principle of equal pay for men and women for work to which equal value is attributed and for which no system of job classification exists to obtain recognition of such equivalence, the United Kingdom has failed to fulfil its obligations under the Treaty;

2. Orders the United Kingdom to pay the costs.

	Mertens de Wilmars	Bosco	Touffait
Due	Pescatore	Mackenzie Stuart	O'Keeffe
Koopmans	Everling	Chloros	Grévisse

Delivered in open court in Luxembourg on 6 July 1982.

P. Heim
Registrar

J. Mertens de Wilmars
President

OPINION OF MR ADVOCATE GENERAL VERLOREN VAN THEMAAT DELIVERED ON 25 MAY 1982 [1]

Mr President,
Members of the Court,

1. The subject-matter of the dispute

The Commission asks the Court to declare that, by failing to adopt the laws, regulations or administrative provisions needed to comply with 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, the United Kingdom has failed to fulfil its obligations under that directive as regards the abolition of discrimination in respect of "work to which equal value is attributed".

This is the second case which the Commission has brought before the Court in proceedings under Article 169 for a failure by a Member State to apply Directive 75/117 correctly. The first case concerned Luxembourg and was

1 — Translated from the Dutch.

registered under No 58/81. In contrast to the present case the action against Luxembourg was based in part on the infringement of Article 119 of the EEC Treaty.

The obligations of the United Kingdom as regards the phrase "work to which equal value is attributed", as contained in the first paragraph of Article 1 of Directive 75/117, are central to this case. This concept has never before been explicitly laid before the Court. In *Defrenne No 2*, in which the aims and scope of Article 119 were interpreted, some of the dicta of the judgment were devoted to the concept of "work of equal value". However, most of the other judgments were particularly concerned with the concept of "equal pay" and there was no need to examine the extent to which there was any question of "equal work or work to which equal value is attributed". In Case 127/79 *Macarthys Limited* v *Smith* [1980] ECR 1275 the concept of "equal work" was certainly examined more closely in so far as amongst other things the question put by the national court as to whether that concept applies only where men and women do the same work at the same time was answered in the negative.

2. The national legislation in question

According to the Commission the legislation of the United Kingdom concerning the principle of equal pay does not meet the requirements of Community law as regards "work to which equal value is attributed". The legislation in point is the Equal Pay Act 1970, as amended by the Sex Discrimination Act 1975. Under the Equal Pay Act any contract of employment is deemed to include an equality clause where a woman is employed on "like work" or "work rated as equivalent"). Those two terms are defined in Section 1 (4) and 1 (5). According to Section 1 (4) a woman is employed on like work with men "if her work and theirs is of the same or a broadly similar nature".

According to Section 1 (5) a woman is employed on work rated as equivalent if the jobs have been given an equal value in terms of certain criteria (for instance, effort, skill, decision) on the basis of a system of evaluating work in an undertaking. The entire concepts of both "equal work or work to which equal value is attributed" are summed up in that manner. The proceedings concern, with regard to the United Kingdom legislation, jobs which are not equal or nearly equal in nature but which may nevertheless be said to be of equal value despite their differences.

The effect of the United Kingdom legislation is that in the case of work which is not equal or nearly equal in nature an equality clause is incorporated only if the work has been judged to be of equal value on the basis of a job classification system. According to the case-file, a job classification system can be applied in an undertaking only with the consent of those concerned, that is to say on a voluntary basis. In my opinion the fact that the implementation of such an evaluation system is dependent on the employer's agreement is particularly important in this case.

3. The main arguments of the parties

The Commission takes the view that Article 1 of the directive, particularly where the phrase "works to which equal value is attributed" is concerned, reinforces Article 119 of the Treaty. Consequently, in view of the interpretation of Article 119 as given in *Defrenne No 2*, the Member States are under the duty to take the measures necessary to give full effect to the principle of equal pay. The United Kingdom legislation makes the application of the principle to work of equal value dependent on whether the jobs to be compared have first been found to be of equal value by means of a job classification system. According to the Commission, that does not meet the requirements of Community law. For if the jobs requiring comparison have not been found to be of equal value on the basis of a job classification system an employee cannot take any steps enabling him to establish whether equal pay is due. If the employer is not prepared to introduce such a system, the employee cannot enforce any right to the equality clause.

The United Kingdom believes that the Equal Pay Act gives proper effect to the directive. It accordingly submits that the Commission's application should be dismissed. The United Kingdom believes that the requirements of the directive take effect only *after* jobs have been found to be of equal value. Neither Article 119 nor the directive give an individual employee the right to take steps to determine the value of the jobs requiring comparison. The United Kingdom here refers to the text of Article 1 of the directive which reads "to which equal value is attributed", stressing the words "is attributed". The text, then, does not just speak of "work of equal value". Moreover, that first paragraph must be read in conjunction with the second paragraph which refers to the use of a job classification system. It follows that equal value should be determined on the basis of a job classification system under the directive, too. Indeed, there is no other method of comparing different jobs.

4. The aim of Article 119

For the purpose of resolving this dispute it is necessary once more to determine the aim and scope of Article 119 and, so far as necessary, examine how much further Directive 75/117 goes.

The Court has expounded the aim and scope of Article 119 in particular in its judgment in *Defrenne No 2*, Case 43/75 [1976] ECR 455. That judgment states that under the terms of the Resolution of the Member States of 1961 all discrimination, both direct and indirect, was to have been completely eliminated by 31 December 1964 (paragraph 48). In the Court's view that resolution clarified the principle of equal pay as contained in Article 119. In order to hasten the full implementation of Article 119 Directive 75/117 was adopted. According to the judgment that directive was intended "to encourage the proper implementation of

Article 119 by means of a series of measures to be taken on the national level, in order, in particular, to eliminate indirect forms of discrimination" (paragraph 60).

From that it may in my view be concluded that Article 119, amplified by the more precise provisions of Directive 75/117, has the aim of eliminating all discrimination, both direct and indirect" as regards the principle of equal pay. Only the term "equal work" appears in Article 119. However, in the first paragraph of Article 1 of the directive the criterion of equal work or work to which equal value is attributed is used. In paragraph 20 of the *Defrenne No 2* judgment it was observed that this extension of the narrow criterion of "equal work" is in accordance in particular with Convention No 100 on equal pay concluded by the International Labour Organization in 1951, Article 2 of which establishes the principle of "equal pay for work of equal value". Although that paragraph refers to an extension of the narrow criterion of "equal work", in my opinion that extension should, in the light of the Court's case-law, be understood to be more a clarification of that term appearing in Article 119. At any rate that is how I understand both paragraph 54 of that judgment and especially paragraph 21 of the judgment in Case 69/80 *Worringham* [1981] ECR 767, at p. 791, the second sentence of which states that ". . . Article 1 of the directive explains that the concept of 'same work' contained in the first paragraph of Article 119 of the EEC Treaty includes cases of 'work to which equal value is attributed' . . .". I also think that it follows from paragraph 20 of the *Defrenne No 2* judgment cited above that by the Court's dicta the phrase "work of equal value" appearing in the ILO Convention accords with the term "work to which equal value is attributed" used in the directive. According to the *Defrenne No 2* judgment, the directive therefore has on the one hand the function completely to implement the aim of Article 119, particularly in the field of indirect discrimination (paragraphs 53 and 60). On the other hand the directive defines the material scope of Article 119 and also adopts various provisions "whose essential purpose is to improve the legal protection of workers who may be wronged by failure to apply the principle of equal pay laid down by Article 119" (paragraph 54). Provision for that is made in Article 2 of the directive. The article also indicates that the principle should constitute a right enforceable at law. That much was already clear from the direct effect of Article 119.

In accordance with that provision in the directive, however, such a right should also be created as regards indirect discrimination since, according to the Court's judgment, the directive concerns such discrimination in particular. In this connection I would stress that Article 119, read where necessary in conjunction with Directive 75/117, is relevant not only for the purposes of the direct effect of that article. Until now that function has been central to its interpretation. But in addition to that the article requires Member States to adopt the measures needed to give effect to the principle in the field of indirect discrimination, too. What the Court understands by this term was explained in paragraphs 18 and 19

of the *Defrenne No 2* judgment and later repeated in paragraph 15 of the *Macarthys* judgment. In my view the term covers those situations in which discrimination on grounds of sex cannot be directly determined by the Court. In those cases it will first be necessary for criteria of assessment to be established by the legislative bodies. Paragraph 19 of the *Defrenne No 2* judgment states:

"It is impossible not to recognize that the complete implementation of the aim pursued by Article 119, by means of the elimination of all discrimination, direct or indirect, between men and women workers, not only as regards individual undertakings but also entire branches of industry and even of the economic system as a whole, may in certain cases involve the elaboration of criteria whose implementation necessitates the taking of appropriate measures at Community and national level."

I infer from the next paragraph (20) that the Court here precisely had in mind the term "work of equal value". If that is the case it may be useful first to give the criteria on the basis of which (different) jobs are evaluated. This may be relevant in particular if a job classification system is used. However, as the Commission report drawn up pursuant to Article 9 of the directive shows, it should be borne in mind that there are no universally accepted systems in the Member States and even in individual Member States different methods are applied (Commission report, pages 65 to 83). For instance, in the Netherlands alone at least 40 different systems of job evaluation are used in various branches of industry and in undertakings. This is shown by the report of A. W. Govers "Gelijkheid van Vrouw en Man in het Europees Sociaal Recht", 1981, page 29, to which I have already referred in my previous Opinion in the *Burton* case, No 19/81 [1982] ECR 579.

It is important to note the Commission's reference to the German legislation on page 9 of its answers to the Court's supplementary questions as to other methods of evaluating jobs apart from on the basis of a job classification system. In the explanatory note on the term "work of equal value" accompanying the German Law it is stated that this must be established objectively, and that collective agreements or the general "Verkehrsanschauung" may also provide indicators, precisely because there is no universally acknowledged job classification system. The Commission report shows that French courts also determine "the equal value" of different jobs without a job classification system. They deduce it from "the circumstances of the case" in which the fact that a collective labour agreement classifies a job in an occupational category may be an important factor (judgments of the Cour de Cassation of 24 November 1976 and 22 June 1977 as cited in the Commission report, page 43).

5. Implementation in the Member States of the principle of "work of equal value"

For the sake of good order I think that it is useful to mention that the Commission report shows, and this is confirmed by the answers to the supplementary questions, that with regard to the

application of the principle of equal pay the term "work of equal value" has been incorporated without more ado and as it stands in the legislation of most Member States. In general it is incorporated as part of the term "equal work or work of equal value". As regards the Danish legislation, an examination is under way as to how far the term "same arbejde" accords with the term "work of equal value". The Irish legislation refers to "like work" but that includes not only equal or nearly equal work but also expressly covers work of equal value. The Netherlands legislation mentions only work of equal value and so does not refer to the term "equal work".

An examination of the United Kingdom legislation regarding the term "work of equal value" in relation to that aim gives the following picture. The fact that under the United Kingdom legislation the evaluation of different jobs has to be done on the basis of a job classification system can but win approval. For the documents on the file show that in the state of current knowledge this method of evaluating work provides the most objective method and is often based on scientifically established criteria. As I said earlier, there is still no universally accepted system of evaluation so that different methods are used in each of the different Member States.

6. Deciding the dispute

As I have already stated, I believe that in order to decide this case it is necessary to start with the aims of Article 119, as construed in the Court's judgment in *Defrenne No 2* and amplified in Directive 75/117. According to that judgment, all discrimination, both direct and indirect, must be abolished. An individual employee has a subjective right to this which not only concerns direct reliance on Article 119 but must also apply to those situations which are shown to constitute indirect discrimination. As regards that kind of discrimination Article 119 and the directive, particularly Articles 2 and 6 thereof, require Member States to take the measures necessary to ensure that the principle of equal pay is applied.

As a result of that method's being required coupled with the fact that its application in an undertaking is voluntary or dependent on the employer's consent, the aim of Article 119, namely the total abolition of wage discrimination, for work of equal value too, is not achieved. In that situation it is conceivable, particularly because of the consent required from the employer, that different wages continue to be paid for work of (supposedly) equal value. Without his employer's consent an employee cannot himself take steps to have the value of different jobs determined, a situation which was confirmed at the hearing by Counsel for the United Kingdom.

The Netherlands legislation, for instance, also requires that a system of evaluating jobs should first be used for evaluating work. In the absence of such a system, however, the Netherlands legislation states that work must be evaluated "fairly". I do not believe that any useful purpose is served by examining what is

"fair". It is important to note, however, that the Netherlands legislation makes provision for the situation in which there is no system of evaluating work, which is not the case with the United Kingdom legislation.

It is not for the Court to indicate how the United Kingdom should adapt its legislation in order to ensure that the principle of equal pay for work of equal value is actually applied in every case. It is important to note that in this matter the Member States must moreover take account of their "national circumstances and legal systems" as stated in Article 6 of the directive. It is precisely in this area that the practice of Member States differs greatly owing to the greater or lesser amount of freedom enjoyed by the two sides of industry. Be that as it may, in my opinion the result, which the Member States must ensure is achieved pursuant to Article 119 and the directive and which I again summarize below, is clear. They are required to take the measures necessary to achieve that result.

I do not believe that what I have said so far is shaken by the interpretation which the United Kingdom places on the expression "work to which equal value is attributed" used in Article 1 of the directive or by its juxtaposition with the second paragraph of that article which refers to a "job classification system". In the first place the article does not indicate by whom and at what time the equal value is attributed. It thus leaves open the possibility that this should be done for example by the court after proceedings have been brought before it. Having regard to the aims of Article 119 and of the directive as defined in the Court's decisions cited above, it must in every case be eventually possible to determine the equal value, even if in a specific case no job classification system or other special procedure applies. Article 2 of the directive clearly points in that direction as well. Therefore, in view of the requirement to achieve the result just summarized and owing to the clear wording of the second paragraph of Article 1 of the directive, that paragraph must in my opinion be considered separately from the first. The second paragraph states "in particular, where" a job classification system is used it must be based on non-discriminatory criteria. The beginning of that paragraph in particular indicates in my view that the purpose of the paragraph is merely to enunciate the prohibition of discrimination should jobs be evaluated on the basis of such a system. According to the Commission report (*inter alia* page 141), in which it discusses such systems, the evaluation criteria are not always neutral as between the sexes. For example, certain qualities in work could be described as typically female (for instance dexterity, meticulousness, readiness to undertake repetitive work and so on) and are valued commensurately lower than "male" qualities (ability to handle materials and machines, physical strength and so on — see also the report by A. W. Govers, page 30). In that sense the second paragraph has an important function, as moreover the Resolution of the Member States of 1961 cited above has already established.

Finally I shall briefly examine a defence argument of the United Kingdom to the effect that it clarified its legislation in connection with "work to which equal value is attributed" in a statement made for recording in the minutes of the Council. The statement is set out in the Report for the Hearing to which I refer. The United Kingdom believes that since neither the Council nor the Commission raised any objection to the statement the Commission can no longer bring an action upon it before the Court. As for the statement itself, I share the Commission's view that it simply explains that in order to determine the equal value of different jobs in the United Kingdom a job classification system must be used. As I have already stated, no objection can be taken to that. However, the statement does not indicate in practical terms how far such a system is dependent on the consent of the employer. It is this in particular which in my opinion is of crucial importance in this case.

The argument that the Commission forfeited its right to take action under Article 169 by not raising any objection against the United Kingdom's statement cannot be accepted in my judgment. In my view such conduct on the part of the Commission cannot diminish its responsibility under Article 155 of the Treaty. Nor is it possible in my view to accept the argument that the United Kingdom can rely on the statement when construing the provision in question. As the Court has held on several occasions (for instance in Case 39/72 *Commission* v *Italy* [1973] ECR 101, paragraph 22 at p. 115), such a statement made by a Member State for recording in the minutes of the Council when a decision is adopted cannot modify the objective scope of Community rules enacted by the Community decision.

7. Conclusion

In conclusion I am of the opinion that the Commission's action is well founded and that the Court may therefore declare that, by failing to adopt the laws, regulations or administrative provisions which, having regard to the Court's case-law on Article 119 of the Treaty are prescribed by Directive 75/117/EEC of 10 February 1975 and are needed to ensure in every case equal pay for work to which equal value is attributed in accordance with Community law, the United Kingdom has failed to fulfil its obligations under that directive. The United Kingdom should also be ordered to pay the costs of the proceedings.