where husband and wife are both civil servants, the authority employing the husband is primarily responsible for paying the contributions and the authority employing the wife is required to pay the contributions only in so far as the upper limit is not reached by the contributions paid on behalf of the husband,

is incompatible with the principle laid down in Article 119 of the EEC Treaty that men and women should receive equal pay for equal work, in so far as the resultant differences between the gross salary of a female civil servant whose husband is also a civil servant and the gross salary of a male civil servant directly affect the calculation of other benefits dependent on salary, such as severance pay, unemployment benefit, family allowances and loan facilities.

In Case 23/83

REFERENCE to the Court under Article 177 of the EEC Treaty by the Centrale Raad van Beroep [Court of last instance in social security matters], Utrecht, for a preliminary ruling in the case pending before that court between

W. G. M. LIEFTING AND OTHERS

and

DIRECTIE VAN HET ACADEMISCH ZIEKENHUIS BIJ DE UNIVERSITEIT VAN AMSTERDAM [Board of the University Hospital, University of Amsterdam], Amsterdam, and Others

on the interpretation of Article 119 of the EEC Treaty,

THE COURT

composed of: Lord Mackenzie Stuart, President, T. Koopmans, K. Bahlmann and Y. Galmot (Presidents of Chambers), P. Pescatore, A. O'Keeffe, G. Bosco, O. Due and U. Everling, Judges,

Advocate General: Sir Gordon Slynn
Registrar: P. Heim

gives the following

JUDGMENT

Facts and Issues

The facts of the case, the course of the procedure and the observations submitted under Article 20 of the Protocol on the Statute of the Court of Justice of the EEC may be summarized as follows:

I — Facts and written procedure

The plaintiffs in the main proceedings are all women employed as officials in the public service. They are married and their husbands are also employed in the public service. Public officials are covered by two sets of pension rules: the Algemene Ouderdomswet [General Law on Old Age, hereinafter referred to as "the Old-Age Pensions Law"] and the Algemene Weduwen- en Wezenwet [General Law on Widows and Orphans hereinafter referred to as "the Widows' and Orphans' Benefits Law"], establishing a general pension scheme for persons domiciled in the Netherlands, and secondly the Algemene Burgerlijke Pensioenwet [General Civil Pensions Law], containing pension arrangements for public officials.

The Old-Age Pensions Law of 1957 contains general pension arrangements for all Netherlands nationals who have reached 65 years of age. Although the general old-age insurance scheme was in principle meant to cover persons who at the age of 65 are not eligible for any pension or only a very low pension, the Old-Age Pensions Law was made into a national insurance scheme for the sake of practicability. It was also considered fair that where there was already good provision for pensions, pension rights under the Old-Age Pensions Law should be partially incorporated into pension rights under the existing separate pension arrangements.

As the State already made full provision for its employees on their retirement, originally in the Pensioenwet [Pension Law] of 1922 and now in the General Civil Pensions Law, the unlimited overlapping of pensions payable under the Old-Age Pensions Law with those paid to public officials would have meant that in many cases pension income would have exceeded income received during active service prior to retirement.

Consequently, in order to avoid any overlapping of pensions, the General Civil Pensions Law provides that a proportion of the general old-age pension is to be considered as forming part of the pension of public officials. This "built-in" portion is the part of the general old-age pension acquired during employment in the public service.

Consequently, a retired public official receives in general only a proportion of the pension payable under the Old-Age Pensions Law or the Widows' and Orphans' Benefits Law. Article N 9 of the General Civil Pensions Law requires the authority with which an official is employed to transfer contributions and to assume the burden of their cost which in principle rests on the official.

Under the Old-Age Pensions Law and the Widows' and Orphans' Benefits Law a married couple is treated as one person

for the purposes of both disbursement of pensions and payment of contributions. There is a maximum limit on contributions. If the public authority has transferred more than the maximum amount on behalf of an official, the excess (called "over-compensation") is paid back by the tax authorities, not to the public authority which paid it, but to the official concerned. Obviously that payment (called "compensation") is financially advantageous for the official for whom the public authority has always transferred contributions.

The recipients of "over-compensation" were mostly officials who worked at different State institutions at the same time with each institution transferring separate contributions under the Old-Age Pensions Law and the Widows' and Orphans' Benefits Law and husbands of female public officials who were employed by different State insitutions which transferred contributions separately and the total contributions transferred for both spouses exceeded the maximum.

In 1972 and 1973 legislation was introduced to end the so-called "over-compensation". It consisted of the Wet Gemeenschappelijke Bepalingen Overheidspensioenwetten [Law laying down common provisions with regard to laws governing the pensions of public officials], the Uitvoeringsbesluit Beperking Meervoudige Overneming AOW/AWW — Premie [order restricting the assumption of payment of contributions due under the Old-Age Pensions Law and the Widows' and Orphans' Benefits Law by more than one institution] and various implementing provisions. All those provisions together created an administrative system under which the various State institutions keep one another informed about the separate transfer of contributions for the same official or married couple. Once the maximum contributions have been transferred in respect of one employment, no further contributions are transferred in respect of another.

The plaintiffs in the main proceedings made applications to the Ambtenarengerecht [Public Officials' Tribunal], Amsterdam, the Ambtenarengerecht, Arnhem, the Ambtenarengerecht, 's-Hertogenbosch, and the Ambtenarengerecht, Utrecht, contending that the "compensation" and "over-compensation" were "pay" within the meaning of Article 119 of the EEC Treaty and that consequently the ending of the transfer of "over-compensation" was contrary to that article as it largely affected contributions payable in respect of married female officials.

Their applications were dismissed at first instance. They then appealed to the Centrale Raad van Beroep [court of last instance in social security matters], Utrecht, which, by order of 20 January 1983, submitted the following questions to the Court under Article 177 of the EEC Treaty:

"1. Must the term 'pay' appearing in Article 119 of the EEC Treaty be construed as including the 'compensation' or, in certain cases, the amount referred to as 'the over-compensation' which the employing public authority used to pay to the tax authorities in excess of the maximum contributions due under the Algemene Ouderdomswet and the Algemene Weduwen en Wezenwet but which now no longer need be transferred by such an authority?

2. If the answer to the first question is in the affirmative, must Article 119 of the Treaty be construed as meaning that the system applying in the Netherlands based on the Wet Gemeenschappelijke Bepalingen Overheidspensioenwetten must be regarded as being contrary to the principle that men and women should receive equal pay for equal work laid down in Article 119 because, under that system, in those cases in which the joint contributions due under the Algemene

Ouderdomswet and the Algemene Weduwen en Wezenwet for a married couple employed in the public service exceed the maximum amounts of contributions due, the contributions are primarily paid by the husband's employer while the wife's employer continues to transfer contributions only in so far as the maximum amount of contributions due is not exceeded?"

In accordance with Article 20 of the Protocol on the Statute of the Court of Justice of the European Economic Community written observations were submitted by two plaintiffs in the main proceedings, Mrs W. G. M. Liefting, represented by R. A. A. Duk, of the Hague Bar, and Mrs W. A. van Plateringen-Doeksen, represented by O. W. Brouwer, of the Amsterdam Bar, by the defendant in the main proceedings, the Board of the University of Amsterdam, represented by H. D. M. Mulder, of the Rotterdam Bar, by the Netherlands Government, represented by I. Verkade, Secretary General at the Ministry of Foreign Affairs, and by the Commission of the European Communities, represented by its Legal Adviser, M. Beschel, assisted by F. Herbert, of the Brussels Bar.

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 — Written observations submitted to the Court

On the *first question* Mrs W. G. M. Liefting, a plaintiff in the main proceedings, argues that compensation paid directly or indirectly to an employee, in this case a public official, by his employer at or about the same time as the rest of his salary for the disadvantage of having his pension rights reduced is actual pay for salary purposes and for social security and tax purposes.

The contributions payable under the Old-Age Pensions Law and the Widows' and Orphans' Benefits Law are social security contributions which should be called employee contributions. They are deducted at source just like income tax and paid by the employer to the tax authorities which collect both income tax and social security contributions. The contributions payable under the two Laws are therefore an integral part of an official's pay. There is a parallel between this case and Case 69/80 *Worringham and Humphreys* v *Lloyds Bank* [1981] ECR 767 in which the Court held that:

"... a contribution to a retirement benefits scheme which is paid by the employer in the name of the employees by means of an addition to the gross salary and which helps to determine the amount of that salary is 'pay' within the meaning of the second paragraph of Article 119 of the EEC Treaty".

The situation in this case is in substance no different from that in which the State increases officials' salaries by the amount of the contribution payable (normally by the employee) under the Old-Age Pensions Law and then deducts the contribution from salaries on the condition that no such increase in salary equivalent to the deduction will take place for those female officials in whose case "over-compensation" has now been stopped. The situation in the Netherlands is practically the same as that in *Worringham and Humphreys.*

It is clear from the history of the legislation in question that the "compensation" was granted to prevent

the public officials concerned from suffering any disadvantage. It was subsequently stopped because pension rights under the Old-Age Pensions Law can be acquired "built into" the pensions without full payment of contributions.

The cases in which the female public officials concerned have husbands who are not public officials show that the compensation is unmistakably "pay". If those husbands are liable to pay the maximum contribution in respect of their employment they retain a right to repayment and this amount is part of disposable income.

The plaintiffs in the main proceedings argue that in view of the purpose of the legislation in question the contribution due under the Old-Age Pensions Law and the Widows' and Orphans' Benefits Law is an employee contribution and therefore simply part of the pay of the employee concerned. The only difference that exists in this regard between employers in the public and private sectors is that in the public sector the contributions payable under the Old-Age Pensions Law and the Widows' and Orphans' Benefits Law are not incorporated in salary scales and in consequence the State literally bears their cost. The true nature of the amount which the State pays is clear from the annual statements of salary issued to public officials in which the contributions it transfers are quite rightly included in the amount of the salary.

On the *second question* the plaintiffs in the main proceedings maintain that if the "compensation" is regarded as part of public officials' pay it seems clear that there is a difference in pay between men and some women. Since the only officials who do not receive the compensation, at any rate not in full, are women (married to public officials), the fact that not all women are discriminated against does not preclude the application of the principle of non-discrimination.

The discrimination in question is not due to the application of a social security scheme of the kind at issue in Case 80/70 *Defrenne* [1971] ECR 445 but is meant to be a corrective to the scheme established by the Old-Age Pensions Law. A difference in pay is not a proper corrective.

Mrs *van Plateringen-Doeksen* observes that in the first *Defrenne* case the question was whether the term "pay" in Article 119 should be construed as also covering a retirement pension granted under a social security scheme financed by contributions from employees and employers and by State subsidy.

In view of the judgment in that case, pension rights are "pay" within the meaning of Article 119 only if they are not directly based on statute but arise under provisions which leave the contracting parties a degree of latitude and are thus private in nature.

The provisions in this case are considerably different from those at issue in the first *Defrenne* case because they relate to:

The payment of contributions and not to the grant of (or entitlement to) benefits

and, secondly, since 1963 those contributions have been paid in full by the employer which happens to be the State.

In this case the question is quite different, for it is whether the employee's contribution, the cost of which is borne by the employer, must be regarded as "pay" within the meaning of Article 119. The Court has answered that question in the affirmative in *Worringham and Humphreys* in which it held that a contribution paid by an employer on behalf of an employee is "pay" within the meaning of Article 119. It is a benefit which must be regarded as "pay" as it amounts to a saving for the employee because he does not need to pay the employee's contribution himself.

The rules at issue in this case provide that in its capacity of employer the State is to assume on behalf of its officials the obligation to pay contributions due under the Old-Age Pensions Law and the Widows' and Orphans' Benefits Law and this amounts to a benefit similar to that in question in *Worringham and Humphreys*. The gross salary of officials is in effect increased by the amount which the State pays on their behalf. As in *Worringham and Humphreys*, gross salary helps to determine certain other benefits, such as mortgage and credit facilities for example, in the Netherlands, too. Furthermore, married female officials lose a certain advantage in so far as the refund of contributions or the "over-compensation" has in fact been stopped by the provisions in question.

The fact that the contribution borne by the State in its capacity of employer must be paid under a social security scheme does not make their payment any the less "pay".

According to the judgment in Case 12/81 *Eileen Garland* v *British Rail Engineering Limited* [1982] ECR 359, a benefit granted in respect of employment need not be based on a contractual obligation. The determining factor is that the employment makes the employee eligible for the benefit. It does not therefore matter what the benefit is based upon. All that matters is that by reason of the employment the obligation to pay contributions is assumed by the State on behalf of its officials.

In conclusion Mrs van Plateringen-Doeksen submits that the payment by Netherlands public bodies on behalf of officials of the employee's contributions due under the Old-Age Pensions Law and the Widows' and Orphans' Benefit Law forms part of gross salary and as such is covered by the term "pay" in Article 119 as being salary in the strict sense of the word. Since in each case the assumption of payment of the contributions amounts to a benefit for the official and, as is clear from consideration of the Court's rulings, the conditions laid down in this regard are fulfilled, it is also covered in other respects by the term "pay" in Article 119. The benefit is in fact paid directly by the employer and also arises directly from employment in the public service.

On the *second question* Mrs van Plateringen-Doeksen states that, according to the judgment in *Worringham and Humphreys*, inequality in gross salaries between men and women amounts to discrimination contrary to Article 119 of the EEC Treaty.

The aim of the rules applied by the State is clear: it is to ensure that in a given situation the contributions it transfers are as far as possible directly in line with the

amount of contributions eventually payable by the official. That aim cannot however be obtained by paying for the husband and not partly for the wife, or vice versa.

In its capacity of employer the State may, of course, change officials' remuneration by legislative process. But it may no longer act in a way which involves sex discrimination.

On the direct effect of Article 119 of the EEC Treaty Mrs van Plateringen-Doeksen states that the discrimination at issue in this case is direct and overt, for it involves unequal pay for men and women (married to officials) for equal work in the same service and is moreover provable by legal analysis alone since it arises from statutory and administrative provisions.

The *Board of the University of Amsterdam* observes first of all that Article 119 is directly applicable in this case but then points out that it is clear from the first *Defrenne* case that the transfer made under Article N 9 of the General Civil Pensions Law is not part of the plaintiff's pay within the meaning of Article 119 of the EEC Treaty.

The reasoning behind Article N 9 is that in incorporating the pension payable under the Old-Age Pensions Law in the pension payable under the General Civil Pensions Law it would not be appropriate to burden public officials with the payment of contributions due under the Old-Age Pensions Law. Consequently the employer assumes the burden of paying the contributions. What an institution pays pursuant to Article N 9 is not therefore pay for work performed but the assumption of a debt. There is no discrimination between men and women as regards this assumption of debt.

The *Netherlands Government* considers that the provisions of Netherlands law are not contrary to Article 119 of the EEC Treaty or Directive No 75/117/EEC in which the principle that men and women should receive equal pay for the same work is laid down.

The assumption of payment of contributions due under the Old-Age Pensions Law and the Widows' and Orphans' Benefits Law is laid down in a statutory provision which was enacted by the legislature to cover all public employees (as well as those having the same status in law).

The sole aim of the measures in question was to end the previous situation in which the State transferred more contributions than were payable by officials by providing that in future it should pay contributions only up to the maximum limits specified in the Old-Age Pensions Law and Widow's and Orphans' Benefits Law. In this respect the sex of officials is not taken into account *per se*. Besides applying to female officials whose husbands are also employed in the public service the measures also apply to male and female officials who are employed by more than one public institution. It is true that in the case of a female official whose husband is employed in the public service the contributions in respect of the man's salary are paid first, and only then, if and so far as the maximum limit on contributions has still not been reached, are the contributions paid for the woman. Although in such a case a distinction is made between men and women for the purpose of applying the measures, it cannot be regarded as sex discrimination in the matter of pay, for it is entirely connected with the structure

of the Old-Age Pensions Law and the Widows' and Orphans' Benefits Law. Under those Laws the married woman's income is regarded as that of her husband for the purposes of levying the contributions. In view of the rationale of the rules adopted to avoid the over-compensation of contributions due under the Old-Age Pensions Law and the Widows' and Orphans' Benefits Law (i.e. not to pay more contributions than are actually due) it cannot be said that in this regard the married woman is in a position comparable to that of the married man since for the purposes of the two laws the married woman's liability to pay contributions herself is limited.

The Netherlands Government concludes that as a general social security scheme the Old-Age Pensions Law lies outside the ambit of Article 119 of the EEC Treaty. If, however, the Court should take the view that the compensation or over-compensation amounts to "pay" within the meaning of Article 119, the Netherlands Government points out that the "pay" in the form of compensation or over-compensation works out the same for men and women. Finally, no benefits in cash or in kind are linked to the compensation or over-compensation.

The *Commission's* first point is that it is clear from the decisions of the Court that unlike Articles 117 and 118 of the EEC Treaty, which essentially lay down a programme, Article 119 is confined to the question of discrimination between men and women in the matter of pay and thus constitutes a special rule whose application is linked to specific factors. What matters in particular here is that it is not only a matter of "pay discrimination" but also a question of equal work.

However, in the present case it must be noted that the complaint made by the plaintiffs in the main proceedings, namely that where the maximum limit on the household contribution is exceeded the woman's employers will simply transfer less contributions, always arises as soon as the man's income exceeds 50% of the maximum income on the basis of which the contribution is calculated.

It therefore seems that it is not so much a question of directly granting preference to the man as of a consequence of the more general policy of preferring the married man to the married woman.

It considers that the answer to the first question has already been given in the judgments in the first *Defrenne* case and in *Worringham and Humphreys.*

In the Court's decision in the first *Defrenne* case the decisive factor for determining what is "pay" was the express requirement in the second paragraph of Article 119 that the direct or indirect benefit should be granted to the employee "in respect of his employment".

The Commission considers that the national court's description of the compensation scheme shows that, as in the first *Defrenne* case, the facts of this case are outside the ambit of Article 119 as defined by the Court.

The General Civil Pensions Law as well as the Old-Age Pensions Law and Widows' and Orphans' Benefits Law concern the statutory social security schemes which compulsorily apply to general categories of employees, are financed by employees, employers and the State and under which contributions are governed not so much by the

employment relationship between employer and employee as by social policy considerations. The rules on the incorporation of the statutory pension payable under the Old-Age Pensions Law into the public official's pension, which is also governed by statute, as well as on compensation and exclusion of overcompensation are also laid down by statute and apply by law to all public employees, that is to say to a specific, abstractly defined category of workers.

The Commission moreover draws the Court's attention to a point Mr Advocate General Dutheillet de Lamothe also made in his opinion in the first *Defrenne* case, namely that the contributions are collected by the tax authorities.

In *Worringham and Humphreys* the Court held that "a contribution to a retirement benefits scheme which is paid by the employer in the name of the employees by means of an addition to the gross salary and which helps to determine the amount of that salary is 'pay' within the meaning of the second paragraph of Article 119 of the EEC Treaty".

The Commmission considers that precisely that judgment provides confirmation *a contrario* of the first *Defrenne* case and of the negative reply which must be given to the first question in the present case.

The *Worringham and Humphreys* case concerned two different pension schemes which Lloyds Bank devised in collective bargaining with the trade unions and under which members contracted out of the earnings-related part of the State pension scheme and this part was replaced by a contractual scheme. The scheme in question was not a statutory scheme but a private contractual scheme.

Unlike the *Worringham and Humphreys* case, this case involves the assumption of payment by the employer of the compulsory contributions due under the Old-Age Pensions Law, but obviously only up to the statutory limits. It clearly falls within the ambit of Directive No 79/7/EEC on the progressive implementation of the principle of equal treatment for men and women in matters of social security (Official Journal 1979, L 6, p. 24).

According to Article 3, the directive is to apply to:

"(a) statutory schemes which provide protection against the following risks:

...

...

old-age,

...".

According to Article 4 of the directive, "the principle of equal treatment means that there shall be no discrimination whatsoever on grounds of sex either directly, or indirectly by reference in particular to marital or family status, in particular as fas as concerns:

...

The obligation to contribute and the calculation of contributions,

...".

The six-year period referred to in Article 8 which started from the notification of the direcitve does not expire until 22 December 1984.

The Commission considers that only after that date will it therefore be possible to assess the compensation scheme with reference to Community law.

In view of its proposed answer to the first question, the Commission considers that the second question need not be answered.

However, in case the Court should take the view in its answer to the first question that Article 119 of the EEC Treaty does apply, the Commission considers that the obvious precedent in its case-law is *Worringham and Humphreys*. But that case differed from the present case inasmuch as in *Worringham and Humphreys* a clear and explicit distinction was drawn between male and female employees whereas in the present case the differences in treatment complained of affect only a limited category of female public officials and only in very specific circumstances.

However, the Commission believes that the application of criteria which affect female employees, in this case public officials, only indirectly and to a partial extent may amount to prohibited discriminatory treatment just as much as the direct application of a criterion based on sex. Reference may be made in this regard to the Court's judgment in Case 20/71 *Luisa Sabbatini, née Bertoni*, v *European Parliament* [1972] ECR 345.

Although no express reference was made to Article 119 of the EEC Treaty in that case, which concerned the Staff Regulations of Officials of the European Communities, the Court held that the fact that entitlement to the expatriation allowance had been made dependent on the status of "head of household" in the knowledge that under the Staff Regulations this normally meant the married male official amounted to prohibited discrimination.

In *Worringham and Humphreys* the Court held that the directly applicable prohibition laid down in Article 119 of the EEC Treaty also applied to a scheme which had the effect of giving men higher (gross) pay because the obligations to pay contributions applied only to men and not to women and the contributions payable by men were paid by the employer in their name by means of an addition to gross salary.

The reference to the absence of any obligation upon women to pay contributions is an application of the rule valid for all types of discrimination prohibited by Community law (in Articles 7, 48, 52, 59, 85, 86 and 95) that prohibited discrimination exists only where facts or situations that are at least comparable are treated differently.

It is clear from *Worringham and Humphreys* that the Court, too, accepts that in a strict comparison of gross salaries the exemption of the married female official from the obligation to pay contributions is relevant and consequently makes it difficult to reach a finding of discrimination.

However, the Court went on to point out that owing to the difference in gross pay men enjoyed greater benefits or social advantages than those to which women were entitled.

Consequently, if it proves necessary to reply to the second question, that criterion could be decisive here, too. In that event it would be for the national court to investigate whether in this case the difference in gross salary affects entitlement to certain other benefits and their amount and whether the exemption of the married woman from liability to pay contributions has a negative effect

on the benefits she subsequently receives, particularly where her marriage comes to an end through her husband's death or through divorce.

III — Oral procedure

One of the plaintiffs in the main proceedings, Mrs van Plateringen-Doeksen, represented by O. W. Brouwer and P. Roorda of the Amsterdam Bar, and the Commission, represented by its Legal Adviser, M. Beschel, assisted by F. Herbert of the Brussels Bar, presented oral argument at the sitting on 21 March 1984.

The Advocate General delivered his opinion at the sitting on 8 May 1984.

Decision

1 By order of 20 January 1983, received at the Court Registry on 16 February 1983, the Centrale Raad van Beroep, Utrecht, submitted to the Court for a preliminary ruling under Article 177 of the EEC Treaty two questions on the interpretation of Article 119 of the EEC treaty.

2 That order was made in the context of nine actions brought by the plaintiffs in the main proceedings against the various public authorities which employ them.

3 The plaintiffs in the main proceedings are all women employed as civil servants. They are married and their husbands are also employed in the civil service. Civil servants are covered by two sets of pension rules: the Algemene Ouderdomswet [General Law on Old-Age Insurance Law, hereinafter referred to as the "Old-Age Law"] and the Algemene Weduwen en Wezenwet [Widows and Orphans General Insurance Law, hereinafter referred to as "the Widows and Orphans Law"], establishing a general pension scheme for persons residing in the Netherlands, and secondly the Algemene Burgerlijke Pensioenwet [General Civil Pensions Law], laying down pension arrangements for civil servants.

4 In order to avoid any overlapping of pensions, the General Civil Pensions Law provides that a proportion of the general Old-Age Pension is to be regarded as forming part of the pension of civil servants. Consequently, a retired civil servant receives in general only a proportion of the pension payable under the Old-Age Law or the Widows and Orphans Law but, by way of compensation, he is not obliged, while in employment, to pay contri-

butions under those two laws. By virtue of Article N 9 of the General Civil Pensions Law the contribution is paid by the authority by which a civil servant is employed; that article makes the payment of contributions, which in principle is the responsibility of the civil servant, incumbent upon the public authority.

5 Under the Old-Age Law and the Widows and Orphans Law a married couple is treated as one person for the purposes both of benefits and of contributions. Only one contribution is payable on the total of both salaries. The contribution is collected by the collector of direct taxes at the same time as income tax. There is a maximum limit for contributions.

6 Before 1972, if the amounts paid by the public authority exceeded that maximum limit, the surplus (called "over-compensation") was paid back by the collector of taxes, not to the public authority which paid it but to the civil servants concerned. Obviously, that payment was financially advantageous for them. The recipients of "over-compensation" were mostly civil servants who worked at the same time for different public authorities, each of which paid separate contributions under the Old-Age Law and the Widows and Orphans Law, and the wives of civil servants employed by an authority other than the one for which their husbands worked.

7 In 1972 and 1973 legislation was introduced to terminate the so-called "over-compensation". It consists of the Wet Gemeenschappelijke Bepalingen Overheidspensioenwetten [Law laying down common provisions with regard to laws governing the pensions of civil servants], the Uitvoeringsbesluit Beperking Meervoudige Overneming AOW/AWW — Premie [Order restricting the payment of contributions due under the Old-Age Insurance Law and the Widows and Orphans General Insurance Law by more than one institution] and various implementing provisions. Those provisions together have created an administrative system under which the various public authorities keep one another informed about the separate payment of contributions for the same civil servant or married couple. Once the maximum amount of contributions has been paid in respect of employment in one place, no further contributions are paid in respect of employment elsewhere.

8 The plaintiffs in the main proceedings made applications to the Ambtenarengerecht [Public Officials' Tribunal], Amsterdam, the Ambtenarengerecht, Arnhem, the Ambtenarengerecht, 's-Hertogenbosch, and the

Ambtenarengerecht, Utrecht, contending that the "compensation" and "overcompensation" were pay within the meaning of Article 119 of the EEC Treaty and that, consequently, the abolition of the payment of "overcompensation" was contrary to that article as it largely affected contributions payable in respect of married female civil servants.

9 Their applications were dismissed at first instance and they appealed to the Centrale Raad van Beroep [Court of last instance in social security matters], Utrecht. Considering that an interpretation of Article 119 was necessary to enable it to give judgment, the Centrale Raad van Beroep stayed the proceedings and submitted the following questions to the Court for a preliminary ruling under Article 177 of the EEC Treaty:

"1. Must the term 'pay' appearing in Article 119 of the EEC Treaty be construed as including the 'compensation', or, in certain cases, the amount referred to as 'the overcompensation' which the employing public authority formerly paid to the tax authorities in excess of the maximum contributions due under the Algemene Ouderdomswet and the Algemene Weduwen en Wezenwet but which now no longer need be paid by such an authority?

2. If the answer to the first question is in the affirmative, must Article 119 of the Treaty be construed as meaning that the system in force in the Netherlands based on the Wet Gemeenschaappelijke Bepalingen Overheidspensioenwetten must be regarded as being contrary to the principle that men and women should receive equal pay for equal work laid down in Article 119 because, under that system, in those cases in which the joint contributions due under the Algemene Ouderdomswet and the Algemene Weduwen en Wezenwet for a married couple employed in the public service exceed the maximum amounts of contributions due, the contributions are primarily paid by the husband's employer while the wife's employer continues to pay contributions only in so far as the maximum amount of contributions due is not exceeded?"

10 Those questions relate to a social security scheme under which:

1. the contributions are calculated on the basis of the employee's salary but may not exceed a certain limit.

2. a husband and wife are treated as one person, the contributions being calculated on the basis of their combined salaries, subject once again to the upper limit,

3. the State is bound to pay on behalf of its employee the contributions owed by him, and

4. where husband and wife are both civil servants, the authority employing the husband is primarily responsible for paying the contributions and the authority employing the wife is required to pay the contributions only in so far as the upper limit is not reached by the contributions paid on behalf of the husband.

The answer must enable the national court to appraise the compatibility of such a scheme with the principle of equal pay for male and female employees doing the same work laid down in Article 119 of the Treaty, if a consequence of that scheme is that, in the case of a female civil servant whose husband is also a civil servant, the contribution paid on behalf of the wife is lower than that paid on behalf of a male civil servant doing the same work.

11 Under the system described above a civil servant whose husband is also a civil servant has the same net disposable salary as a male civil servant doing the same work but the latter's gross salary is higher than hers. The reason for that difference is to be found in the way in which the Netherlands old-age insurance scheme and widows' and orphans' pensions scheme operate.

12 It follows from the decisions of the Court, and in particular from the judgment of 11 March 1981 (Case 69/80 *Worringham and Another* v *Lloyds Bank* [1981] ECR 767), that although the portion which employers are liable to contribute to the financing of statutory social security schemes to which both employees and employers contribute does not constitute pay within the meaning of Article 119 of the Treaty, the same is not true of sums which are included in the calculation of the gross salary payable to the employee and which directly determine the calculation of other advantages linked to the salary such as redundancy payments, unemployment benefits, family allowances and credit facilities. That is also the case if the amounts in question are immediately deducted by the employer and paid to a pension fund on behalf of the employee.

13 Consequently, the amounts which the public authorities are obliged to pay in respect of contributions owed to the social security scheme by persons working for the State and which are included in the calculation of the gross salary payable to civil servants must be regarded as pay within the meaning of Article 119 since they directly determine the calculation of other advantages linked to the salary.

14 The principle that men and women should receive equal pay for equal work, as laid down in Article 119, has not therefore been complied with in so far as those other advantages linked to the salary and determined by the gross salary are not the same for male civil servants and for female civil servants whose husbands are also civil servants.

15 The reply to the questions raised by the national court must therefore be that a social security scheme under which:

1. the contributions are calculated on the basis of the employee's salary but may not exceed a certain limit,

2. a husband and wife are treated as one person, the contributions being calculated on the basis of their combined salaries, subject once again to the upper limit,

3. the State is bound to pay on behalf of its employee the contributions owed by him, and

4. where husband and wife are both civil servants, the authority employing the husband is primarily responsible for paying the contributions and the authority employing the wife is required to pay the contributions only in so far as the upper limit is not reached by the contributions paid on behalf of the husband,

is incompatible with the principle laid down in Article 119 of the EEC Treaty that men and women should receive equal pay for equal work, in so far as the resultant differences between the gross salary of a female civil servant whose husband is also a civil servant and the gross salary of a male civil servant directly affect the calculation of other benefits dependent on salary, such as severance pay, unemployment benefit, family allowances and loan facilities.

Costs

16 The costs incurred by the Government of the Kingdom of the Netherlands and by the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. As these proceedings are, in so far as the parties to the main action are concerned, in the nature of a step in the action pending before the national court, the decision as to costs is a matter for that court.

On those grounds,

THE COURT

in answer to the questions referred to it by the Centrale Raad van Beroep, Utrecht, by order of 20 January 1983, hereby rules:

A social security scheme under which:

1. **the contributions are calculated on the basis of the employee's salary but may not exceed a certain limit,**
2. **a husband and wife are treated as one person, the contributions being calculated on the basis of their combined salaries, subject once again to the upper limit,**
3. **the State is bound to pay on behalf of its employee the contributions owed by him, and**
4. **where husband and wife are both civil servants, the authority employing the husband is primarily responsible for paying the contributions and the authority employing the wife is required to pay the contributions only in so far as the upper limit is not reached by the contributions paid on behalf of the husband,**

is incompatible with the principle laid down in Article 119 of the EEC Treaty that men and women should receive equal pay for equal work, in so far as the resultant differences between the gross salary of a female civil servant whose husband is also a civil servant and the gross salary of a male civil servant directly affect the calculation of other benefits dependent on salary, such as severance pay, unemployment benefit, family allowances and loan facilities.

Mackenzie Stuart Koopmans Bahlmann Galmot

Pescatore O'Keeffe Bosco Due Everling

Delivered in open court in Luxembourg on 18 September 1984.

P. Heim
Registrar

A. J. Mackenzie Stuart
President