OPINION OF ADVOCATE GENERAL POIARES MADURO delivered on 29 June 2004 [1]

1. The question referred by the Tribunal administratif de Paris (Administrative Court, Paris) (France) asks whether 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 [2] precludes a provision such as Article 8 of the French Law No 75-3 of 3 January 1975, [3] as amended by Law No 79-569 of 7 July 1979 [4] and Law No 2001-397 of 9 May 2001 [5] (hereinafter 'the relevant law'), in so far as it exempts widows who have not remarried from the age limits for recruitment to the administration.

I — Facts, legal framework and question referred to the Court

2. At the time of the relevant facts, Mr Briheche was a widower who had not remarried, aged 48 with a 12-year-old dependent child. He applied to sit four competitive examinations for recruitment to various departments of the administration for which the age limit was set at 45 years. His applications were in each case refused on the ground that he was above the statutory age limit.

3. On 30 January 2002, the directeur du service inter-académique des examens et concours des académies de Créteil, Paris et Versailles (director of the Joint Examinations and Competitions Service for the regional education authorities of Créteil, Paris and Versailles) refused his application to sit the open competitive examination for the recruitment of administrative assistants within central government. On 5 February 2002, he rejected Mr Briheche's application

1 — Original language: Portuguese.

2 — OJ 1976 L 39, p. 40. It should be noted that Directive 76/207 has been replaced by Directive 2002/73/EC of the European Parliament and of the Council of 23 September 2002 amending Council Directive 76/207 (OJ 2002 L 269, p. 15). The new provisions do not apply to the present case, since they have to be implemented by Member States only by 5 October 2005 at the latest.

3 — *Journal Officiel de la République Française* (JORF) of 4 January 1975, p. 198.

4 — JORF of 8 July 1979, p. 1666.

5 — JORF of 10 May 2001, p. 7320.

to sit the joint open competitive examination for the posts of administrative secretary within central government and school and university secretary. On 27 February 2002, the ministre de l'éducation nationale (Minister for National Education) dismissed Mr Briheche's appeal to a higher administrative authority against the abovementioned decisions.

4. On 28 January and 8 March 2002, the ministre de l'intérieur (Minister for the Interior) rejected Mr Briheche's application to sit the open competitive examination for the recruitment of administrative assistants within central government.

5. On 28 February 2002, the ministre de la justice (Minister for Justice) refused Mr Briheche's application to sit the open competitive examination for the recruitment of administrative assistants for the decentralised departments of the prison service.

6. In three different applications lodged before the Tribunal administratif de Paris, Mr Briheche sought the annulment of the abovementioned decisions and compensation for the damage suffered as a result of them. [6]

7. Depending on the type of competitive examination, either Article 5 of Decree No 90-713 of 1 August 1990, concerning common statutory provisions applicable to administrative assistants within State administration, [7] or Article 1 of Decree No 75-765 of 14 August 1975, concerning age limits applicable to recruitment through competitive examinations of civil servants classified in categories B, C, and D, [8] fixes an age limit of 45 years for applicants.

8. Article 8 of the relevant law introduces an exception: 'the age limit for obtaining access to public-sector employment shall not be enforceable against mothers with three or more children, widows who have not remarried, divorced women who have not remarried, legally separated women or unmarried men or women with at least one dependent child, all of whom are obliged to work'.

9. Article 2(1) of Directive 76/207 prohibits discrimination 'on grounds of sex either directly or indirectly by reference in particular to marital or family status.' This principle has a wide material scope, as defined in Article 3(1) of the Directive: '[a]pplication of the principle of equal treatment means that there shall be no discrimination

6 — The applications were registered respectively on 28 and 29 March and on 19 April 2002 under Nos 0204512/5, 0204571/5 and 0205683/5.

7 — Article 5 of Decree No 90-713 of 1 August 1990, concerning common statutory provisions applicable to administrative assistants within State administration: 'the competitive examination is open to applicants aged less than 45 years on 1st January of the year of the competitive examination.' JORF of 11 August 1990, p. 9795.

8 — Article 1 of Decree No 75-765 of 14 August 1975, concerning age limits applicable to recruitment through competitive examinations of civil servants classified in categories B, C and D: '[t]he age limit ... is fixed at 45 years unless specific provisions establish a higher age limit.' JORF of 19 August 1975.

whatsoever on grounds of sex in the conditions, including selection criteria, for access to all jobs or posts, whatever the sector or branch of activity, and to all levels of the occupational hierarchy'.

10. In the present case, several other provisions of Directive 76/207 could, according to the parties, come into play. Mr Briheche invokes in his written observations before the national court and this Court Article 2(2) which states that: '[t]his Directive shall be without prejudice to the right of Member States to exclude from its field of application those occupational activities and, where appropriate, the training leading thereto, for which, by reason of their nature or the context in which they are carried out, the sex of the worker constitutes a determining factor'.

11. The French Government mentioned Article 2(3) of Directive 76/207, which provides: '[t]his Directive shall be without prejudice to provisions concerning the protection of women, particularly as regards pregnancy and maternity'.

12. According to the Commission, in order to answer the question raised by the national court the central provision of Directive 76/207 is Article 2(4), according to which: '[t]his Directive shall be without prejudice to measures to promote equal opportunity for men and women, in particular by removing existing inequalities which affect women's opportunities in the areas referred to in Article 1(1).'

13. In those circumstances, the national court decided to stay the proceeding and to refer the following question to the Court:

'Does Directive 76/207/EEC of 9 February 1976 preclude France from maintaining in force the provisions of Article 8 of Law No 75-3 of 3 January 1975, as amended by Law No 79-569 of 7 July 1979 and Law No 2001-397 of 9 May 2001, concerning widows who have not remarried?'

II — Assessment

14. I will first determine the applicability of Directive 76/207 to a law such as the one at issue in the present proceedings and then examine whether such a law can be justified under the exceptions to the principle of equal treatment.

A — *Applicability of Directive 76/207 and existence of discrimination on the ground of sex*

15. Article 8 of the relevant law regulates access to employment in the public service in so far as it exempts certain categories from an age limit for sitting competitive examinations. According to settled case-law, Directive 76/207 applies to employment in the public service.[9] Article 3(1) of Directive 76/207 expressly covers access to employment. Article 8 of the relevant law therefore falls within the material scope of Directive 76/207, as defined in Article 3(1).

16. There can be no doubt that Article 8 of the relevant law creates direct discrimination between widows and widowers who have not remarried. In fact, whereas widows can apply to sit competitive examinations for recruitment to the administration even after they have reached the age limit of 45 years, widowers do not enjoy the same right.

This clearly constitutes discrimination on the ground of sex in the conditions of access to posts in the administration.[10]

17. Moreover, in his submission before the Court Mr Briheche invokes further discrimination, noting that Article 8 of the relevant law unjustly discriminates between a widower who has not remarried and has a dependent child and an unmarried man or woman with a dependent child, since only the latter is exempt from the age limit of 45 years. Here again, conditions of access to administrative competitive examinations will differ for parents with a dependent child, depending on their marital status. Only single parents, widows who have not remarried, divorced women and legally separated women with a dependent child can sit the competitive examinations when they are above the threshold of 45 years.

18. The referring court limited the scope of its question to the situation of widowers who have not remarried, as compared with the situation of widows who have not remarried. In this regard, it should be borne in mind that, in accordance with settled case-law, it is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court.[11] The scope of the

9 — Case C-273/97 *Sirdar* [1999] ECR I-7403, paragraph 18; Case C-285/98 *Kreil* [2000] ECR I-69, paragraph 18; and Case C-476/99 *Lommers* [2002] ECR I-2891, paragraph 25.

10 — Even though Directive 76/207 was initially conceived to remove discrimination against women, there is no doubt that men can also invoke the removal of discrimination affecting them whenever they are put at a disadvantage compared with women.

11 — See, inter alia, Case C-302/98 *Sehrer* [2000] ECR I-4585, paragraph 20; Case C-33/99 *Fahmi* [2001] ECR I-2415, paragraph 28; and Case C-111/01 *Gantner Electronic* [2003] ECR I-4207, paragraphs 34 and 38.

analysis can therefore be limited to the question concerning discrimination between widows and widowers who have not remarried.

19. One may nevertheless note at this point that Article 8 of the relevant law contains other similar instances of discrimination on the ground of sex. Mothers with three or more children, divorced women who have not remarried and legally separated women with a dependent child all benefit from an exemption from the age limit of 45 years in respect of access to the administration, while men in the same situation (fathers with three or more children, divorced men who have not remarried and legally separated men with a dependent child) do not benefit from that exemption.

20. By enabling widows who have not remarried — and not widowers who have not remarried — to sit competitive examinations for recruitment to the administration regardless of their age, Article 8 of the relevant law introduces discrimination on the ground of sex in respect of conditions of access to the administration, thereby infringing Articles 2(1) and 3(1) of Directive 76/207.

21. The question is whether such discrimination could be justified.

22. In its written observations before the Court, the French Government indicated that a reform of conditions of access to competitive examinations for recruitment to the administration had been undertaken in order to remedy the abovementioned discrimination.

B — *Potential exceptions to the principle of equal treatment*

23. Directive 76/207 allows for three exceptions to the principle of equal treatment: where the sex of the worker constitutes a determining factor (Article 2(2)), where women need to be protected as regards pregnancy and maternity (Article 2(3)) and where measures to promote equal opportunity are taken (Article 2(4)). As will be shown, none of them applies in the present situation, taking into account the present case-law of the Court.

24. Mr Briheche invoked Article 2(2) of Directive 76/207 in order to argue that there was no justification to reserve to women the posts he was applying for in the administration. But this exception to the equal treatment principle is not relevant. The French Republic did not claim that it applied. Indeed, the competitive examinations organised by the State for posts in the administration are not reserved to women, since

both men and women can apply. The discrimination lies in the exceptions to the age limit set at 45 years, according to Article 8 of the relevant law.

25. Another possible exception to the equal treatment principle is defined in Article 2(3) of Directive 76/207 and is aimed at the protection of women, particularly as regards pregnancy and maternity. At least implicitly, the French Government seems to rely on this exception when it mentions that the legislation in question was adopted in order to limit inequalities between men and women. To this end, it refers to studies according to which women undertake the essential part of housework, particularly in families with children. It also cites statistics from July 2003 according to which 10.8% of women, as against 8.7% of men, are unemployed. One can note that these statistics are not relevant to the application of Article 2(3) of Directive 76/207. They could however be of relevance to justify measures taken under Article 2(4) of Directive 76/207.

26. In this regard, and as acknowledged by the French Republic itself, settled case-law has established that the exception of Article 2(3) of Directive 76/207 can only be invoked to protect 'a woman's biological condition during pregnancy and thereafter until such time as her physiological and mental functions have returned to normal after childbirth'. [12] This exception is therefore not applicable to the present situation.

27. Finally, Article 2(4) of Directive 76/207 could be applied if one were to consider that Article 8 of the relevant law is designed to promote 'equal opportunity for men and women, in particular by removing existing inequalities which affect women's opportunities'.

28. The objective of this provision has been described by the Court as authorising measures 'which, although discriminatory in appearance, are in fact intended to eliminate or reduce actual instances of inequality which may exist in the reality of social life. It authorises national measures relating to access to employment, including promotion, which give a specific advantage to women with a view to improving their ability to compete on the labour market and to pursue a career on an equal footing with men'. [13]

12 — Cases 184/83 *Hofmann* [1984] ECR 3047 and C-394/96 *Brown* v *Rentokil* [1998] ECR I-4185. By analogy, though the analysis is made under Article 141 EC, see also Case C-366/99 *Griesmar* [2001] ECR I-9383, paragraphs 43 and 44.

13 — *Lommers*, cited above, paragraph 32. See also Case C-450/93 *Kalanke* [1995] ECR I-3051, paragraphs 18 and 19; Case C-409/95 *Marschall* [1997] ECR I-6363, paragraphs 26 and 27; and Case C-158/97 *Badeck and Others* [2000] ECR I-1875, paragraph 19.

29. Whereas the broad terms in which this objective is framed would seem to include measures designed to achieve substantive equality between men and women on the labour market, the Court has interpreted Article 2(4) of Directive 76/207 in a narrow way, referring to the 'restricted concept of equality of opportunity'. [14]

30. Three categories of positive measures can be distinguished. [15] A first category includes measures which are not directly discriminatory in nature but aim simply at improving the training and qualifications of women (for instance the allocation of training places to women). The underlying idea is that equality of opportunities requires the provision of means to allow the individual talents of women to be displayed. A second category contains measures which aim at enabling women to better reconcile their role as parent and their professional activity (such as the possibility to benefit from nursery places offered by the employer). Men can also benefit from the latter kind of measures, which can be neutrally designed in favour of parents. The third category includes measures which also aim at achieving equality between men and women on the labour market but are discriminatory in nature in that they favour women in order to reduce their under-representation in professional life. The third category includes measures having a direct impact on employment, which give preference to women in selection processes or set targets or quotas to be achieved. The previous case-law of the Court has had to deal mainly with positive measures in the third category, implying potential discrimination against men. In *Badeck* and *Lommers*, the Court had to judge whether and on what conditions measures belonging respectively to the first and second categories were compatible with Article 2(4) of Directive 76/207. All categories of positive measures are submitted to a threefold test.

31. To be compatible with Article 2(4) of Directive 76/207, a national measure should aim at remedying an existing situation of imbalance between men and women. For a positive measure to fall under Article 2(4) of Directive 76/207, it must thus first be demonstrated that women are under-represented in a specific sector or career grade. The measure is thus aimed at removing the inequalities existing in that sector or career grade. One could also imagine the adoption of a positive measure in the public sector in order for instance to make up for the difficulties encountered by older women in the private sector. A measure of this second type would not, however, be aimed at removing discrimination but at compensating for it. In any event, in the absence of any evidence, no action aimed at remedying the

14 — *Lommers*, paragraph 33.

15 — A similar distinction has already been advanced by Advocate General Tesauro, in *Kalanke*, cited above, at point 9.

situation whether directly or indirectly can be justified under Article 2(4) of Directive 76/207.

32. Second, the Court will verify the likelihood that the measure taken will remedy the concrete situation. This adequacy test will however be superfluous for measures in the third category since they expressly prescribe the results they seek to achieve.

33. Finally, in order to be justified under Article 2(4) of Directive 76/207, the positive measure taken must be reconciled as far as possible with the equal treatment principle. This appears to exclude measures which establish automatic or absolute preferences for women and requires an analysis of the proportionality of the measure. Such an analysis of proportionality will have different consequences depending on the type of measure in question and its possible reconciliation with the principle of equal treatment.

34. In *Kalanke*, *Marschall* and *Badeck*, the Court had to examine national legislation giving preference to women candidates who possessed qualifications equal to those of male candidates. In *Badeck*, it held that: '[A] measure which is intended to give priority in promotion to women in sectors of the public service where they are under-represented must be regarded as compatible with Community law if — it does not automatically and unconditionally give priority to women when women and men are equally qualified, and — the candidatures are the subject of an objective assessment which takes account of the specific personal situations of all candidates.' [16]

35. In *Abrahamsson*, [17] the national provision at issue automatically gave preference to women candidates provided they were sufficiently qualified, subject only to the proviso that the difference between the merits of the candidates of each sex was not so great as to result in a breach of the requirement of objectivity in making appointments. The Court considered that such a measure was precluded by Article 2(4) of Directive 76/207, since the selection procedure was 'ultimately based on the mere fact of belonging to the under-represented sex'. [18] The Court nevertheless stated that a selection process could include criteria giving preference to women, provided such criteria were 'transparent and amenable to review in

16 — *Badeck*, paragraph 23. See also Case E-1/02 *EFTA Surveillance Authority* v *Kingdom of Norway* [2003] EFTA Court Report 1, paragraph 15.

17 — Case C-407/98 [2000] ECR I-5539.

18 — *Abrahamsson*, paragraph 53.

order to obviate any arbitrary assessment of the qualifications of candidates'. [19]

36. In line with this case-law, the EFTA Court held in Case E-1/02 *EFTA Surveillance Authority* v *The Kingdom of Norway* [20] that earmarking of permanent and temporary academic posts for women was contrary to the principle of equal treatment and could not be regarded as falling within the exception defined in Article 2(4) of Directive 76/207, since it did not entail the necessary flexibility and did not provide for any assessment of candidates' qualifications but automatically excluded male applicants from the earmarked posts.

37. It should however be borne in mind that the measures under scrutiny in *Kalanke*, *Marschall* and *Abrahamsson* belonged to the third category as defined above in point 30 (measures which give preference to women in access to employment or set targets or quotas to be achieved). Measures in other categories are subject to the same criteria of review although the last condition of proportionality may impose different requirements since these measures do not directly discriminate in respect of access to employment.

38. In *Lommers*, the national measure at issue concerned the exclusive allocation of nursery places to female employees of the Ministry of Agriculture, Nature Management and Fisheries in the Netherlands, 'save in the case of an emergency, to be determined by the Director'. [21] The Court stressed the fact that the measure in question did not reserve to women places of employment, but only 'enjoyment of certain working conditions'. [22]

39. Further, allocating nursery places to women employees was likely to improve equal opportunities for women since it was established that they were more likely than men to give up their careers in order to raise a child. [23]

40. Both in *Badeck* and *Lommers*, the Court gave specific consideration to the fact that the measures in question did not amount to a total exclusion of male candidates. [24] The Court held that, in order to be compatible with Article 2(4) of Directive 76/207, a measure should meet this negative condition. In fact, in *Lommers* the Court expressly noted that the measure at issue did not

19 — *Abrahamsson*, paragraph 49.

20 — Cited above.

21 — *Lommers*, paragraph 11.

22 — *Lommers*, paragraph 38.

23 — *Lommers*, paragraph 37.

24 — *Badeck*, paragraph 53; *Lommers*, paragraphs 44 and 45.

totally exclude male officials from its scope.[25] Otherwise, the positive measure could not be reconciled with the equal treatment principle.[26]

41. It appears that such reconciliation with the principle of equality excludes any type of automatic preference for women and requires the measures to be proportionate in balancing the benefits of the positive action in promoting equality for women against the costs imposed on other individuals. These requirements appear necessary to prevent equality between individuals from being overridden by concerns of substantive equality between groups.[27]

42. The Court attempts to reconcile positive discrimination with the general principle of equality by allowing the former only to the extent that it does not lead to discrimination that favours a certain group at the expense of particular individuals: achieving a more equal representation of men and women in the workforce does not justify derogating from the right of each individual not to be discriminated against. In other words, equality of opportunities prevails over equality of results. The Court assumes that positive discriminatory measures can be accepted only if they are designed, in effect, to prevent discrimination in each individual case by forcing the employer to place women in a similar position to men. Positive discriminatory measures are, in this light, only apparently discriminatory. This explains why the Court accepts, for example, measures aimed at reconciling work with child care, thereby favouring women, so long as those measures do not relate to access to employment and can be extended to men.[28] This also explains why the Court accepts measures giving some preference to women in employment so long as this does not become an automatic priority but simply one more criterion to be taken into account by the employer in allocating posts. This logic of authorising positive discrimination only to the extent that it can serve to eliminate potential discrimination can, however, easily conflict with the more ambitious goals sometimes attributed to measures of affirmative action. They are often vested with the purpose of eliminating or compensating for the underrepresentation of certain groups in society by

25 — *Lommers*, paragraph 45.

26 — *Lommers*, paragraph 39; and *EFTA Surveillance Authority* v *Kingdom of Norway*, paragraph 43.

27 — For a critical analysis of the preference given to equality between individuals, see Freeman, S., *Social Law and Policy in an evolving European Union*, Shaw, J., (eds), 2000, p. 189; Haquet, A., *L'action positive, instrument de l'égalité des chances entre hommes et femmes*, RTDE, 2001, p. 305; Prechal, S., *Equality of Treatment, Non-Discrimination and Social Policy: Achievements in Three Themes*, CMLRev., 2004, p. 533.

28 — *Badeck*, paragraph 53; *Lommers*, paragraphs 44 and 45.

giving them preference in access to certain social sectors.

43. The case-law of the Court reflects, instead, the exclusive reference in Article 2 (4) of Directive 76/207 to measures aiming at 'removing existing inequalities' without mention of compensation. It is in the light of this that the Court authorises forms of positive discrimination only to the extent that they can help correct discriminatory mechanisms of decision-making (in particular regarding employment) but not in order to compensate for them.

44. In the present case, the French Government has not demonstrated that women were under-represented in the administration or more specifically in certain career grades. Moreover, Article 8 of the relevant law does not simply distinguish between men and women but also refers to the marital status of individuals. It is also not clear why widows who have not remarried, divorced women who have not remarried and legally separated women should be distinguished from other categories of single individuals for which measures should be taken. In any event, the French Government has not provided any evidence likely to support such reasoning.

45. Moreover, as stated above, measures falling within the scope of Article 2(4) of Directive 76/207 are only compatible with this provision if they are adequate and proportionate to the aim they pursue. In the present case, in the absence of any evidence that the measure is designed to correct an existing under-representation of women, it is not even necessary to assess the adequacy and proportionality of the relevant law to its aim.

46. It follows from these considerations that none of the exceptions to Article 2(1) of Directive 76/207 could justify the discrimination on the grounds of sex contained in Article 8 of the relevant law.

47. In those circumstances, it is however necessary to determine whether the legislation at issue could be justified under Article 141(4) EC.

48. Article 141(4) EC allows measures 'providing for specific advantages in order to make it easier for the under-represented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers'. [29] It cannot be ruled out that positive measures which do not fall within the scope of Directive 76/207 could be authorised under this provision. [30] In effect, as I have highlighted, one could argue that there is a distinction between measures aimed at reducing inequalities and measures aimed at compensating for past or existing inequalities suffered by a social group. It cannot be excluded that the reference in Article 141(4) EC to compensatory purposes is intended to provide the Member States with a broader discretion in adopting measures of positive discrimination. Such an interpretation must, however, always remain within the boundaries authorised by the general principle of equality. The question for the Court is not whether certain forms of positive discrimination would or would not lead to a more equal and just society but whether such forms of positive discrimination, if adopted by the legislature, can be reconciled with the general principle of equality and non-discrimination. [31]

49. In this respect, the reference to compensation in Article 141(4) EC could be read as meaning either that the need to compensate for past or existing social inequalities can justify favouring individuals in those groups at the expense of discriminating against members of the over-represented groups or that the adoption of measures of a compensatory type is necessary in view of the fact that the non-discriminatory application of the current societal rules is structurally biased in favour of the members of the over-represented groups. [32] The first reading makes individuals' rights not to be discriminated against subordinate to achieving equality between groups which is justified by the aim of compensating the members of the under-represented groups for the past discrimination to which they were subject.

29 — The word 'compensate' was introduced by the Treaty of Amsterdam.

30 — As was recognised by the Court in *Abrahamsson*, paragraph 54.

31 — In assessing national legislature choices, the Court should also take into account the fact that allowing some diversity of national political choices, in an area where there is great uncertainty and debate as to the exact effects and benefits of measures of positive discrimination, may provide for some useful degree of experimentation and learning among the different Member States. Another factor to take into account is whether, in the instances where measures of positive discrimination are adopted, the members of the over-represented group have sufficient representation and participation to express their views in the political process.

32 — This is at the core of the critiques made of formal equality which is said to reinforce discrimination existing in society.

Such a reading is hardly compatible with the priority which the Court has given to equality of opportunities and to its traditional understanding of the general principle of equal treatment.

50. The second reading may however be more easily reconciled with the principle of equal treatment as interpreted and applied by the Court. According to this view, equality of results is not the goal. Nor do the aims of positive discrimination necessarily justify discrimination between individuals. What is believed is that measures often associated with substantive equality which compensate for the under-representation of certain groups (for example quotas, automatic preferences) are the only ones that can effectively bring about long-term equality of opportunities. Measures favouring the members of certain groups are therefore not conceived as a means to achieve equality among groups or equality of results but, instead, as an instrument to bring about effective equality of opportunities. The purpose of compensatory measures of this type becomes that of re-establishing equality of opportunities by removing the effects of discrimination and promoting long-term maximisation of equality of opportunities. [33] Compensation refers in this case to reinstating a balance between the opportunities given by society to the members of the different groups.

51. To base the acceptance of compensatory forms of positive discrimination on equality of opportunities and not on equality of results would still make equality among individuals prevail over equality among groups but would, in turn, impose certain limits and conditions on the forms of compensatory positive discrimination that could be acceptable in the light of Article 141 (4) EC. The acceptability of such forms of positive discrimination would, for example, be closely linked to its transitional nature. [34] Otherwise, such forms of positive discrimination may, in the long run, create

33 — Two main reasons can be given in this regard. First, positive discrimination is conceived as simply improving the prospects of victims of discrimination to the point where they would have been without any such discrimination. Second, positive discrimination is supposed to be the only effective means to generate the right incentives for the under-represented groups to invest in human capital (breaking the cycle of discrimination) and to address market failures (social monopolies and information costs) that, by reinforcing current societal discrimination, actually prevent the best persons from being chosen. It should be noted that the causality between these reasons and the effects of positive discrimination is often contested and the subject of many alternative strategies. It is not, however, for the Court to assess the merits of these policies but only whether, and to what extent, they can be regarded as compatible with the principle of equal treatment.

34 — That could be ensured by limitation clauses or requirements of periodic reassessment of the legislation.

entrenched rights even when the original conditions justifying them are no longer present. As a consequence, the purpose of creating long-term effective equality of opportunities would be compromised. Other conditions may be linked to the nature and extent of the burden imposed on the individuals of the over-represented group, the likelihood that increased prospects for the members of the under-represented group can lead to real equality of opportunities and the requirement to show under-representation not only in general but in the specific sector or institution subject to forms of positive discrimination.

52. In the present case, in the absence of evidence as to the aim pursued by the legislation, a provision such as Article 8 of the relevant law cannot be justified under Article 141(4) EC, so that it is not necessary to determine whether such conditions are fulfilled.

III — Conclusion

53. Accordingly, the question referred by the national court should, in my opinion, be answered as follows:

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 and Article 141(4) EC preclude national legislation such as Article 8 of French Law No 75-3, as amended, in so far as it discriminates between widowers and widows who have not remarried as regards the age limit imposed on them for access to posts in the administration, without being aimed either at removing existing inequalities or at compensating for them.