OPINION OF ADVOCATE GENERAL LA PERGOLA

delivered on 26 October 1999 *

I — The question referred for a preliminary ruling

1. The present case concerns the prohibition, laid down under the national legislation of a Member State, on the recruitment of women into sectors of the armed forces other than the medical and military-music services. The question referred to the Court by the Verwaltungsgericht Hannover (Administrative Court, Hannover) concerns the interpretation 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 (hereinafter 'the Directive'). [1] The question referred by the national court is as follows:

'Is Council Directive 76/207/EEC of 9 February 1976, in particular Article 2(2) of that Directive, infringed by the third sentence of Article 1(2) of the Soldatengesetz (Law on Soldiers) in the version of 15 December 1995 (*Bundesgesetzblatt I*, p. 1737), as last amended by the Law of 14 December 1997 (*Bundesgesetzblatt I*, p. 2846), and Article 3a of the Soldatenlaufbahnverordnung (Regulations on Soldiers' Careers), in the version published on 28 January 1998 (*Bundesgesetzblatt I*, p. 326), under which women who enlist as volunteers may be engaged only in the medical and military-music services and are excluded in any event from armed service?'

II — The relevant Community legislation

2. According to Article 1(1) of the Directive: '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... This principle is hereinafter referred to as "the principle of equal treatment".'

Article 2 of the Directive provides:

'1. For the purposes of the following provisions, the principle of equal treatment shall mean that there shall be no discrimi-

* Original language: Italian.

1 — OJ 1976 L 39, p. 40.

nation 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.

...'.

Pursuant to Article 3(1) of the Directive: 'Application of the principle of equal treatment means that there shall be no discrimination whatsoever on grounds of sex in the conditions, including the selection criteria, for access to all jobs or posts, whatever the sector or branch of activity, and to all levels of the occupational hierarchy.'

Under Article 9(2) of the Directive: '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.'

III — The relevant national legislation

3. Under Paragraph 1(2) of the Soldatengesetz (Law on Soldiers, hereinafter the 'the SG'): 'any person who voluntarily undertakes to perform military service for life may be appointed to serve as a professional soldier. Any person who voluntarily undertakes to perform military service for a limited period may be appointed to serve as a soldier for a fixed term. Women may also be appointed to serve in the armed forces, in accordance with the first and second sentences above, in posts in the *medical and military-music services*.' [2]

In accordance with Article 3a of the Soldatenlaufbahnverordnung (Regulation on Soldiers' Careers, hereinafter the 'the SLV'): 'women may enlist only as volunteers and

2 — My emphasis.

only in the *medical and military-music services*.' [3]

4. The Federal Republic of Germany and the European Commission (hereinafter the 'Commission') which, like Mrs Kreil and the United Kingdom and Italian Governments, have submitted observations in these proceedings, have pointed out that the legal basis for the abovementioned provisions — which form the subject-matter of this reference for a preliminary ruling — is Article 12a of the Grundgesetz für die Bundesrepublik Deutschland (Basic Law for the Federal Republic of Germany or the German Constitution, hereinafter 'the Constitution' or 'GG'), according to which:

'(1) Men who have attained the age of eighteen years may be required to serve in the Armed Forces, in the Federal Border Guard or in a civil defence organisation.

...

(4) If, while a state of defence exists, [4] civilian requirements in the civilian public health and medical system or in the stationary military hospital organisation cannot be met on a voluntary basis, women between eighteen and fifty-five years of age may be assigned to such services by or pursuant to a law. *They may on no account render service involving the use of arms*.' [5]

The German Government has also pointed out that the last sentence of Article 12a(4) of the Constitution (hereinafter 'Article 12a GG') is simply the 1968 updated version of the analogous 1956 provision, that is to say Article 12(3) GG, and that 'the new wording reflects purely linguistic changes.'

5. Citing the definition furnished by the Bundesverwaltungsgericht (Federal Administrative Court of last instance) and German legal literature, the German Government and the Commission have also submitted that Article 12a GG and the abovementioned provisions of the SG and the SLV constitute *lex specialis* (a 'Spezialvorschrift' or 'Sonderregelung') in relation to the general principle of equal treatment for

3 — My emphasis.

4 — According to Article 115a(1) GG, a state of defence (Verteidigungsfall) is declared by the Bundestag (Federal Parliament) in agreement with the Bundesrat (the Federal Council, through which the *Länder* are involved in the legislative activity and administration of the Federal Republic), in the event of an armed attack or if there is an imminent threat of armed attack.

5 — My emphasis.

men and women enshrined both in the Constitution [6] and in German military legislation. [7]

IV — The facts and the main proceedings

6. The German Government also points out that, even though the bar on recruiting women to services other than the medical and military-music services, laid down in the legislation in issue, applies without exception ('on no account', see Article 12a GG), the many civilian posts (mainly in the administrative and support services) in the Bundeswehr (Federal armed forces) provided for in Article 87b GG are in fact open to men and women equally.

7. In 1996 Tanja Kreil, who has been trained in electronics, specialising in installations technology, applied for voluntary service in the Bundeswehr, requesting to be assigned to duties in electronic weapons maintenance. Her application was rejected both by the Bundeswehr's local recruitment

6 — The German Constitution guarantees equal treatment for men and women, in general (Articles 3(2) and (3) GG) and in relation to access to or, rather, the freedom to choose an occupational activity (Article 12(1) GG), as well as employment in the public service (Article 33(2) GG). In a recent decision, cited in this case by both the national court and the German Government, the Bundesverwaltungsgericht held that Article 12a GG constitutes *lex specialis* and, as such, is consistent with the principles of equal treatment and freedom to choose a profession laid down in the other abovementioned provisions of the Constitution (judgment of 30 January 1996 — 1 WB 89/95 — *BVerwGE*, volume 103, p. 301, and *NJW*, 1996, p. 2173; hereinafter 'the *Sanitätsdienst* decision', relating to the medical service, which is one of the services to which women may also be recruited in accordance with Article 12a GG, Article 1(2) SG and Article 3a SLV).
Although the majority of German legal writers endorse that judgment, it should be pointed out that as a result of a debate currently under way in Germany it is not clear that the constitutional provision in issue is lawful, at least as construed hitherto. In point of fact, authoritative studies take the view that a distinction should be made between compulsory military service (Pflichtdienst) and voluntary military service (freiwilliger Dienst) and that, in relation to the latter, Article 12a GG should be strictly interpreted, even if it is a Sonderregelung. Particular attention should be paid to fundamental principles, such as equality and the freedom to choose a profession, in respect of which derogations may be adopted only with caution and in accordance with the Constitution as a whole (see H. D. Jarass-B. Pieroth, commentary on Article 12a GG, in *Grundgesetz, Kommentar*, 1997, 4th edition, paragraph 3; J. Kokott, commentary on Article 12a GG, in *Grundgesetz, Kommentar*, edited by M. Sachs, 1999, 2nd edition, paragraph 3 et seq.; U. Repkewitz, *Kein freiwilliger Waffendienst für Frauen?*, *NJW* 1997, p. 506; M. Sachs, *Zur Bedeutung der grundgesetzlichen Gleichheitssätze für das Recht des öffentlichen Dienstes*, *ZBR*, 1994, p. 133, in particular p. 139; M. Zuleeg, *Frauen in die Bundeswehr?*, *Die Öffentliche Verwaltung*, 1997, p. 1017).
Therefore, based on a systematic and restrictive interpretation of the Constitution (given that the exclusion of women from the Bundeswehr derogates from the principles laid down in Articles 3, 12 and 33 GG), the abovementioned writers consider that the prohibition under Article 12a GG applies solely to compulsory military service: since Article 12a GG as a whole relates exclusively to Pflichtdienst, the exclusion of women cannot be extended to voluntary service (see, in particular, M. Zuleeg, op. cit., p. 1018).
Some commentators also point out that a restrictive interpretation is justified on the ground that Article 12a GG *does not guarantee a fundamental right* (Grundrecht), in contrast to the rights that it restricts (see Articles 3(2) and (3), 12(1) 33(2) GG; see M. Zuleeg, op. cit., p. 1023. Moreover, according to Scholz, in contrast to other provisions of the Constitution, Article 12a GG may be amended because it is not covered by the strict limits which Article 79 GG imposes on revision of the Constitution (R. Scholz, commentary on Article 12a GG, in *Grundgesetz, Kommentar*, edited by T. Maunz, G. Dürig and G. Herzog, 1984, paragraph 208).

7 — Both Paragraph 3 SG and Paragraph 1 SLV provide that the appointment and assignment of soldiers must be made on the basis of their aptitude, qualifications and professional abilities without regard, in particular, to gender.

centre and, when she lodged an objection, by its head staff office, on the ground that under national law women are barred from all duties involving the use of arms. Considering this to be unlawful discrimination on grounds of sex, Mrs Kreil challenged that decision before the national court.

V — Legal analysis

(1) The alleged discrimination and the basis for it

8. The Verwaltungsgericht Hannover is asking the Court whether the Directive precludes a more or less absolute bar on voluntary service for women in a Member State's armed forces.

9. According to the plaintiff in the main proceedings, the restrictions on recruiting women into the Bundeswehr constitute a flagrant violation of the prohibition, laid down in Article 3 of the Directive, on any discrimination whatsoever on grounds of sex for access to all occupations or posts. [8] Ms Kreil points out that the point at issue in this case is not compulsory military service but the professional choice of women wishing to engage in voluntary military service.

10. The Federal Republic of Germany considers the national legislation in issue to be justified on the basis of Article 2(2) and (3) of the Directive, which provide for exceptions to an individual's right to equal treatment. The Commission (whose view is broadly shared by the British and Italian Governments) considers that, on the basis of Article 2(2) alone, the national legislation in issue is in essence justifiable, it being understood, of course, that its validity must be assessed in regard to all posts in the

8 — As far as the plaintiff in the main proceedings is concerned, there is no doubt that the German legislation may be analysed in the light of the Directive, since the Court has already interpreted it, and therefore considered it to be relevant, in a case concerning regulations similar to the SG and the SLV (see Case C-1/95 *Gerster* [1997] ECR I-5253 in which the Court ruled that the scope of the Directive extended to a provision — contained in the Bavarian Beamtenlaufbahnverordnung (the Regulation on the careers of public servants in Bavaria) — on the calculation of public servants' length of service. In *Gerster* the Court referred specifically to Article 3(1) of the Directive, which prohibits discrimination on grounds of sex 'whatever the sector or branch of activity', paragraph 28).

armed forces and in the light of the principle of proportionality. [9]

11. None of the interveners in this case disputes the fact that the provisions in issue have the effect of excluding women from the majority of posts in the Bundeswehr, and thereby give rise to discrimination on grounds of sex within the meaning of Article 2(1) and Article 3(1) of the Directive; this involves direct discrimination — although it does lead to other forms of indirect discrimination, given that the armed forces largely consist of men. [10] In some instances, soldiers discharged from the army are given priority access to posts

9 — As far as the *Commission* is concerned, it is clear that employment in the armed forces does not fall outside the scope of the Directive: it cites the judgment in Case 248/83 *Commission* v *Germany* [1985] ECR 1459, paragraph 16, in which the Court ruled that the Directive also applies to employment in the public service. However, before considering the substance of the question referred for a preliminary ruling, the *United Kingdom, Italian and German Governments* maintain — basing their argument on Article 224 of the EC Treaty (now Article 297 EC) in particular — that the Directive does not apply to this case because issues relating to defence and the organisation of the armed forces are outside the scope of the Treaty. The national court has not raised this issue, which suggests to me that it considers that employment in the Bundeswehr falls within the scope of the Directive. Be that as it may, on that point, I can only refer back to my Opinion of 18 May 1999 in Case C-273/97 *Sirdar* [1999] ECR I-7403, at I-7405 concerning a policy of barring women from an élite unit of the British armed forces. In *Sirdar*, in accordance with the views currently held by Mrs Kreil and the Commission in this case, I considered that, generally speaking, access to employment in the armed forces is subject to the rules laid down in the Directive (see points 9 to 29).
Further to my Opinion in *Sirdar*, and with specific reference to the national legislation in issue in this case, I have an additional point to make. This relates to the justification advanced by the German Government — in the alternative, if the Directive is held to be applicable to this case — to vindicate, as to the substance, the discrimination in issue.
The German Government has simply cited the political objective of fulfilling the moral obligation, incumbent upon it because of Germany's own tragic past, of *protecting women* to the greatest possible extent from the dangers soldiers face in war (see point 12 of this Opinion). In other proceedings before the Court of Justice, the United Kingdom Government, however, based its argument that the particular discriminatory provisions in issue were not covered by the Directive on quite different reasons. According to the explanations given by the United Kingdom Government, the provisions had been adopted on grounds of *public safety* (to prevent an increase in attacks on the police in circumstances of serious internal conflict, see Case 222/84 *Johnston* [1986] ECR 1651, paragraph 35), and *defence and external security* (ensuring the combat effectiveness of an élite unit of the armed forces; see point 4 of my Opinion in *Sirdar*); these, clearly, were reasons linked to areas that fall within the exclusive responsibility of the Member States. In neither *Johnston* nor *Sirdar* was the Directive held to be inapplicable.
Consequently, a provision based solely on the protection of women cannot, *a fortiori*, fall outside the scope of the Directive, on the basis of either Article 224 of the EC Treaty relating to 'quite exceptional' measures needed to guarantee *(internal or external) security* or, to put it another way, a country's very survival (see point 24 of the Opinion in *Sirdar*), or on the basis of considerations linked to Member States' autonomy in relation to the organisation of their own armed forces, designed to ensure that they operate as effectively as possible.

10 — Under the Directive, 'there shall be no discrimination whatsoever on grounds of sex either directly or indirectly' (see Article 2(1)), except where this may be justified on the basis of one of the derogations laid down in the Directive itself. For specific examples of the application of the Directive to cases of indirect discrimination, see *Gerster* (cited in footnote 8 above), paragraphs 29 to 34, and Case C-100/95 *Kording* [1997] ECR I-5289, in particular paragraph 13 et seq.

in the public service, [11] and the possibility cannot be ruled out that they will find it easier to obtain employment in civilian life because of the technical and vocational training they are able to acquire while performing military service. [12] In order to answer the question referred by the Verwaltungsgericht, which concerns only direct discrimination, it is necessary to ascertain whether the measures adopted may be covered by one of the exceptions provided for in Article 2(2) and (3) of the Directive. [13] Before I embark upon that analysis, it is, however, necessary to recall the reasons for the exclusion under Article 12a GG, which is the legal basis of the provisions regarding which the national court is seeking clarification.

12. According to the Federal Republic of Germany, the provisions in question, which were adopted to prevent women from taking part in warfare, are designed to ensure that women are *on no account* exposed to enemy fire as combatants, and that applies equally to women who wish to enlist voluntarily. Reference is made in that connection to the Bundestag's preparatory work on Article 12(3) GG, introduced in 1956 (see point 4 above), from which it is clear that the exclusion applied to women in this case is based on a moral obligation stemming from Germany's tragic past. The German Government also refers to the recent decision in the *Sanitätsdienst* case (see footnote 6), in which the Bundesverwaltungsgericht ruled that this moral obligation requires protection for women which should be as comprehensive as possible and can be secured only if the rules on the recruitment to and employment of women in the Bundeswehr are substantially 'harmonised' with international humanitarian law. [14] International

11 — V. K. Bertelsmann and U. Rust, *Equality in Law between Men and Women in the European Community — Germany* (published by the European Commission), Dordrecht-Luxembourg, 1995, page 53, paragraph 4.14.3, in which the authors point out by way of example that, in accordance with Paragraphs 9 and 10 of the SVG, those who have served for at least 12 years in the armed forces are given preference on recruitment for vacant posts in the public service other than defence. The effect of that, according to the authors, is that some vacant jobs are reserved for ex-soldiers even if there are other candidates with identical or even superior training (op. cit., p. 54). Furthermore, some commentators have noted that, as a result of Article 12a GG, women may not have access to some of the most senior governmental posts: Bundeskanzler (Federal Chancellor), Bundesminister der Verteidigung (Federal Minister of Defence) and Staatssekretär (State Secretary). As interpreted by some authors, those posts actually include the supreme command of the armed forces, in other words a post which, like any command (see Paragraph 1(4) SG, regarding the concept of 'Vorgesetzter' or 'Wachvorgesetzter', that is to say, commander) involves the use of arms (Waffendienst or Dienst mit der Waffe; see A. Poretschkin, *Verfassunugsverbot für einen weiblichen Verteidigungsminister?*, *NZWehrR*, 1993 p. 232; U. Repkewitz, op. cit., p. 507; D. Walz, *Der 'geschlechtsneutrale' Bundesminister der Verteidigung*, *NZWehrR* 1996, p. 117). In fact, according to Article 65a GG, the Federal Defence Minister (who may delegate to or be represented by the State Secretary) has command of the armed forces; in accordance with Article 115b GG, as soon as a state of defence is declared (see footnote 4), command of the armed forces passes to the Federal Chancellor. In that connection, it is hardly necessary to point out that, pursuant to Article 3(1) of the Directive, any discrimination on grounds of sex is prohibited, as regards the conditions of access 'to all levels of the occupational hierarchy'.

12 — This does not appear to apply to Ms Kreil who already held a diploma at the time she applied to enlist. However, this does not seem to me to amount to negligible discrimination: modern armed forces use increasingly sophisticated technical equipment requiring specific know-how that is certainly valuable on the civilian labour market which is now more competitive than ever (take, for instance, military pilots who, because of their experience, have no difficulty in finding jobs with civilian airlines on leaving the armed forces).

13 — The exception provided for in Article 2(4) of the Directive is not relevant; it actually reads: 'This Directive shall be without prejudice to measures to promote equal opportunity for men and women, in particular by removing existing inequalities which affect women's opportunities in the areas referred to in Article 1(1).'

14 — Also known as the 'law of human rights in armed conflict'; see N. Rodley, *The Treatment of Prisoners under International Law*, Unesco-Clarendon Press, Paris-Oxford, 1987, p. 3.

humanitarian law includes the Third Geneva Convention of 12 August 1949 relative to the Treatment of Prisoners of War [15] (hereinafter 'the Convention') and Protocol I Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts [16] (hereinafter 'the Protocol'). According to the Bundesverwaltungsgericht — and the German Government, which fully subscribes to that court's interpretation in the *Sanitätsdienst* decision — the discriminatory provisions were prompted by Article 51 of the Protocol, under which only the civilian population enjoys general humanitarian protection from dangers arising from military operations. More specifically, this means that the civilian population may not be the object of attack, [17] unlike 'combatants' within the meaning of Article 43 of the Protocol, or those who take part in hostilities using weapons or weapons systems. Again, it is combatants who may be made 'prisoners of war' when they fall into enemy hands. [18] In contrast, not only may members of the medical and pastoral services of the armed forces not be taken captive as 'prisoners of war', they have to be respected and protected and must not be attacked. [19] That is why women are admitted to the medical units. As far as the military-music services are concerned, the German Government has explained that, in the event of hostilities, those services are disbanded and their members assigned to medical units as nursing or auxiliary nursing staff (musicians belonging to military bands are given the requisite training during peacetime).

15 — BGBl 1954, II, p. 838. In addition to the Third Geneva Convention, there are the First Geneva Convention of 12 August 1949 for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (BGBl 1954 II, p. 783) and the Second Geneva Convention of 12 August 1949 for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (BGBl 1954 II, p. 813). The three Conventions are known collectively as the Geneva Conventions of 12 August 1949 for the Protection of the Victims of International Armed Conflicts.

16 — BGBl 1990, II, p. 1550.

17 — See Articles 48 and 51(2) of the Protocol.

18 — See Article 4 of the Convention and Article 44(1) of the Protocol.

19 — See Article 33 of the Convention and Article 12(1) of the Protocol respectively.

(2) Derogations from the principle of equal treatment: Article 2(3) of the Directive

13. The German Government claims that, in view of the objective sought by the legislature, the more or less absolute bar on women joining the Bundeswehr is covered by the derogation under Article 2(3) of the Directive. I am more inclined to the Commission's view, based on the judgment in *Johnston* which concerned the employment of women in armed units of the British police force in Northern Ireland in the 1980s, that is to say, in circumstances of full-scale civil *war*. In its judgment in *Johnston*, the Court ruled: 'it is clear from the express reference to pregnancy and maternity that the Directive is intended to protect a woman's biological condition and the special relationship which exists between a woman and her child. That provision of the Directive does not therefore allow women to be excluded from a certain type of employment on the ground that public opinion demands that women be given *greater protection* than men against risks which affect men and women *in the same way* and which are distinct from women's specific needs of protection,

such as those expressly mentioned.' [20] However, it does not appear from the documents before the Court that the risks to which women would be exposed in units of the Bundeswehr that require the use of arms are any different from or greater than the risks faced by men carrying out those same duties; the German Government has produced no evidence to that effect. If that is the case, then the total exclusion of women from posts in units other than the military-music and medical services, on grounds of general risks rather than risks specific to women, cannot fall within the scope of the difference in treatment permitted by Article 2(3) of the Directive: [21] 'Article 2(3) presupposes that the difference in the treatment reserved to the woman shall not be discriminatory; such will be the case whenever the difference in treatment — namely the protection of the woman — can be justified by an *objective difference* between the situation of the male worker and that of his female counterpart. That *objective rationale* is connected with a woman's special biological make-up, as is clearly indicated by the illustrative references to pregnancy and maternity.' [22] As regards the use in Article 2(3) of the Directive of the word 'particularly' — to introduce the illustrative reference to pregnancy and maternity — the Court has always firmly rejected arguments advanced by the Member States in an attempt to extend the scope of the expression 'protection of women' beyond the conditions of pregnancy, lactation or maternity. [23]

(3) Derogations from the principle of equal treatment: Article 2(2) of the Directive

14. Furthermore, the German Government maintains that the objective pursued by the authors of the Constitution in 1956 and 1968 is not incompatible with Article 2(2) of the Directive — the construction placed on that provision by the Court of Justice being of more particular interest to the

20 — Cited in footnote 9 above, paragraph 44; my emphasis. *Johnston* forms part of the series of settled decisions in which the Court of Justice has ruled that Article 2(3) of the Directive is geared solely to the *protection of a woman's biological condition* during and after pregnancy and the special relationship between a woman and her child: see Case 184/83 *Hofmann* [1984] ECR 3047, paragraphs 25 and 26; Case 312/86 *Commission* v *France* [1988] ECR 6315, paragraph 13; Case C-345/89 *Stoeckel* [1991] ECR I-4047, paragraph 13; Case C-13/93 *Minne* [1994] ECR I-371, paragraph 11; Case C-421/92 *Habermann-Beltermann* [1994] ECR I-1657, paragraph 21; Case C-32/93 *Webb* [1994] ECR I-3567, paragraph 20; Case C-136/95 *Thibault* [1998] ECR I-2011, paragraph 25; and Case C-66/96 *Dansk Handel* [1998] ECR I-7327, paragraph 54. The following extract from *Hofmann* sheds particular light on the Court's approach: (Article 2(3) of the Directive seeks) 'first... to ensure the protection of a woman's biological condition during pregnancy and thereafter until such time as her physiological and mental functions have returned to normal after childbirth; secondly... to protect the special relationship between a woman and her child over the period that follows pregnancy and childbirth by preventing that relationship being disturbed by the multiple burdens that would result from the simultaneous pursuit of employment' (paragraph 25). Then, in *Johnston*, Advocate General Darmon expressed the view that 'if indeed Article 2(3) may be invoked to reduce the rights of women, there can be no question of taking into consideration, on the basis of that provision, a need for protection — no matter how well founded — whose origin is socio-cultural or even political' (point 8).

21 — See *Johnston*, paragraph 45; see also, to the same effect, Case 312/86 *Commission* v *France*, paragraph 14, and *Stoeckel* (cited in footnote 20 above), paragraph 15.

22 — Opinion of Advocate Darmon in *Hofmann* (third subparagraph of point 10; my emphasis); see, to the same effect, the Opinion of Advocate General Tesauro in *Habermann-Beltermann* (point 11).

23 — See the observations of the United Kingdom in *Johnston* in relation to the fourth question referred (p. 1672) and of France in *Commission* v *France* (Case 312/86 [1988] ECR 6322) concerning a series of special laws adopted for the protection of women. According to Advocate General Sir Gordon Slynn, 'although the word "particularly" in Article 2(3) indicates that situations other than pregnancy and maternity may fall within its scope, those words colour the scope of the exceptions' (Opinion in Case 312/86 *Commission* v *France* [1988] ECR 6327).

referring court. In point of fact, according to the German authorities, Article 12a GG and the abovementioned provisions of the SG and the SLV perceive gender as a determining factor for the performance of armed military service. The protection of women could therefore be guaranteed only by barring them completely from all activities pertaining to the legal status of 'combatant' within the meaning of international humanitarian law. The Commission and the Italian Government make a distinction here. While accepting that there can in principle be no objection to this kind of basic defence policy decision by a Member State, they distinguish between those posts that involve a specific risk [24] and technical activities which may be carried out behind the lines, do not involve specific risks and do not demand special physical strength. According to the Commission and the Italian Government, such activities do not fall within the category of activities the nature of which or the context in which they are carried out, within the meaning of Article 2(2) of the Directive, require them to be reserved for men rather than women. It would then be for the national court to assess whether the post for which Ms Kreil wished voluntarily to enlist falls within one or other of these categories of activity. This qualified acceptance on the part of the Commission and Italian Government of the reasons for the discrimination in issue here is not shared by the German Government, which considers that the prohibition under Article 12a GG has to be construed as absolute in so far as, if a state of defence is declared, all members of the armed forces may be required to take an active part in military operations. It is also necessary for soldiers responsible for the electronic maintenance of weapons systems to be able to be sent to the front line to ensure that the Bundeswehr is an effective fighting force. According to the German authorities, that is a sign of the times: in their view, it must be possible in a crisis to deploy troops with advanced technical equipment 'interoperably', without differentiating between front line and non-front line duties.

15. Under Article 2(2) of the Directive, sex may constitute a determining factor for specific occupational activities, provided that 'their nature' or the 'context in which they are carried out' is taken into account. Those conditions serve to define the scope of the reservation under Article 2(2), as well as to distinguish it in conceptual terms from the derogation provided for under Article 2(3).

16. To my mind, the scope of the reservation must be determined by reference to the actual professional qualifications that make sex a determining factor for a given activity; examples of this would be the activities of male and female singers, actors and actresses, male and female dancers and

24 — The Commission cites *Johnston*, concerning a post in the armed forces of the British police force stationed in Northern Ireland during the 1980s, and *Sirdar*, concerning recruitment to the élite Royal Marines unit, the jewel in the crown of the United Kingdom's crack combat forces.

male and female artistic and fashion models. [25] More generally, according to some legal writers, Article 2(2) of the Directive provides for a 'rigid' or 'strict' derogation; a Member State or employer wishing to rely on that derogation would have therefore to show that, in the case of a specific post, sex is so much a determining factor that a non-discriminatory employment policy would make it extremely difficult or indeed impossible to fulfil the functions of that post. In other words, it would have to be established that it is necessary to employ a person of a particular sex. [26] The Court itself has also held that in order to be able to derogate, in accordance with Article 2(2) of the Directive, from the grant of an individual right such as the equal treatment of men and women, it is necessary to take into account only the 'requirements which are *decisive for the carrying out of* the specific activity in question.' [27] However, during the hearing before the Court, the agent for the German Government specifically stated that there was absolutely no doubt as to the suitability of either Ms Kreil or women generally to serve in the armed units of the Bundeswehr. I am not therefore persuaded that the submissions of the German Government concerning the exclusion laid down in Paragraph 12a GG are sufficient to prove that the matter in question is covered by Article 2(2) of the Directive. Again, as regards the latter provision, it seems to me that it can hardly be claimed that the nature or context of the work carried out by members of the armed forces is such as to make it absolutely impossible, or at least extremely difficult, to employ women in any 'combat' unit, and, consequently, in any service other than the medical and military-music services. It is no coincidence that — save for exceptions restricted to very specific situations [28] — women are employed regularly and without distinction in all of the Community's armies (and in NATO forces). [29]

17. It is therefore necessary to analyse and further clarify the difference between the

25 — See Case 248/83 *Commission* v *Germany* [1985] ECR 1459, paragraph 34, in which the Court mentions a number of occupations which, on the basis of practice or legislation, are more generally covered by derogations from the principle of equal treatment in the Member States.

26 — See V. T. Hervey, *Justifications for the Sex Discrimination in Employment*, Butterworths, London, 1993, section 4.2.1.3.

27 — See Case 318/86 *Commission* v *France* [1988] ECR 3559, paragraph 28; my emphasis. See also, to the same effect, Case 165/82 *Commission* v *United Kingdom* [1983] ECR 3431, paragraphs 18 and 20, and *Johnston* (cited in footnote 9 above), paragraph 38.

28 — For instance, the members of submarine crews and marines in the Netherlands, the Royal Marines in the United Kingdom and, until 1993, fighter pilots in Denmark.

29 — The only country other than the Federal Republic of Germany that has yet to admit women into its armed services is Italy. In Italy, however, the absence of voluntary military service for women is the result not of a prohibition (either under the constitution or in ordinary law) but of the legislature's failure to act. In fact — and in contrast to what happened when the police force was demilitarised in 1981 — the special rules designed to implement the principle of equal treatment enshrined in the constitution have yet to be adopted. The Italian Chamber of Deputies approved a draft law for the establishment of voluntary military service for women on 29 September 1999 (Atto Camera No 2970-B). Save where otherwise provided, that law will result in women being generally admitted to all units. According to the statement made by the Italian Government's representative during the hearing before the Court, there will be exceptions in specific cases in which the conditions or nature of the duties assigned to soldiers are such that the deployment of women would be highly inadvisable (it seems to me that there is a certain analogy here with the case of the Royal Marines recently considered in *Sirdar*).

provisions of Article 2(2) and 2(3) of the Directive in order to arrive at a more precise definition of the actual scope of the reservation provided for in Article 2(2). As has been pointed out in legal literature, [30] Article 2(2) concerns the impact which sex has *on persons other than the female (or male) worker, in the exercise* of a particular employment activity, whereas — as we have seen — Article 2(3) is concerned with the impact of a particular employment activity *on the female worker herself.* The Court's own case-law bears out that distinction.

18. In *Commission* v *United Kingdom*, respect for *patients' sensitivities* led the Court to regard as justified certain restrictions placed on men only in relation to the activity of midwife. [31] In *Johnston*, the exclusion of women from armed units of the British police stationed in Northern Ireland was permitted because the presence of women could have created additional risks of their being assassinated and might therefore have proved incompatible with the requirements of *public safety*, thereby causing harm to local people. [32] In Case 318/86 *Commission* v *France*, the Court held that it was justified, within the meaning of Article 2(2), to recruit male and female staff separately, for both the post of prison warder, which involves regular con-

30 — V. C. Kilpatrick, *How long is a piece of string? European Regulation of the Post-Birth Period*, in *Sex Equality Law in the European Union*, edited by T. Hervey and D. O'Keefe, Wiley, 1996, Chapter 6, footnote 26.

31 — See paragraphs 18 and 20.

32 — Paragraph 36 of the judgment, in which — after analysing whether the citation of Article 2(2) by the Member State concerned was relevant — the Court ruled that 'it cannot be excluded that in a situation characterised by serious internal disturbances the carrying of fire-arms by policewomen might create additional risks of their being assassinated and might *therefore be contrary to the requirements of public safety*' (my emphasis). The Court did not accept that the exclusion of women from armed police units was a measure designed, *in the final analysis*, to prevent them from being exposed to attack (and I cannot therefore share H. Fenwick's disappointment about this in *Special Protections for Women in European Union Law*, in *Sex Equality Law*, op. cit., p. 63, to p. 70, where she expresses the fear that the Court has, as a result, legitimised the relevance of female vulnerability in relation to Article 2(2) of the Directive). In my view, what actually led the Court to consider that exclusion justifiable in principle (subject to the test of proportionality, as to which see paragraph 38), was not so much the alleged weakness of women *per se* or a general desire to prevent them being subject to attack (for their own good) as the British authorities' fear that issuing women with firearms 'in a situation characterised by serious internal disturbances' could have increased the risk of such attacks and, consequently, the risk of their weapons falling into the hands of their assailants (see the statements by the United Kingdom Government in the Report for the Hearing, p. 1672). It is therefore that risk alone that is incompatible with the requirements of public safety, and in view of the conditions for the exercise of the specific occupational activity in question, the latter are the sole requirements which could make being of the male sex a determining factor: '... the carrying of fire-arms by policewomen might create additional risks of their being assassinated *and might therefore be* contrary to the requirements of public safety' (paragraph 36; my emphasis).
This becomes clearer still in the light of the factors identified by the Court to enable the national court to determine, by weighing them up against one another, whether that exclusion may be described as proportionate. Those factors are, on the one hand, the principle of equal treatment under Article 1(1) of the Directive and, on the other, the requirements of public safety: '(in this case, the principle of proportionality) requires the principle of equal treatment to be reconciled as far as possible with the requirements of public safety *which constitute the decisive factor* as regards the context of the activity in question.' Consequently, no concern for the protection of women is discernible in the Court's judgment.
I note, finally, that in the light of the abovementioned paragraphs 36 and 38 of *Johnston*, the Court does not appear to have shared the view of Advocate General Darmon, namely that, in some circumstances, requirements concerning the protection of women — of a social nature (cultural, political and so on) — other than those covered by Article 2(3), may constitute a legitimate ground for the authorities of a Member State to permit only individuals of one sex to do certain work relating to the maintenance of law and order (see point 9 of Advocate General Darmon's Opinion; on that same point, see also point 20 above).

tact with detainees, and the post of head warder, with responsibility for running a prison, in view of the professional experience gained in the corps of custodial staff, which is useful for the exercise of an activity that involves managing all the other warders. [33] In *Sirdar*, finally, I concluded that, in principle, a policy of men-only recruitment into the élite corps of the Royal Marines appeared to be justified since it could not be ruled out that the admission of women could have an adverse effect on the morale and cohesion of the *soldiers within the commando units*, thereby undermining their combat effectiveness to the detriment, in the final analysis, of the *United Kingdom's defence* requirements. [34]

19. In conclusion, in view of the importance attaching to Article 2(2), it does not seem to me that the reasons put forward by the German Government can justify the exclusion laid down in Paragraph 12a GG.

33 — See paragraphs 12 to 17.

34 — In *Sirdar*, I pointed out that 'the essence of the United Kingdom Government's argument seeking to justify the exclusion of women from the Royal Marines on grounds of combat effectiveness lies in the apprehension that the participation of women could have an *adverse effect* "on the morale and cohesion" of commando units ("fire teams")', and I considered to be of a '*markedly more "social" slant*... the observations contained in the document submitted to the national tribunal in the main proceedings' (point 45). I also queried whether 'combat effectiveness can be safeguarded, even in cases in which women are allowed, taking particularly into account the way in which their presence is *perceived* by their male comrades in arms' (point 45; the emphasis does not appear in the original).

In point of fact, the German authorities have not explained why, in the specific working environment in question, it is crucial to be male (bearing in mind *the context in which* the work of the Bundeswehr *is carried out* or indeed the relations that develop between soldiers). Basically, the German Government has failed to cite any considerations of the kind put forward by the United Kingdom Government in *Sirdar* and which, as careful scrutiny of my Opinion in that case shows, were the sole considerations that led me to accept the possibility — albeit only in principle and without prejudice to proper verification of respect for the principle of proportionality — that the current criteria governing recruitment to the Royal Marines may fall within the scope of Article 2(2) of the Directive. [35]

(4) Derogations from the principle of equal treatment: Article 2(2) in conjunction with Article 9(2) of the Directive

20. I have already mentioned that, according to Advocate General Darmon, social requirements for the protection of women (cultural, political and so on) could be relevant for the purposes of Article 2(2), by

35 — See paragraph 34 of my Opinion in *Sirdar*.

virtue of Article 9(2) of the Directive,[36] which requires Member States to assess whether there is justification for maintaining the discrimination permitted under Article 2(2) 'in the light of social developments'. The argument put forward by the German authorities — although not specifically founded on Article 9(2) of the Directive — seems to echo the thinking of Advocate General Darmon. However, if that approach were adopted, the scope of Article 2(2) would be defined by reference to a criterion other than the only two criteria laid down by that provision for the purpose of permitting derogations from the principle of equal treatment: namely, the 'nature' of specific occupational activities and the 'context in which they are carried out.' The result would therefore be a broad interpretation of a reservation regarded by the Court as an exception to be construed restrictively, in the same way as Article 2(3) of the Directive.[37] Basically, I consider that, were the provision in issue to be interpreted as including general social requirements (such as the protection of women in circumstances other than those covered by Article 2(3) of the Directive), there would be a real risk that the aims of the Directive would be wholly frustrated. Through the Directive, the Community was seeking to implement equal treatment between men and women — or, to be more precise, '*to further*' 'the harmonisation of living and working conditions *while maintaining their improvement*'[38] — that is to say, a fundamental human right[39] for which there is now also specific provision in primary legislation.[40] The interpretation of Article 2(2) in conjunction with Article 9(2) cannot therefore be based on the criterion that Advocate General Darmon seemed to be suggesting.

36 — See the end of footnote 32 above, in which I point out that the Court does not appear to have shared that view.

37 — See *Johnston*, paragraphs 36 and 44.

38 — See the third recital of the Directive (my emphasis).

39 — See, among many, Case 149/77 *Defrenne* [1978] ECR 1365, paragraph 27; Joined Cases 75/82 and 117/82 *Razzouk and Beydoun* v *Commission* [1984 ECR 1509, paragraph 16; Case 151/84 *Roberts* v *Tate & Lyle* [1986] ECR 703, paragraph 35; Case 152/84 *Marshall* [1986] ECR 723, paragraph 36; Case 262/84 *Beets-Proper* v *Van Lanschot Bankiers* [1986] ECR 773, paragraph 38); *Johnston* (cited in footnote 9 above), paragraph 38; Case C-158/91 *Levy* [1993] ECR I-4287, paragraph 16; and Case C-13/94 *P* v *S. and Cornwall County Council* [1996] ECR I-2143, paragraph 19.

40 — As regards the principle of equal treatment, important new elements have been introduced into the Community legal framework, albeit after the events that gave rise to the main proceedings. The Treaty of Amsterdam of 2 October 1997 introduced a new fourth recital into the preamble to the Treaty on European Union, in which the Member States confirm 'their attachment to fundamental social rights as defined in the European Social Charter signed at Turin on 18 October 1961 and in the 1989 Community Charter of the Fundamental Social Rights of Workers.' Both Charters confirm the right to equality of opportunity and of treatment for men and women. But above all — and again as a result of the amendments made by the Treaty of Amsterdam —, within the EC Treaty, the principle of equal treatment for men and women is no longer confined to pay-related aspects of the employment relationship (see Article 119 of the EC Treaty, now Article 141 EC; Articles 117-120 of the EC Treaty have been replaced by Articles 136-143 EC), but, as a result of an array of 'programmatic' provisions, this has become a principle that both informs Community action and is an objective of that action. For example, the amendments to the EC Treaty introduced in this field by the Treaty of Amsterdam include: the new text of Article 2 of the EC Treaty (now, after amendment, Article 2 EC), which now includes among the various objectives that the Community must promote 'equality between men and women'; the new Article 3(2) of the EC Treaty (now, after amendment, Article 3 EC listing the Community's responsibilities), according to which: 'in all the activities referred to in this Article, the Community shall aim to eliminate inequalities, and to promote equality, between men and women'. With a view to achieving the social objectives listed in Article 117 of the EC Treaty (Articles 117 to 120 of the EC Treaty have been replaced by Articles 136 to 143 EC) — which include the promotion of employment and the improvement of living and working conditions —, the new Article 118 of the EC Treaty requires the Community to support and complement the activities of the Member States in relation to various aspects of employment, including 'equality between men and women with regard to labour market opportunities and treatment at work' (see P. Mori, *La parità tra uomo e donna nel Trattato di Amsterdam*, in *Il diritto dell'Unione europea*, 1998, p. 571).

21. In any event, the starting-point for an interpretation of the provisions in issue has already been indicated in points 15 to 19 above. I shall continue my analysis below in order to demonstrate how taking 'social developments' into account can help to determine the effects — on persons other than the male or female worker — that have to be taken into consideration when it is necessary to ascertain whether sex is a determining factor for the performance of a specific occupational activity. The Court appears already to have espoused this view. In Case 165/82 *Commission* v *United Kingdom*, the Court reviewed a discriminatory provision of national law in the light of the combined provisions of Article 2(2) and Article 9(2) of the Directive. The case concerned *specific* and *limited* differences in treatment between men and women in relation to the activity of midwife.[41] In order to demonstrate the legitimacy of its own laws, the United Kingdom Government proved to the Court that it had conducted periodic reviews, most recently on the basis of wide-ranging consultations, involving two studies on male midwives, with the health authorities, the professional and occupational groups concerned and other organisations.[42] In those circumstances, the Court ruled that the legislation criticised by the Commission did not go beyond the limits set by Article 2(2) inasmuch as, in the light of the (established) social developments in the Member State concerned, allowing men access to the profession of midwife and to exercise that profession without restriction would have had negative effects on patients in a sphere in which 'respect for the patient's sensitivities is of particular importance' (paragraph 18).[43] According to the Court, 'it must... be recognised 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 [of equal treatment] 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' (paragraph 20; my emphasis). There consequently seems to me to be some similarity between the relationship between midwife and patient and the relationship between fellow members of Royal Marines commando units:[44] in neither case — bearing in mind the personal sensitivities of those concerned, which are certainly bound to evolve with the passage of time — does it seem possible to ignore the implications of sexual identity in relations between individuals who find themselves in close contact as a result of the exercise of a specific occupational activity.

41 — Men were allowed to train as midwives only in centres authorised by the ministry responsible (one in London and one in central Scotland), and were able to exercise that activity only in places listed by the ministry, that is to say, in four hospitals in London and Edinburgh (see the Opinion of Advocate General Rozès, [1983] ECR 3458).

42 — See the Opinion of Advocate General Rozès, p. 3458. I would point out in passing that the German Government has provided no shred of evidence of ever having reviewed, at least periodically, the discriminatory provisions in issue, in accordance with Article 9(2) of the Directive. The *Sanitätsdienst* decision of 1996, to which reference has been made (see footnote 6 above), simply restates the historical reasons which prompted the drafters of the Constitution to introduce, forty years earlier, the 'obligation' to protect women to the greatest possible extent.

43 — The United Kingdom Government stressed the special nature of the activity of midwife and expressed the fear that some women (or their husbands) might refuse the assistance of male midwives; it pointed out the unique role played by midwives — who may be on duty 'alone, particularly at night, in the midwifery ward of a hospital and above all at the patient's home' — during the pre-natal and particularly the post-natal periods as regards care involving intimate personal contact with the woman (see the Opinion of Advocate General Rozès, pp. 3458 and 3459).

44 — See the extracts from my Opinion in *Sirdar*, quoted in footnote 34 above.

22. The reservation contained in Article 2(2) of the Directive does not permit any difference in treatment based on general considerations of a social or political nature. Gender-based discrimination is not in principle excluded, but it is justified only where the national legislature has made provision for it as a result of *specific* requirements, *closely bound up* with the nature of an activity or the context in which it is carried out — perhaps reflecting the cultural fabric of a country at a specific point in time. And these must in any event be requirements crucial to the exercise of the particular occupational activity in question.

23. It is clear from a proper reading of the combined provisions of Articles 2(2) and 9(2) of the Directive that there are other grounds for discarding the idea that inequalities in treatment based on sex may be justified solely by reference to general political requirements for the protection of women — even, as in this case, requirements designed to protect them from the risks to which 'combatants' may be exposed. Let me clarify that. First, were the argument of the German authorities to be upheld, Article 2(3) of the Directive would be divested of all effectiveness and even, perhaps, of its raison d'être.[45] It would simply no longer be possible to explain why that rule should be rigorously applied only where women need protection for biological reasons. Furthermore, as the Court has ruled, Article 2(3) in turn has an impact on the scope of Article 3(2)(c) of the Directive,[46] with the result that, if the German Government's view were adopted, the latter provision, too, would lose all practical relevance. And that is not all. As I have pointed out, the settled case-law of the Court restricts that exception *exclusively* to differences in treatment based on the need to secure the 'biological protection' of women (see point 13 above). The exception is designed for that purpose alone, and, therefore, like the reservation contained in Article 2(2) of the Directive (which the Court has, I repeat, held to be an exception), it must be interpreted strictly.[47] Furthermore, the Court has already clearly rejected the argument that Article 2(3) may justify different treatment for 'protective' purposes, the reason for which was much akin to the political objective pursued by the German legislature in this case: namely, to cater to public opinion. In *Johnston*, the Court ruled that: '[Article 2(3)] of the Directive does not... allow women to be excluded from a certain type of employment on the ground that *public opinion demands* that women be given greater protection than men against risks which affect men and women in the same way and are distinct from women's specific needs of protection...' (paragraph 44; my emphasis). It therefore seems to me that, pursuing that line of reasoning, the Directive precludes *any* discriminatory measure of a 'protec-

45 — As regards the importance of ensuring that Article 2(3) of the Directive has full practical effect, see *Habermann-Beltermann*, paragraph 24, and Case C-400/95 *Larsson* [1997] ECR I-2757, paragraph 22.

46 — See *Johnston*, paragraph 44. According to Article 3(2) of the Directive, in order to guarantee that there is no discrimination based on sex, 'Member States shall [within four years of notification of the Directive, see Article 9(1)] take the measures necessary to ensure 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...'.

47 — See *Johnston*, paragraph 44.

tive' kind that falls outside the scope of Article 2(3). [48]

24. Moreover, were the contrary view to be adopted, women would continue to be marginalised by being confined to certain sections of the Bundeswehr only — with the risk that the old stereotypical division between the sexes would be perpetuated. [49] Finally, as German legal commentators have observed, as a result of being barred from voluntary enlistment, women are being denied their moral independence. [50]

(5) A derogation founded on Article 2(2) in relation to specific occupational activities

25. In these proceedings, the Commission and the Italian Government have acknowledged that, while the exclusion of women from the armed forces for 'protective' reasons is in principle acceptable, it is actually legitimate only when it relates to specific activities, and when the context in which those activities are carried out in practice involves specific risks of a particular magnitude, such as the risks faced by armed police units in a civil war or by one of a country's élite assault forces (see point 14 above).

26. In point of fact, according to the Court, limitations on the principle of equal treatment based on Article 2(2) may relate only to *specific* occupational activities. [51] In *Commission* v *United Kingdom*, the Court rejected *totally* the argument that Article 2(2) could encompass a general derogation from the principle of equal treatment in relation to employment in private households, 'whilst it is undeniable that, for certain kinds of employment..., that consideration may be decisive' on grounds of respect for private life (paragraph 14). In Case 318/86 *Commission* v *France*, the Court then ruled to be insufficiently specific a derogation from the principle of equal treatment which applied to women in

48 — To the same effect, see, for example, H. Fenwick, op. cit., p. 79.

49 — See, to the same effect, the decisions of the Bundesverfassungsgericht (Federal Constitutional Court) of 28 January 1992 concerning the prohibition of night work for women (Nachtarbeitsverbot) (1 BvR 1025/82, 1 BvL 16/83 and 10/91, *BVerfGE*, vol. 85, pp. 191 to 207) and of 24 January 1995 in which the exclusion of women from compulsory service in the fire brigade was held to be unconstitutional (Feuerwehrdienstpflicht; 1 BvL 18/93 and 5, 6, 7/94, 1 BvR 403, 569/94 — *BVerfGE*, vol. 92, p. 91). In point of fact, the subject of the protection of women is very much a recurring theme in German employment law (see R. Harvey, 'Equal Treatment of Men and Women in the Work Place: the Implementation of the European Community's Equal Treatment Legislation in the Federal Republic of Germany', in *The American Journal of Comparative Law*, 1990, p. 31). That 'protection' of that nature is actually likely to relegate women to the traditional role of wife and mother is clear from the way in which the Federal Minister for Employment and Social Affairs (Bundesminister für Arbeit und Sozialordnung) mounted a vigorous defence of the Nachtarbeitsverbot, itself dating back to a law of 1891, as recently as 1992 — that is to say a year, after the *Stoeckel* judgment (see footnote 20) in which the Court for the first time held the ban on night work for women to be unjustified. It is clear from the abovementioned decision of the Bundesverfassungsgericht, which clearly confirmed the principle that the Directive takes precedence over conflicting provisions of national law, that the administration — prompting very fierce criticism from the German Federation of Women Lawyers (Deutscher Juristinnenbund) and the Association of German Women (Deutscher Frauenring) which intervened in the case — sought to justify the ban in question on the ground that 'women are responsible for child care and housework in addition to their occupational activity far more often than men' (op. cit., p. 200). Similar considerations appear in the Commission Communication of 20 March 1987, *Protective legislation for women in the Member States of the European Community*, COM(87) 105 final, section I-4, p. 5, hereinafter: 'the Communication'.

50 — V. Kokott (op. cit., commentary on Article 12a, paragraph 6).

51 — See Case 165/82 *Commission* v *United Kingdom*, paragraphs 14 to 16; Case 318/86 *Commission* v *France*, paragraph 25, and the Opinion of Advocate General Sir Gordon Slynn (pp. 3570-3571); and *Sirdar* (points 35 to 37 of the Opinion).

relation, not to the whole of the French police force, but to five police units only; [52] basically, according to the Court, it is only after the *specific activities* for which sex is a determining factor within those particular units have been identified that derogations pursuant to Article 2(2) of the Directive are permissible (paragraphs 25 to 30).

27. In this case, the exclusion of women from the Bundeswehr is not restricted to specific units but covers, without distinction, *all* sections other than the medical and military-music services. The German Government has sought to justify its position by maintaining that women have to be totally excluded because all combat units must be capable of 'interoperable deployment' (see point 14 above), without any distinction between front-line duties (which present a greater risk) and duties behind the lines (which present a lesser risk). In other words, the effect of the general requirement for interoperability within the Bundeswehr is to render specific the derogation laid down in both Article 12a GG and the rules adopted on the basis of that constitutional provision. This interoperability calls to mind the 'interchangeability' of the police forces — in issue in Case 318/86 *Commission* v *France* — which, according to the French Government, justified the recruitment system operated in certain units. [53] However, that system was found to be incompatible with the Directive, because it was doubtful whether the principle of 'interchangeability' was either necessary or actually put into practice. At a conceptual level, the 'interoperability' that is supposed, in this case, to be a hallmark of the whole of the Bundeswehr is to some extent reminiscent of the 'interoperability' of the Royal Marines. According to the national court in *Sirdar*, the United Kingdom Government had proved beyond question that the principle of 'interoperability' was consistently applied to all members of the Royal Marines; [54] for that reason, I considered the discriminatory measure in issue in that case to be sufficiently specific, even though it covered *all* posts in the Royal Marines. [55] Applying to this case the principles drawn from *Commission* v *France* (which also guided my Opinion in *Sirdar*), I therefore take the view that the 'interoperability' required of soldiers in the Bundeswehr is not sufficient to justify the discrimination in question, since the German authorities have failed to prove that this is a rule which is actually enforced in all 'combat units', that is to say, in all units other than the medical and military-music services.

28. That is not all. Interoperability applied across-the-board to the armed forces would be hard to reconcile with the fact that the different units are becoming ever more specialised and use increasingly sophisticated combat equipment, and that their members are frequently trained in military

52 — *Commissaires* (inspectors and superintendents), *commandants* and *officiers de paix*, *inspecteurs* (detectives), *enquêteurs* (investigators), *gradés* and *gardiens de paix* (sergeants and constables) (see pp. 3561 and 3562).

53 — See the comments on that point in my Opinion in *Sirdar*, point 36.

54 — See point 7 of my Opinion.

55 — See points 35 and 36 of my Opinion.

techniques specific to the individual division or unit. It therefore carries little conviction to claim that it is necessary to secure the possibility of assigning all 'combatants' to functions other than those for which they have been trained, possibly even including duties that involve the use of arms and require the kind of expertise that cannot be learnt from one day to the next. However, all Royal Marines, without exception, undergo the same lengthy specialist training (designed to guarantee the greatest possible degree of interoperability) and can potentially be assigned to the same duties. In *Sirdar*, it was seen that even cooks, like other members of their unit, have to take a test three times a year to assess their continuing physical fitness. [56]

29. The non-specific nature of the derogation from the principle of equal treatment contained in Article 12a GG and the rules adopted on the basis of that provision would therefore appear to be incompatible with the Court's case-law from yet another point of view: where the discrimination is claimed to be justified by reference to the reservation under Article 2(2), it must be sufficiently transparent to permit effective monitoring by the Commission. [57] In the present case, the general nature of the national legislation at issue makes it impossible to ascertain whether all the divisions from which women are barred 'actually correspond to specific activities for which the sex of the persons to be employed constitutes a determining factor within the meaning of Article 2(2) of the Directive'. [58] Moreover, I would venture to point out that the Commission itself has contributed to the fact that this difference in treatment persists. During the course of these proceedings, the Court put a specific question in writing to the Commission in order to ascertain to what extent the Commission had taken steps to monitor, in accordance with Article 9(2) of the Directive, those occupations and activities in relation to which the individual Member States (including Germany) exclude application of the principle of equal treatment, pursuant to Article 2(2) of the Directive. [59] As on previous occasions, [60] the Commission failed to provide specific data on this point.

30. The considerations set out above lead me to conclude that the exclusion in issue is not covered by either Article 2(2) of the Directive or by Article 2(3), and is therefore incompatible with the Directive. However, should the Court take a different view, I consider it appropriate to make a number of further observations concerning both the validity of the justification claimed by the German authorities and the proportionality of the system adopted by them. Were the Court to find that the Directive does not preclude the national legislation in issue, it would in fact be for the national court —

56 — See *Sirdar*, points 6 and 7 of my Opinion.

57 — See Case 318/86 *Commission* v *France*, paragraphs 25 and 26; and, to the same basic effect, *Commission* v *Germany* (paragraphs 36 et seq.).

58 — Case 318/86 *Commission* v *France*, paragraph 27.

59 — In *Commission* v *Germany*, paragraph 38, the Court explicitly referred to the Commission's specific right and duty, as guardian of the Treaty, to monitor the situation.

60 — See *Commission* v *Germany*, paragraph 34.

by reason of the division of jurisdiction laid down in Article 177 of the EC Treaty (now Article 234 EC) — to ascertain whether the rejection of Ms Kreil's application can actually be regarded as justified and consistent with the principle of proportionality. [61] I wish to draw attention to an initial and preliminary point here. The German authorities maintain that they have a discretion to determine what derogations from the principle of equal treatment provided for in the Directive may be introduced on socio-cultural grounds. But what is the basis for that claim?

(6) The role of discretion in determining derogations from the principle of equal treatment

31. According to the German Government, the discretion to adopt derogations in the terms set out above is justified in this case for historical reasons which explain the 'moral obligation to protect women' in accordance with Article 12a GG. The German authorities are therefore linking the present case to the case the Court considered concerning restrictions imposed on the free movement of workers on grounds of public policy, in accordance with Article 48(3) of the EC Treaty (now, after amendment, Article 39(3) EC). In *Van Duyn* [62] and *Regina* v *Bouchereau*, [63] the Court held that 'the particular circumstances (regarding the adoption of provisions on the expulsion of foreign nationals) justifying recourse to the concept of public policy may vary from one country to another and from one period to another', and acknowledged that 'it is therefore necessary in this matter to allow the national authorities an area of discretion ...' [64] I would not, however, say that the same criterion can and must apply in this case.

32. I pointed out in *Sirdar*, in which the United Kingdom put forward an argument similar to that currently advanced by the German Government, that when the national court is assessing the validity and proportionality of reasons cited to justify a derogation based on Article 2(2), the Court's case-law does not require that national court take into account an 'area

61 — See *Johnston*, paragraphs 38 and 39.

62 — Case 41/74 *Van Duyn* v *Home Office* [1974] ECR 1337, paragraphs 18 and 19.

63 — Case 30/77 *Regina* v *Bouchereau* [1977] ECR 1999, paragraphs 33 to 35.

64 — *Regina* v *Bouchereau*, paragraph 34; see also *Van Duyn*, paragraph 18.

of discretion' that the Member State concerned would like to possess. [65]

(7) Criteria for assessing the validity and proportionality of the derogation in question

33. The German Government contends that, since it is clearly based on international humanitarian law, Article 12a GG and the legislation implementing it offer the only means of pursuing the objective that women may 'on no account' be exposed to enemy fire as 'combatants' (see point 12 above). In reality, as will be apparent immediately below, neither the German Constitution nor the Convention and the Protocol afford the kind of protection that would unfailingly guarantee that, although not admitted (with certain exceptions) to the Bundeswehr, women of German nationality would avoid any risk linked to enemy attack or the risk of being declared prisoner of war if captured.

34. As stated by the German Government itself during the hearing before the Court, on the basis of Article 87b GG, the Federal armed forces have their own civilian administrative structure, with a staff in the region of 142 000 (compared with 330 000 soldiers), whose main responsibilities are personnel management and directly meeting the material needs of the Bundeswehr. Civilians employed in that capacity include, again according to figures provided by the German authorities, some 49 500 women. It cannot, however, be assumed that international humanitarian law accords *all* those who form part of the administration the protection afforded to the civilian population under Article 51 of the Protocol. Besides, that same humanitarian law appears to accept, in some cases at least, that individuals employed in the administration may be deemed to be 'prisoners of war' in the same way as 'combatants'. According to Article 50 of the Protocol and Article 4(A)(4) of the Convention (to which Article 50 of the Protocol refers): 'persons who accompany the armed forces without actually being members thereof, such as civilian members of military aircraft crews, war correspondents, supply contractors, members of labour units or of services responsible for the welfare of the armed forces... which they accompany' do not belong to the civilian

65 — See points 40-41 of my Opinion in *Sirdar* in which I refer to the judgment in *Johnston*. With more direct reference to the historical reasons underlying Article 12a GG, I would point out that in *Vogt* v *Germany* (judgment of 26 September 1995, *Vogt* v *Germany*, Series A, Vol. 323), the European Court of Human Rights (hereinafter the 'ECHR') was very reluctant to endorse the position of the German Government, according to which the experience Germany had suffered during the period that led to the Nazi regime provided sound justification for a measure that was clearly contrary to freedom of expression. In a case concerning the dismissal of a secondary school teacher on the ground that she was disloyal to the democratic constitution because she was an active member of the Deutsche Kommunistische Partei (German Communist Party), the ECHR ruled that, not even the experience Germany underwent during the Weimar Republic, which led to the 'nightmare of Nazism' was sufficient to justify such a radical measure, dictated by the defence of fundamental values such as national security and public order (see paragraph 49 et seq.). Taking an approach similar to the one it has adopted in these proceedings, the German Government maintained that the Federal Republic of Germany has a special responsibility in the fight against all forms of extremism, whether right-wing or left-wing, and, as a result and in the light of the experience of the Weimar Republic, every civil servant is bound by a special duty of political loyalty, given that the civil service is the cornerstone of a 'democracy capable of defending itself' (paragraph 54). It is worth mentioning the finding of the ECHR that 'the *absolute* nature of that duty [of political loyalty on the part of civil servants] as construed by the German courts is striking' (paragraph 59; my emphasis).

population, that is to say they are combatants. Under Article 4 of the Convention, if captured by the enemy, those same persons are deemed to be 'prisoners of war'. In my view, therefore, the Verwaltungsgericht Hannover must assess the responsibilities actually assigned to women under Article 87b GG, in order to ascertain whether, in accordance with the abovementioned provisions of international humanitarian law, their employment as Bundeswehr support staff is consonant with the rationale of Article 12a GG.

35. It is also necessary to take into account practical considerations: it is not actually clear how it can be guaranteed that women employed, pursuant to Article 87b GG, at military headquarters or other command posts — as secretaries, for example — or as support staff in any division of the Bundeswehr, can completely avoid the risks which international humanitarian law 'reserves' for 'combatants'. It is well known that, today, the use of modern long-range weapons systems means that, in the event of conflict, the nerve centres of an army's command and control structure are among the initial targets. Consequently, there are a substantial number of women, some 49 500, employed in the Bundeswehr administration and required to engage in a wide range of 'non-military' activities alongside soldiers (who, according to the German Government, are also engaged in administrative activities), who, it must be assumed, are not safe from enemy attack. The national court ought therefore to assess the reasonableness of a 'protective' measure, which, on the one hand, does not totally eliminate the risks it is designed to prevent, and, on the other, has the effect of barring women from more than 300 000 posts (which, as the Commission has pointed out, are not affected by negative trends in the economy or on the market and provide the kind of technical and vocational training that is extremely useful once the individuals concerned transfer back to civilian life). [66] From that point of view, the national court ought, more particularly, to ascertain whether, while exercising 'civilian' functions, women are not in fact exposed to the same risks, even if at one remove, as soldiers themselves.

36. The more or less absolute exclusion of women from the Bundeswehr on purely 'protective' grounds is also inconsistent with what appears, in contrast, to be an employment policy for women that is far more open in relation to other activities,

66 — The mix of civilian and military activities and the close relationship between them within the Bundeswehr administration are underlined by the fact that, as the German Government has pointed out, in other countries' armed forces, there is no division of responsibilities between the 'civilian' and 'military' elements, as it is almost exclusively the military that has administrative responsibility. That being so, I wonder how it is possible to guarantee that women, many of whom are employed in Bundeswehr support services, 'on no account' suffer from enemy attacks on objectives such as military bases, arms stores and the whole of the logistical infrastructure.

even though they involve considerable risk. I am referring in particular to the fire service [67] and the police force. [68] Although the police do not generally face the kinds of risk to which soldiers are exposed in wartime, members of the police force, in particular, are exposed to serious risks on a daily basis, including shoot-outs with ordinary criminals or terrorists. As far as fire-fighters are concerned, in its recent decision (see footnote 49), the Bundesverfassungsgericht held even the exclusion of women from compulsory service to be discriminatory. In that connection, during the hearing before the Court, the German Government merely pointed out that posts in the police force and the Bundeswehr are treated differently because only soldiers constitute 'combatants' under international humanitarian law. As I have already said, the relevance of combatant status for the purposes of this case is a matter that can be assessed by the national court (see points 33 to 35 above). More important, however, is that the national court should ascertain whether the radically different treatment accorded to women, as compared with men, in the armed forces can in fact be justified on the basis of the risks *inherent* in that activity.

37. Finally, as regards the risks bound up with the status of captive, that is to say 'prisoner of war' status, in the light of current international humanitarian law — which has seen significant developments since the period immediately following the Second World War [69] — those risks appear unquestionably diminished compared with the risks to which soldiers were exposed during the period of history to which the

67 — In the *Feuerwehrdienst* decision (see footnote 49 above), the Bundesverfassungsgericht held to be unconstitutional the exclusion of women from *compulsory* service in fire-fighting units — provided for in the legislation of more than half the *Länder — on the ground that the exclusion is not objectively justified by the need to protect women from risks to which men are not exposed and might perpetuate a traditional division of roles* (pp. 109 to 113). That decision is particularly significant because, throughout the 1970s and 1980s, the Bundesverfassungsgericht had repeatedly ruled that the exclusion of women from that activity (which is compulsory for all adult men who are physically fit to serve but from which it is possible to be exempted by paying the relevant local tax or 'Feuerwehrabgabe', if there are sufficient volunteers to perform the duties assigned to the fire service units) was objectively justified in view of the risks inherent in it, despite the fact that, in many *Länder*, women have, since 1978, been able to enlist as volunteers (for a better understanding of the problems discussed by the Bundesverfassungsgericht, see the judgment of the European Court of Human Rights of 18 July 1994, *Schmidt* v *Germany*, Series A, Vol. 291-B).

68 — *Zuleeg* has already pointed out that contradiction (op. cit., p. 1020). This calls to mind, again by way of example, the activity of social worker in men's prisons: in Case 14/83 *Von Colson and Kaman* [1984] ECR 1891, in submitting to the Court a series of questions for a preliminary ruling concerning the penalties laid down under national law for employers guilty of discrimination based on sex, the German national court had no doubts regarding the discriminatory nature of the refusal by a prison for male offenders to employ two qualified (female) social workers on grounds related to sex on the basis of the 'problems and risks connected with the appointment of female candidates' (see paragraphs 2 and 3).

69 — According to Rodley, before World War II there was virtually no international law of human rights (op. cit., p. 1); this did not begin to develop, *inter alia* in relation to armed conflicts, until the advent of the three Geneva Conventions to which have been added over the years a whole array of international instruments that are no longer limited to laying down rules ('standard setting') but also contain mechanisms aimed at securing respect for the undertakings entered into by States at an international level (the best-known is the procedure approved by the UN Economic and Social Council by its resolution No 1503 of 27 May 1970, whereby the UN Commission on Human Rights is empowered to investigate or make a thorough study of alleged serious violations of human rights and fundamental freedoms; see N. Rodley, op. cit., p. 6, footnote 18).

German Government refers, namely the Third Reich, which influenced the authors of the 1956 German Constitution (see point 12 above). Any assessment of the proportionality of the national measures at issue in the present proceedings must, in my view, take account of the more 'protective' character developed by international humanitarian law over the past 50 years.

38. Having once concluded that the Directive precludes the discrimination in issue in these proceedings for a preliminary ruling, I have drawn attention to a range of criteria that the national court will be able to take into account in making its assessment, in order to establish whether the more or less total exclusion of women from the Bundeswehr may in fact be justified on the basis of the reasons advanced by the German Government, and whether it is proportionate.

VI — Conclusion

39. The question submitted by the Verwaltungsgericht Hannover should therefore, in my view, be answered as follows:

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 precludes the application of national provisions, such as the third sentence of Paragraph 1(2) of the Soldatengesetz in the version of 15 December 1995, most recently amended by the Law of 4 December 1997, and Paragraph 3a of the Soldatenlaufbahnverordnung in the version adopted on 28 January 1998, which exclude all women from recruitment to any 'combat' unit of the armed forces.