JUDGMENT OF THE COURT
11 March 2003 *

In Case C-186/01,

REFERENCE to the Court under Article 234 EC by the Verwaltungsgericht Stuttgart (Germany) for a preliminary ruling in the proceedings pending before that court between

Alexander Dory

and

Bundesrepublik Deutschland,

on the interpretation of Article 2 of Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions (OJ 1976 L 39, p. 40), and, more generally, on the compatibility with Community law of the limitation of compulsory military service in Germany to men,

* Language of the case: German.

THE COURT,

composed of: G.C. Rodríguez Iglesias, President, J.-P. Puissochet (Rapporteur), M. Wathelet, R. Schintgen and C.W.A. Timmermans (Presidents of Chambers), C. Gulmann, D.A.O. Edward, P. Jann, V. Skouris, F. Macken, N. Colneric, S. von Bahr and J.N. Cunha Rodrigues, Judges,

Advocate General: C. Stix-Hackl,
Registrar: H.A. Rühl, Principal Administrator,

after considering the written observations submitted on behalf of:

— the Federal Republic of Germany and the German Government, in its capacity as a Member State and as a party to the main proceedings, by W.-D. Plessing and B. Muttelsee-Schön, acting as Agents,

— the French Government, by R. Abraham, C. Bergeot-Nunes and C. Chevallier, acting as Agents,

— the Finnish Government, by T. Pynnä, acting as Agent,

— the Commission of the European Communities, by J. Sack and N. Yerrell, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Mr Dory, represented by W. Dory and C. Lenz, Rechtsanwälte; the German Government, represented by W.-D. Plessing, assisted by C. Tomuschat, Sachverständiger; the Finnish Government, represented by T. Pynnä; and the Commission, represented by J. Sack, at the hearing on 16 April 2002,

after hearing the Opinion of the Advocate General at the sitting on 28 November 2002,

gives the following

Judgment

1 By order of 4 April 2001, received at the Court on 30 April 2001, the Verwaltungsgericht Stuttgart (Administrative Court, Stuttgart) referred to the Court for a preliminary ruling under Article 234 EC a question on the interpretation of Article 2 of Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions (OJ 1976 L 39, p. 40) and, more generally, on the compatibility with Community law of limiting compulsory military service in Germany to men.

2 That question was raised in proceedings between Mr Dory and the Federal Republic of Germany concerning a decision of the Kreiswehrersatzamt Schwäbisch Gmünd (District Recruiting Office, Schwäbisch Gmünd, 'the KSG') refusing to exempt him from call-up by the army and compulsory military service.

Legal background

Community law

3 Under Article 2 EC:

'The Community shall have as its task, by establishing a common market and an economic and monetary union and by implementing common policies or activities referred to in Articles 3 and 4, to promote throughout the Community a harmonious, balanced and sustainable development of economic activities, a high level of employment and of social protection, equality between men and women, sustainable and non-inflationary growth, a high degree of competitiveness and convergence of economic performance, a high level of protection and improvement of the quality of the environment, the raising of the standard of living and quality of life, and economic and social cohesion and solidarity among Member States.'

4 Article 3(2) EC states that, in the context of the activities referred to in Article 3(1) EC carried on for the purposes set out in Article 2 EC, 'the Community shall aim to eliminate inequalities, and to promote equality, between men and women'.

5 Under Article 13 EC:

'Without prejudice to the other provisions of this Treaty and within the limits of the powers conferred by it upon the Community, the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.'

6 Under Article 141(1) EC:

'Each Member State shall ensure that the principle of equal pay for male and female workers for equal work or work of equal value is applied.'

7 Article 141(3) EC states:

'The Council, acting in accordance with the procedure referred to in Article 251, and after consulting the Economic and Social Committee, shall adopt measures to

ensure the application of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation, including the principle of equal pay for equal work or work of equal value.'

8 Article 1(1) of Directive 76/207 provides:

'The purpose of this Directive 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 and, on the conditions referred to in paragraph 2, social security....'

9 Article 2(1) to (3) of that 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.

3. This Directive shall be without prejudice to provisions concerning the protection of women, particularly as regards pregnancy and maternity.'

10 Under Article 3(1) of Directive 76/207:

'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.'

National legislation

11 Under Article 12a of the Grundgesetz für die Bundesrepublik Deutschland (Basic Law of the Federal Republic of Germany), in the version published in BGBl. 2000 I, p. 1755 ('the Grundgesetz'):

'1. Men who have attained the age of 18 years may be required to serve in the armed forces, in the Federal Border Guard, or in a civil defence organisation.

...

4. If, during a state of defence, civilian service requirements in the civilian public health and medical system and in the stationary military hospital organisation cannot be met on a voluntary basis, women between 18 and 55 years of age may be assigned to such services by or pursuant to a law. They may on no account be required to bear arms.'

12 The Wehrpflichtgesetz (Federal law on military service), in the version of 15 December 1995, applicable from 1 January 1996 (BGBl. 1995 I, p. 1756), provides in Paragraph 1(1), headed 'Law on compulsory military service: General obligation to perform military service':

'All men who have attained the age of 18 years and are Germans within the meaning of the Grundgesetz are obliged to perform military service...'

13 Under Paragraph 3(1) of that law, '[t]he obligation to perform military service is satisfied by military service or, in the case referred to in Paragraph 1 of the Kriegsdienstverweigerungsgesetz (Law on refusal to perform war service) of 28 February 1983 (BGBl. I, p. 203), by civilian service...'.

The main proceedings and the question referred for a preliminary ruling

14 Mr Dory was born on 15 June 1982. After receiving a questionnaire in September 1999 as a preliminary to the medical examination to determine his fitness for

military service, he requested the KSG to be exempted from call-up by the army and compulsory military service. In support of that request, he submitted that the Wehrpflichtgesetz was contrary to Community law, citing Case C-285/98 *Kreil* [2000] ECR I-69, in which the Court held that women were not to be excluded from access to all posts in the German armed forces.

15 By decision of 3 February 2000, the KSG rejected his request, stating that the judgment in *Kreil* concerned only the voluntary access of women to careers in the armed forces, not the question of compulsory military service, and that the obligation to perform such service remained within the sole competence of the Member States.

16 Mr Dory's appeal against that decision was dismissed by the Wehrbereichsverwaltung (Military Area Administration). He thereupon brought an action in the Verwaltungsgericht Stuttgart, in which he argued that the fact that women have a right of access to military posts in accordance with *Kreil* but are exempted from the obligation to perform military service, while that obligation is imposed on men, is contrary to the principle of equality and constitutes unlawful discrimination against men.

17 The defendant in the main proceedings submitted that no provision of the EC Treaty allows compulsory military service to be regarded as an activity falling under Community law. The organisation of that service is within the competence of each Member State. Neither Articles 3(2) EC and 13 EC, which do not as such provide a basis of competence for the Community but merely define the

conditions of exercise of powers conferred by other provisions, nor Article 141 EC and Directive 76/207, which relate solely to occupational activities, are capable of application in the main proceedings.

18 The Verwaltungsgericht Stuttgart expressed doubts as to the latter arguments. On the one hand, referring to Case C-79/99 *Schnorbus* [2000] ECR I-10997, it observed that performance of military service delayed access by men to employment and vocational training and could therefore constitute discrimination on grounds of sex within the meaning of Article 2(1) of Directive 76/207. On the other hand, it considered that that difference in treatment could nevertheless be justified as specific preferential treatment for women, compensating in part for the periods of interruption of work due to maternity and child-rearing.

19 In those circumstances, the Verwaltungsgericht Stuttgart considered it necessary for the Court to define the scope of Community law in this respect. It therefore decided to stay the proceedings and refer the following question to the Court for a preliminary ruling:

'Having regard in particular to the interpretation of Article 2 of Directive 76/207/EEC..., is the fact that in Germany military service is compulsory only for men contrary to Community law?'

20 On 26 September 2001 Mr Dory received call-up papers requiring him to commence his military service between 1 and 5 November 2001.

21 By letters of 28 September 2001, Mr Dory made an application to the national court and an application for interim measures to the Court, seeking suspension of enforcement of the call-up. By order of 19 October 2001, the national court granted the application. By order of 24 October 2001 in Case C-186/01 R *Dory* [2001] ECR I-7823, the Court declared the application for interim measures inadmissible.

The question referred for a preliminary ruling

Observations submitted to the Court

22 Mr Dory submits that compulsory military service has the effect of prohibiting the exercise of an occupation during the period of that service and of delaying access to employment. It therefore falls under Directive 76/207 and constitutes discrimination prohibited by that directive. It is contrary in any event to the general principle of equality of men and women set out in Article 3(2) EC.

23 The German Government observes, first, that compulsory military service is of fundamental importance in the Federal Republic of Germany. It is intended to ensure close contact between the armed forces and the population and so to guarantee the democratic transparency of the military, and it is a factor of

national integration especially between the young generations of the old and new *Länder*. The manpower needed to defend the country in time of war is not sufficient without the reserves provided by those called up for military service.

24 The German Government submits, second, that military service comes within the field of organisation of the armed forces, an essential field of public authority which remains within the competence of the Member States. It considers that that analysis was accepted by the Court in Case C-273/97 *Sirdar* [1999] ECR I-7403, paragraph 15, and *Kreil*, paragraph 15.

25 In any event, it submits that limiting compulsory military service to men — even on the assumption that that service may fall within the scope of the Treaty and Directive 76/207 — is not contrary to Community law. First, Article 3(2) EC, which states that it is a Community aim to promote equality between men and women, applies only to specific measures taken by the Community for that purpose on other legal bases. Next, Article 13 EC has no direct effect and empowers the Council to take measures against discrimination on grounds of sex only within the areas of competence given it by the Treaty. Finally, Article 141 EC and Directive 76/207 only govern employment relationships resulting from a contract between an employer and an employee, so that they are not applicable to the general obligation of service which military service constitutes for those called upon to perform it.

26 The French Government considers that performance of compulsory military service cannot be equated with the occupation of a post and consequently does not come under the social provisions of the Treaty or under Directive 76/207. The organisation of such service constitutes a measure relating to national defence, within the exclusive competence of the Member States.

27 The Finnish Government submits that fundamental choices of defence policy are for the Member States to make, as the Court held in *Kreil*, and that Community law is not applicable to the main proceedings. In any event, the obligation to perform military service does not concern the conditions of access to the military profession and is therefore not within the scope of Directive 76/207. Moreover, the fact that the obligation is limited to men does not compromise the progress of women's careers in the armed forces, since they still have the possibility of voluntary military service and thus being placed in the same position as men called up for military service.

28 The Commission considers that compulsory military service is a service obligation under public law which is unilateral and does not place the persons concerned in an employment relationship with an employer. So that service does not form part of the employment market, and is therefore outside the scope of Community law. It does not restrict the scope of that law beyond what is inherent in its nature. It is therefore unnecessary to examine whether limitation to men of the obligation to perform such service can be justified under Directive 76/207. The dispute in the main proceedings is thus very different from the previous cases in which the Court has given judgment. The Commission submits that the Member States may consequently rely in this connection on Article 6(3) EU and Article 5 EC for their sovereignty in defence matters to be respected in accordance with the forms developed in their national traditions.

Findings of the Court

29 To determine whether or not limitation of compulsory military service to men is compatible with the principle of equal treatment of men and women in

Community law, the conditions for applying that law to activities relating to the organisation of the armed forces must first be determined.

30 Measures taken by the Member States in this domain are not excluded in their entirety from the application of Community law solely because they are taken in the interests of public security or national defence.

31 As the Court has already held, the only articles in which the Treaty provides for derogations applicable in situations which may affect public security are Articles 30 EC, 39 EC, 46 EC, 58 EC, 64 EC, 296 EC and 297 EC, which deal with exceptional and clearly defined cases. It cannot be inferred from those articles that the Treaty contains an inherent general exception excluding all measures taken for reasons of public security from the scope of Community law. To recognise the existence of such an exception, regardless of the specific requirements laid down by the Treaty, might impair the binding nature of Community law and its uniform application (see, to that effect, Case 222/84 *Johnston* [1986] ECR 1651, paragraph 26, *Sirdar*, paragraph 16, and *Kreil*, paragraph 16).

32 The concept of public security, within the meaning of the Treaty articles cited in the preceding paragraph, covers both a Member State's internal security, as in the *Johnston* case, and its external security, as in the *Sirdar* case (see, to that effect,

Case C-367/89 *Richardt and 'Les Accessoires Scientifiques'* [1991] ECR I-4621, paragraph 22, Case C-83/94 *Leifer and Others* [1995] ECR I-3231, paragraph 26, *Sirdar*, paragraph 17, and *Kreil*, paragraph 17).

33 Furthermore, some of the derogations provided for by the Treaty concern only the rules relating to free movement of persons, goods, capital and services, and not the social provisions of the Treaty, of which the principle of equal treatment for men and women forms part. In accordance with settled case-law, that principle is of general application and Directive 76/207 applies to employment in the public service (see, to that effect, Case 248/83 *Commission* v *Germany* [1985] ECR 1459, paragraph 16, Case C-1/95 *Gerster* [1997] ECR I-5253, paragraph 18, *Sirdar*, paragraph 18, and *Kreil*, paragraph 18).

34 Thus the Court held that Directive 76/207 was applicable to access to posts in the armed forces and that it was for the Court to verify whether the measures taken by the national authorities, in the exercise of their recognised discretion, did in fact have the purpose of guaranteeing public security and whether they were appropriate and necessary to achieve that aim (see *Sirdar*, paragraph 28, and *Kreil*, paragraph 25).

35 Certainly, decisions of the Member States concerning the organisation of their armed forces cannot be completely excluded from the application of Community law, particularly where observance of the principle of equal treatment of men and women in connection with employment, including access to military posts, is concerned. But it does not follow that Community law governs the Member States' choices of military organisation for the defence of their territory or of their essential interests.

36 It is for the Member States, which have to adopt appropriate measures to ensure their internal and external security, to take decisions on the organisation of their armed forces, as the Court observed in *Sirdar*, paragraph 15, and *Kreil*, paragraph 15.

37 The German Government submits that compulsory military service is of great importance in Germany, both politically and in terms of the organisation of the armed forces. It stated, in its written observations and at the hearing, that the institution of such service makes a contribution to the democratic transparency of the military, national integration, the link between the armed forces and the population, and the mobilisation of the manpower needed by the armed forces in the event of a conflict.

38 Such a choice, enshrined in the Grundgesetz, consists in imposing an obligation to serve the interests of territorial security, albeit in many cases to the detriment of access of young people to the labour market. It thus takes precedence over the objectives of policies aimed at the work prospects of young people.

39 The decision of the Federal Republic of Germany to ensure its defence in part by compulsory military service is the expression of such a choice of military organisation to which Community law is consequently not applicable.

40 It is true that limitation of compulsory military service to men will generally entail a delay in the progress of the careers of those concerned, even if military

service allows some of them to acquire further vocational training or subsequently to take up a military career.

41 Nevertheless, the delay in the careers of persons called up for military service is an inevitable consequence of the choice made by the Member State regarding military organisation and does not mean that that choice comes within the scope of Community law. The existence of adverse consequences for access to employment cannot, without encroaching on the competences of the Member States, have the effect of compelling the Member State in question either to extend the obligation of military service to women, thus imposing on them the same disadvantages with regard to access to employment, or to abolish compulsory military service.

42 In the light of all the foregoing, the answer to the national court's question must be that Community law does not preclude compulsory military service being reserved to men.

Costs

43 The costs incurred by the German, French and Finnish Governments and by the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT,

in answer to the question referred to it by the Verwaltungsgericht Stuttgart by order of 4 April 2001, hereby rules:

Community law does not preclude compulsory military service being reserved to men.

Rodríguez Iglesias	Puissochet	Wathelet
Schintgen	Timmermans	Gulmann
Edward	Jann	Skouris
Macken	Colneric	von Bahr
	Cunha Rodrigues	

Delivered in open court in Luxembourg on 11 March 2003.

R. Grass
Registrar

G.C. Rodríguez Iglesias
President