choice made by the public authorities which does not depend on the employment conditions of a particular person or category of persons. Such social security schemes fall within the scope of Directive 79/7/EEC.

39. Pensions paid under the State pension scheme, in the Finnish Government's submission, by no means supplement or replace a statutory pension entitlement; they play a major role in pensions insurance and are part of Finland's statutory social insurance scheme. Consequently, pensions under the Valtion eläkelaki are not pay within the meaning of Article 141 EC; on the contrary, what is concerned here is a statutory social security scheme as referred to in Directive 79/7/EEC.

40. The *Commission* examines the Finnish State pensions scheme by reference to the relevant case-law of the Court. [15] According to that case-law, a decisive criterion is whether the worker may claim his pension by reason of the employment relationship existing between him and his previous

14 — The Finnish Government is referring in this regard to *Beune* (cited in footnote 8) and to Case 170/84 *Bilka* v *Weber von Hartz* [1986] ECR 1607.

15 — See *Beune* (cited in footnote 8) and Case C-147/95 *DEI* v *Evrenopoulos* [1997] ECR I-2057, Case C-50/99 *Podesta* v *CRICA and Others* [2000] ECR I-4039, Case C-262/88 *Barber* v *Guardian Royal Exchange Assurance Group* [1990] ECR I-1889 and Joined Cases C-234/96 and C-235/96 *Deutsche Telekom* v *Vick and Conze* [2000] ECR I-799.

employer. The scheme at issue in this case is without any doubt a statutory scheme. The employment pension scheme, of which the Valtion eläkelaki forms part, is in itself statutory and compulsory. However, the benefits derived from it are based on the employment relationship alone, as is apparent from Paragraph 1 of the Valtion eläkelaki.

41. Similarly, when calculating the pensions of public servants, account has to be taken of their remuneration in its entirety. Under Paragraphs 7 and 8 of the Valtion eläkelaki, on the one hand, and under the transitional provisions, on the other, the amount of pension received is directly linked to length of service and income earned over the last four to 10 years of service. The sole fact that the average income earned over a certain period rather than the salary received over the last years before retirement is taken as the basis for calculating the pension is not, the Commission contends, sufficient to depart from the relevant case-law of the Court.

42. It is also clear, according to the Commission, that the transitional provisions which lay down different retirement ages for men and women employed in the defence forces relate to a particular category of employees. The transitional provisions relate, however, only to the retirement age which, in accordance with Paragraph 8 of the Valtion eläkelaki, entails entitlement to a pension.

43. Nor does the similarity between this scheme and the Finnish employment pension scheme in terms of their structural principles provide any reason for departing from the Court's case-law. The Commission considers that a Finnish public servant is entitled to a pension solely by reason of his service relationship. The differences, mentioned in the order for reference, between the Netherlands civil-service pension scheme, which was the subject of *Beune*,[16] and the Finnish State pension scheme are insufficient to remove the Finnish scheme from the scope of Article 141 EC and bring it within the scope of Directive 79/7/EEC. Finnish State pensions are therefore to be regarded as pay or any other consideration within the meaning of Article 141 EC.

44. As far as the temporal scope of Article 141 EC in this case is concerned, the Commission refers to the 'Barber Protocol'. Rather than 17 May 1990 referred to in that protocol, 1 January 1994, that is to say the date of Finland's accession to the European Economic Area, is to be regarded as the date of applicability.

16 — See footnote 8.

VI — Assessment

45. The referring court seeks to ascertain whether the pension arrangement under the Valtion eläkelaki falls within the scope of Article 141 EC or Directive 79/7/EEC. For the purpose of answering that question, it is necessary to clarify whether pensions under that Finnish State pensions law are to be regarded as 'pay' within the meaning of Article 141 EC or as benefits of a statutory social security scheme which provides protection against the risk of old age. [17]

46. Both Article 141 EC and Directive 79/7/EEC are an expression of the prohibition under Community law of discrimination on grounds of sex. Under Article 7(1)(a) of Directive 79/7/EEC, that directive is nevertheless without prejudice to the right of Member States to exclude from its scope 'the determination of pensionable age for the purposes of granting old-age and retirement pensions and the possible consequences thereof for other benefits'. In taking the view that the Valtion eläkelaki falls within the scope of Directive 79/7/EEC, the Finnish Government is implicitly referring to that derogation.

47. However, the derogation could apply to that pension scheme only if it were a statutory scheme providing protection against the risk of old age for the purposes of the directive and if the retirement age at issue in these proceedings which differs according to the sex of the worker were the pensionable age specified in the Valtion eläkelaki. The pensionable age directly laid down in the Valtion eläkelaki is, none the less, indisputably neutral in terms of sex.

48. The particularity of the case lies first in the fact that the retirement age which differs according to sex is contained in a transitional provision, that is to say in a regulation, and secondly in the fact that that transitional provision governs the age at which military professionals must be discharged, not pensionable age. The entitlement to a pension, regulated by statute elsewhere, is the consequence of a decision by the legislature to entitle those persons to a pension even before they have reached the pensionable age laid down in the Valtion eläkelaki.

49. The question therefore arises as to whether the different retirement ages for men and women set out in the transitional provisions are to be regarded as 'conditions governing dismissal' to which, depending on the circumstances, Article 5 of Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions is to be applied. That provision expressly provides that application of the principle of equal treatment also includes the conditions governing dismissal.

17 — See Article 3 of Directive 79/7/EEC and the third recital in the preamble to that directive.

50. However, it must be borne in mind that in this case leaving the service, according to the claimant, is linked to entitlement to a pension from a factual, legal and economic viewpoint. Her wish is to leave the service, not without entitlement to a pension, but on the same conditions and with the same financial benefits as those available to male military professionals. Thus, the referring court has expressly pointed out that the compulsory retirement age is, in practice, the same as pensionable age. Given, therefore, that this dispute in effect concerns retirement from the service concurrently with the grant of a pension, the principle of equal pay laid down by Article 141 EC must first be examined.

51. Under Article 141(1) EC each Member State is to ensure that the principle of equal pay for male and female workers for equal work or work of equal value is applied. The starting point for comparing the claimant's situation with that of a male colleague in terms of the work done is exactly the same. It is for that reason that, in her observations, the claimant expressly takes the example of wholly comparable careers of a man and woman, both of whom are military professionals but whose respective retirement ages are different.

52. Since retirement from the service as a result of his reaching retirement age also and specifically entails receipt of a pension, and thus a monetary benefit, it must be considered whether that benefit is 'pay' within the meaning of Article 141 EC. Notwithstanding the conditions governing access to the benefit, which can be left aside for the moment, the benefit must consequently be categorised in the light of the State Pensions Law.

53. Article 141(2) EC defines 'pay' as 'the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives directly or indirectly, in respect of his employment, from his employer'. Since this case relates to a retirement benefit rather than to remuneration received in respect of an active employment relationship, what is concerned here can be nothing other than 'other consideration' received by the worker from the employer in respect of his employment.

54. The Court has consistently held that although consideration which by its nature encompasses social security benefits is not in principle alien to the concept of pay, that concept cannot encompass social security schemes or benefits, in particular retirement pensions, directly governed by statute to the exclusion of any element of agreement within the undertaking or occupational sector concerned, which are com-

pulsorily applicable to general categories of workers. Such schemes guarantee workers the benefit of a statutory scheme to which workers, employers and in some cases the public authorities contribute financially to an extent determined less by the employment relationship between the employer and the worker than by considerations of social policy. [18]

55. In its previous decisions the Court had to categorise both the Netherlands civil service pension scheme [19] and the French civil and military retirement pension scheme. [20] In spite of the various differences in the structure of the two schemes, it came to the conclusion in both cases that the benefits under both schemes were 'pay' within the meaning of Article 119 of the EC Treaty or Article 141 EC. In particular, in its judgment in *Beune*, [21] which must be regarded as fundamental, the Court provided a synopsis of the constituent elements of the concept of pay, as they could be inferred from its previous judgments, and distinguished between them and the benefit schemes falling under Directive 79/7/EEC.

56. Categorisation of the benefits in point in this case therefore turns above all on the extent to which those benefits differ from those assessed in *Beune* [22] and *Griesmar*. [23] It will then be necessary to examine whether as a result of such differences, if any are found to exist, the benefits at issue are to be categorised differently.

57. In categorising the benefit in point in *Beune*, the Court held that a statutory basis alone was not sufficient to exclude a benefit from the scope of Article 119 of the EEC Treaty. [24] However, the criterion of negotiation between employers and employees' representatives was satisfied only if it resulted in a formal agreement. Similarly in the civil service there were consultation procedures which did not necessarily culminate in an agreement. [25] Applicability of Article 119 of the EEC Treaty did not depend on whether the benefit concerned was *supplementary*. [26] With regard to the funding of the scheme, the Court held that the pension scheme was indeed managed independently in accordance with rules

18 — For the first time, in Case 80/70 *Defrenne* v *Belgium* [1971] ECR 445, paragraph 7 et seq.; see also *Bilka* (cited in footnote 14, at paragraph 17 et seq.), *Barber* (cited in footnote 15, at paragraph 22 et seq.) and *Beune* (cited in footnote 8, at paragraph 24) as well as Case C-366/99 *Griesmar* v *Ministre de l'Economie, des Finances et de l'Industrie et Ministre de la Fonction publique, de la Réforme de l'Etat et de la Décentralisation* [2001] ECR I-9383, paragraph 27.

19 — See *Beune* (cited in footnote 8).

20 — See *Griesmar* (cited in footnote 18) and Case C-206/00 *Mouflin* v *Recteur de l'académie de Reims* [2001] ECR I-10201.

21 — Cited in footnote 8.

22 — Cited in footnote 8.

23 — Cited in footnote 18.

24 — See paragraph 26 of the judgment (cited in footnote 8).

25 — See paragraph 32 of the judgment (cited in footnote 8).

26 — See paragraph 37 of the judgment (cited in footnote 8).

similar to those applicable to occupational pension funds. Those characteristics did not substantially distinguish it from schemes covered by Directive 79/7/EEC. [27] In that respect it was also significant that the State could make additional contributions. [28]

58. The Court acknowledges that 'the term "general categories of workers" can "hardly be applied to a particular group of employees such as civil servants"'. [29]

59. The only decisive criterion was ultimately 'whether the pension is paid to the worker by reason of the employment relationship between him and his former employer'. [30] The pension, which 'concerns only a particular category of workers,... is directly related to the period of service and... [the] amount [of which] is calculated by reference to the civil servant's last salary', [31] was a pension paid by the public employer which was entirely comparable to that paid by a private employer to his former employees [32] and was therefore to be regarded as 'pay' within the meaning of Article 119 of the EEC Treaty.

60. The Court reaffirmed that line of authority in its judgment in *Evrenopoulos*. [33] That case concerned classification of a pension scheme for employees in the service of a State body. [34] It was set up and governed exclusively by statute. Applying the principles laid down in *Beune*, [35] the Court regarded a survivor's pension under that 'occupational pension scheme' [36] as 'pay' within the meaning of Article 119 of the EC Treaty.

61. In the judgment in *Griesmar* [37] the Court again summarised the essential criteria for characterising a pension scheme. First the Court stated that it had pointed out in *Beune* [38] 'that, of the criteria for characterising a pension scheme which it had adopted on the basis of the situations that had been brought before it, 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

27 — See paragraph 39 of the judgment (cited in footnote 8).
28 — See paragraph 40 of the judgment (cited in footnote 8).
29 — See paragraph 42 of the judgment (cited in footnote 8).
30 — See paragraph 43 of the judgment (cited in footnote 8).
31 — See paragraph 45 of the judgment (cited in footnote 8).
32 — See paragraph 45 of the judgment (cited in footnote 8).
33 — Case C-147/95 *DEI* v *Evrenopoulos* (cited in footnote 15).
34 — See paragraph 3 of the judgment (cited in footnote 15).
35 — See paragraph 19 et seq. of the judgment (cited in footnote 8).
36 — See paragraph 22 of the judgment (cited in footnote 15).
37 — Cited in footnote 18.
38 — Cited in footnote 8; see, in that judgment, paragraphs 23 and 24.

criterion of *employment* based on the actual wording of Article 119 of the Treaty'.[39] The Court accepted that that criterion could not be regarded as exclusive, inasmuch as pensions paid by statutory social security schemes might reflect, wholly or in part, pay in respect of work.[40]

62. The Court nevertheless went on as follows: 'However, considerations of social policy, of State organisation, of ethics, or even the budgetary concerns which influenced, or may have influenced, the establishment of a scheme by the national legislature cannot prevail *if the pension concerns only a particular category of workers, if it is directly related to the period of service and if its amount is calculated by reference to the civil servant's last salary.*'[41] The pension paid by the public employer was in that case entirely comparable to that paid by a private employer to his former employees.[42]

63. The Court has thus developed a functional conception of retirement benefits. Under that conception the primary consideration is the connection between the employment relationship and the retirement benefit and no longer the structural principles of the system of benefit. In that respect, the Court's decisions since *Beune*, in which it acknowledged for the first time that the employment relationship was the decisive criterion,[43] could be construed as a reversal, albeit not explicit, of the earlier case-law. That functional approach will be taken as the basis for the following considerations.

64. The pension scheme applicable in this case is based, at least in terms of its defining principles as laid down in the Valtion eläkelaki, on statute. The legal provisions by means of which that scheme is applied to persons employed in the defence forces[44] are, admittedly, of a lower rank than a statute. However, what is concerned is enacted law as opposed to a formal agreement between the employer and employees' representatives. The scheme is, moreover, a compulsory one. As the participants in these proceedings, all agree, all employees are in one way or another affiliated to the Finnish employment pension scheme. What is more, this scheme does not involve a supplementary pension benefit. These considerations appear to bear out the view held by the Finnish Government that the scheme

39 — See paragraph 28 of the judgment in *Griesmar* (cited in footnote 18); emphasis added.

40 — See paragraph 29 of the judgment.

41 — See paragraph 30 of the judgment; emphasis added.

42 — See paragraph 30 of the judgment.

43 — See paragraph 43 of the judgment in *Beune* (cited in footnote 8).

44 — See the Asetus puolustusvoimista and the provisions implementing Amending Regulation No 1994/1032 of 28 November 1994.

falls within the scope of Directive 79/7/EEC.

65. However, the schemes which the Court had to assess in *Beune* and *Griesmar*[45] were also based on statute. They, too, were compulsory schemes. Whilst *Beune* concerned a supplementary pension, the French civil service retirement pension scheme which was the subject of *Griesmar* involved a basic pension. The structure of the civil service pension schemes operating in the Netherlands and Finland seems to be fundamentally different. Whilst on the one hand persons employed in the Netherlands civil service likewise are in the first place paid a basic pension under a general scheme which is then topped up with a supplementary pension, in Finland on the other hand employment pensions, according to the Finnish Government, form the basic pension which can in some cases[46] be supplemented by a national pension.

66. The fact that the civil service retirement pensions at issue in *Griesmar* is a basic pension did not prevent the Court from bringing the benefits under that scheme within the scope of Article 141 EC. It must therefore be assumed that the characterising features of the public service pension scheme to be assessed in this case, that is to say a compulsory, statutory scheme providing a basic pension, do not in principle exclude such a pension from the scope of Article 141 EC.

67. There are fundamental structural differences in terms of funding between the schemes at issue in *Beune* and *Griesmar*. Whilst the French civil service retirement pension scheme is funded in its entirety out of the State budget, the Netherlands supplementary pension scheme opts for funding through a separate fund, a solution nevertheless similar in a number of respects to the organisation of an occupational pension fund.

68. The Finnish option occupies the middle ground between those two different types of arrangement. Whilst a State pension fund is financed to begin with by employers and employees to make provision for the subsequent funding of pensions, the State pensions are, according to the Finnish Government, paid out of the State budget, to which money is transferred on an annual basis from the pension fund.

45 — *Beune* (cited in footnote 8) and *Griesmar* (cited in footnote 18).

46 — If the income from an employment pension is too low.

69. The manner in which pensions are funded cannot ultimately be the decisive criterion since in *Beune* and *Griesmar* the Court acknowledged the two very different types of arrangement and in neither case found any obstacle to the the benefits falling within the scope of Article 141 EC. Therefore the manner in which the Finnish State pension scheme is funded, which is an almost equal mix of the two methods of funding, cannot prevent the benefits from being assessed in the light of Article 141 EC. What is remarkable, however, in the Finnish State pension scheme, is that the State as employer, while paying the pensions out of the State budget, holds itself directly responsible for funding those pensions.

70. There can be no denying the fact that in the Valtion eläkelaki, as described in these proceedings, the pension scheme is established for all persons employed by the State, although access to the benefit is acquired by means of specific legislative instruments governing the individual situations of objectively defined categories of employees. In the claimant's case, the Valtion eläkelaki is applied by means of the Asetus puolustusvoimista together with the provisions implementing Amending Regulation No 1994/1032 of 28 November 1994. In that context the different retirement ages for male and female employees, which have given rise to the present disputes, result exclusively from the provisions applying specifically to persons employed in the defence forces.

71. Consequently it is not the Valtion eläkelaki as such which is really at issue, but the special provisions which apply to persons employed in the defence forces. Given that the Court has, with regard to civil servants, already held in *Griesmar* that they 'must be regarded as constituting a particular category of workers, they are distinguished from the employees grouped within an undertaking or group of undertakings in a particular sector of the economy, or in a trade or inter-trade sector, only by reason of the specific features governing their employment relationship with the State, or with other public employers or bodies',[47] the same must apply *a fortiori* to the much more specific category of employees of the defence forces.

72. The provisions applying to persons employed in the defence forces cover both military and civilian posts. Those provisions describe a category of employees characterised by the fact that they are in an employment relationship with one and the same employer, that is to say the defence forces. They are distinguished from all other employees, even from other State employees, by reason of that specific feature of their employment relationships.

47 — See *Griesmar*, paragraph 31 (cited in footnote 18).

73. That view is supported by the fact that, in respect of that category of State employees, special provisions concerning retirement age apply in addition. Those special provisions, which contain a derogation from the general provisions laid down in the Valtion eläkelaki, distinguish these service relationships from those of other employees of the State or of public bodies.

74. Inasmuch as the Court, in *Griesmar*, characterised pensions as 'remuneration for the services performed by civil servants until their retirement from the service', [48] the question arises whether the pensions of persons employed in the Finnish defence forces may also be regarded as 'remuneration for the services performed [by them]'.

75. Just as the Finnish Government has maintained clearly and plainly that the pensions under the Valtion eläkelaki are not based on a special employment relationship, the Commission has maintained, in equally unambiguous terms, that the opposite is true. The referring court, the Finnish Government and the claimant have all submitted that the employment pension scheme in Finland takes into consideration a person's entire employment record. In contrast, when pensions under the Valtion eläkelaki are calculated, account is taken only of employment relationships with the State or with a number of public bodies.

76. Depending on the course taken by a person's employment career, the employment relationship with the defence forces alone is not the determining factor for the grant of a pension. Any other years of employment completed as a civilian in the service of the State are also taken into consideration. As far as calculating pensions is concerned, both the referring court and the Commission have stated that the amount of the pension is determined on the basis of the length of service and the income earned in the last years of employment. The Commission went into greater detail on that matter, pointing out that earnings over the last four to 10 years of service are taken as a basis for calculation.

77. In the light of those circumstances it can be considered that the pensions under the Valtion eläkelaki are granted in remuneration for the services performed by State employees until their retirement from the service. In that regard, the amount of the pensions takes account of the level, duration and nature of the services performed. [49] The pensions provided under the Valtion eläkelaki are therefore determined by length of service and their amount is calculated on the basis of the salary which the person concerned received during his or her final years at work. Consequently, such pensions satisfy the

48 — See paragraph 32 of the judgment (cited in footnote 18).

49 — For a comparable finding in relation to the pensions at issue in *Griesmar*, see paragraph 32 of the judgment in that case (cited in footnote 18).

criterion of employment which the Court, in *Beune* and *Griesmar*, held to be decisive for the purpose of characterising, with respect to Article 141 EC, pensions provided under a retirement scheme for civil servants. [50] Pensions under the Valtion eläkelaki are consequently to be regarded as 'pay' within the meaning of that Treaty provision.

78. If, therefore, the pensions under the Valtion eläkelaki fall within the scope of Article 141 EC, that means that different conditions governing access to pay for men and women in otherwise identical circumstances infringe the principle of equal pay. It is significant in this regard that the reforms of the pension scheme carried out in the 1990s removed previous inequalities in treatment and established a non-discriminatory scheme. However, different retirement ages were introduced by the transitional provisions. Such discrimination on grounds of sex, anchored in that way in the conditions governing access to benefit, is contrary to Article 141 EC.

79. The functional approach underlying the line of argument [51] developed above presupposes the structural principles of pension schemes have taken second place. The Finnish Government's argument that under the Valtion eläkelaki a statutory social security scheme is concerned from the point of view of Regulation (EEC) No 1408/71 [52] cannot, therefore, in the light of the Court's case-law in *Beune* and *Griesmar*, in any way alter the nature of the benefits as pay. [53]

80. Should the Court none the less conclude that the benefits under the Valtion eläkelaki are not to be regarded as pay within the meaning of Article 141 EC, it will then be necessary to examine the different retirement ages for men and women contained in the implementing provisions of the regulations amending the Asetus puolustusvoimista in the light of Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions.

81. As is already made clear in its title, that directive concerns the implementation of the principle of equal treatment as regards employment conditions. The principle also applies to employment relationships in the

50 — See *Griesmar*, paragraphs 34 and 35 (cited in footnote 18).

51 — See point 63 above.

52 — Council 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, as amended and updated by Council Regulation (EC) No 118/97 (OJ 1997 L 28, p. 1).

53 — See *Beune* (cited in footnote 8) and *Griesmar* (cited in footnote 18); see, in addition, *Mouflin* (cited in footnote 20).

public service.[54] Article 5 of Directive 76/207/EEC expressly provides that application of that principle also covers the conditions governing dismissal. Given that the different retirement ages for male and female military professionals partake of the nature of a condition governing dismissal, that difference is contrary to Directive 76/207/EEC in so far as it constitutes prohibited discrimination on grounds of sex.

82. The fact that in this case what is concerned is, specifically, not the general pensionable age laid down in the Valtion eläkelaki is of fundamental importance in that regard. The distinction in law between retirement age which differs according to employment sector and the general, statutory pensionable age laid down in the Valtion eläkelaki makes it possible to characterise pensionable age as a condition governing dismissal within the meaning of Directive 76/207/EEC.

83. The parties have not submitted any observations with regard to whether the Finnish legislature could, relying on Article 7(1)(a) of Directive 79/7/EEC, have maintained a different pensionable age for men and women in the Valtion eläkelaki. Nor is an answer to that question necessary in the light of the answer proposed here. It is, in any case, an entirely hypothetical question as the Valtion eläkelaki lays down a pensionable age without any discrimination.

84. In the result, the question referred by the Vakuutusoikeus should be answered to the effect that the pension scheme under the Valtion eläkelaki falls within the scope of Article 141 EC.

85. As regards any retroactive effect of the implications of the judgment in this case, it should be pointed out that the relevant provisions of Community law are applicable as from Finland's accession to the European Economic Area, that is to say as from 1 January 1994. The 'Barber Protocol' would to that extent at most be indirectly applicable.

Costs

86. The preliminary ruling procedure is by its nature a step in the proceedings before the national court. It does not give rise to court costs. The decision as to costs is a matter for the national court.

54 — See *Marshall* (cited in footnote 12).

VII — Conclusion

87. In the light of the foregoing considerations I propose that the question referred for a preliminary ruling be answered as follows:

The pension scheme under the Valtion eläkelaki falls within the scope of Article 141 EC.