satisfy or need not satisfy. The need to ensure that the directive is completely effective therefore requires that any clauses in such agreements which are incompatible with the obligations imposed by the directive upon the Member States may be rendered inoperative, eliminated or amended by appropriate means.

2. Whilst Article 2 (2) of Directive 76/207 allows Member States to exclude from the field of application of the directive 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, the fact that a law of a Member State excludes from the prohibition of discrimination between sexes all kinds of employment in private households or in small undertakings with not more than five employees nevertheless goes beyond the objective which may be lawfully pursued within the framework of the provision in question, by reason of the generality of the exclusion.

3. As regards access to the occupation of midwife and to the training relating thereto, the Member States are under an obligation to implement the principle of equality of treatment laid down by Directive 76/207. It must however be recognized that at the present time personal sensitivities may play an important role in relations between midwife and patient. In those circumstances, by failing at the present time fully to apply the principle laid down in the directive, a Member State has not exceeded the limits of the power granted to the Member States by Articles 9 (2) and 2 (2) of the directive.

In Case 165/82

COMMISSION OF THE EUROPEAN COMMUNITIES, represented by John Forman, a member of its Legal Department, acting as Agent, having an address for service in Luxembourg at the office of Oreste Montalto, a member of its Legal Department, Jean Monnet Building, Kirchberg,

applicant,

v

UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND, represented by J. D. Howes, Treasury Solicitor's Department, assisted by I. Glick, with an address for service in Luxembourg at the Embassy of the United Kingdom,

defendant,

APPLICATION for a declaration that the United Kingdom has failed to fulfil its obligations under the EEC Treaty by failing to enact within the

prescribed period the provisions needed in order to comply with 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),

THE COURT

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

Advocate General: S. Rozès
Registrar: P. Heim

gives the following

JUDGMENT

Facts and Issues

The facts of the case, the course of the procedure and the submissions and arguments of the parties may be summarized as follows:

I — Facts and written procedure

The purpose of Council Directive 76/207 is to put into effect in the Member States the principle of equal treatment for men and women as regards access to employment, including promotion, and to vocational training and as regards working conditions. That principle is referred to as "the principle of equal treatment" (Article 1 (1)).

Article 2 of the directive reads as follows:

"1. For the purposes of the following provisions, the principle of equal treatment shall mean that there shall be no discrimination whatsoever on grounds of sex either directly or indirectly by reference in particular to marital or family status.

2. This 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.

...".

Article 3 of the directive provides:

"1. Application of the principle of equal treatment means that there shall 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.

2. To this end, Member States shall take the measures" listed in the latter part of that article.

Article 4 of the directive provides:

"Application of the principle of equal treatment with regard to access to all types and to all levels, of vocational guidance, vocational training, advanced vocational training and retraining, means that Member States shall take" the measures subsequently listed in that article.

The relevant provisions of Article 5 of the directive are as follows:

"1. Application of the principle of equal treatment with regard to working conditions, including the conditions governing dismissal, means that men and women shall be guaranteed the same conditions without discrimination on grounds of sex.

2. To this end, Member States shall take" the measures listed in the subsequent part of that provision.

The measures which the Member States must take pursuant to Articles 3, 4 and 5 are the following:

"... the measures necessary to ensure that:

(a) any laws, regulations and administrative provisions contrary to the principle of equal treatment shall be abolished;

(b) any provisions contrary to the principle of equal treatment which are included in collective agreements, individual contracts of employment, internal rules of undertakings or in rules governing the independent occupations and professions shall be, or may be declared, null and void or may be amended".

Articles 3 and 5 further require that:

"(c) those laws, regulations and administrative provisions contrary to the principle of equal treatment when the concern for protection which originally inspired them is no longer well founded shall be revised; and ... where similar provisions are included in collective agreements labour and management shall be requested to undertake the desired revision."

Article 4 requires that:

"(c) without prejudice to the freedom granted in certain Member States to certain private training establishments, vocational guidance, vocational training, advanced vocational training and retraining shall be accessible on the basis of

the same criteria and at the same levels without any discrimination on grounds of sex."

Article 6 of the directive provides:

"Member States shall introduce into their national legal systems such measures as are necessary to enable all persons who consider themselves wronged by failure to apply to them the principle of equal treatment within the meaning of Articles 3, 4 and 5 to pursue their claims by judicial process after possible recourse to other competent authorities."

Article 9 of the directive provides that the Member States must put into force the laws, regulations and administrative provisions necessary in order to comply with it within 30 months of its notification. Since the directive was notified to the Member States on 12 February 1976 the period expired on 12 August 1978. Paragraph (2) of that article provides that:

"Member States shall periodically 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. They shall notify the Commission of the results of this assessment."

In the United Kingdom the directive was implemented, with regard to Great Britain, by the Sex Discrimination Act 1975 (hereinafter referred to as "the Act") and, with regard to Northern Ireland, by the Sex Discrimination (Northern Ireland) Order 1976. For practical purposes the content of these legislative measures is identical. The Act entered into force on 12 November 1975.

The definition of discrimination for the purposes of the Act is given in Part I. Section 1 (1) in particular provides that there is discrimination by a person against a woman if

"(a) on the ground of her sex he treats her less favourably than he treats or would treat a man, or

(b) he applies to her a requirement or condition which applies or would apply equally to a man but —

(i) which is such that the proportion of women who can comply with it is considerably smaller than the proportion of men who can comply with it,

and

(ii) which he cannot show to be justifiable irrespective of the sex of the person to whom it is applied,

and

(iii) which is to her detriment because she cannot comply with it."

Section 6 (1) and (2) concerns discrimination against those seeking employment and employees. Nevertheless section 6 (3) exempts from those subsections employment

"(a) for the purposes of a private household, or

(b) where the number of persons employed by the employer, added to the number employed by any associated employers of his, does not exceed five (disregarding any persons employed for the purposes of a private household)."

Likewise section 20 of the Act provides that the provisions of section 6 (1) and (2) (a) do not apply to midwives and that section 14 concerning vocational training bodies does not apply to training as a midwife.

Section 77 (1) of the Act reads as follows:

"A term of a contract is void where —

(a) its inclusion renders the making of the contract unlawful by virtue of this Act, or

(b) it is included in furtherance of an act rendered unlawful by this Act, or

(c) it provides for the doing of an act which would be rendered unlawful by this Act."

The Commission maintained that the Act was not in accordance with the provisions of the directive and on 29 July 1980 requested the Government of the United Kingdom to submit its observations within a period of two months.

In its reply of 30 October 1980 the United Kingdom contended that the Act was in accordance with the provisions of the directive and that with regard to section 77 the amendments requested by the Commission would not serve any practical purpose. It added that Article 2 (2) authorized derogations, of the type provided for by the legislature, from the principle laid down in the directive.

On 9 October 1981 the Commission sent the Government of the United Kingdom a reasoned opinion under the first paragraph of Article 169 of the Treaty. In its reply dated 29 January 1982 the United Kingdom Government adhered to its view that its legislation was fully in compliance with the directive, whose aim was achieved in the United Kingdom in an appropriate and effective way in accordance with Article 189 of the Treaty.

The Commission considered that the United Kingdom had failed to comply with its reasoned opinion and brought the matter before the Court by an application dated 28 May 1982.

The application was received at the Court Registry on 3 June 1982.

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* claims that the Court should:

"1. Declare that, by failing to adopt the laws, regulations or administrative provisions necessary to comply with 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, the United Kingdom has failed to fulfil its obligations under that directive;

2. Order the Government of the United Kingdom to pay the costs of the proceedings."

The *Government of the United Kingdom* contends that the Court should:

"1. Dismiss the Commission's application;

2. Order the Commission to pay the costs of the proceedings."

III — Submissions and arguments of the parties

The *Commission* claims in the first place that, although section 77 (1) of the Act provides that a term of an individual contract is void in the circumstances set out in that subsection, similar provisions do not exist for collective agreements, internal rules of undertakings or rules governing the independent occupations and professions. Leaving aside those cases where the provisions of a collective

agreement are legally enforceable because they are expressly stated to be legally enforceable contracts or because they have been incorporated into individual contracts of employment, collective agreements are presumed by statute not to have been intended by the parties to be legally enforceable.

The Commission does not consider that the provisions in question ensure that the objective of the directive is being achieved. The particular obligation imposed on the Member States by the directive is precise — the taking of those measures which are necessary to ensure that given provisions are (at law) null and void, or may be declared null and void (by the courts) or may be amended (by the courts). Whilst as regards directives Article 189 of the Treaty leaves the national authorities the choice of "form and methods" it remains the case that the result, or objective to be achieved, is binding upon the Member States. In the view of the Commission, there is a fundamental difference between a legal situation which arises as a result of the annulment or amendment of a discriminatory provision causing that provision to cease to exist and that which is present in respect of a provision which continues to exist even if, at law, it may be unenforceable. The same reasoning applies, at least as strongly, to provisions which are contrary to the principle of equal treatment and which are included in internal rules of undertakings or in rules governing the independent occupations and professions.

The Commission furthermore considers that the terms of section 6 (3) of the Act, which exclude employment for the purposes of a private household, or where five or fewer persons are employed, from the general restriction of discrimination contained in the Act are contrary to the terms of the directive, in particular Articles 3, 4 and 5. The argument that these exceptions were introduced because such employment often involves "close personal relationships" does not prevail over the requirement that Article 2 (2), as an exception to the general rule established by the directive, must be interpreted strictly and that the directive in any case permits Member States to exclude only certain occupational activities from its field of application. The Commission emphasizes that the United Kingdom refers to the extremely imprecise concept of "employment . . . for the purposes of a private household" without limitation as to numbers and adopts the entirely arbitrary figure of five persons in connection with all kinds of employment. In addition no guidance is given as to what is a "household" or when it is to be considered "private".

As regards the exclusion of midwives from the Act pursuant to section 20 the United Kingdom states that full equal treatment might in theory be restricted because the transitional provisions in paragraph 3 of Schedule 4 to the Act have the effect that, until a date to be specified by the Secretary of State, male midwives may train and work only in places specified by the Secretary of State (Edinburgh and London). In that connection the Commission does not accept the United Kingdom's contention that the occupation of midwife is covered by the exclusion contained in Article 2 (2) of the directive, namely by reason of its nature or the context in which it is carried out. It recalls that the profession of gynaecologist has not given rise to similar problems and concludes that Article 9 (2) is not relevant.

In its defence the *United Kingdom* replies that in its view its legislation faithfully reflects the meaning and intent of the directive. In particular with regard to collective agreements, rules of undertakings and rules governing independent occupations and professions, it points out that it is not customary for collective agreements to be legally binding (cf. *Ford Motor Co. Ltd* v *Amalgamated Union of Engineering and Foundry Workers and Others* [1969] 2 QB 303). Moreover if a collective agreement were legally binding and any provisions in it contrary to the principle of equal treatment that agreement would be rendered void by section 77 of the Act. Nevertheless, since the provisions of collective agreements which are not legally binding acquire legal force to the extent to which they are embodied in individual contracts of employment, a provision which was contrary to the principle of equal treatment would be void under the said section because it constituted a term of such a contract of employment. Since, in such a case, the legislation in force renders void any discriminatory provision of a collective agreement which would otherwise apply, the enactment of the measures suggested by the Commission would do nothing, according to the United Kingdom, to apply the principle of equal treatment. Similarly section 77 of the Act renders void any provision contrary to the principle of equal treatment, contained in the internal rules of an undertaking or of the rules of an occupational or professional body, which is embodied in an individual contract. If any discrimination in employment were to result from such a discriminatory provision that discrimination would be caught by section 6 of the Act and furthermore if, for example, an undertaking, in terms of one of its internal rules, were in business to find employment for members of one sex only, that would be prohibited by section 15 of the Act. With regard to independent occupations and professions section 13 (1) of the Act must be construed widely (cf. *British Judo Association* v *Petty* [1981] ICR 660).

With regard to employment for the purposes of a private household and in small-scale undertakings the United Kingdom claims that Article 9 (2) of the directive shows that the question whether the sex of a worker constitutes a determining factor for any particular occupational activities, whether by reason of their nature or of the context in which they are carried out, is something which must be judged in the light of social developments. Furthermore it remarks that, if the Commission's point of view according to which Article 2 (2) means that an exclusion may be admitted only for reasons of authenticity which rule out the exercise of the employment by a member of the opposite sex, were right, the sole ground of exclusion from the application of the principle of equal treatment would be contrary to the clear language of the said provision which excludes the application of that principle for two separate and independent reasons: the nature of the activities and the context in which they are carried out. The United Kingdom contests the Commission's opinion that Article 2 (2) must be interpreted strictly and provides solely for the exclusion of occupational activities, and contends that the sex of the worker constitutes a determining factor for many occupational activities by reason of the context in which these activities are carried out. The kind of employment in question frequently involves very close personal relationships

between employer and employee by reason of the fact that the latter often lives in the household and may, for example, concern resident companions or personal maids. The United Kingdom considers that the employer is in that case entitled to regard the sex of the employee or prospective employee as a determining factor. Furthermore the concept of "employment for the purposes of a private household" is not imprecise and on the contrary conveys a clear direction to industrial tribunals and courts as to what is meant. Thus a family cook, gardener or chauffeur will usually come within the exceptions: but, for example, if the chauffeur is usually employed not for the purposes of his employer's household but for his business the exception will not apply (cf. *Heron Corp. Ltd* v *Commis* [1980] ICR 713).

With regard to an employer who employs not more than five employees (disregarding any persons employed for the purposes of a private household) the exception is carefully drawn so as not to include cases where associated employers maintain a number of small establishments each of which may employ only five or less but who together employ more. That exception is justified and comes within Article 2 (2) of the directive because of the close personal relationships that often exist in small undertakings. Reference might be made to the case of female owners and managers of small shops, perhaps elderly, who desire to employ assistants of the same sex.

With regard to midwives the United Kingdom recalls that such discriminatory provisions as remain continue to be necessary and justified under Article 2 (2) of the directive by reason of the nature of midwifery and the context in which it is carried out. Nevertheless such provisions have been and continue to be assessed periodically in the light of social developments. The Commission's argument that the profession of gynaecologist has not given rise to problems in this area illustrates a lack of understanding of the respective roles of the gynaecologist and of the midwife. Their work is different and the conditions in which the former practises are not identical with the context in which the midwife works. Gynaecologists rarely attend a patient alone, contact is nearly always in a consulting room, clinic, hospital room or the like in the presence of another person, usually a midwife or female attendant. The attendance of gynaecologists and obstetricians is usually of short duration and intermittent whilst a midwife remains with the patient for extended periods and at more frequent intervals. Care of a patient by the midwife for at least 10 days after the delivery often takes place in the patient's home. Thus if women are not able to choose a female midwife they put themselves and their new-born children at risk by refusing the service of any midwife. The United Kingdom considers that it is necessary to introduce the concept of male midwives gradually, having regard to the sensitivities and beliefs of the peoples with different cultural backgrounds who live in the

United Kingdom. A Report of Two Studies on Male Midwives carried out in London and the Central Region of Scotland indicates that the occupation may be opened to men if it is ensured that a woman may have as wide a choice as possible in selecting a midwife of the sex she wishes. It is therefore hoped that before long it will be possible for the transitional period provided for in the Act to come to an end and that men will be able to train and practise midwifery on an equal footing with women subject to the safeguards referred to above.

In its reply the *Commission* claims in particular that the statement that in practice it is not customary for collective agreements in the United Kingdom to be legally binding is an inadequate response to the obligation laid down on three separate occasions in the directive. It should also be noted, according to the Commission, that the obligations in the directive extend expressly to individual contracts of employment and collective agreements and not only to the former as in the United Kingdom.

With regard to the internal rules of undertakings the Commission raises the question of a candidate for a professional post faced with a discriminatory rule of the profession. According to the Commission such a person would have no redress under national law but under Community law such a rule must be, or may be declared null and void or may be amended. That obligation is not satisfied either by sections 6 and 13 or by section 15 to which the United Kingdom refers.

The Commission considers that different treatment within the meaning of Article 2 (2) of the directive is possible only where the sex of the worker constitutes a determining factor. The question whether that arises by reason of the nature of the activities in question or the context in which they are carried out is a secondary consideration. It also reiterates that it is for the Member State, if challenged, to demonstrate that the particular activity in question (and the exceptions made by the United Kingdom do not involve activities) may be permitted as an exception under Article 2 (2), bearing in mind the requirements of Article 9 (2). In any case there are not many activities which would fall within Article 2 (2) and it is for the Member States to justify any specific exceptions which they may wish to retain.

With regard to private households the Commission notes that the United Kingdom sometimes employs the expression "resident companions" or "personal maids" or includes within the exception cooks, gardeners or chauffeurs. Furthermore the fact that the concept "private household" has been considered by the courts shows that it is not entirely clear.

With regard to the employment of five persons or less what is the position with regard to the other small undertakings where such close personal relationships do not exist? That the "owner" or "manager" of a shop, even if "small", should be permitted to discriminate might seem to suggest, according to the Commission, a scene from Dickensian England rather than from the European Community of the 1980s.

With regard to midwives the Commission remarks that it still fails to see how the discrimination against men can

be defended. Because United Kingdom legislation enables men to practise as midwives, it is impossible, under the terms of the directive, subsequently to subject such practice to incidental discriminatory provisions. In other words either that occupation falls under the exception in Article 2 (2) of the directive *ab initio,* which the United Kingdom expressly recognizes is not the case, or it does not. From a practical point of view the Commission, in this connection, does not see any basic difference between the gynaecologist and the midwife as the former is also quite likely to be alone with his patient. The Commission fails to see what the problem is in practice since for some time to come the male midwife would no doubt represent the exception rather than the rule. That being the case, the Commission considers that the exception in question must disappear from the national statute-books, as it has in a number of other Member States.

Perusal of the Report of the Commission to the Council on 11 February 1981 shows that the Commission approaches the construction of Article 2 (2) incorrectly since it suppresses half of that article, namely that concerning the context in which the occupational activities are carried out. Nothing in the directive supports the view that it is necessary for the Member States to specify the particular activities which come within Article 2 (2). For example it is perfectly proper for a Member State to implement the directive by enacting laws which prohibit discrimination in terms following the language of Article 2 (1) and (2), leaving the national courts to determine case by case which occupational activities are excluded from the general prohibitions. That course seems to have been adopted by the Netherlands and a similar, general, approach seems to have been adopted in legislation in France and the Federal Republic of Germany. It is equally open to Member States to exclude occupational activities under Article 2 (2) *(inter alia)* by reference to their nature or the context in which they are carried out, as the United Kingdom has done.

In its rejoinder the *United Kingdom* repeats that the directive does not require legislation to annul, or enable the annulment or amendment of things which are already without legal effect, such as collective agreements in English law. Likewise it is incorrect to suggest that a candidate for a professional post faced with a discriminatory rule of his profession would be without redress. In so far as the employer, or prospective employer, adopts such a rule as his own the candidate has redress against the employer (section 6 of the Act). In so far as the rule affects the candidate's authorization or qualification for the post the candidate has redress against the professional body (section 13).

The United Kingdom does not accept that its legislation in relation to private households and small undertakings is unclear: the Commission's suggestion that the language of a law must be unclear because it has been considered by a court is absurd; by the same reasoning the concepts in Article 2 (2) of the directive must also be not entirely

clear because they have been submitted for consideration to the Court.

With regard to midwives the Commission's argument leads to the result that if all discrimination is prohibited by legislation of a Member State at the point of access to a profession, that is to say if no reliance is placed on Article 2 (2) at the point of access, then any discrimination which may subsequently be exercised within that profession must be outside the provisions of that article. If that were correct Member States would be encouraged to maintain discrimination in respect of occupational activities where social developments would have allowed their gradual abolition, for fear that any relaxation would mean that no discrimination, however necessary and justified, would be permitted. Thus a Member State may permit women to have access to employment but certain prohibitions may clearly be placed on particular activities within their employment. Equally, in some cases, whilst it may be appropriate to prohibit discrimination on grounds of sex at the point of access to certain occupations, it may be legitimate on the grounds set out in Article 2 (2) to permit discrimination at the access to certain levels of that hierarchy. The United Kingdom submits that the proper construction of the directive is as follows: where the sex of the worker constitutes a determining factor for an occupational activity, by reason of its nature or the context in which it is carried out, Member States are entitled to exclude that occupational activity from the field of application of the principle of equal treatment. However whether the sex of the worker is a determining factor will depend on all the circumstances, including any relevant social developments. The United Kingdom submits that if in practice discrimination is necessary in current social conditions then, provided that the necessity of permitting discrimination arises out of the nature of the occupational activity or the context in which it is carried out, that occupational activity comes within Article 2 (2).

The United Kingdom considers that the Commission has failed to understand the respective roles of the midwife and of the gynaecologist. The urgent needs of the moment may cause women and their husbands to be less concerned at the time of birth about intimate procedures being carried out by a man. Nevertheless the difference in the roles, or occupational activities, lies in the antenatal and postnatal periods and in the intimate personal procedures often carried out in the patient's home, which are the preserve of the midwife. The point should, however, be made that despite the fact that there are many male gynaecologists many women will choose a female doctor and where no woman doctor is available, will refuse medical attention and rely on the services of a midwife.

IV — Questions submitted to the parties

The Court submitted the following questions to the United Kingdom, to which the following replies were given:

Question 1

"Can the awards or declarations of the Committee established in application of

the Equal Pay Act concern the sphere to which Directive 76/207 relates — which is different?"

Reply

1. The United Kingdom does not regard section 3 of the Equal Pay Act as being primarily directed to fulfilment of the United Kingdom's obligations under Directive 76/207.

2. Section 3 was enacted primarily in order to ensure that discrimination in terms and conditions of employment resulting from the operation of collective agreements or employers' pay structures that could not be dealt with under other provisions of the Equal Pay Act could none the less be dealt with by reference to the discriminatory terms and conditions contained in the collective agreement or the employer's pay structure itself. Section 3 was necessary because other provisions of that Act (which was enacted five years before the Sex Discrimination Act and Directive 76/207) did not deal with cases where the individual did not have other employees of the other sex with whom directly to compare his or her terms or conditions.

3. The Sex Discrimination Act operates in a different way. Actual comparison with the treatment of persons of the other sex is not necessary as the Act allows comparison with the hypothetical treatment of a person of the other sex. It is however the case that section 3 confers on the Central Arbitration Committee power to declare amendments needing to be made as to terms and conditions of employment where a collective agreement (or an employer's pay structure) contains a provision applying specifically to men only or to women only so as:

(a) to extend to both men and women any provision applying specifically to men only or to women only; and

(b) to eliminate any resulting duplication in the provisions of the agreement (or pay structure) in such a way as not to make the terms and conditions agreed for men, or those agreed for women, less favourable in any respect than they would have been without the amendments, provided that the effect of the amendments is not to apply the provisions of the collective agreement (or pay structure) to employees who were not previously covered by it.

The collective agreement (or pay structure) may be referred to the Central Arbitration Committee by a party to the agreement (or by the employer, where it is an employer's pay structure) or by the Secretary of State. Section 3 therefore provides one way in which the principle of equal treatment for men and women as regards working conditions is implemented in the United Kingdom.

Questions 2 and 3

"What stage has been reached at the present time in the consideration by the government authorities of the report of the studies regarding male midwives and towards what conclusions, if any, does it tend?"

"Does the United Kingdom intend, in accordance with the hopes expressed in paragraph 71 of its defence, to bring to an end in the near future the transitional period provided for in the Sex Discrimination Act?"

Reply

Following the widespread consultation with health authorities, professional bodies and other organizations on the Report of Two Studies on Male Midwives the United Kingdom Government has concluded that the present restrictions on the training and employment of men as midwives should now be lifted.

Orders giving effect to this decision are being prepared under section 80 (1) (a) of and paragraph 3 of Schedule 4 to the Sex Discrimination Act 1975. It is anticipated that the changes effected by the Orders will come into operation by the end of August 1983.

Paragraph 68 of the defence referred to the strong possibility that women, particularly women from the number of ethnic minorities living in the United Kingdom, may put themselves and their new-born children at risk by refusing professional attention if they are unable to choose a female midwife. Health authorities will therefore be asked to ensure that women are always given the opportunity to be attended by a female midwife if they choose and to ensure that, where a male midwife is provided, adequate chaperoning is provided.

V — Oral procedure

The parties presented oral argument at the sitting on 22 March 1983.

The Advocate General delivered his opinion at the sitting on 7 June 1983.

Decision

1 By application lodged at the Court Registry on 3 June 1982 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 to enact within the prescribed period the provisions needed in order to comply with 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), the United Kingdom has failed to fulfil its obligations under the Treaty.

2 The Commission charges the United Kingdom with only partially implementing the directive in so far it has failed to amend and supplement the Sex Discrimination Act 1975 [hereinafter referred to as "the 1975 Act"]

which, although abolishing discrimination in certain areas of employment, allows it to continue in other areas in which by virtue of the directive discrimination must be abolished by 12 August 1978 at the latest.

3 The Commission's complaints relate to the following points:

(a) Neither the 1975 Act nor any other provision of the legislation in force in the United Kingdom provides that provisions contrary to the principle of equal treatment contained in collective agreements, rules of undertakings and rules governing independent occupations and professions are to be, or may be declared, void or may be amended.

(b) Contrary to the provisions of the directive, section 6 (3) of the 1975 Act provides that the prohibition of discrimination does not apply to employment in a private household or where the number of persons employed by an employer does not exceed five (disregarding persons employed in a private household).

(c) Finally, by virtue of section 20 of the 1975 Act the prohibition of discrimination based on sex does not apply to the employment, promotion and training of midwives.

The first complaint

4 The Government of the United Kingdom considers that this complaint is unfounded. By virtue of section 18 of the Trade Union and Labour Relations Act 1974, any collective agreements made before 1 December 1971 or after the entry into force of that act are to be presumed not to have been intended by the parties to be legally enforceable unless they are in writing and contain a provision in which the parties express their intention that the agreements are to be legally enforceeable. In fact, collective agreements are not normally legally binding. The United Kingdom Government is not aware of there being any legally binding collective agreements at present in force in the United Kingdom.

5 Even if collective agreements containing provisions contrary to the principle of equality of treatment do exist, those provisions, in so far as they are not capable of amendment under section 3 of the Equal Pay Act 1970, would be rendered void by section 77 of the 1975 Act.

6 The consequences of any provision in the internal rules of an undertaking or in the rules governing an independent occupation or profession which is contrary to the prohibition of discrimination would similarly be rendered void by the same provision. This would apply to any contract between members of a profession or occupation or between them and an undertaking or any occupational or professional body with legal personality. If any discrimination in employment were to result from the existence of such a discriminatory provision in the internal rules of an undertaking or of an occupational or professional body, that driscrimination would be caught by section 6 of the 1975 Act. Moreover, if for example an undertaking whose business was to find employment for workers offered work, by virtue of its internal rules, only to persons of one sex, to the exclusion of persons of the other sex, that would be prohibited by section 15 of the 1975 Act.

7 Finally, if a provision contrary to the principle of equal treatment related to authorization or qualification for a particular profession or occupation, it would be dealt with by section 13 (1) of the 1975 Act which, in substance, makes it unlawful for an authority or body which can confer an authorization or qualification "to discriminate against a woman".

8 These arguments are not sufficient to nullify the complaints made by the Commission. Whilst it may be admitted that the United Kingdom legislation satisfies the obligations imposed by the directive as regards any collective agreements which have legally binding effects, in so far as they are covered by section 77 of the 1975 Act, it is to be noted on the other hand that the United Kingdom legislation contains no corresponding provision regarding either non-binding collective agreements — which the United Kingdom Government declares to be the only kind in existence — or the internal rules of undertakings or the rules governing independent occupations or professions.

9 The United Kingdom's argument to the effect that the non-binding character of collective agreements removes them from the field of application of that

directive cannot be accepted, even if account is taken of the United Kingdom's observation that individual contracts of employment entered into within the framework of a collective agreement are rendered void by section 77 of the 1975 Act.

10 Article 4 (b) of Directive 76/207 provides that the application of the principle of equal treatment in the areas to which it relates means that Member States must take the necessary measures to ensure that:

...

"(b) any provisions contrary to the principle of equal treatment which are included in collective agreements, individual contracts of employment, internal rules of undertakings or in rules governing the independent occupations and professions shall be, or may be declared, null and void or may be amended."

11 The directive thus covers all collective agreements without distinction as to the nature of the legal effects which they do or do not produce. The reason for that generality lies in the fact that, even if they are not legally binding as between the parties who sign them or with regard to the employment relationships which they govern, collective agreements nevertheless have important *de facto* consequences for the employment relationships to which they refer, particularly in so far as they determine the rights of the workers and, in the interests of industrial harmony, give undertakings satisfy or need not satisfy. The need to ensure that the directive is completely effective therefore requires that any clauses in such agreements which are incompatible with the obligations imposed by the directive upon the Member States may be rendered inoperative, eliminated or amended by appropriate means.

The second complaint

12 According to the United Kingdom, the exclusions from the prohibition of discrimination provided for in section 6 (3) of the 1975 Act in the case of employment in a private household or in undertakings where the number of

persons employed does not exceed five are justified by the exception provided for in Article 2 (2) of the directive itself, according to which:

"This 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."

13 It must be recognized that the provision of the 1975 Act in question is intended, in so far as it refers to employment in a private household, to reconcile the principle of equality of treatment with the principle of respect for private life, which is also fundamental. Reconciliation of that kind is one of the factors which must be taken into consideration in determining the scope of the exception provided for in Article 2 (2) of the directive.

14 Whilst it is undeniable that, for certain kinds of employment in private households, that consideration may be decisive, that is not the case for all the kinds of employment in question.

15 As regards small undertakings with not more than five employees, the United Kingdom has not put forward any argument to show that in any undertaking of that size the sex of the worker would be a determining factor by reason of the nature of his activities or the context in which they are carried out.

16 Consequently, by reason of its generality, the exclusion provided for in the contested provision of the 1975 Act goes beyond the objective which may be lawfully pursued within the framework of Article 2 (2) of the directive.

The third complaint

17 The Commission's third complaint relates to the fact that the 1975 Act ensures access to the occupation of midwife and to training for that occupation only within certain limits. This is said to entail discrimination based on sex.

18 The United Kingdom acknowledges the facts. By virtue of paragraph (3) of Schedule 4 to the 1975 Act, until a day to be specified by order of the Secretary of State, men are granted access to the occupation in question and may be trained for that purpose only in certain specific places. This situation is due to the fact that in the United Kingdom the occupation in question is not traditionally engaged in by men. In a sphere in which respect for the patient's sensitivities is of particular importance, it considers that at the present time that limitation is in conformity with Article 2 (2) of the directive. However, it adds that it intends to proceed by stages and keep the position under review, in accordance with the obligations imposed by Article 9 (2) of the directive.

19 That provision requires Member States 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 permitted exclusions. They are to notify the Commission of the results of that assessment.

20 It is undeniable that in the area in question, as the United Kingdom acknowledges, the Member States are under an obligation to implement the principle of equality of treatment. It must however be recognized that at the present time personal sensitivities may play an important role in relations between midwife and patient. In those circumstances, it may be stated that by failing fully to apply the principle laid down in the directive, the United Kingdom has not exceeded the limits of the power granted to the Member States by Articles 9 (2) and 2 (2) of the directive. The Commission's complaint in that regard cannot therefore be upheld.

21 It is apparent from all the foregoing considerations that by failing to adopt in accordance with Directive 76/207 of 9 February 1976 the measures needed to ensure that any provisions contrary to the principle of equality of treatment contained in collective agreements or in the internal rules of undertakings or in the rules governing the independent professions or occupations are to be, or may be declared, void or be amended, and by excluding

from the application of that principle employment for the purposes of a private household and any case where the number of persons employed does not exceed five, the United Kingdom has failed to fulfil its obligations under the Treaty.

22 In all other respects, the application is dismissed.

Costs

23 Under Article 69 (2) of the Rules of Procedure, an unsuccessful party is to be ordered to pay the costs if they have been asked for in the successful party's pleadings. However, by virtue of paragraph (3) of the same article, the Court may order each party to bear its own costs if either of the parties is unsuccessful in one or more of its submissions.

24 It is appropriate to have recourse to that provision in this case, since the Commission has failed in one of its submissions.

For those reasons

THE COURT

1. Declares that by failing to adopt in accordance with Directive 76/207 of 9 February 1976 the measures needed to ensure that any provisions contrary to the principle of equality of treatment contained in collective agreements or in the rules of undertakings or in the rules governing the independent professions and occupations are to be, or may be declared, void or may be amended, and by excluding from the application of that principle employment for the purposes of a private household and any case where the number of persons employed does not exceed five, the United Kingdom has failed to fulfil its obligations under the Treaty;

2. Dismisses the application in all other respects;

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

Mertens de Wilmars Koopmans Bahlmann Galmot

Mackenzie Stuart O'Keeffe Bosco Due Everling

Delivered in open court in Luxembourg on 8 November 1983.

P. Heim
Registrar

J. Mertens de Wilmars
President

OPINION OF MRS ADVOCATE GENERAL ROZÈS DELIVERED ON 7 JUNE 1983 [1]

Mr President,
Members of the Court,

In Case 165/82, an action brought against the United Kingdom, the Commission maintains that the incorrect implementation of Directive 76/207 is fourfold:

1. Contrary to the obligations laid down by the directive, the United Kingdom legislation does not ensure that provisions contrary to the principle of equal treatment which are contained in collective agreements, on the one hand, and in the internal rules of undertakings or the rules governing the independent occupations and professions, on the other hand, are null and void (at law) or may be declared null and void or may be amended (by the courts).

2 and 3. By reason of an erroneous interpretation of the exception provided for in Article 2 (2) of the directive, section 6 (3) of the Sex Discrimination Act (hereinafter referred to as "the Act") excludes from its field of application employment for the purposes of a private household and cases where five or fewer people are employed.

4. By granting to persons of the male sex only very limited access to training for the occupation of midwife and to the occupation itself the United Kingdom is also interpreting Article 2 (2) of the directive in an excessively restrictive manner.

I shall examine each of these complaints.

1 — Translated from the French.