some of those activities do not necessarily have to be carried out by persons of one sex, having regard to the way in which the career of officials must be structured and the importance to be attached to their professional experience.

2. The derogation provided for in Article 2 (2) of Directive 76/207 may relate only to specific occupational activities. They must be sufficiently transparent so as to permit effective supervision by the Commission and, in principle, they must be capable of being adapted to social developments. Those requirements are not fulfilled by the practice of fixing the percentages of posts to be allotted to men and women respectively in the case of each competition held to recruit officials to a corps in which only some activities justify recourse to the derogation and when no legislative provision defines any objective criterion for fixing those percentages. That practice 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.

REPORT FOR THE HEARING
delivered in Case 318/86 *

I — Facts and procedure

1. *Law applicable*

(a) *Community rules*

Article 1 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 1976, L 39, p. 40, hereinafter referred to as 'the directive') states that the purpose of the directive is to put into effect in the Member States the principle of equal treatment for men and women as regards *inter alia* access to employment. Article 3 provides that application of the principle of equal treatment means that there is to be no discrimination 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.

Article 2 (1) of the directive defines the principle of equal treatment as meaning that there is to be no discrimination whatsoever on grounds of sex either directly or indirectly by reference in particular to marital or family status. However, Article 2 (2) provides that the directive is to 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

* Language of the Case: French.

which, by reason of their nature or the context in which they are carried out, the sex of the worker constitutes a determining factor.

Article 9 (2) provides that Member States are periodically to assess the occupational activities referred to in Article 2 (2) in order to decide, in the light of social developments, whether there is justification for maintaining the exclusions concerned.

Finally, the first subparagraph of Article 9 (1) provides that Member States are to put into force the laws, regulations and administrative provisions necessary in order to comply with the directive within 30 months of its notification and are to inform the Commission thereof immediately. The directive was notified to the French Republic on 12 February 1976. The period prescribed for implementation therefore expired on 12 August 1978.

(b) *The system of recruitment for the public service in France*

In France, officials in the public service are recruited by competition. From time to time, administrative competitions are held for certain posts. In each competition a number of posts are available and are distributed among the candidates found to be suitable. Officials are not generally recruited for a specific post; a successful candidate in a competition is entitled to occupy, in the corps to which he belongs, any post in his grade. In the course of his career an official may be promoted to a higher post (the 'career principle').

In the majority of cases a single competition is held for female and male candidates. The sole criterion for recruitment is the grading of the candidate, regardless of the candidate's sex. However, certain exceptions have been provided for. 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 as follows:

'For certain corps a list of which shall be drawn up by decree of the conseil d'état . . . separate recruitment may be organized for men and women if belonging to one or other sex constitutes a determining factor for the performance of the duties carried out by persons in such posts.'

This provision replaces Article 18 *bis* of the Order of 4 February 1959 on the statut général des fonctionnaires (General Staff Regulations), an order which was repealed by Law No 84-16, cited above. Article 18 *bis* had been inserted in the order by Law No 82-380 of 7 May 1982. By virtue of Article 18 *bis*, the list of posts for which men and women may be recruited separately was laid down by Decree No 82-886 of 15 October 1982 (JORF 1982, p. 3154). Decree No 84-957 of 25 October 1984 on the application of Article 21 of Law No 84-16 maintained in force that list, which at the time covered the following corps:

inspectors and superintendents in the national police force;

'commandants' and 'officiers de paix' in the national police force;

detectives in the national police force;

investigators in the national police force;

police sergeants and police constables in the national police force;

'attachés d'éducation' at the 'maisons d'éducation' of the Légion d'honneur;

corps in the external departments of the prison service, namely: management staff corps, technical and vocational training staff corps and custodial staff corps;

customs inspectors;

customs investigators;

customs officers;

teachers;

physical education and sports teachers;

assistant physical education and sports teachers.

The separate recruitment for the abovementioned corps of public employees does not involve the holding of separate competitions, with separate sittings, examinations and selection boards. There is a single competition but the decision ordering the holding of a competition fixes in each case the percentage of posts to be allotted to men and women respectively.

2. *Background to the dispute*

In a letter of 12 August 1983 the Commission gave the French Government formal notice to submit its observations on Decree No 82-886 of 15 October 1982 within two months. The Commission considered that that decree, by fixing an extremely wide-ranging list of corps to which men and women could be recruited separately, was contrary to the principle of equal access to employment. That list exceeded the limits of the exemption laid down in Article 2 (2) of the directive.

In a letter of 16 February 1984 the French authorities replied to that letter, rejecting the Commission's criticisms. In particular they contended that the exceptions to the principle of the equal treatment of the sexes applied in the French public service were only formally incompatible with the directive, as a result of the particular way in which the public service is structured in France.

After the order of 4 February 1959 was repealed in 1984, the Commission on 7 August 1984 addressed to the French Government another letter, this time concerning Article 21 of Law No 84-16 of 11 January 1984 and, once again, the list laid down by Decree No 82-886, which was still in force. In that letter, the Commission stated essentially that Article 21 of Law No 84-16 defined the possibility of providing for exceptions to the principle of equal treatment according to criteria which were excessively general and which were not provided for by Article 2 (2) of the directive, and that any implementing decree adopted on such a basis was also incom-

patible with the directive. The Commission requested the French Government to submit its observations within two months.

On 30 October 1984 the French authorities replied to the fresh letter of formal notice. They rejected the Commission's criticisms, once again referring to the particular structure of the French public service. In addition, they contended that for the duties to be performed by persons belonging to the corps appearing on the list, the sex of the person was, by reason of their nature or the context in which they were carried out, a determining factor.

The Commission was not satisfied with the French Government's reply and on 29 January 1986 delivered the reasoned opinion provided for by Article 169 of the Treaty, requesting the French Republic to adopt the measures needed to comply with it within one month. When some months after notification of the reasoned opinion the situation remained unchanged, the Commission brought the present action.

3. *Subject-matter of the dispute*

In its reasoned opinion the Commission had already stated that, as regards custodial staff corps in prisons and the corps of 'attachés d'education' at the 'maisons d'éducation' of the Légion d'honneur, the derogation from the principle of the equality of the sexes provided for by the French legislation did not exceed the limits of Article 2 (2) of the directive. Subsequently, in a letter of 7 March 1986, the French Government informed the Commission that the three corps of customs inspectors, customs investigators and customs officers had been removed from the list at issue. Lastly, during the written procedure before the Court, the corps of teachers was also removed.

Under those circumstances the Commission restricts its application, in so far as particular corps are concerned, to the following corps: the five corps in the national police force; custodial staff in the prison service as far as 'surveillants chefs' (head wardens) responsible for the direction of prisons are concerned, teachers and assistant teachers of physical education, and the management and technical and vocational training staff in the external departments of the prison service.

4. *Procedure*

The Commission's application was lodged at the Court Registry on 18 December 1986.

The written procedure followed the normal course. However, after that procedure was closed, the Commission, with the Court's leave, submitted certain statistical information. The French Government submitted its observations on that document.

Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court decided to open the oral procedure without any preparatory inquiry.

II — Conclusions of the parties

The Commission, the applicant, claims that the Court should:

Declare 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;

Order the French Republic to pay the costs.

The French Republic, the defendant, contends that the Court should:

As regards the five corps in the national police force, physical education and sports teachers, and as regards the conditions for access of head wardens responsible for the direction of prisons, dismiss the Commission's application;

Order the applicant to pay the costs.

III — Submissions and arguments of the parties

1. *The system of separate recruitment*

The Commission claims that in principle separate recruitment is contrary to the principle of equal treatment as defined by the directive. By determining in advance the number of posts to be allocated to candidates of each sex, the French rules make the candidate's sex a criterion for his appointment. Consequently, separate recruitment according to sex is in itself contrary to the principle of non-discrimination and may therefore be justified only if one of the exceptions laid down by the directive applies.

The French Government refers first to the 'single competition' rule: there is a single competition with, in principle, the same tests, a single sitting and the same selection board (the only exception is for physical tests: these tests may be different). The determination in advance of the percentage of posts to be allocated to men and women respectively does not necessarily constitute a restriction of equal opportunities.

In addition, the French Government considers that separate recruitment may in any event be justified on the basis of Article 2 (2) of the directive.

2. *Separate recruitment and Article 2 (2) of the directive*

The Commission points out first of all that Article 2 (2) of the directive, being an exception, must be interpreted strictly. A derogation from the principle of non-discrimination is compatible with the directive only for objective reasons relating to the very nature of the occupational activity concerned or the context in which it is carried out and showing that, having regard to the specific duties involved, it may be pursued only by persons of a specific sex.

Secondly, the Commission states that even if certain posts within certain corps may involve duties for which sex constitutes a determining factor, that is no justification for applying discriminatory conditions of recruitment to those corps, considered as a whole and without regard for the nature and context in which the particular duties entrusted to successful candidates are carried out. The Commission considers that such a system goes beyond the terms of Article 2 (2) of the directive because it is too general in scope.

The French Government contends that the system of separate recruitment results from the particular way in which the French public service is structured: an official is appointed to a grade rather than to a particular post. An official in a certain grade has to occupy posts which often cover very different occupational activities. Furthermore, the General Staff Regulations for the Public Service provide that 'no distinction shall be made between men and women'. Once appointed, an official may no longer be subject to any measure based on his or her sex; for that reason, it is impossible to take into consideration the specific duties performed by an official instead of the particular corps to which he or she belongs.

The French Government adds that if separate recruitment is undertaken at the level of the posts to be filled and not at the level of access to corps, its effect would be identical. The percentage of posts reserved to men and women under the separate recruitment system is determined by the needs of the service and therefore by the specific nature of the posts to be filled.

Lastly, the French Government maintains that the system of separate recruitment constitutes progress in the sphere of equal treatment, in so far as it provides women with access to posts which were at one time reserved solely for men.

3. *Separate recruitment for individual corps*

(a) *Physical education and sports teachers and assistant teachers*

The Commission considers that a physical education and sports teacher should be able to adjust the exercises and average level of attainment to be reached according to the physical abilities of the pupils, according to their age or sex. Although it is true that the morphology and physical abilities of boys and girls are different, that does not justify separate recruitment. Moreover, physical education and sports teachers were not mentioned in the list of posts in the private sector for which belonging to one or other sex is a determining factor.

The French Government merely states that the posts of physical education and sports teachers and assistant teachers will be removed from the list at issue within a period of a few months.

(b) *Management staff and technical and vocational training staff in the external departments of the prison service*

It appears from the papers before the Court that both parties consider that separate recruitment for these two posts cannot be justified on the basis of Article 2 (2) of the directive.

The French Government states that these two posts will be removed from the list at issue.

(c) *Posts in the national police force*

The French Government contends that an excessive proportion of women in these corps, which are active corps in the national police force, would seriously damage the credibility of these corps and would appreciably alter the conditions in which police duties are carried out. The tasks entrusted to the police are often very dangerous and require that police officers should always be able to deter trouble-makers and resort to physical force. When maintaining order, the incidents with which they must deal are often unpredictable and may require immediate action. This requirement makes it impossible for a large number of women to be appointed to the groups of posts in the police force that are responsible for maintaining order. Consequently, considerations of public interest concerning the organization of the national police force and conditions for maintaining public order in France necessitate the maintenance of the system of separate recruitment.

The Commission recognizes that certain police duties may not be carried out by women and men without distinction. However, this cannot justify discriminatory treatment as regards access to the police force in general. The Commission states that Article 2 (2) of the directive does not permit derogations based on a comprehensive assessment of all the activities of a police corps. In that regard it is necessary to carry out a separate examination of the specific activities to be carried out.

As regards the physical capacity which is essential for carrying out certain police duties, the Commission adds that such a capacity forms part of the requirements which candidates must satisfy in order to take the tests. Furthermore, it does not believe that the risk of 'excessive feminization' of the police force can in fact be a foreseeable reality.

(d) *Head wardens responsible for the direction of prisons*

The Commission claims that head wardens of prisons no longer carry out supervisory duties; their duties are administrative, comparable to those of governors. For that reason, the Commission considers that, although the derogation in Article 2 (2) of the directive may justify separate recruitment for wardens in the strict sense, it does not apply in this case. Consequently, the post of head warden responsible for the direction of a prison should be open to men and women without distinction. In support of that view, the Commission refers to consultations concerning *inter alia* the application of the principle of equality between men and women as regards access to the posts of prison wardens, which were held by Mr Schmelck, First Honorary President of the Court of Cassation (Annex 10 to the application).

The French Government contends that head wardens responsible for the direction of prisons are part of the supervisory staff. Their post is in fact the highest stage in the career of a warden. Since the Commission has accepted that separate recruitment is justified for wardens, the French Government cannot see how an exception can be made for 'head wardens'. In that regard, the French Government stresses that access to the post of head of a prison is by promotion and not by recruitment. Suitability for such a post is itself evaluated without taking into account the wardens' sex.

T. Koopmans
Judge-Rapporteur