promotion, and working conditions if he refuses to enter into a contract of employment with a female candidate whom he considers to be suitable for the job where such refusal is based on the possible adverse consequences for him of employing a pregnant woman, owing to rules on unfitness for work adopted by the public authorities, which assimilate inability to work on account of pregnancy and confinement to inability to work on account of illness. The fact that no man applied for the job is irrelevant.

2. Although Directive 76/207 gives the Member States, in penalizing infringement of the prohibition of discrimination, freedom to choose between the various solutions appropriate for achieving its purpose, it nevertheless requires that, where a Member State opts for a sanction forming part of the rules on civil liability, any infringement of the prohibition of discrimination suffices in itself to make the person guilty of it fully liable, and no regard may be had to the grounds of exemption envisaged by national law.

REPORT FOR THE HEARING
in Case C-177/88 *

I — Legal context

A — *Directive 76/207/EEC*

The purpose of Council Directive 76/207/EEC of 9 February 1976 (Official Journal 1976 L 39, p. 40) (hereinafter referred to as 'the Directive') is, according to Article 1(1) thereof, to put into effect in the Member States the principle of equal treatment for men and women as regards access to employment, training and working conditions.

Article 2(1) of the Directive specifies

'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.'

Article 2(3), however, provides that the Directive 'shall be without prejudice to provisions concerning the protection of

* Language of the case: Dutch.

women, particularly as regards pregnancy and maternity'.

Article 3(1) provides that the principle of equal treatment, as defined, applies to the conditions, including selection criteria, for access to all jobs or posts, whatever the sector or branch of activity. Under Article 3(2) Member States are required to take the measures necessary to ensure that:

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

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

(c) ...'.

Lastly, the first paragraph of Article 9(1) provides with regard to the provisions mentioned above that Member States must put into force the laws, regulations and administrative provisions necessary in order to comply with the Directive within 30 months of its notification — that is to say, by 12 August 1978.

B — *National law*

The *Wet gelijke behandeling van mannen en vrouwen* (Law of 1 March 1980 on equal treatment for men and women; *Staatsblad* 1980, p. 86) seeks to bring Netherlands legislation into line with Directive 76/207. Article 1 of that law inserts a new article, Article 1637ij, into the *Burgerlijk Wetboek* (Netherlands Civil Code). Pursuant to Article 1:

'An employer may not draw any distinction, whether directly or indirectly, by reference in particular to marital or family status, on concluding the employment contract, in connection with vocational training, [or] with regard to working conditions ...

The first sentence of the first paragraph of this article shall not apply in the context of provisions for the protection of women, particularly those regarding pregnancy and maternity.

The first sentence of the first paragraph of this article shall not apply in the context of provisions designed to accord workers of one or other sex a privileged position for the purpose of eliminating *de facto* inequalities.

...'

Article 3(1) of the law provides as follows:

'In an advertisement for a post and in considering applications for a vacancy, it is not permitted to distinguish between men and women, whether directly or indirectly, by reference in particular to marital or family status. The prohibition set out herein shall not apply in cases in which sex is a determining factor.'

Article B2 of the *Algemene Burgerlijke Pensioenwet* (General Netherlands Law of 6 January 1966 on retirement pensions for the civil service (hereinafter referred to as 'the ABP'); *Staatsblad* 1966, p. 6) provides that members of special educational staff are civil servants for the purposes of that law (although in all other respects they have the status of employees under private law).

The Royal Decree of 19 December 1967 (*Staatsblad* 1967, p. 683), issued pursuant to Article B13 of the ABP, concerns the rules governing the rights of certain groups of civil servants covered by the ABP, in the event of incapacity for work due to sickness or invalidity.

Under Article 2(1) thereof 'a worker who is unfit to carry out his duties owing to illness shall receive his full salary during the calendar month in which he became unfit and during the year following that month. Thereafter he shall receive 80% of his salary'.

According to Article 3 of the Royal Decree, as amended by the Royal Decree of 24 December 1975 (*Staatsblad* 1975, p. 767),

'1. For the purposes of the application of this decree, inability to work in connection with pregnancy and confinement or by reason of disability is assimilated to inability to work on account of sickness.

2. A pregnant worker shall in any event be deemed unfit for work owing to pregnancy with effect from the sixth week preceding the estimated date of confinement as attested in a certificate issued by a doctor or midwife.

3. A worker who has ended her confinement shall in any event be deemed unfit for work owing to confinement for at least six weeks following the day of the birth.'

Pursuant to Article 14 of the decree:

'The provisions of this decree shall not be applicable to workers having the status of State, provincial or local employees, whereby they enjoy rights in the event of inability to work owing to sickness or invalidity; nor shall they apply to workers in agencies whose internal rules on rights in the event of inability to work owing to sickness or invalidly confer on those workers rights which are no less beneficial than those accruing to them through the application of this decree.'

According to the judgment of the Hoge Raad the risk of workers at the Stichting Vormingscentrum voor Jong Volwassenen ('the VJV') becoming unfit for work owing to sickness is compulsorily covered by an institution known as the *Risicofonds Sociale Voorzieningen Bijzonder Onderwijs* (Fund covering social-benefit risks in special education; hereinafter referred to as 'the Risicofonds'). This institution refunds its members (the individual employers) when an insured person 'falls ill', provided that he satisfies the conditions of the Risicofonds' internal rules on daily sickness allowances (the 'Ziekengeldreglement'). Article 6 of the Ziekengeldreglement (under the heading 'Non-payment of allowances') provides that:

'the board of management has the power to refuse to pay sick pay, in whole or in part, to a Member:

(a) if an insured person was unfit for work on the date on which the insurance commenced;

(b) if an insured person becomes unable to work within six months of the date on which the insurance commenced, when such inability to work within half a year was clearly to be anticipated from the state of health of the person concerned at the time when he commenced work;

...'

It should be observed that Article 6 of the Ziekengeldreglement differs from Article 44 of the Ziektewet — the Netherlands law on sickness insurance which generally lays down the insurance rules applicable to employees in the private sector — under which Mrs Decker had been insured in the post she had occupied before applying for the post at the VJV. Although the first and second indents of Article 44(1)(a) contain provisions comparable to Article 6 of the Ziekengeldreglement, Article 44(1)(b) provides as follows:

'In the case of pregnancy occurring before the date on which the insurance commences, or in the case of confinement within six months of the date on which the insurance commences, the above provisions shall not apply when the insurance, including the insured's earlier insurance periods, has not been interrupted for more than 60 days during the period of pregnancy ...'

In view of the phrasing of the third question submitted by the Hoge Raad, it is also appropriate to set out the wording of Articles 1401 and 1402 of the Netherlands Civil Code. Article 1401 of the Code provides that 'any unlawful human act causing harm to another obliges the person through whose fault the harm has occurred to make it good', while Article 1402 further provides that 'every person is liable for the harm he causes, not only through his acts but also through his negligence or carelessness'.

II — Facts and procedure

In June 1981 Mrs Decker applied for the post of instructor at the Training Centre for Young Adults managed by the VJV. On 15 June 1981 she informed the committee dealing with the applications that she was

three months' pregnant. Although the committee had put her name forward to the board of management of the VJV as the most suitable candidate for the post, Mrs Decker was subsequently notified, by letter of 10 July 1981, that she would not be appointed.

The letter cited as the ground for rejection the fact that she was already pregnant at the time of her application, explaining that the economic reason for the rejection was that, according to the information obtained by the VJV, the VJV would not have obtained payment of the daily allowances during Mrs Decker's absence on account of her pregnancy and confinement. The VJV would thus have been obliged to pay Mrs Decker 100% of her most recent salary during the first year and 80% during the second year, without being able to recover those sums from the Risicofonds. Consequently, the VJV would have found it financially impossible to appoint a replacement, and this might further have led to a staff shortage.

The Arrondissementsrechtbank (District Court) and the Gerechtshof (Regional Court of Appeal) Amsterdam dismissed, in turn, the applications by Mrs Decker for an order requiring the VJV to pay damages for her loss of income, and she therefore appealed against the judgment of the Gerechtshof.

The Hoge Raad took the view that the case raised questions as to the interpretation of Directive 76/207 which might affect the interpretation of the Netherlands law implementing it, as well as the pre-existing legislation; accordingly, by judgment of 24 June 1988 it referred the following questions to the Court under Article 177 of the EEC Treaty:

'(1) Is an employer directly or indirectly in breach of the principle of equal treatment laid down in Articles 2(1) and 3(1) of the Directive (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) if he refuses to enter into a contract of employment with a candidate, found by him to be suitable, because of the adverse consequences for him which are to be anticipated owing to the fact that the candidate was pregnant when she applied for the post, in conjunction with rules concerning unfitness for work laid down by a public authority under which inability to work in connection with pregnancy and confinement is assimilated to inability to work on account of sickness?

(2) Does it make any difference if there were no male candidates?

(3) Is it compatible with Articles 2 and 3 that:

(a) if a breach of the principle that the rejected candidate must be accorded equal treatment is estab-

lished, fault on the part of the employer is also required before a claim based on that breach such as the present can be upheld;

(b) if such a breach is established, the employer for his part can still plead justification, even if none of the cases provided for in Article 2(2) to (4) applies?

(4) If fault as referred to in Question 3 above may be required or grounds of justification may be pleaded, is it then sufficient, in order for there to be absence of fault or for a ground of justification to exist, that the employer runs the risk referred to in the summary of the facts, or must Articles 2 and 3 be interpreted as meaning that he must bear those risks, unless he has satisfied himself beyond all doubt that the benefit on account of unfitness for work will be refused or that posts will be lost, and he has done everything possible to prevent that from happening?'

The judgment of the Hoge Raad was lodged at the Court Registry on 30 June 1988.

In accordance with Article 20 of the Protocol on the Statute of the Court of Justice of the European Communities, written observations were submitted by Mrs Decker, the plaintiff in the main proceedings, represented by T. E. Van Dijk, of the Hague Bar, by the VJV, the defendant in the main proceedings, represented by J. L. de Wijkerslooth, landesadvocaat, by the United Kingdom, represented by J. A. Gensmantel of the Treasury Solicitor's Department, acting as Agent, by the Netherlands Government, represented by E. F. Jacobs, General Secretary at the Ministry of Foreign Affairs, acting as Agent, and by the Commission of the European Communities, represented by K. Banks and B. J. Drijber, members of its Legal Department, acting as Agents.

Upon hearing the Report of the Judge-Rapporteur and the views of the Advocate General the Court decided on 7 June 1989 to open the oral procedure without any preparatory inquiry. However, the Court requested the Netherlands Government in writing to provide it with a full text of the Ziekengeldreglement by 15 July 1989 at the latest. The Netherlands Government complied with the request within the prescribed period.

III — Written observations submitted to the Court

First question (whether there was direct or indirect discrimination)

Mrs Decker argues that both the lower courts found that there had been a priori an infringement of the law on equal treatment between men and women; the Arrondissementsrechtbank had found an infringement of Article 1637ij of the Netherlands Civil Code (inserted by Article 1 of the aforesaid law) and the Gerechtshof, Amsterdam, had found an infringement of Article 3 of that

law. The courts had none the less dismissed the claim in damages on the ground that the employer had pleaded a ground of justification as the result of which the infringement lost its unlawfulness. However, the fact that the rules laid down by the public authorities assimilate unfitness for work due to pregnancy and confinement to inability to work due to sickness does not prevent the reference by the employer to the candidate's pregnancy from being linked to the candidate's sex. The legislative provisions merely provide that comparable rights shall be enjoyed by workers who, for a variety of reasons, are unable to perform their duties.

In the case of incapacity due to sickness, the Risicofonds' power of refusal can affect men as much as women. The adverse consequences of a refusal to pay the daily allowance on account of pregnancy and confinement can affect only female workers. An employer who points to those adverse consequences is thus pleading an excuse which is available only for one sex and is thereby drawing a distinction prohibited by the Directive.

Mrs Decker notes that the national courts have failed to answer the question whether a reference to pregnancy indicates direct or indirect discrimination. Although academic writers regard it as indirect discrimination, following the example of indirect discrimination cited by the Directive in its reference to family circumstances, Mrs Decker takes the view that such a reference indicates direct discrimination. She submits that this case does not strictly concern family circumstances arising out of the pregnancy but relates to the state closely associated with the sex of the worker, namely her inability to engage in employment on account of her maternity leave.

If the Court holds that the reference to pregnancy must be regarded as indirect discrimination, Mrs Decker submits that the discrimination practised by the employer cannot be accepted as being objectively justified, since the employer rejected the candidate immediately after learning that the Risicofonds was empowered to refuse payment of the benefits, which is contrary to the principle under Community law that the means adopted must be necessary and proportionate to the end sought. In any case, the employer took no steps to ascertain whether the power to withhold the benefits would be exercised, nor did it endeavour to prevent the use of that power or to forestall the harmful consequences of any such exercise of it.

Lastly, Mrs Decker takes the view that the consequences to be anticipated by the employer were not so serious as to override her own interest in securing observance of the principle of equal treatment.

On the other hand, the *VJV* contends that the first question submitted by the Hoge Raad must be answered in the negative. After giving some guidance as to what 'hour of employment' means in the context of the Netherlands and as to how that hour of employment, in terms of posts, relates to the staff of an organization such as the VJV, the VJV submits that a refusal to enter into a contract with a candidate cannot in its opinion be viewed as direct or indirect discrimination under the Directive merely because the candidate is a woman. Even when a female candidate shows the abilities

needed for the post applied for, an employer may have perfectly valid reasons for not offering a contract of employment (for example, when she requires too high a salary). It is only when the employer's refusal is due wholly or mainly to the fact that he does not wish the post being offered to be occupied by a woman that, unless a legitimate ground of justification can be pleaded, the refusal will constitute direct or indirect discrimination. The need to take account of the employer's motive is shown by the case-law of the Court: see judgments in Case 96/80 *Jenkins* v *Kingsgate* [1981] ECR 911, Case 170/84 *Bilka* v *Weber von Hartz* [1986] ECR 1607, Case 30/85 *Teuling* v *Bidrijfsvereniging voor de Chemische Industrie* [1987] ECR 2497 and Case 222/84 *Johnston* v *Chief Constable of the Royal Ulster Constabulary* [1986] ECR 1651.

In the event, the VJV did not offer the post to Mrs Decker, not because she was a woman nor because she was pregnant, but because the VJV's insurer had informed it that in cases of leave on grounds of pregnancy or any subsequent unfitness for work which might be linked to pregnancy and confinement the Risicofonds could refuse to pay any benefits. The consequence would have been that the VJV would have been unable to appoint a replacement, thereby seriously jeopardizing, through the operation of the arrangements regarding subsidies, the continuity of its activities and the employment prospects it offered.

The decisive element was thus the financial risk which the VJV would have incurred by appointing Mrs Decker. Although the VJV admits that there is a link between Mrs Decker's pregnancy and the decision not to appoint her, it claims that that link was a factor lying totally beyond its control.

In any case, the VJV did not seek out an argument enabling it, in effect, to object to the appointment of a (pregnant) woman, since the facts established by the Hoge Raad show that the VJV was prepared to accept Mrs Decker's absence during her maternity leave. The only problem was whether, during that period, a salary could be provided for a person replacing her.

As a preliminary, the *Netherlands Government* queries the interpretation of the rules in question apparently accepted by the two parties to the main proceedings. In its view, since schemes such as the one run by the Risicofonds must not operate in such a way that the rights accruing to the employees are less extensive than those they would enjoy under the ordinary insurance scheme, the rules empowering the Risicofonds to withhold the daily benefits from Mrs Decker would not have been binding. It further submits that the assimilation of maternity to an inability to work on grounds of sickness is valid only with regard to benefit entitlement.

As far as the answer to the first question to the Court is concerned, the Netherlands Government takes the view that failure to appoint a woman on the ground that she is pregnant is tantamount to drawing a distinction in the treatment of men and women. A difference in treatment on account of maternity is, moreover, so closely related to sex that it is legitimate to speak of a direct distinction in treatment.

The *United Kingdom* takes that view that Article 3(1) of the Directive, in conjunction with Article 2(1) thereof, requires that a woman shall not be rejected for a post on

the ground that she is or will become unable to work, when a man would not have been rejected on the same ground. The implications of the Directive go no further than this; in particular, the Directive does not require that a woman be treated more favourably because of her pregnancy or prospective absence due to pregnancy or confinement than a man would have been treated in similar circumstances. However, although the Directive does not require more favourable treatment, Article 2(3) permits Member States to institute provisions which specifically benefit women as regards pregnancy or confinement, thereby permitting an exception to the general purpose of the Directive, namely to put into effect the principle of equal treatment. The United Kingdom Government therefore proposes that the first question be answered as follows:

'An employer will be in breach of the principle of equal treatment laid down in Articles 2(1) and 3(1) of the Directive if he refuses to enter into a contract of employment with a candidate found by him to be suitable, because he anticipates the fact that that candidate is or will become unable to work due to her pregnancy only if he would not have refused to enter into a contract of employment with a male candidate because he anticipates that the male candidate is or will become unable to work on account of illness. However, Article 2(3) permits a Member State to have provisions to the effect that an employer may not refuse to engage a female candidate because she is or will become unable to work due to her pregnancy. Such provisions will therefore not require revision in accordance with Article 5(2). If, however, a Member State has no such provisions, Directive 76/207/EEC does not require it to adopt them.'

The *Commission*, after setting out the facts and the course of the procedure before the national courts and commenting on the national legislation at issue, observes that the questions submitted by the Hoge Raad are directly attributable to Article 1401 of the Netherlands Civil Code. In order for non-contractual liability to arise there has to be *inter alia* an unlawful act, and this is indeed the case where the law on equal treatment for men and women is infringed. The question whether such an infringement has occurred depends on how that law is to be interpreted. Since it implements the Directive, the provisions of that law must be interpreted by reference to it (see judgments in Case 14/83 *Von Colson and Kamann* v *Land Nordrhein-Westfalen* [1984] ECR 1891 and Case 79/83 *Harz* v *Deutsche Tradax* [1984] ECR 1921).

However, the Commission is doubtful whether the issue in this case is one of Community law. According to the findings of fact the VJV decided against appointing Mrs Decker because the national legislation, while assimilating pregnancy to sickness, empowers the management of the Risicofonds to refuse payment of sickness benefits when a worker becomes unfit to work within six months on account of a 'sickness' which could be anticipated at the commencement of the insurance.

The Commission concludes that the national legislation — at least, as implemented at the material time — was not in keeping with the principle of equal treatment laid down by the Directive. Since only women can become pregnant, the six-month rule is liable to affect women more than men. Moreover, since that rule operates mainly in the case of new posts, not preceded by posts subject to the same insurance scheme, it is legitimate to suppose that it principally affects young workers, whose age — in the case of women — suggests that they are likely to bear children. Regardless of whether direct discrimination is involved here, the legislation at any rate has the effect of indirect discrimination, which is contrary to the obligation placed on the Netherlands by Article 3(2)(a) of the Directive. It follows that the real problem lies in the national legal system itself, and not in the conduct of the employer.

Turning to the obligations laid on the employer under the Directive, the Commission notes that the national legislation does not place him under any specific obligation. It leaves him free to heed or to ignore its operation but imposes a financial burden on any employer who, in the face of its provisions, observes the prohibition on discrimination on grounds of sex.

It is reasonable to ask in the circumstances whether the employer may legitimately be expected either to ignore altogether the discriminatory national legislation or to challenge it before the courts for incompatibility with the Directive or with the law on the equal treatment of men and women. The outcome of such proceedings would, however, be largely uncertain; in any case, a demand of that kind would be tantamount to imposing on the employer an obligation which should be borne by the State. To do so would appear to conflict with the ruling of the Court in Case 152/84 *Marshall* v *Southampton and South-West Hampshire Area Health Authority* [1986] ECR 723, by imposing obligations, in effect, directly on the employer.

In brief, the Commission takes the view that it is for the national court to determine whether the reason relied on by the employer in departing from the principle of equal treatment can really be explained by the failure of the State to transpose the Directive fully and correctly into national law.

Second question (implications of the absence of male candidates)

Mrs Decker claims that her case shows evidence of an unlawful differentiation, since the reference to her pregnancy is directly linked with her sex. Thus the ground cited by her employer as precluding her appointment could never have related to a man. The Directive, on the other hand, seeks to prohibit any criteria liable to be wholly associated (direct discrimination), or virtually so (indirect discrimination), with one or other sex for the purposes of recruitment or selection on the labour market. Furthermore, the requirement that candidates of the opposite sex must be present would raise insuperable procedural problems since, in establishing whether persons of the opposite sex have applied for the post, reliance is placed entirely on information which would have to be supplied by the defendant.

According to the *VJV*, the second question must be answered in the affirmative. The case is not concerned with the discriminatory effect of a measure *in abstracto* but with a specific decision by an employer not to appoint a given candidate. Article 2(1) and Article 3(1) of the Directive prohibit any discrimination on grounds of sex; it follows that, when an employer wishing to fill a given post chooses from amongst candidates all of whom are female, the adoption of the decision cannot be regarded as discrimination on grounds of sex. In those circumstances an employer must be wholly guided in his choice by financial or administrative considerations. The consequence of knowing that a given candidate will be absent from work without any possibility of replacing her, whereas some other candidate will not, may be that preference will be given to that other candidate, and such preference will have nothing to do with discrimination on grounds of sex.

The *Netherlands Government* contends that it is irrelevant that there were no male candidates. The actual reason for rejection (attributable to the sex of the person concerned) is in breach of the prohibition on disparity of treatment, irrespective of the factual circumstances of the case, which are relevant only in determining whether the difference in treatment is an indirect one.

The *United Kingdom* takes the view that it does not make any difference that there were no male candidates, provided that the female candidate can establish that a comparable male candidate would have been treated more favourably.

The *Commission* contends that the position when the only applicants for the post are women is quite unaltered, since it is the reason for the employer's decision which is the decisive factor. The rejection of a female candidate on account of pregnancy constitutes discrimination against that woman on grounds of sex, because a rejection on that ground must by definition be addressed to a woman.

Third question (possible prerequisite of fault on the employer's part or ground exempting him from liability)

Mrs Decker infers from the wording of the Directive that, since the principle of equal treatment prohibits women from being placed at a disadvantage by comparison with men, it is unacceptable that employers should be able to continue differentiating between them on the ground that the consequences of according equal treatment are too onerous. On the other hand, the principle of equal treatment means that the employer shall run the risk of financial loss, and it is his task to insure himself, where necessary, against the harmful consequences.

The *VJV*, for its part, claims that it is not easy to answer the third question, since the distinction drawn between the two limbs of the third question is, in part, connected with the relevant national law, which distinguishes between grounds of justification (expunging the unlawfulness of an act) and grounds of exemption (eliminating liability and the duty of indemnification), whereas the Directive observes no such distinction. The Directive merely allows an answer to be given to the question whether an infringement of the principle of equal treatment may be justified in a particular

case, no matter whether such justification is, under national law, to be considered a ground of exemption or a ground of justification.

Article 2(2), (3) and (4) is addressed to the Member States and provides further particulars as to their legislative authority. It does not, however, rule out the possibility that an individual employer may wish to plead a ground of justification, over and above the cases envisaged by paragraphs (2), (3) and (4), enabling him to depart from the principle of equal treatment. An individual employer cannot, in fairness, be asked to contend with the consequences of legislation in force in the Netherlands which for the purposes of insurance benefits assimilates pregnancy to sickness when such consequences may seriously impair the continuity of his business and the employment prospects he offers.

The *Netherlands Government* takes the view that the success of a claim based on infringement of the principle of equal treatment does not necessitate fault — or, where relevant, absence of justification — on the employer's part. The Directive contains nothing to that effect, and acceptance of such provisos would seriously jeopardize the aim of the Directive.

The *United Kingdom* maintains that, if breach of the principle that the rejected candidate must be accorded equal treatment is established, no further fault on the part of the employer is required before a claim for judicial redress based on that breach can be upheld. The same applies to the employer's reliance on a ground exempting him from liability. On the other hand, if one of the cases provided in Article 2(2), (3) and (4) applies, there is no breach of the principle of equal treatment.

The *Commission* states the view that if the employer infringes the principle of equal treatment, it is incompatible with the Directive to introduce a further condition before he can be made liable. Either there is a breach in the principle involved (in which case national law must provide suitable penalties) or else there is not (in which case there is no need for penalties).

Turning to the economic ground which may arguably exempt the employer, the Commission claims that the question is whether the actual or potential economic harm to the employer would afford a ground for his departing from the principle of equal treatment — a matter on which the Court has not yet had occasion to rule in the context of Directive 76/207/EEC. Referring to previous judgments of the Court, concerning Council Directive 79/7/EEC of 19 December 1978 on equal treatment for men and women in matters of social security (Official Journal 1979 L 6, p. 24) (see *Teuling* judgment of 11 June 1987, cited above), and to the judgments on the principle of equal pay for men and women (see in particular the *Jenkins* and *Bilka* judgments, cited above), the Commission concludes that grounds which are explained by objectively justified factors, free from any discrimination on grounds of sex, do not contravene the principle of equal treatment as regards access to employment, despite the fact that the prohibition of discrimination on grounds of sex is one of the fundamental rights protected by Community law (see judgment in Case

149/77 *Defrenne* v *Sabena* [1978] ECR 1365). According to the Commission it is the national court which is responsible for determining whether the employer's decision meets those criteria.

Fourth question (extent of the risks which the employer is required to run)

Mrs Decker points out that the fourth question presupposes an affirmative answer to the third, the only implication of which will be that the right to plead specific instances of *force majeure* will be conceded. However, *force majeure* must be such as to have rendered the conclusion of the employment contract a wholly meaningless act. Even if it is quite certain that the consequences feared by the employer will actually materialize his liability cannot be discharged, since he is compelled to suffer those consequences. Any other conclusion would be tantamount to making individual workers bear the harmful practical and financial consequences of the principle of equal treatment,

The *VJV* claims that the basis for an answer to the fourth question is given by the judgment of the Court in the *Johnston* case (cited above), and that it is for the national court to decide whether the grounds on which the VJV has relied are valid and justify the measure actually adopted, and to ensure compliance with the principle of proportionality and ascertain whether the refusal of the contract could have been avoided. The VJV nevertheless considers that the *Johnston* judgment goes too far in the generality of its wording and in requiring an employer to satisfy himself absolutely that the benefit will be withheld or that the post will be lost, and to make every possible effort to avoid those consequences. The VJV pleads that the only requirement made of the employer should be that he shall duly inform himself of the insurer's attitude and investigate properly the arrangements regarding subsidies, since he must also arrange a recruitment procedure with some care, in the interests both of the candidates and of his own organization.

The *Netherlands Government* did not set out any explicit views as to the answer to be given to the fourth question, and the *United Kingdom* confines itself to observing that the question does not arise if the third question is answered in the way it has suggested.

The *Commission* considers that the answer to the fourth question submitted by the Hoge Raad may, in principle, be found through the application of the criteria laid down by the Court in the *Bilka* case, cited above. In the present case it may be argued that an employer's refusal to enter into an employment contract with an applicant whom he has considered suitable and who is known to be pregnant is not to be regarded as an unlawful infringement of the principle of equal treatment on condition that the refusal is objectively justified and that the national court holds the refusal to be in the higher economic interests of the undertaking and to be necessary to achieve its end. As regards the first proviso, account must be taken of the interests of the undertaking as an economic entity, and such interests may include those of the other workers. As far as the second proviso is concerned, the question is whether the same aim could not have been achieved by some less radical measure, pursuant to the principle of proportionality.

In the light of the foregoing as a whole, the Commission proposes that the Court answer the four questions referred by the Hoge Raad as follows:

'An employer in the private sector does not act in breach of the principle of equal treatment between men and women set out in Articles 2(1) and 3(1) of Council Directive 76/207/EEC if the Member State in question has not correctly transposed that directive into national law and if it transpires that the employer's conduct, of which a candidate for employment, relying on that principle, has complained, can be explained by that failure of the Member State.'

G. Slynn
Judge-Rapporteur