OPINION OF ADVOCATE GENERAL LÉGER

delivered on 31 May 1995 *

1. These requests for preliminary rulings are concerned with the interpretation of Article 4(1) of Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security [1] (hereinafter 'the Directive'). Essentially the Court has been asked to rule on the application of that principle to national (German) legislation which excludes persons in 'minor' employment (geringfügige Beschäftigungen) or 'short-term' employment (kurzzeitige Beschäftigung) from the benefit of compulsory invalidity and old-age insurance and sickness insurance and from the obligation to contribute to the unemployment insurance scheme.

2. Article 4(1) of the Directive, whose interpretation is sought, reads as follows:

'The principle of equal treatment means that there shall be no discrimination whatsoever on ground [s] of sex either directly, or indirectly by reference in particular to marital or family status, in particular as concerns:

— the scope of the schemes and the conditions of access thereto,

— the obligation to contribute and the calculation of contributions,

— the calculation of benefits including increases due in respect of a spouse and for dependants and the conditions governing the duration and retention of entitlement to benefits.'

3. I would briefly call to mind the national provisions common to the two cases before the Court.

* Original language: French.

1 — OJ 1979 L 6, p. 24.

The national legislation

(a) *Compulsory invalidity and old-age insurance and sickness insurance*

4. Under the relevant German legislation, employment is regarded as being 'minor' [2] where it is normally engaged in for less than 15 hours a week and the monthly remuneration does not exceed one-seventh of the average monthly salary of persons insured under the statutory old-age insurance scheme during the reference calendar year. [3]

5. Such employment is subject neither to compulsory invalidity and old-age insurance [4] nor to sickness insurance. [5] Consequently, no compulsory contributions are paid by persons in such employment.

(b) *Obligation to contribute to the unemployment insurance scheme*

6. Likewise, entitlement to unemployment benefit or assistance exists only if it has been previously acquired through the exercise of an activity which is subject to the obligation to pay contributions or to the accrual of a period treated as equivalent thereto. [6]

7. Workers in 'minor' or 'short-term' employment are exempt from the obligation to pay contributions. [7]

8. Employment is regarded as being 'short-term' where it is normally restricted, by virtue of its nature or under a contract of employment, to 18 hours a week. [8]

Background to Case C-137/93 *Nolte*

9. Mrs Nolte, the plaintiff in the main proceedings in Case C-317/93, worked in

2 — Paragraph 8(1)(1) of Volume IV of the Sozialgesetzbuch (Social Security Code; hereinafter 'SGB IV') and Paragraph 5(2)(1)(1) of Volume VI of the Sozialgesetzbuch ('SGB VI').

3 — The remuneration ceiling is adjusted annually; in 1993 it was DM 530 a month in the original Länder and DM 390 in the new Länder.

4 — Paragraph 8(1) of SGB IV and Paragraph 5(2) of SGB VI.

5 — Paragraph 7 of SGB V in conjunction with Paragraph 8(1) of SGB IV.

6 — Paragraphs 100, 134, 104 and 168 of the Arbeitsförderungsgesetz (Law on the Promotion of Employment, hereinafter 'the AFG').

7 — Paragraph 169a of the AFG.

8 — Paragraph 102 of the AFG.

employment subject to compulsory contributions until 1965, when she attained the age of thirty-five. Thereafter she ceased to carry out activities covered by the statutory social security scheme and hence paid no further compulsory contributions. Her last work consisted of 'minor' employment (as a cleaner), which she was engaged in from 1977 to March 1987, when she worked ten hours a week, continually remaining below the remuneration ceiling laid down for exemption from old-age insurance.

In June 1988 she was afflicted by a severe illness which, from then on, prevented her from being engaged in any regular paid employment. She applied for an invalidity pension in November 1988. Her claim was rejected by the Landesversicherungsanstalt (Regional Insurance Institution) Hannover, the defendant in the main proceedings, on the ground that she did not fulfil the conditions laid down by the Insurance Code for the grant of a pension. [9]

10. The Sozialgericht (Social Court) Hannover, in which Mrs Nolte instituted proceedings, takes the view that the exclusion of 'minor' employment from compulsory insurance constitutes indirect discrimination contrary to Article 4(1) of the Directive and that the plaintiff in the main proceedings therefore has to be treated as if her remuneration had to give rise to the payment of old-age insurance contributions. [10]

11. The national court therefore stayed the proceedings and referred the following questions to the Court for a preliminary ruling:

'1. Does a national provision which excludes employment normally involving less than 15 hours per week and remuneration of up to one-seventh of the monthly reference amount from the statutory old-age insurance scheme — Paragraph 8(1)(1) of SGB IV, Paragraph 5(2)(1)(1) of SGB VI — entail discrimination on grounds of sex contrary to Article 4(1) of Directive 79/7/EEC if considerably more women than men are thereby affected?

2. If the answer to Question 1 is in the affirmative, is Article 4(1) of Directive 79/7/EEC to be interpreted as meaning that entitlement to a pension on account of incapacity for work (Paragraph 44(1)(2) of SGB VI) exists even in the absence of compulsory contribution periods if, in the five years prior to the occurrence of the incapacity for work, employment not subject to social

9 — Paragraph 1247(2a) in conjunction with Paragraph 1246(2a)(1)(1) of Volume IV of the Reichsversicherungsordnung (the former Reich Insurance Code, hereinafter 'the RVO'), which corresponds to the new Paragraph 44(1)(2) of SGB VI: in order to qualify for an invalidity pension, a person must be able to show that he paid at least three years' contributions in the five years preceding the onset of invalidity in respect of employment or an activity subject to compulsory insurance.

10 — See to this effect the judgment in Case 384/85 *Borrie Clarke* v *Chief Adjudication Officer* [1987] ECR 2865, paragraph 12.

insurance under national law has been engaged in for at least three years involving up to 15 hours per week, in the course of which the stipulated earnings thresholds have not been exceeded, and the exclusion from benefits associated with this form of part-time work affects considerably more women than men?'

Background to Case C-444/93 *Megner and Scheffel*

12. Mrs Megner and Mrs Scheffel, the plaintiffs in the main proceedings in Case C-444/93, are employed as cleaners by G. F. Hehl & Co, which is joined as a party to the main proceedings. Their normal working time is a maximum of two hours per working day, five days a week. Their remuneration is set by the collective agreement for office-cleaning trades and does not exceed one-seventh of the relevant monthly reference amount under Paragraph 18 of SGB IV.

They sought from the Innungskrankenkasse (Sickness Fund for Trade Guilds) Vorderpfalz, the defendant in the main proceedings, recognition that they were subject to compulsory insurance under the statutory sickness and invalidity and old-age insurance schemes and that they were under an obligation to pay contributions to the statutory unemployment insurance scheme.

By letter of 6 March 1992, the defendant in the main proceedings refused to consider that they were engaged in paid employment subject to compulsory insurance.

13. Thereupon the plaintiffs in the main proceedings brought an action in the Sozialgericht Speyer for a declaration that their employment was subject to compulsory insurance under the schemes in question. They argued that the national provisions on exemption from insurance and contributions were contrary to Community law inasmuch as they constituted indirect discrimination against women.

14. In those circumstances, the Sozialgericht Speyer referred the following question to the Court for a preliminary ruling:

'Must Article 4(1) of Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security ... be interpreted as meaning that a national rule which excludes employment regularly consisting of less than 15 hours a week and regularly attracting remuneration of up to one-seventh of the monthly reference amount (Sozialgesetzbuch, "SGB", Volume IV, Paragraph 18) from compulsory insurance under the statutory sickness and old-age insurance schemes (SGB V, Paragraph 7; SGB VI, Paragraph 5(2)(1); SGB IV, Paragraph 8(1)(1)) and a national rule which excludes

employment which tends by its nature to be regularly limited to less than 18 hours a week or is limited in advance by a contract of employment from the obligation to contribute to the statutory unemployment insurance scheme (Arbeitsförderungsgesetz, "AFG", Paragraphs 169a(1) and 102(1)) constitute discrimination on grounds of sex if considerably more women than men are affected thereby, and is it the case that such discrimination is not justified by objective criteria unrelated to any discrimination on grounds of sex?'

Preliminary observation

15. The Commission mentions in its observations [11] that it has already been concerned about the compatibility of the legislation at issue with the principle of equal treatment of men and women. A complaint was made to it by the Niedersachsen District of the Deutscher Gewerkschaftsbund (Federation of German Trade Unions) concerning the exclusion of persons in 'minor' employment from the social insurance scheme and in 1992 it asked the German Government to state its views on this point with a view to assessing whether it was appropriate to bring an action before the Court under Article 169 of the EEC Treaty. Although the German Government replied, so far the Commission has not taken any actual decision.

16. I shall first consider the question which is common to both cases before moving on to the second question raised in the case of Mrs Nolte.

Does the German legislation at issue constitute discrimination on grounds of sex contrary to Article 4(1) of the Directive?

17. Save for the fact that Mrs Nolte's case is restricted to invalidity and old-age insurance, the key question before the Court is identical in both cases: does the German legislation under which minor employment is excluded from benefiting by various statutory social insurance schemes constitute discrimination on grounds of sex contrary to Article 4(1) of the Directive?

18. I would recall, once for all, that since the judgment in *Federatie Nederlandse Vakbeweging*, [12] which has been confirmed on

11 — Section 12 in the case of Nolte; section 9 in the case of Megner and Scheffel.

12 — Case 71/85 *Federatie Nederlandse Vakbeweging* [1986] ECR 3855.

several occasions, the Court has held that Article 4 has had direct effect and has been able to be relied on in order to set aside the application of any inconsistent national provision since 23 December 1984. [13]

19. The Directive applies to *direct* and *indirect* discrimination alike.

Direct discrimination is characterized by a situation which clearly discriminates against persons of a particular sex. Whilst there is no doubt that such a situation is not present in these cases, it is not possible to rule out indirect discrimination.

There is a presumption that indirect discrimination is present '... once an apparently neutral measure in fact has a preponderant effect on workers of a given sex — without there being any need to establish the intention to discriminate'. [14]

20. As the Court has consistently held, there is indirect discrimination which is in principle contrary to the principle of equal treatment where a disadvantageous situation based on the application of criteria not based on sex affects a much larger number of women than of men, unless it is proved that this is justified by objective factors unrelated to any discrimination on grounds of sex.

The Court's case-law covers both remuneration [15] and social security. [16] It is also applicable where the discrimination originates in an occupational scheme, [17] a collective agreement [18] or in a statutory provision. [19]

21. According to that case-law, the German legislation cannot be regarded as discriminatory unless it gives rise to *disadvantages*, those disadvantages *affect a much larger number of women than of men* and the legislation *cannot be justified* by objective factors unrelated to any discrimination on grounds of sex.

13 — See, for example, the judgments in Case 286/85 *McDermott and Cotter* [1987] ECR 1453, paragraph 17, *Borrie Clarke*, cited in footnote 10, paragraph 12, Case 80/87 *Dik and Others* [1988] ECR 1601, paragraph 11, and Case C-31/90 *Johnson* [1991] ECR I-3723, paragraph 36.

14 — Commission of the European Communities, Directorate General for Employment, Industrial Relations and Social Affairs (DG V), 'Equal treatment in Community law', *Social Europe*, 3/91, p. 79.

15 — See, for example, the judgments in Case 171/88 *Rinner-Kühn* [1989] ECR 2743, paragraph 16, and Case C-184/89 *Nimz* [1991] ECR I-297, paragraph 15.

16 — See, for example, the judgment in Case C-102/88 *Ruzius-Wilbrink* [1989] ECR 4311, paragraph 17.

17 — See, for example, the judgment in Case 170/84 *Bilka-Kaufhaus* v *Weber von Harz* [1986] ECR 1607, paragraph 31.

18 — See, for example, the judgments in Case C-33/89 *Kowalska* [1990] ECR I-2591, paragraph 16, and *Nimz*, cited in footnote 15, paragraph 15.

19 — See, for example, the judgment in *Rinner-Kühn*, cited in footnote 15, paragraph 16.

22. Consequently, I shall examine those points *seriatim*, after having first made sure that the Directive is applicable in this case, since '[i] t may be inferred from the internal logic of the Directive that Article 4, which defines the extent of the principle of equal treatment, only applies within the scope *ratione personae* and *ratione materiae* of the Directive'. [20]

Scope of the Directive

23. There is no doubt that both cases fall squarely within the scope *ratione materiae* of the Directive, as defined in Article 3(1). The risks listed in that provision, to which the Directive is applicable, include invalidity, old age, sickness and unemployment.

Moreover, the Court gives a broad interpretation to the wording of that provision by taking the view that it covers any benefit which forms part of one of the statutory schemes referred to or a social assistance provision intended to supplement or replace such a scheme. [21]

24. In contrast, the question as to whether these cases fall within the scope *ratione personae* of the Directive is a more delicate one. Yet Article 2 gives this a very broad definition covering practically the whole '... working population — including self-employed persons, workers and self-employed persons whose activity is interrupted by illness, accident or involuntary unemployment and persons seeking employment — and ... retired or invalided workers'.

In the final analysis, as Advocate General Darmon and Mr Huglo have pointed out, [22] it covers:

'— workers;

— persons wishing the enter the employment market who are therefore registered, where necessary, with the various bodies responsible for assisting job-seekers to find employment;

— persons who have left their employment only because one of the risks

20 — Judgment in Joined Cases 48, 106 and 107/88 *Achterberg-te Riele and Others* v *Sociale Verzekeringsbank* [1989] ECR 1963, paragraph 16.

21 — Judgment in Case 150/85 *Drake* v *Chief Adjudication Officer* [1986] ECR 1995, paragraph 23.

22 — 'L'égalité des traitements entre les hommes et les femmes dans la jurisprudence de la Cour de justice des Communautés européennes: un univers en expansion', *RTDE*, January-March 1992, p. 9.

mentioned in [the provision] has materialized'.

25. In view of the range of persons falling within the scope of the Directive, it cannot be argued that workers in 'minor' or 'short-term' employment in Germany are not part of the 'working population' within the meaning of the Directive.

26. In the first place, I consider that the mere fact that they work for less than 15 hours and less than 18 hours, respectively, per week is not sufficient to deny them membership of the working population. [23]

27. Moreover, the Court has already held that workers employed for a very small numbers of hours per week were part of the working population.

28. Thus the Court held to be contrary to Article 119 of the EEC Treaty German legislation permitting employers to exclude employees whose normal working hours did not exceed *10 hours a week or 45 hours a month* from the continued payment of wages in the event of illness. [24]

29. Likewise, the Court held that Article 48 of the EEC Treaty applied to a national of a Member State who pursued, within the territory of another Member State, an activity as an employed person which yielded *an income lower than that which, in the latter State, was considered as the minimum required for subsistence* [25] and to a Community national who was employed *12 hours per week*. [26]

30. Lastly, the Court held to be contrary to Article 4(1) of the Directive a derogating provision of Netherlands legislation precluding insured persons who had previously worked on a part-time basis (*18 hours* a week in the particular case) [27] from obtaining the minimum subsistence income paid to insured persons suffering from incapacity for work; '[t] he same exclusion ... applies to *very low income*, which is ... defined as *less than 48 times the minimum wage*'. [28]

23 — See, against this view, the German Government's observations in the case of Nolte (section 11) and in the case of Megner and Scheffel (section 6).

24 — Judgment in *Rinner-Kühn*, cited in footnote 15, paragraph 16.

25 — Judgment in Case 53/81 *Levin* v *Staatssecretaris van Justitie* [1982] ECR 1035, paragraph 18.

26 — Judgment in Case 139/85 *Kempf* v *Staatssecretaris van Justitie* [1986] ECR 1741, paragraphs 2 and 16.

27 — Judgment in *Ruzius-Wilbrink*, cited in footnote 16, paragraphs 7 and 17.

28 — Section 4 of the Opinion of Advocate General Darmon in *Ruzius-Wilbrink*, cited in footnote 16, my emphasis.

31. I would point out that those judgments, which related to fields other than the statutory security schemes with which the instant cases are concerned, do not base recognition of the status of 'worker' or member of the 'working population' on the field concerned. Recognition is predicated solely on the principle of equality of the sexes as between workers, which, although it 'is not the subject of a general rule of the Treaty, ... has been developed in several successive legal instruments': [29] equal pay (Article 119 of the EC Treaty and Directive 75/117/EEC); access to employment, vocational training and promotion, and working conditions (Directive 76/207/EEC); self-employed activities (Directive 86/613/EEC) and social security (Directives 79/7/EEC and 86/378/EEC).

32. Irrespective of the subjects to which the aforementioned judgments related, they may all be transposed to the instant cases, since the scope *ratione personae* of the Directive has to be defined in the light of the principle of equal treatment.

Moreover, this was the idea underlying the Court's reasoning when it ruled, referring to '... the objectives of Community law and the wording of the other provisions in the same field as Directive 79/7', that

'Article 119 of the EEC Treaty and Council Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women ... and 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 ... *implement equal treatment between men and women not generally but only in their capacity as workers*'. [30]

33. Secondly, the fact that in these cases the German legislation refuses to recognize persons in 'minor' employment as having the status of workers is equally irrelevant. The Court has held that the term 'worker' may not be defined by reference to the national laws of the Member States but, on the contrary, has a *Community meaning*. [31]

29 — P. Garrone: 'La discrimination indirecte en droit communautaire: vers une théorie générale', *RTDE*, No 30, July-September 1994, p. 425, at p. 441.

30 — Judgment in *Achterberg-te Riele and Others*, cited in footnote 20, paragraph 12, my emphasis.

31 — See, for example, the judgments in Case 75/63 *Hoekstra (née Unger)* [1964] ECR 177, *Levin*, cited in footnote 25, paragraph 11, and *Kempf*, cited in footnote 26, paragraph 15.

34. Consequently, it must generally be held that persons in 'minor' or 'short-term' employment are in fact members of the 'working population' and therefore fall within the scope *ratione personae* of the Directive.

35. However, I would enter a caveat: in Case C-317/93, it is not certain that the Directive is applicable to the plaintiff in the main proceedings (Mrs Nolte).

36. She was indeed in 'minor' employment, but ceased to be so, for some unknown reason, before she applied for invalidity and old-age benefit. Yet, according to the judgment in *Achterberg-te Riele and Others*, [32] only persons who were *actually* members of the working population *at the time when one of the risks set out in Article 3 (sickness, invalidity, old age ...) materialized* fall within the scope *ratione personae* of the Directive. In other words, the Directive does not apply to *'persons who have never been available for employment or who have ceased to be available for a reason other than the materialization of one of the risks referred to by the Directive'*. [33]

37. Mrs Nolte is precisely in this situation. Although one of the relevant risks (invalidity) did materialize in respect of her, it was not *on account of* the materialization of that risk that she ceased to be employed. The medical diagnosis which brought her invalidity to light did not take place until *more than one year* after she ceased to be in employment.

38. Consequently, the plaintiff in the main proceedings falls outside the scope *ratione personae* of the Directive and, in principle, is not entitled to rely on Article 4. [34]

39. Nevertheless, that statement has to be qualified.

40. The Court has no information as to the plaintiff's position after she left her last employment, in particular as to whether, from that time on, she was looking for a new job.

This is, however, relevant.

32 — Cited in footnote 20.

33 — Paragraph 11 of the judgment, my emphasis.

34 — Ibid., paragraph 17.

According to the judgment in *Johnson*, [35] if the plaintiff had been looking for a new job, she would still fall within the scope of the Directive, '... it being unnecessary to make a distinction according to the reason for which [she] left [her] previous employment'. [36]

41. Thus, in order to ascertain that the Directive is applicable *ratione personae* in the case of Mrs Nolte, the national court will have to take into consideration evidence proving that she was actually seeking employment, such as '... register [ing] with an employment organization responsible for dealing with offers of employment or assisting persons seeking employment, ... [sending] job applications to employers and ... certificates ... available from firms stating that the person concerned had attended interviews'. [37]

42. Consequently, only if the plaintiff in the main proceedings was *actually* seeking employment at the time when she applied for invalidity and old-age benefit, is she entitled to rely on Article 4(1) of the Directive. Therefore whether a discriminatory situation may be held to exist depends on her fulfilling that requirement. I shall merely observe that there is nothing in the case file to suggest that the requirement is satisfied. In order to ensure that my consideration of the subsequent points is clearly reasoned, I shall, however, say nothing more about my doubts as to whether this factual requirement is satisfied, while referring this aspect to the national court for careful examination.

43. I shall now consider, in accordance with the case-law which I have already cited, [38] whether the legislation at issue places the workers concerned at a real disadvantage.

Existence of a disadvantage

44. As the United Kingdom points out in its observations, [39] '[m] embership of a contributory social security system provides the member with insurance against certain risks which, if they materialize, will deprive him of his income'. Consequently to deprive certain workers of cover against those social risks, whereas other workers qualify for it, seems *a priori* to put them at a definite disadvantage.

45. However, it should be noted that it appears that a good number of this class of worker have *indirect* access to a number of social security benefits without their having previously contributed, by virtue of the fact that members of their families are affiliated to the compulsory scheme (as in the case of

35 — Cited in footnote 13, paragraph 20.
36 — Ibid., paragraph 27.
37 — Ibid., paragraph 22.
38 — Sections 20 and 21, *infra*.
39 — Observations on the case of Mrs Nolte, section 3.2.

sickness and old-age insurance, for instance). But it must be observed that not *all* persons in 'minor' employment qualify for such benefits, for instance, divorced or single persons.

Likewise, if a person has several 'minor' jobs, they are aggregated in order to ascertain whether the limits relating to the number of hours worked per week and to remuneration are exceeded. If that is so, all the 'minor' employment carried out by the person concerned will be subject to compulsory invalidity and old-age insurance and sickness insurance. In contrast, a person carrying out several 'short-term' activities may not apply for them to be aggregated in order for him or her to be subjected to the obligation to contribute to the unemployment insurance scheme.

Lastly, certain classes of person requiring specific protection are subject to insurance even if their employment is 'minor' (apprentices, handicapped persons, etc.).

46. Consequently, not all persons in 'minor' employment are precluded from qualifying for the social security provisions at issue. But even in the case of those who may qualify, access to them is made more difficult, or at least less direct, than it is in the case of other workers. Conversely, generalized access to those various social security insurance schemes would enable *all* those workers to rely on *general* rights to social security benefits.

47. But would that eliminate the disadvantage completely? The corollary of being subject to such social cover is the payment of contributions. [40] It is possible to ask oneself whether those benefits would not lose all their attraction having regard to the amount of the contributions. Whereas the persons concerned already have a low income on account of the small number of hours which they work, that income would be diminished even further by the deduction of contributions. The situation would be no different if the burden of the contributions affected the employer (as is, moreover, generally the case in Germany): there would then be the fear that the employer might pass on this additional wage 'cost' by cutting wages or that the supply of jobs of this type might dry up.

48. In contrast, the German Government's argument to the effect that there is no disadvantage inasmuch as the persons concerned are insured by other means and hence do not need direct protection cannot be accepted. Where even the majority of the persons concerned qualify indirectly for social security

40 — Even though this is not invariably true in every Member State. For instance, the Kingdom of Sweden provides for exemption from contributions for persons whose income falls below a particular threshold, yet grants entitlement to social security benefits.

cover, what about the remaining persons? A provision continues to be disadvantageous in any event even where it affects only a very small proportion of persons.

49. Those manifold questions underscore the complexity of this point. However, one argument seems to me to settle the matter. The German legislation does provide that one category of persons in 'minor' employment should be subject to compulsory invalidity and old-age insurance, namely persons requiring 'special protection', such as apprentices and handicapped persons. By so providing, the national legislator concedes that not being subject to such insurance constitutes a disadvantage. It cannot be seen why that legislation should be disadvantageous in regard to those persons alone.

50. Finally, I would note that a degree of balance would, as it were, be restored if the persons excluded from the benefit of social security insurance were entitled to opt for *voluntary* affiliation to a statutory scheme. Yet, according to that which the representative of the German Government stated at the hearing, the possibility of voluntary insurance exists only in the case of old-age insurance and is precluded in the case of sickness or unemployment insurance.

51. Consequently, it must therefore be concluded that the legislation is disadvantageous for all workers in 'minor' or 'short-term' employment.

52. Does that disadvantage affect more women than men?

Existence of a disadvantage affecting a much larger number of women than of men

53. Consideration of 'significant statistics' [41] should enable it to be determined whether the majority of the jobs in question are performed by women. Unfortunately, the 'battle of the figures' in which the parties engaged at the hearing precludes any definitive conclusion. In particular, two statistical studies were produced: according to one, women account for almost 75% of persons in this type of work, whereas, according to the other, they account for only 60%. [42]

54. The national court should therefore establish what the factual position actually is.

41 — Judgment in Case C-127/92 *Enderby* [1993] ECR I-5535, paragraph 19.

42 — According to the first study, which dates from 1990 and was produced by the national court in Nolte's case (third subparagraph of paragraph 4 of section III), about three-quarters of 'minor' jobs are held by women. According to the other study, which dates from 1993, relates to 1992 and was produced by the defendant in the same case (paragraph 3.2.1.1 of its observations) and the German Government (section 20 of its observations) — the study carried out by the Institut für Sozialforschung und Gesellschaftspolitik, Cologne ('the ISG') —, women account for only about 60% of such jobs (an earlier ISG survey relating to 1987 gave a percentage of the order of 55%).

55. Nevertheless, I would make a few observations.

56. In the first place, the statistics produced to the Court by the Commission in the *Rinner-Kühn* case [43] are not relevant. They come from a study relating to *part-time* work. 'Minor' employment cannot be equated with part-time work, since the former is merely a sub-set of the second, which covers much more extensive possibilities. At the most, that study may be used by the national court as 'evidence' in order to discern whether a more particularly disadvantageous situation exists for women.

57. Secondly, in order to be presumed discriminatory, the measure must affect 'a far greater number of women than men' [44] or 'a considerably lower percentage of men than of women' [45] or 'far more women than men'. [46]

58. Consequently, the proportion of women affected by the measure must be particularly marked. Thus, in the judgment in *Rinner-Kühn*, the Court inferred the existence of a discriminatory situation where the percentage of women was *89%*.

In this instance, *per se* the figure of 60% disclosed by one of the studies would therefore probably be quite insufficient to infer the existence of discrimination.

59. However, should the national court not take account of the *prospects for change in the future*? Thus, whilst the figure was 60% in 1992, this already showed a marked change over the previous situation: a study carried out by the same institution produced a figure of only 55% in 1987. It might therefore be thought that the situation is affecting an ever increasing number of women, as compared with men, which, moreover, was confirmed by the representative of the German Government at the hearing. Accordingly, the national court might take the view that, if this trend continues, 'a much larger number of women than of men' will in fact soon be affected by the legislation at issue.

60. Lastly, I would note that, above and beyond statistics, it is probable *from a sociological point of view* that a much larger number of women than of men will be more particularly concerned by minor employment.

43 — Judgment in *Rinner-Kühn*, cited in footnote 15. The statistics are set out in section 23 of Advocate General Darmon's Opinion. They establish that in 1987 89% of part-time jobs in the Federal Republic of Germany were held by women.

44 — Ibid., operative part.

45 — Judgments in *Nimz*, cited in footnote 15, paragraph 15, and *Kowalska*, cited in footnote 18, paragraph 16.

46 — Judgment in Case C-343/92 *Roks and Others* [1994] ECR I-571, paragraph 38.

61. In any event, while stressing once again that it is for the national court to decide this point, I would simply observe that the questions have been referred to the Court on the assumption that the legislation at issue affects 'considerably more women than men'. I shall therefore base my reasoning on the assumption that the legislation at issue does in fact apply much more to women than to men.

62. The outcome of these initial considerations, which point to a disadvantageous situation which affects much more women than men, enables it to be presumed that discrimination on grounds of sex is involved contrary to Article 4(1) of the Directive. But, in order to confirm this presumption, the national court will further have to ascertain that the difference in treatment is not attributable to objective criteria unrelated to any discrimination on grounds of sex. [47]

63. Let us turn to the identification of such factors.

47 — See, for example, the judgments in *Ruzius-Wilbrink*, cited in footnote 16, paragraph 15, and in Case C-229/89 *Commission* v *Belgium* [1991] ECR I-2205, paragraph 13.

Existence of objective justification

64. The Court reverses the burden of proof in this area. The onus is on the author of the measure presumed to be discriminatory to adduce evidence that it is justified by objective criteria unrelated to any idea of discrimination. [48] Since the measure at issue is legislative in origin, the onus of discharging the burden of proof is on the German Government.

65. The task of determining whether the reasons given are sufficient to show that the provision in question is not discriminatory falls to the national court, '... which has sole jurisdiction to interpret the facts and interpret the national legislation ...'. [49]

66. However, the Court has given national courts some guidance: the means chosen must correspond to a *real need*, be *appropriate with a view to achieving the objective in question* and be *necessary* to that end. [50]

48 — On 27 May 1988, the Commission submitted a Proposal for a Council Directive on the burden of proof in the area of equal pay and equal treatment for women and men (COM(88) 269 final), which embodies most of the principles laid down by the Court's case-law (OJ 1988 C 176, p. 5).

49 — Judgment in *Rinner-Kühn*, cited in footnote 15, paragraph 15.

50 — Judgment in *Bilka-Kaufhaus* v *Weber von Harz*, cited in footnote 17, paragraph 37.

67. As far as statutory social security schemes are concerned, these factors are proved if:

'... [the Member State] can show that the means chosen meet a necessary aim of its *social policy* and that they are suitable and requisite for attaining that aim, the mere fact that the system of allowances favours a much greater number of male workers cannot be regarded as an infringement of the principle of equal treatment'. [51]

68. The German Government seeks to justify the legislation at issue precisely on the basis of its social policy. [52]

69. By way of preliminary, it is necessary to eliminate an ambiguity fostered by the German Government and the representatives of other Governments at the hearing. In the instant cases, the Court has been asked to rule on the compatibility of national social legislation with the principle of equal treatment. There is no question here relating to competence in the field of social security. Yet, in order to justify the legislation at issue, the German Government argues that in any event the principle of *subsidiarity* militates in favour of the retention of social security schemes '... which have proved themselves ... and have developed in the context of the national social system'. [53]

It is undisputed that under Article 117 et seq. of the EC Treaty the Member States retain their competence in the sphere of social security and, in particular, remain free to regulate the terms of affiliation to the various social security schemes. Moreover, the Court has already been moved to point out that:

'Those principles and objectives form part of a social policy which in the current state of Community law is a matter for the Member States, which enjoy a margin of discretion as regards both the nature of the protective measures and the detailed arrangements for their implementation'. [54]

51 — Judgment in *Commission* v *Belgium*, cited in footnote 47, paragraph 19, my emphasis. See also, to the same effect, the judgments in Case C-226/91 *Molenbroek* [1992] ECR I-5943, paragraph 13, and in *Roks and Others*, cited in footnote 46, paragraph 34.

52 — See the German Government's observations in Nolte's case, section 30 et seq.

53 — Ibid., section 42.

54 — Judgment in *Commission* v *Belgium*, cited in footnote 47, paragraph 22.

But it has also held that:

'... when the Member States lay down the conditions creating the right or the obligation to become affiliated to a social security scheme, *they are under an obligation to comply with the provisions of the Community law in force*'. [55]

The principle of equal treatment between the sexes set forth in Article 4(1) of the Directive is indeed one of the 'provisions of the Community law in force' to which the Court refers.

70. Consequently, the Member States' competence in social security matters under the EC Treaty can in no case release them from the obligation to comply with that principle set out in the Directive, to which they remain bound: '...Community law does not prevent Member States from taking measures, in order to control the social expenditure, which have the effect of withdrawing social security benefits from certain categories of persons, *provided that those measures are compatible with the principle of equal treatment* between men and women as defined in Article 4(1) of Directive 79/7'. [56]

71. Let us turn to the other justifications put forward by the German Government.

72. In the first place, it argues that the exclusion of persons in 'minor' employment from social security schemes accords with a structural principle of the German social security system.

It is undisputed that each Member State is at liberty to 'organize' its social legislation in order to ensure that it is *coherent*. [57] The exclusion of a particular category of workers as from a particular threshold may be consistent with this. Moreover, other Member States have adopted similar measures, this being the case with Ireland and the United Kingdom of Great Britain and Northern Ireland. It must further be ascertained that such exclusion does indeed constitute a structural principle of the German social security system which is appropriate and essential in order to secure its consistency.

55 — Judgment in Case C-2/89 *Kits van Heijningen* [1990] ECR I-1755, paragraph 20, my emphasis.

56 — Judgment in *Roks and Others*, cited in footnote 46, paragraph 20, my emphasis.

57 — See, as regards fiscal policy, the judgment in *Commission* v *Belgium*, cited in footnote 47, paragraph 21.

The German legislation could also be justified — as the Commission points out [58] — by the need to adapt the social system to take account of the changing age pyramid as a result of the ageing of the population. Today, most Member States are faced with this change and each is seeking to adapt its contributory system accordingly. The exclusion from the social system of the 'least active' sector of workers may be one of the solutions put forward. However, it is observed that this is not a usual principle in the other Member States.

73. The German Government also argues that subjecting workers in 'minor' employment to social security schemes would trigger financial disequilibrium such as to endanger the whole of the system.

However, the Court has already categorically refused to accept that budgetary considerations are capable of constituting a justification:

'... although budgetary considerations may influence a Member State's choice of social policy and affect the nature or scope of the social protection measures it wishes to adopt, they cannot themselves constitute the aim pursued by that policy and *cannot, therefore, justify* discrimination against one of the sexes',

whilst adding that, conversely,

'... to concede that budgetary considerations may justify a difference in treatment as between men and women which would otherwise constitute indirect discrimination on grounds of sex, which is prohibited by Article 4(1) of Directive 79/7, *would be to accept that the application and scope of as fundamental a rule of Community law as that of equal treatment between men and women might vary in time and place according to the state of the public finances of the Member States*'. [59]

Consequently, that argument cannot constitute an objective justification.

74. The German Government further considers that the adverse repercussions on *employment policy* of the abolition of the exemption from social insurance of persons in 'minor' employment justify such measures.

58 — See section 65 of its observations in Nolte's case and section 35 *in fine* of its observations in the case of Megner and Scheffel.

59 — Judgment in *Roks and Others*, cited in footnote 46, paragraphs 35 and 36, my emphasis.

To my mind, the national court should consider this point very particularly. There is no doubt that the existing system is very 'attractive' for employers, who are dispensed from having to pay social security contributions where they employ workers in 'minor' employment. Moreover, this type of work attracts 8 to 10% (according to the estimates of various parties taking part in the hearing) of German workers. That proportion is far from negligible. It is to be feared that the abolition of exemption from social insurance for 'minor' employment might have a number of adverse effects on the employment market.

Would employers continue to offer such employment if it constituted an additional burden as a result of the 'cost' of social security contributions? This is unlikely. Admittedly, part-time, or even full-time, employment might take its place. But, if that occurred, the capacity to take on such workers would be very limited and very large numbers of persons who had hitherto been members of the working population by virtue of their having been in 'minor' employment would be excluded. In the final analysis, those persons would be at risk of finding themselves *unemployed*.

A further adverse consequence would also be liable to occur: an increase in people working in the *black economy*. Part of the population — notably for family reasons — is available on the employment market only for a very few hours a week. If businesses henceforth were to refuse to take them on on account of the additional cost entailed thereby, those persons would probably be forced to accept to work in the black economy.

In the final analysis, the present system has the advantage of integrating part of the population into the working population who would otherwise probably be excluded.

Moreover, the Court lent a sympathetic ear to this type of argument in the judgment in *Kirsammer-Hack*, [60] where it held that there was objective justification for '... legislation which ... forms part of a series of measures intended to alleviate the constraints burdening small businesses which play an essential role in economic development and the creation of *employment* in the Community'. [61]

75. The German Government also considers that it can derive an argument from the fact that other Member States provide in the same way for a threshold for being subject to social security schemes. The Commission itself, it is claimed, provided for such a threshold in a proposal for a directive. [62]

60 — Judgment in Case C-189/91 *Kirsammer-Hack* [1993] ECR I-6185.

61 — Paragraph 33, my emphasis.

62 — Proposal for a Council Directive on certain employment relationships with regard to distortions of competition (COM(90) 228 final); OJ 1990 C 224, p. 6; amended version of 7 November 1990, OJ 1990 C 305, p. 8.

Admittedly, only under the law of four Member States (France, Greece, Italy and Portugal) is no provision made, in principle, for excluding persons in employment from social security. In other legal systems, rules exist excluding certain employment from being subject to social security on the basis of various criteria (duration, remuneration received, ...).

In contrast, only the Federal Republic of Germany, Ireland and the United Kingdom of Great Britain and Northern Ireland have laid down rules under which paid employment carried out on a regular basis but on a minor scale may be excluded from being subject to social security. It is observed, moreover, that it is in the Federal Republic of Germany that the threshold is the highest.

Consequently, it is impossible to generalize and take the view that the exclusion of persons in 'minor' employment from the social security system constitutes a customary principle of all the Member States' social security systems. In any event, such a finding would not constitute justification.

76. Lastly and more generally, the German Government considers that 'to abolish the exemption from social insurance of persons in minor employment would give rise to *serious problems* for the statutory old-age insurance scheme'. [63]

I would simply call to mind in that connection that:

'[t]he complexity of given situations in a State cannot alter the legal nature of a directly applicable Community provision, especially as the Community rule must be applied with the same force in all Member States'. [64]

More specifically,

'[n]or can the alleged complexity of social security schemes be relied upon to suspend the application of the principle of equal treatment. It was precisely in view of the complexity of the statutory schemes that the directive provided for an implementing period of sufficient duration (six years), and the Member States are not entitled either to rely on difficulties of that kind to justify a failure to implement a directive correctly and in full ...'. [65]

63 — Section 49 of its observations in Nolte's case, my emphasis.

64 — Judgment in Case 28/67 *Molkerei-Zentrale* [1968] ECR 143, at 154.

65 — Opinion of Advocate General Cruz Vilaça in *Borrie Clarke*, cited in footnote 10, section 31.

It therefore seems contestable whether any drawback liable to ensue as a result of the abolition of the rule that persons in 'minor' employment are not subject to invalidity and old-age insurance may be regarded as constituting an objective reason justifying the unequal treatment.

77. In bringing this point to a close, I would note that it is, in any event, for the national courts to take account of the arguments set out above in order to determine whether the legislation at issue can be justified by objective criteria unrelated to any discrimination on grounds of sex.

78. Following the above considerations and bearing in mind the various points left in suspense which the national courts will have to decide, I propose that the Court should answer in the affirmative the question common to the two cases, subject to the Directive's being applicable to the plaintiff in the main proceedings in Case C-317/93, provided, however, that the national provisions affect a much larger number of women than of men, unless the Federal Republic of Germany can prove that the legislation is justified by objective criteria unrelated to any discrimination on grounds of sex.

79. Let us now turn to the second question raised in Nolte's case.

In the event that the legislation at issue is held to be discriminatory and hence contrary to Article 4(1) of the Directive, is there an entitlement to receive an invalidity pension even in the absence of periods of compulsory contributions?

80. In its second question, the national court asks the Court to specify the consequences for the persons concerned if the first question is answered in the affirmative.

81. My observations on this point are given in the alternative in so far as Mrs Nolte seems to fall outside the scope of the Directive. [66]

82. I would merely point out that, in the absence of objective justification, the plaintiff in the main proceedings is entitled to have the same rules applied to her as other workers in the same situation, 'since, where the directive has not been implemented, those rules remain the only valid point of reference'. [67]

66 — See my observations on this point in sections 36 to 43, *supra*.

67 — Judgments in *Borrie Clarke*, cited in footnote 10, operative part, in *Federatie Nederlandse Vakbeweging*, cited in footnote 12, operative part, and in *McDermott and Cotter*, cited in footnote 13, point 2 of the operative part. See also the judgment in *Ruzius-Wilbrink*, cited in footnote 16, paragraph 21.

83. It should therefore be held that, in the event that the first question is answered in the affirmative, the plaintiff in the main proceedings, in common with all other workers in 'minor' employment, must be put in the same situation as if she fulfilled the conditions for access to social security benefits.

84. In view of the foregoing considerations, I therefore propose that the Court reply to the national courts' questions as follows:

In Case C-317/93:

— Article 4(1) of Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security should be interpreted as precluding a national provision which excludes employment normally involving less than 15 hours per week and remuneration of up to one-seventh of the monthly reference amount from the statutory old-age insurance scheme if that provision constitutes a disadvantage affecting a much larger number of women than of men, unless the provision in question is justified by objective criteria unrelated to any discrimination on grounds of sex.

— A person who is not covered by Article 2 of Directive 79/7/EEC cannot rely on Article 4 thereof.

— Article 4(1) of Directive 79/7/EEC should be interpreted as meaning that, in the absence of the correct implementation of the Directive, persons who are, by a majority, disadvantaged by the continuance of the discrimination are entitled to be treated in the same way, and have applied to them the same rules relating to social cover, as the other members of the working population.

In Case C-444/93:

Article 4(1) of Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in

matters of social security should be interpreted as precluding a national rule which excludes employment regularly consisting of less than 15 hours a week and regularly attracting remuneration of up to one-seventh of the monthly reference amount from compulsory insurance under the statutory sickness and old-age insurance schemes and a national rule which excludes employment which tends by its nature to be regularly limited to less than 18 hours a week or is limited in advance by a contract of employment from the obligation to contribute to the statutory unemployment insurance scheme if a much larger number of women than of men are affected thereby, unless the legislation in question is justified by objective criteria unrelated to any discrimination on grounds of sex.