JUDGMENT OF THE COURT
30 June 1988 *

In Case 318/86

Commission of the European Communities, represented by its Legal Adviser, Joseph Griesmar, acting as Agent, assisted by J. G. Nicolas, H. Masse-Dessen and B. Georges, lawyers with a right of audience before the French conseil d'état and the Cour de cassation, Paris, with an address for service in Luxembourg at the office of G. Kremlis, a Member of the Commission's Legal Department, Jean Monnet Building, Kirchberg, Luxembourg,

applicant,

v

French Republic, represented by Gilbert Guillaume, Agent for the French Government, and Philippe Pouzoulet, Deputy Agent, with an address for service in Luxembourg at the French Embassy,

defendant,

APPLICATION for a declaration that by failing to take all necessary measures for the full and proper implementation of Council Directive 76/207/EEC of 9 February 1976 within the period laid down in the first subparagraph of Article 9 (1) of that directive, and, in particular, by maintaining a system of separate recruitment according to sex for appointment to certain civil service corps, contrary to the requirements of that directive, the French Republic has failed to fulfil its obligations under the Treaty,

THE COURT,

composed of: Lord Mackenzie Stuart, President, O. Due, J. C. Moitinho de Almeida and G. C. Rodríguez Iglesias (Presidents of Chambers), T. Koopmans, U. Everling, Y. Galmot, C. Kakouris and T. F. O'Higgins, Judges,

Advocate General: Sir Gordon Slynn
Registrar: B. Pastor, Administrator

* Language of the Case: French.

having regard to the Report for the Hearing and further to the hearing on 23 March 1988, at which the defendant was represented by Claude Chavance, acting as Agent,

after hearing the Opinion of the Advocate General delivered at the sitting on 24 May 1988,

gives the following

Judgment

1 By an application lodged at the Court Registry on 18 December 1986, the Commission of the European Communities brought an action before the Court under Article 169 of the EEC Treaty for a declaration that by failing within the prescribed period to take all the measures necessary for the full and proper implementation of 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 (Official Journal L 39, p. 40) and in particular by maintaining a system of separate recruitment according to sex for appointment to certain civil service corps, contrary to the requirements of that directive, the French Republic had failed to fulfil its obligations under the Treaty.

2 The dispute concerns the system of recruitment to the civil service in France. It is common ground that under French legislation, the only criterion for recruitment is a candidate's grading after a single-entry competition open to both men and women. However, Article 21 of Law No 84-16 of 11 January 1984 laying down statutory rules on the State public service (*Journal officiel de la République française* 1984, p. 271) provides that for certain corps of officials, a list of which is to be drawn up by decree, separate recruitment may be organized for men and women. Those recruitment procedures are characterized by the fact that each decision ordering the holding of a competition fixes the percentage of posts to be allotted to men and women respectively.

3 The list in question was laid down by Decree No 82-886 of 15 October 1982 (*Journal officiel de la République française* 1982, p. 3154). That decree was adopted under rules applicable before the entry into force of Law No 84-16 but the list contained in the decree was maintained in force by the decree implementing that law.

4 The Commission considers that that list is extremely broad in its scope and that the recruitment conditions related to it are contrary to the principle of equal access to employment for men and women, as guaranteed by Directive 76/207 (hereinafter referred to as 'the directive'). The French Government claims that in the case of the corps of officials set out in the said list, a person's sex constitutes a determining factor for the performance of the duties carried out by members of those corps. Consequently, the difference in the conditions of recruitment at issue is in conformity with Article 2 (2) of the directive.

5 That provision provides that the directive is without prejudice to the right of Member States to exclude from its field of application those occupational activities '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'.

6 Reference is made to the Report for the Hearing for a fuller account of the legal context, the background and the subject-matter of the dispute and the submissions and arguments of the parties, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

7 It is apparent from the documents before the Court that during the pre-litigation procedure the Commission arrived at the conclusion that in the case of certain corps the derogation from the principle of equal treatment for men and women provided for in French legislation did not exceed the limits laid down in Article 2 (2) of the directive; the French Government had also withdrawn certain other corps from the contested list. At the time of the hearing, the application concerned only the following corps: five corps in the national police force, custodial staff in the prison service as far as 'surveillants chefs' (head warders) responsible for the direction of prisons are concerned, teachers and assistant teachers of physical education and sports and the management, technical and vocational training staff in the external departments of the prison service.

8 After the hearing, the Commission withdrew its action in regard to teachers and assistant teachers of physical education and sports since those corps had been removed in the mean time from the contested list by a decree of 29 April 1988. They therefore no longer form part of the subject-matter of the action.

9 With regard to management, technical and vocational training staff in the external departments of the prison service, the French Government admits that the derogation provided for in the national legislation is not in conformity with the directive. It has announced its intention to remove that corps from the contested list.

10 The issue between the parties is therefore limited to the requirements of the directive in relation to head warders of prisons and to the five corps in the national police force.

(a) *Head warders responsible for the direction of prisons*

11 The category of head warders responsible for the direction of prisons does not appear as such in the contested list since the head warders in question do not constitute a 'corps' within the meaning of the French legislation. On the other hand, the list refers to the 'corps du personnel de surveillance' (corps of custodial staff) as part of the corps in the external departments of the prison service for which separate recruitment of men and women may be provided for.

12 As far as custodial staff in general are concerned, the Commission admits that the specific nature of the post of warder and the conditions under which warders carry out their activities justify reserving such posts primarily for men in male prisons and primarily for women in female prisons. To that extent, the different access to the custodial staff corps arising from a system of separate recruitment for men and women does not go beyond the limits laid down in Article 2 (2) of the directive.

13 However, the Commission considers that an exception should be made in the case of 'surveillants chefs' in charge of prisons. They carry out management functions which involve no regular contact with the prisoners. Their duties are thus comparable to those of a 'directeur d'établissement' (governor of a penal institution), the only difference residing in the capacity of the penal institution managed by the official concerned. However, the French Government has admitted that, in the case of governors of large establishments, belonging to one sex or the other is not a determining factor.

14 The French Government contends that governors belong to the management staff corps ('personnel de direction') whereas head warders always belong to the custodial staff corps, even if they are required to take charge of a prison (maison d'arrêt). Recruitment of that body of personnel is therefore in accordance with the requirements of the directive, since separate recruitment is necessary for the custodial staff corps in general, as the Commission has admitted, and the list of candidates eligible for appointment to a post of head warder of a prison is drawn up without account being taken of a candidate's sex.

15 It can be seen from the documents before the Court that the custodial staff corps is composed of different grades, in particular those of 'surveillant' (warder) and 'surveillant principal' (principal warder), 'premier surveillant' (leading warder) and 'surveillant chef' (head warder). The applicable provisions state that head warders may be appointed governors of prisons (chefs de maison d'arrêt) if the establishment in question can accommodate no more than 100 prisoners. Head warders and, subject to their authority, leading warders, are 'responsible for organizing and directing the work of warders and principal warders' ('sont chargés de l'encadrement des surveillants et surveillants principaux'). Head warders appointed 'chefs de maison d'arrêt' are responsible for the operation of their own institution.

16 The question to be considered accordingly concerns a corps in respect of which separate recruitment of male and female candidates is regarded as justified under Article 2 (2) of the directive, in which promotion is carried out without discrimination but in which promotion to the highest grade may, in certain cases, lead to a situation in which the person concerned carries out activities of such a nature that sex does not constitute a determining factor.

17 In such a situation, the derogation provided for in Article 2 (2) of the directive extends to activities corresponding to the highest grade of the corps concerned,

even if certain of those activites do not necessarily have to be carried out by persons of one sex. Although it is true, as the Commission has emphasized, that the French authorities could have avoided the problem by organizing their departments differently, for example by creating a separate corps for prison governors, or by including that post in the management staff corps, it must also be admitted that there could be reasons for appointing to the post of head warder only persons having actually performed the duties of a warder. However, the French Government gave the Court to understand that such reasons exist in this case, having regard to the need to provide for opportunities for promotion within the corps of warders and to the fact that the professional experience acquired in that corps is desirable for the performance of the duties of a prison governor. For its part, the Commission has not shown that those arguments are not valid.

18 The Commission's complaints relating to head warders responsible for the direction of prisons must therefore be rejected.

(b) *The five corps in the national police force*

19 The following corps in the national police force are included in the contested list: 'commissaires' (inspectors and superintendents) in the national police force; 'commandants' and 'officiers de paix' in the national police force; 'inspecteurs' (detectives) in the national police force; 'enquêteurs' (investigators) in the national police force; 'gradés' (sergeants) and 'gardiens de la paix' (constables) in the national police force.

20 According to the Commission, the fact that certain police functions cannot be performed by men and women alike does not justify discriminatory treatment in admission to the police force in general. The application of Article 2 (2) of the directive cannot be based on a general assessment of police activities as a whole; it requires a specific consideration of the specific duties to be performed in individual cases.

21 The French Government states that the five corps at issue form the active corps of the national police force and that their duties may involve activities for which the sex of the persons who are to perform them constitutes a determining factor. In particular, members of the national police force must at any time be able to use

force in order to deter potential troublemakers. The fundamental requirement to maintain public order thus prevents the inclusion of a large proportion of women in the corps of officials entrusted with the duties in question.

22 The French Government adds that the last obstacle to the entry of women into all the corps of the national police force was abolished in 1983 and that since that time the percentage of posts allocated to women has increased significantly. However, the incorporation of female officers into the active services of the police force must be carried out gradually so as not to impair the proper performance of duties which serve public safety.

23 The argument conducted before the Court showed that the two parties agree that certain activities connected with the duties performed by the corps of the national police force may be performed by men only or, depending on the case, by women only, whereas certain other duties may be performed by any member of the police force, whether male or female. The dispute concerns the consequences arising from such a situation in relation to the application to Article 2 (2) of the directive.

24 In that regard, it should be pointed out that Article 2 (2) of the directive leaves the Member States the power to exclude certain 'occupational activities' from its field of application and that Article 9 (2) of the directive requires them periodically to assess the activities in question in order to decide, in the light of social developments, whether there is justification for maintaining the exclusions concerned. Article 9 (2) further provides that the Member States are to notify the Commission of the results of that assessment.

25 It follows from those provisions that the exceptions provided for in Article 2 (2) may relate only to specific activities, that they must be sufficiently transparent so as to permit effective supervision by the Commission and that in principle they must be capable of being adapted to social developments. The last requirement gives rise to no difficulties in this case; however, French law is not in accordance with the other two requirements.

26 As regards the requirement of transparency, it must be concluded that it is not fulfilled. Under the system of separate recruitment, the percentages of posts to be allotted to men and women respectively are fixed in the decision ordering the holding of a competition; the fixing of those percentages is not governed by any objective criterion defined in a legislative provision.

27 This lack of transparency also has consequences for compliance with the second requirement laid down by the directive, which relates to the activities involved. The contested system of recruitment makes it impossible to exercise any form of supervision, not only by the Commission and the courts but also by persons adversely affected by discriminatory measures, in order to verify whether the percentages fixed for the the recruitment of each sex actually correspond to specific activities for which the sex of the persons to be employed constitutes a determining factor within the meaning of Article 2 (2) of the directive.

28 The French Government also argues that the fact that separate recruitment exists at the corps level and not for access to certain precise activities is consistent with the basic principles of French law governing the French civil service. It should, however, be observed that such a circumstance should not lead to a situation in which derogations from an individual right such as the right to equal treatment of men and women exceed the limits of what is necessary to achieve the legitimate objective in view. The principle of proportionality makes it necessary to reconcile, as far as possible, equal treatment of men and women with the requirements which are decisive for the carrying out of the specific activity in question.

29 Consequently, the Commission's complaints concerning the system of recruiting officials to the five corps of the national police force must be upheld.

30 It follows from the foregoing that by retaining in force a system of separate recruitment according to sex, contrary to the requirements of Council Directive 76/207/EEC, for appointment to the management staff corps and the corps of technical staff and vocational training staff in the external departments of the prison service as well as to all of the five corps in the national police corps, the French Republic has failed to fulfil its obligations under the Treaty. The remainder of the application must be dismissed.

Costs

31 Under Article 69 (2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs. However, the first subparagraph of Article 69 (3) provides that the Court may order the parties to bear their own costs if each party succeeds on some and fails on other heads. Since the applicant has failed in one of its submissions, the parties must be ordered to bear their own costs.

On those grounds,

THE COURT

hereby:

(1) Declares that by retaining in force a system of separate recruitment according to sex, contrary to the requirements of 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, for appointment to the management staff corps and the corps of technical staff and vocational training staff in the external departments of the prison service as well as to all of the five corps in the national police force, the French Republic has failed to fulfil its obligations under the Treaty;

(2) Dismisses the remainder of the application;

(3) Orders each of the parties to bear its own costs.

Mackenzie Stuart Due Moitinho de Almeida Rodríguez Iglesias

Koopmans Everling Galmot Kakouris O'Higgins

Delivered in open court in Luxembourg on 30 June 1988.

J.-G. Giraud
Registrar

A. J. Mackenzie Stuart
President