OPINION OF ADVOCATE GENERAL GEELHOED

delivered on 14 March 2002 [1]

I — Introduction

1. The question central to the present case is whether female employees who, following a competitive tendering procedure by the tendering body for which they worked, were transferred to the employers to whom the tender was awarded, argue in support of a claim for equal pay for men and women brought against their present employers may be compared with male comparators working for their previous employer.

II — The legal framework

A — *Community law*

2. The principle of equal pay for male and female workers for equal work or work of equal value is set out in Article 141 EC. The first subparagraph of Article 141(2) EC provides:

'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.'

3. The first paragraph of Article 1 of Council Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women [2] provides:

'The principle of equal pay for men and women outlined in Article 119 [3] of the

1 — Original language: Dutch.

2 — OJ 1975 L 45 of 19 February 1975, p. 19.

3 — Now, after amendment, Article 141 EC.

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

4. Council Directive 77/187/EEC of 14 February 1977 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses, [4] amended by Directive 98/50/EC, [5] applies to the transfer of an undertaking, business or part of a business to another employer as a result of a legal transfer or merger. Article 3(1) provides that the transferor's rights and obligations arising from a contract of employment or from an employment relationship existing on the date of a transfer are, by reason of such transfer, to be transferred to the transferee.

Article 3(2) provides:

'Following the transfer within the meaning of Article 1(1), the transferee shall continue to observe the terms and conditions agreed in any collective agreement on the same terms applicable to the transferor under that agreement, until the date of termination or expiry of the collective agreement or the entry into force or application of another collective agreement.

Member States may limit the period for observing such terms and conditions, with the provision that it shall not be less than one year.'

B — *National law*

5. In the United Kingdom, the principle of equal pay is enshrined in the Equal Pay Act 1970 ('the 1970 Act'). Section 1(2) of the 1970 Act provides that a woman employed on like work with a man 'in the same employment' or on work rated as equivalent with that of such a man is entitled to the modification of any term in her contract of employment which is or becomes less favourable than a comparable term in the contract under which her male comparator is employed.

6. Section 1(3) provides that the employer has a defence to a claim if he proves that the variation between the woman's contract and the man's contract is genuinely attributable to a material factor other than the difference in sex.

4 — OJ 1977 L 61 of 5 March 1977, p. 26.

5 — Council Directive 98/50/EC of 29 June 1998 amending Directive 77/187/EEC on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses (OJ 1998 L 201 of 17 July 1998, p. 88).

7. The term 'in the same employment' is defined as follows in section 1(6)(c):

'[T]wo employers are to be treated as associated if one is a company of which the other (directly or indirectly) has control or if both are companies of which a third person (directly or indirectly) has control, and men shall be treated as in the same employment with a woman if they are men employed by her employer or any associated employer at the same establishment or at establishments in Great Britain which include that one and at which common terms and conditions of employment are observed either generally or for employees of the relevant classes.'

III — Facts and procedure

8. Regent Office Care Ltd, Commercial Catering Group and Mitie Secure Services Ltd — the respondents in the main proceedings — provide catering and cleaning services in school and educational institutions on behalf of North Yorkshire County Council ('the Council').

9. Up to the end of the 1980s school meals for pupils and the cleaning of school premises were provided by employees of the Council. However, as a result of the Local Government Act 1988, the Council was required thereafter to put those services out to competitive tender.

10. In order that the Council could enable its 'own' services also to participate in the competitive tendering procedure, an internal independent 'direct service organisation' (DSO) was set up. This DSO was able to take part in the tendering procedure on an equal footing with private caterers and private cleaning services.

11. In order to improve the DSO's prospects in the tendering procedure, the Council, which remained the employer, reduced the pay of the DSO's employees. [6]

12. The employees affected thereupon brought an equal pay claim under the 1970 Act against their employer, the Council. In this connection they used the Council's male employees as comparators. A job evaluation study carried out in 1987, which was also accepted by the Council, con-

6 — The competitors employed exclusively women, and at lower rates of pay.

cluded that the work performed by the appellants was of equal value to the various jobs performed by men, such as gardening, collection of household waste and drainage maintenance.

13. The employees concerned were ultimately successful at final instance. [7] The Council's defence that lower pay for those employees was necessary to make it possible to compete in a competitive tendering procedure on an open market with commercial undertakings was rejected by the House of Lords. The House of Lords ruled that it was impossible to say that the difference in pay was genuinely due to any material factor other than the difference in sex. The female employees were entitled to compare, for equal-pay purposes, their own working conditions with those of men employed by the Council in other areas of the local government service and who, as the job evaluation study found, performed work of equal value.

14. The Council was according obliged to pay the employees concerned the amounts by which their pay had been reduced for the period during which they had continued to work for the DSO in question.

15. While the proceedings against the Council were still pending, the DSO, in a second round of tendering which took place in 1993, lost the greater part of the catering and cleaning contracts to the respondents named in point 8 above. Two of the three respondents were unaware that these transactions might come under the Transfer of Undertakings (Protection of Employment) Regulations, by which the United Kingdom had implemented Directive 77/187. The employees concerned were for that reason dismissed by the Council and subsequently re-employed by those private undertakings. The employees were thereby obliged to accept less favourable terms and conditions of employment than those which the DSO had offered them hitherto (terms and conditions which were already more unfavourable than those of 'ordinary' Council employees; the final judgment in the case of *North Yorkshire County Council* v *Ratcliffe* had not yet been delivered).

16. Commercial Catering Group alone took the view that the case did indeed involve the transfer of an undertaking. For that reason it directly employed the employees concerned without any interim dismissal.

17. A large number of employees of the private undertakings challenged the working conditions imposed on them, which were considerably more unfavourable than

7 — *North Yorkshire County Council* v *Ratcliffe* [1995] ICR 833.

those which obtained — and obtain — for equivalent work with the Council. They invoked Article 141 EC in this connection.

18. The appellants in the main proceedings roughly fall into four separate categories:

— those who were former employees of the Council and who were then immediately employed by one of the respondents;

— those employed by the Council who did not accept employment with one of the respondents, or who did accept employment with one of the respondents but left that employment more than six months before the main applications were brought;

— those employed by one of the respondents but who had never been employed by the Council;

— those who were previously employed by the Council and subsequently became employees of one of the respondents, but who did not transfer directly when the activities were transferred.

19. The first-named category of employees invoke Article 141 EC in the main proceedings only by way of alternative submission. They principally invoke Directive 77/187, as implemented in English law by the Transfer of Undertakings Regulations.

20. The interpretation and application of that directive, and *in casu* those of the Transfer of Undertakings Regulations, are, however, in no respect in issue in the present reference for a preliminary ruling.

21. The parties to the main proceedings also agreed to proceed on the basis that there is a difference, operating to the appellants' disadvantage, between their

terms and conditions of employment and those of their comparators. The parties further base themselves on the following assumptions:

a. There was a transfer of an undertaking when the relevant catering and cleaning contracts were contracted out to the respondents;

b. The jobs of the appellants were of equal value to the jobs of their chosen comparators at the dates of the respective transfers;

c. The jobs of the appellants were still of equal value to the jobs of their chosen comparators at the respective dates when their originating applications were submitted;

d. The comparators were at all material times employed by North Yorkshire County Council.

22. The proceedings brought by the appellants against their present employers before the Employment Tribunal [8] resulted, however, in a decision on 16 April 1997 against the appellants. The Employment Appeal Tribunal confirmed the findings of the Employment Tribunal and dismissed the appellants' appeal on 5 November 1998. The appellants were ultimately given leave to appeal to the Court of Appeal. They submit that, in the special circumstances of the present case, Article 141 EC gives them a directly effective right to claim, while in the employment of the respondents, pay equal to that of the male workers employed by the Council.

23. The question now before the Court of Appeal is whether, in support of their claim for equal pay as against the three respondents, the appellants can apply the terms and conditions of employment of the Council's male employees as a criterion of comparison, even though those male comparators do not work for any of the respondents.

IV — The questions submitted for preliminary ruling

24. By judgment of 20 July 2000, received at the Court Registry on 22 August 2000, the Court of Appeal of England and Wales

8 — At the time still referred to as the Industrial Tribunal.

requested a preliminary ruling on the following questions:

'1. Is Article 141 [9] directly applicable in the circumstances of this case (as set out in this judgment) so that it can be relied upon by the applicants in national proceedings to enable them to compare their pay with that of men in the employment of the North Yorkshire County Council who are performing work of equal value to that done by the applicants?

2. Can an applicant who seeks to place reliance on the direct effect of Article 141 do so only if the respondent employer is in a position where he is able to explain why the employer of the chosen comparator pays his employees as he does?'

V — Assessment

Preliminary observations

25. The facts underlying the main proceedings provide an example of the reorganisation effected within numerous public services during the 1980s and 1990s. In this connection activities which it was considered might also be carried out by private undertakings were put out to tender and privatised. The hope was that the introduction of market forces would result in cost savings and greater efficiency. The degree to which this turned out to be the case varies from one Member State to another. In the United Kingdom, the decentralised authorities, the counties, were required to contract out a wide range of activities which they had previously performed under their own management.

26. For the employees concerned, the result of this process was that they transferred from a public employment relationship to a private one. This has, as a rule, implications for their terms and conditions of employment. The legal position, remuneration and ancillary conditions of employment within the public sector tend generally to differ from those normally obtaining in the private sector. This means that the transfer from a public to a private employer may bring with it social consequences for the employees affected thereby, irrespective of whether those employees happen to be men or women.

27. Both national employment law and Community legislation have adopted provisions to address the social repercussions of such a transfer. The present case clearly involves transferred undertakings within the meaning of Directive 77/187. That directive has also been invoked in the main proceedings. It is clear from the documents on the case-file that the parties disagree as to the applicability of that directive and

9 — Article 141 EC.

that there is also disagreement as to whether that directive applies to the various categories of appellants. These issues and other potentially linked issues have, however, been distinguished in the main proceedings. The parties to the main proceedings agree that the national court should solely refer to the Court of Justice a question confined to the interpretation of Article 141 EC. In view of the fact that the Court of Appeal, in its referring judgment, expressly excludes potential questions concerning the applicability of the directive, such questions may not here be addressed.

28. The contracting-out in the present case coincidentally happens to involve a service in which many female employees are affected. Particularly from the views expressed and the arguments presented by the appellants in the main proceedings, it is evident that, in their view, the fact that the activities or services contracted out are mainly performed by women provides reasons for considering whether Article 141 EC is applicable in this case. One reason for this probably lies in the fact that Directive 77/187 certainly does not apply to all of the appellants concerned.

The appellants' arguments

29. The appellants submit that Article 141 EC continues to have direct effect wherever, on the facts of the particular case, sex discrimination in respect of pay can be identified by using the criteria of equal work and equal pay. National legislation may not in this regard create any artificial barriers. The appellants refer in this connection to section 1(6) of the 1970 Act.

30. The appellants take the view that, given the particular circumstances of this case, they ought to be allowed to use the Council's male employees as their comparators. The only thing that has been changed is the identity of the employer. They are, however, still in the 'same service' and continue to perform the same work, which has been deemed to be equivalent to the work performed by male workers employed by the Council. They argue that it follows from paragraph 23 of the judgment in *Worringham and Humphreys* [10] that persons employed in the same service may well have different employers. Although the appellants in the present case changed their respective employers, that fact, they contend, should not have any bearing on the comparability of their work and conditions of employment with those of workers who remained in the employment of the Council. Were it to have such a bearing, this would constitute a lacuna in the protection which Article 141 EC is intended to provide.

31. The appellants point out that in the competitive tendering procedure for activ-

10 — Case 69/80 *Worringham and Humphreys* v *Lloyds Bank* [1981] ECR 767.

ities such as in the present case, those employees who actually carry out the activities are likely, for practical reasons, to remain the same when the process of contracting-out results in one contractor being replaced by another. The actual conditions which the activities must satisfy remain the same. These are in part laid down in the legislation making open tendering compulsory. The source from which the activities are financed also remains the same, that is to say, the community charges paid by the taxpayers in North Yorkshire. In those circumstances, it can be maintained that the context in which the appellants are working remains *de facto* the same and that, in regard to their working conditions, they may use as their comparators the male workers who remained in the employment of the Council.

32. The appellants point out that the Court, in the light of the twofold objective (economic and social) of Article 141 EC as enunciated in *Defrenne II*,[11] has consistently rejected any attempt to impose artificial constraints on the realisation of the principle of equal pay. They cite in this regard, *inter alia*, the judgment in *Macarthys*,[12] in which the Court ruled that the national statutory requirement of contemporaneity constituted an impermissible restriction on the scope of Article 141 EC.

33. The appellants then go on to refer to the Opinion of Advocate General VerLoren van Themaat in *Commission* v *Denmark*.[13] In that Opinion the Advocate General addressed the question whether Danish legislation stating that the principle of equal pay applied only to the same work performed at the same place of work was compatible with Article 119 of the EC Treaty (now, after amendment, Article 141 EC) and with Directive 75/117. The Advocate General took the view that the restriction of the comparability of conditions of remuneration to 'the same place of work' was contrary to the Treaty:

'... a comparison of duties within the same fixed establishment of an undertaking or even within a single undertaking will not always be sufficient. In certain circumstances comparison with work of equal value in other undertakings covered by the collective agreement in question will be necessary.... in sectors with a traditionally female workforce, comparison with other sectors may even be necessary. In certain circumstances the additional criterion of "the same place of work" for work of equal value may therefore place a restriction on the principle of equal pay laid down in Article [141 EC] and amplified in the directive in question. The mere fact that such a supplementary condition for equal

11 — Case 43/75 *Defrenne* v *Sabena* [1976] ECR 455.

12 — Case 129/79 *Macarthys* v *Smith* [1980] ECR 1275.

13 — Case 143/83 *Commission* v *Denmark* [1985] ECR 427.

pay which has no foundation in Article [141 EC] or in the directive has been added must in any event be regarded as an infringement of the Treaty.'

From this the appellants derive an argument to the effect that the principle of equal pay may make comparisons outside an undertaking necessary, particularly within sectors of work in which women predominate, such as cleaning and catering, and that the imposition of additional restrictions on the right to equal pay is in principle inadmissible.

34. The appellants argue further that Advocate General Lenz has also rejected a formalistic approach. They cite his Opinion in *Enderby*,[14] at point 15 of which he states that: 'The purpose of a conceptual scheme [direct and indirect discrimination] is to comprehend methods by which women are placed at a disadvantage in their working lives and not to create additional obstacles to claims being made before the courts in respect of sex-related pay discrimination. For this reason, a formalistic approach should not be adopted when categorising actual instances where women are placed at a disadvantage at work.'

As an illustration of the fact that this 'pragmatic' approach is not without significance, the appellants point out that more than 25 years after equal-pay legislation came into force, the average hourly rate of pay of women in the United Kingdom remains 82% of that of men, while the average weekly earnings of female full-time workers stands at 74.5% of that of male full-time workers. This is in large measure attributable to the fact that many women perform low-paid work in sectors where women have traditionally predominated, such as cleaning and cooking, in which it is difficult to identify male comparators.

35. The appellants conclude by referring to the principle of effectiveness and the right of access to the courts. Member States, they argue, are obliged to take measures to ensure that the right to equal pay can be effectively relied on before national courts. A provision such as section 1(6) of the 1970 Act, under which a female employee may use as her comparator only a male employee working in the same employment, has the result that, if she is unable to find a male comparator, she will be

14 — Case C-127/92 *Enderby* [1993] ECR I-5535.

deprived of the possibility of asserting her right to equal pay. The appellants take the view that such a rule constitutes an obstacle to the exercise of the rights conferred by the Treaty and Directive 75/117 and is also at variance with Article 6 of the European Convention on Human Rights.

The arguments of the respondents, the Commission and the United Kingdom

36. Mitie Secure Services Ltd ('Mitie'), which is one of the respondents in the main proceedings, the Commission, and the United Kingdom take the view that the appellants cannot invoke Article 141 EC in the present case. The Commission does not, as a matter of principle, exclude a comparison with employees working for other employers. Citing point 60 of the Opinion of Advocate General Cosmas in *Angestelltenbetriebsrat der Wiener Gebietskrankenkasse*, [15] the Commission argues that it is inherent in the notion of discrimination that the same individual or entity must be responsible for the difference in treatment. The United Kingdom Government and Mitie also do not exclude a comparison with employees working for other employers as such, but take the view that there must be a common source from which the terms or conditions of employment at issue in the specific case can be derived, such as is the position where different employers are required to apply the same collective bargaining agreement in the case of a group of undertakings or authorities under common control, or where those terms and conditions have been laid down by statute or regulation. In such cases 'cross-comparisons' are indeed possible, in which employees of more than one establishment or undertaking may be involved. This is the sense in which they also construe the Opinion of Advocate General VerLoren van Themaat. They are, however, in agreement that in the present case the differences in the conditions of pay cannot be attributed to one common 'source'.

37. The United Kingdom Government also refers to the judgment in *Defrenne II*. [16] It takes the view that it follows from that judgment that the direct effect of Article 141 EC is limited to those cases in which courts can detect discrimination on the basis of a legal analysis. While this discrimination may be either direct or indirect, the crucial factor is the frame of reference which enables a court to conclude that there is discrimination on grounds of sex. Where the pay terms of different employers cannot be traced to a single source, the United Kingdom Government submits, pay discrimination on grounds of sex cannot be confirmed on the basis of a purely legal analysis. By way of illustration it presents the situation in which one employer provides a higher rate of pay than another employer. Employees of the

15 — Case C-309/97 *Angestelltenbetriebsrat der Wiener Gebietskrankenkasse* [1999] ECR I-2865. The Commission refers to the passage in which the Advocate General notes that '... the principle of equal pay laid down by Article [141 EC] is clearly aimed at the body responsible for adopting the rules in question.'

16 — Cited in footnote 11. The United Kingdom Government refers in the present context to paragraphs 19 to 22 of that judgment.

second employer cannot derive from that fact any entitlement to the same rate of pay as that provided by the first employer. Even if the second employer happens to have a predominantly female workforce, that fact by itself is not sufficient ground to justify the conclusion that there is pay discrimination based on sex. The only conclusion possible in such a situation is that there are differences in the terms of remuneration of two employers. There are in such a case no means by which a court can determine what rate ought to be paid by the employers involved in the comparison. If it is true that undertakings or sectors with predominantly female employees have less favourable terms and conditions of employment than those in undertakings or sectors where the majority of employees are male, national, or indeed Community, rules are required to ensure alignment of such terms and conditions.

38. The second problem that has been alluded to is that an employer who is accused of pay discrimination on the basis of sex, on the ground that he pays his workers a lower rate than that received by comparators working for another employer, is not in a position to explain that difference or to explain why the difference in pay is objectively justified. For that reason also the Commission, Mitie and the United Kingdom Government take the view that a difference in remuneration must be traceable to one source alone. They find support for this conclusion in the Opinion of Advocate General Lenz. [17]

39. The United Kingdom Government also asks itself where the line ought to be drawn. Are the appellants entitled, without any limitation of time, to compare themselves with male workers employed by the Council? This would appear to mean that if the comparators were to receive a pay increase the appellants would also be similarly entitled. The practical difficulty in this is that an employer is not, and cannot be, aware that another employer has made a pay increase. Pay scales and job specifications may diverge, but even if nothing changes in the equivalence of the work, the terms and conditions of employment operated by each employer may diverge for reasons unconnected with sex. The United Kingdom Government also points out that, in its judgment in *Macarthys*, [18] the Court rejected the 'hypothetical male worker'. That Government also cites point 65 of the Opinion of Advocate General Van Gerven in *Coloroll*. [19]

40. The United Kingdom Government is also unable to accept the appellants' argument concerning effectiveness and access to

17 — Cited above in footnote 14.

18 — Cited above in footnote 12.

19 — Case C-200/91 *Coloroll Pension Trustees* [1994] ECR I-4389.

the courts. In its view, the question is whether the appellants can invoke a directly effective right. The requirement that there be a male comparator for the purpose of making a comparison is not an obstacle but rather an essential precondition for exercise of the right to equal pay. What is involved is a precondition which precedes the existence of a right. With regard to the 'same service', the United Kingdom notes that the Court has never defined that concept, although it follows from the wording used by the Court in a number of judgments that, at least in the private sector, it has had in mind a single undertaking. Mitie points out that, although the work done by the appellants is the same as the work that they used to do for the Council, that is not sufficient to render it work in the same service, as that term is used in *Defrenne II*[20] and *Macarthys*.[21] The crucial matter is thus, in Mitie's view, and contrary to what the appellants assert, not the type of work but the identity of the employer.

41. The Commission, further, notes that part of the problem which has arisen ought to have been resolved through the application of the Transfer of Undertakings Regulations. However, the Commission also points out that at the time of the transfer of the undertaking the rates of pay are frozen at that level. The rights and obligations passing to the new employer do not, however, go so far as to include the right to the same pay as the comparator working for the previous employer or the right to be compared with that person.

20 — Cited above in footnote 11.

21 — Cited above in footnote 12.

Assessment

42. The question of law, as formulated, features a classic case of direct discrimination, that is to say, less favourable working conditions governing the activities performed in the main proceedings by female employees than those in force for male employees performing similar activities. The Court has already previously ruled, in an extensive body of case-law from *Defrenne II*[22] through *Macarthys*[23] to the more recent cases of *Worringham and Humphreys*[24] and *Brunnhofer*,[25] that Article 141 EC does have direct effect.

43. It is on the basis of that case-law not open to question that the appellants in the main proceedings would succeed in their claims if they were still employed by the Council or the DSO. The decision delivered in the case of *North Yorkshire County Council* v *Ratcliffe* is in this regard unequivocal and entirely in accordance with the case-law of the Court.

22 — Cited above in footnote 11.

23 — Cited above in footnote 12.

24 — Cited above in footnote 10.

25 — Case C-381/99 *Brunnhofer* [2001] ECR I-4961.

44. That said, however, the fact that they are no longer in the employment of the Council or the DSO, but rather in that of an undertaking which has taken over the services which they performed, means that, in order to support their view that discrimination is taking place, they are obliged to refer to a 'male comparator' who is working for a different organisation or service (*in casu*, the Council) to that for which they themselves work.

45. The central issue raised by the question referred is thus whether, in order to determine if there is direct discrimination within the meaning of Article 141 EC, a comparison may be made between the terms and conditions of employment of men and women who carry out comparable activities for different employers. The issue of the choice of comparator and of the circumstances under which a comparison should be made has already been addressed on numerous occasions in the Court's case-law. [26] However, the question here before us has not yet been answered in the case-law.

46. It is not evident from the wording of Article 141 EC that the comparison must be confined to one and the same employer. Its case-law demonstrates that the Court has consistently stood by its requirement that for a finding of direct discrimination there must be a clear difference in pay *vis-à-vis* male co-workers working in the 'same establishment or service' (see, *inter alia*, *Defrenne II*, paragraph 22) or that this difference in pay must have its origin in legislative provisions or provisions of collective labour agreements (*Defrenne II*, paragraph 21). [27]

47. In *Macarthys* [28] the Court ruled that the direct effect of Article 141 EC cannot be restricted by the requirement of contemporaneity. Thus, a female employee may, in a dispute concerning pay discrimination, compare herself with her male predecessor. However, the Court in that judgment expressly rejected an attempt to establish discrimination on grounds of sex by means of a 'hypothetical male worker'. The Court has subsequently confirmed that case-law in its judgment in *Coloroll*. [29]

48. The appellants, the United Kingdom Government and the Commission are in agreement that the argument that a comparison with employees outside a specific undertaking can never be made is untenable. That is also my own view.

49. This thus concerns three categories. The first covers cases in which statutory rules apply to the working and pay conditions in more than one undertaking, establishment or service. By way of example, one may think of the salaries of

26 — For example, *Defrenne II*, *Macarthys*, *Commission* v *Denmark*, *Enderby* and *Angestelltenbetriebsrat der Wiener Gebietskrankenkasse*, already cited above in footnotes 11, 12, 13, 14 and 15 respectively.

27 — Cited above in footnote 11.

28 — Cited above in footnote 12.

29 — Cited above in footnote 19; see paragraphs 102 and 103.

the nursing staff working for a service such as the National Health Service. Second, there are cases in which several undertakings or establishments are covered by a collective works agreement or regulations governing the terms and conditions of employment. Finally, the third category concerns those cases in which the terms and conditions of employment are laid down centrally for more than one organisation or business within a holding company or conglomerate.

50. In all of those cases it is possible, going beyond the boundaries of the individual undertaking or service, to compare male with female employees in order to determine whether there is discrimination prohibited by Article 141 EC.

51. The feature common to these three categories is that regulation of the terms and conditions of employment actually applied is traceable to one source, whether it be the legislature, the parties to a collective works agreement, or the management of a corporate group.

52. Advocates General Cosmas and Lenz, and now the United Kingdom Government, were right to stress this as being an essential criterion. Why is this so? Article 141 EC is addressed to those who may be held responsible for the unauthorised differences in terms and conditions of employment. In the cases mentioned, these are the legislature, the parties to a collective works agreement and the management of a corporate group. They may be held accountable in this regard. On the other hand, if differences in pay arise as between undertakings or establishments in which the respective employers are separately responsible for the terms and conditions of employment within their own undertaking or establishment, they cannot possibly be held individually accountable for any differences in the terms and conditions of employment between those undertakings.

53. The case-law to date also links up with this argument inasmuch as Article 141 EC operates against all forms of discrimination which can be detected by the courts on the basis of a purely legal analysis.

54. It is clear from the foregoing that the direct effect of Article 141 EC extends to employees working for the same legal person or group of legal persons, or for public authorities operating under joint control, as well as cases in which, for purposes of job classification and remuneration, a binding collective agreement or statutory regulation applies. In all these

cases the terms and conditions of employment can be traced back to a common source.

55. The differences in conditions of remuneration between male and female employees which form the subject-matter of the main proceedings in the present case cannot, however, be traced back to one single source capable of being held responsible. The mere fact that the terms and conditions of employment for similar activities with the Council and with the appellants' new employers diverge is not sufficient to justify the conclusion that their present employers are guilty of direct discrimination under Article 141 EC. The Court's established case-law on the criterion of the 'same establishment or service' allows of no other conclusion.

56. In my view, this result is also justified. One of the constituent elements of Article 141 EC is that the employer is entitled to 'the right of defence'. He is entitled to argue that an established difference in pay is justified on the basis of objective factors unrelated to discrimination on grounds of sex. It is impossible for an employer against whom a claim for equal treatment has been made to examine the reasons why another employer remunerates activities 'of equal value' 'differently' to him. Even were he able to do so, it is still not certain, given his distinct economic situation, that he would be able to align himself accordingly. Moreover: in which other undertaking are the activities 'of equal value' to be sought?

57. In their written and oral observations the appellants in the main proceedings point out that in the United Kingdom there are still appreciable differences in pay between business sectors in which predominantly women work and those in which this is not the case. I find no reasons to cast doubt on the accuracy of the facts set out in this regard. I also agree with the appellants that this situation may appear to be at variance with the tenor of Article 141 EC. However, their attempts to counter such differences in conditions of remuneration by invoking the direct effect of that article cannot succeed. The analysis, which must be much broader than merely legal, required to correct these structural anomalies calls for the intervention of the parties to collective agreements or, failing this, the intervention of the national legislature. I would further note that Article 141 EC also offers the Community legislature a legal basis on which expressly to require the national legislative authorities to act in this regard.

58. That said, however, the abovementioned limits which the Court has placed on the direct effect of Article 141 EC lead me to the conclusion that the individual invocation of that article cannot have the

effect of aligning ancillary and structural differences in remuneration, the responsibility for which is traceable to a variety of sources.

59. The particular circumstances underlying the questions in the present reference provide no grounds on which to refine or distinguish the existing case-law of the Court in this regard. Where reorganisation of the public service results in a certain number of its existing activities being taken over by private undertakings, this may, by its very nature, have consequences for the employees affected. While they may be protected against specified social consequences of such a transfer, as envisaged by Directive 77/187, Article 141 EC is not intended for that purpose. Article 141 EC is, furthermore, inappropriate for such an end: ought female employees to forfeit the hypothetical protection which they may derive from it if the transferred activities were 'mixed' activities?

60. Equally untenable is the argument that within the new context they perform exactly the same activities as previously and that the Council remains responsible to the same degree for the provision of school meals and the cleaning of school premises. This public responsibility is, however, quite separate from the question as to who supplies the actual services and who is responsible for the employees providing those services. It does not imply any responsibility for the terms and conditions of employment within the undertakings which provide the services purchased by the Council.

61. The argument that the services provided by the Council itself and those provided for it are ultimately funded from the same source is one which I consider forthwith to be untenable. Authorities purchase goods and services on a large scale. The Council cannot be obliged, when contracting out specified services, to impose on the suppliers concerned a requirement that the terms and conditions of employment for women whom they employ must be the same as those of male workers who perform equivalent work for the Council. *A fortiori*, this argument cannot be used to oblige the present employers to continue to bring the working conditions of women whom they employ into line with those of men performing equivalent work for the Council.

62. I accordingly conclude that Article 141 EC cannot be directly applicable in the present case. In view of this conclusion, there is no need to reply to the second question.

VI — Conclusion

In the light of the foregoing, I propose that the Court reply as follows to the first question submitted by the Court of Appeal of England and Wales:

In a situation such as that underlying the main proceedings in this case, Article 141 EC is not directly applicable in such a way as to allow the appellants in those proceedings to rely on that article in their claim that they should receive the same pay from their present employers as male employees of their previous employer who perform the same work or work of equal value.