OPINION OF ADVOCATE GENERAL SAGGIO

delivered on 13 January 2000 *

1. By order of 4 June 1998 the Østre Landsret (Eastern Regional Court), Denmark, referred to the Court of Justice for a preliminary ruling four questions on the interpretation of Directives 76/207/EEC [1] and 86/613/EEC, [2] concerning equal treatment for men and women, in the context of alleged indirect discrimination adversely affecting a female medical specialist. Those questions call for an examination of the national and Community rules applying in the present case, and necessitate consideration of the criteria for assessing the existence of indirect discrimination on the grounds of sex.

Analysis of the national legislative framework

2. Under the health system currently operating in Denmark, patients residing in that country can in principle benefit from free medical treatment, provided by doctors — general practitioners and specialists — who have concluded special agreements with the public body which manages the health insurance scheme. Doctors who have concluded such agreements receive their fees directly from that body; their patients pay nothing, but are subject to significant restrictions in the choice of the doctors treating them. There are various alternatives to this general scheme, inasmuch as it is possible for doctors to invoice directly those patients who so wish, and patients may choose their doctor provided that they bear a substantial part of the expense; but such alternatives are rarely used in practice and it may thus be said that in Denmark virtually all medical expenses are reimbursed directly to the doctors concerned by the health insurance body. Consequently, doctors need to enter into agreement with the body administering the health insurance scheme, since it is on that basis that they will receive most of their income.

3. That health system reached crisis point during the 1980s because of the enormous and uncontrolled increase in public expenditure on free medical treatment for patients. The problem concerned, in parti-

* Original language: Italian.

1 — Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions (OJ 1976 L 39, p. 40).

2 — Council Directive 86/613/EEC of 11 December 1986 on the application of the principle of equal treatment between men and women engaged in an activity, including agriculture, in a self-employed capacity, and on the protection of self-employed women during pregnancy and motherhood (OJ 1986 L 359, p. 56).

cular, the provision of services by specialists whose practices are frequently organised on a part-time basis. With the aim of gradually limiting public expenditure in the health sector and of allowing a better system for the planning of medical resources, an agreement was signed on 1 June 1990 between the Foreningen af Speciallæger (Association of Specialist Doctors, hereinafter the 'FAS') and the Sygesikringens Forhandlingsudvalg (Health Insurance Negotiation Committee, hereinafter the 'SFU'). The 1990 agreement sought to rationalise, on the one hand, the structure of specialists' fees and, on the other, the situation in relation to both practices operated on a full-time basis and those run on a part-time basis. The resulting system produced a scheme of reduction (the 'knækmodel') involving a curtailment of the fees of those practices having the highest turnovers, and a reorganisation scheme (the 'transformationsmodel', hereinafter the 'reorganisation scheme') modifying the situation of full and part-time practices with respect to their turnover levels.

4. In order to understand the present case, it is appropriate briefly to consider the reorganisation scheme provided for by the 1990 agreement.[3] It should be recalled, first of all, that, according to clause 15 of the agreement, only specialist practices having a maximum annual turnover of DKK 500 000 (DKK 400 000 for rheumatology practices) are regarded as part-time, whilst practices with turnovers higher than that ceiling are regarded as full-time. In that context, the signatories to the agreement have expressed the view[4] that specialist medical assistance must in principle be provided by full-time doctors and that newly formed practices should preferably be full-time. The reorganisation scheme is based on that premiss and, as regards the present action, contains a special legal mechanism aimed at ensuring that the situation of full-time practitioners adequately meets the new demands of specialist medical assistance. That mechanism provides for a turnover ceiling of DKK 500 000 (DKK 400 000 for rheumatologists) for 1989 (the year preceding the 1990 reforms) and a tolerance margin of DKK 100 000 above the fixed ceiling; full-time practices which do not exceed the ceiling are re-classified as part-time practices; practices which exceed that ceiling and the tolerance margin remain full-time medical practices, whilst — and this is the relevant point for the present purposes — medical practices which exceed the turnover ceiling but are within the tolerance margin remain full-time practices but must be converted to part-time practices in the event of their sale to third parties.[5] The latter intermediate category of full-time practices, subject to conversion in the event

3 — That scheme is described in the minutes of the SFU of 13 February 1990, to which the agreement indirectly refers.

4 — In a note to clauses 13 and 14 of the 1990 agreement.

5 — This rule is set out in point 6 of the SFU's abovementioned minutes of 13 February 1990.

of sale, [6] represents a compromise between the demands of reform and the needs of practices with average turnovers. In this regard, a corrective factor is built into the system: if special circumstances, such as illness, cause a full-time practice to fall within the aforementioned band, the previous three years' turnover can be taken into consideration.

5. As we will see, the main action concerns the particular situation of full-time specialist practices subject to the conversion clause in the event of sale, the incompatibility of which with Community law is in issue by reason of its alleged discriminatory nature operating to the detriment of female specialists.

The facts in the main action

6. At the material time, Dr Birgitte Jørgensen, a specialist in rheumatology, operated a full-time medical practice the turnover of which in 1989 was DKK 424 016. In application of the reorganisation scheme described above, the FAS, by letter dated 18 May 1990, informed Dr Jørgensen that her practice could continue to work on a full-time basis, but because of the conversion clause it would convert to part-time in the event of sale to a third party. On 1 June 1990 she requested FAS to waive application of the conversion clause to her practice in the event of its being sold, citing by way of justification, *inter alia*, the special situation in which she found herself when, by reason of her obligations to her family, she had had to neglect her work commitments in order to take care of her three children. In subsequent correspondence with the FAS, Dr Jørgensen also raised the matter of possible compensation for the damage — in terms of a substantial reduction in the value of her goodwill — which she would suffer on account of the conversion clause in the event of her deciding to sell her practice to a third party at the end of her professional career. However, the FAS confirmed that the conversion clause was to be maintained, by notification of its decision on 28 November 1990. By an appeal brought on 18 December 1990, Dr Jørgensen challenged that decision before the Specialist Medical Practitioners' Cooperation Committee ('Speciallægesamarbejdsudvalget') for the district of Frederiksborg. By letter of 19 March 1991, the Committee informed her that her application for exemption from the conversion clause had been rejected. She thereupon decided to bring proceedings challenging that decision before the Danish court.

7. In the course of those proceedings, the applicant has pleaded *inter alia* that she has been adversely affected by indirect discrimination on grounds of sex, supporting that assertion with a report prepared by a

6 — In practice, such practices are referred to as 'full-time but subject to the conversion clause' ('fuldtidspraksis med klausul').

statistical expert chosen by her.[7] The defendants (the FAS and the SFU) have in turn produced a report of their own,[8] purporting to show the absence of any discrimination on grounds of sex. In actual fact, the difference of opinion between the experts — who are nevertheless in agreement as to the choice of methodology, calculations and statistical comparisons — is due to the divergent assumptions on which their conclusions are based: the report of the applicant's expert is founded on the prejudicial effect of the conversion clause taken in isolation, and therefore adopts a precise comparative approach, whereas the defendants' expert has preferred to take into consideration the effects as a whole of the reorganisation scheme adopted by the medical specialists, therefore having recourse to a global evaluation of the potentially discriminatory consequences of the entire scheme devised by the agreement. That diversity of approach is reflected, as we shall see, by the content of the questions referred for a preliminary ruling by the Danish court.

The questions referred by the national court

8. For a proper understanding of the questions referred, it should be noted that the arguments of the parties to the main proceedings differ as regards the basic assumptions underlying an assessment of the question of the existence or otherwise of indirect discrimination on grounds of sex: the applicant maintains that it is necessary to make a precise comparison of the individual elements comprising the reorganisation scheme, whereas the defendants consider that a global assessment of those elements is required. The national court has not expressed a view as to the correctness of one or the other approach, referring instead to the consequences which the adoption of either of them would inevitably involve. According to the Østre Landsret, if the precise comparison approach is adopted, and the conversion clause is analysed without regard to the other components of the reorganisation scheme, there can be no doubt that the measure is objectively discriminatory on grounds of sex, since conversion of the type in issue would affect a proportionately higher number of female medical specialists than male medical specialists. If a global evaluation of all the effects of the reorganisation scheme is selected instead, then it is necessary — in the opinion of the national court — to accept the defendants' argument that there is no significant difference in the way in which the scheme affects the practice of their profession by female or male medical specialists. Even though, in the view of the national court, the two options are equally tenable, they not only produce different legal consequences but also result in different legal approaches to the question of the allegedly discriminatory effects of the conversion clause. The point-by-point comparison option is, in fact, typical of cases concerning equal pay,[9] so that its possible adoption would lead to the

7 — The expert in question is Professor Steffen L. Lauritzen, of the University Centre of Aalborg, whose report is reproduced in part in the order for reference.

8 — Drawn up by Professor Knut Conradsen, of the Technical University of Denmark, and likewise reproduced in part in the order for reference.

9 — The Court's decisions have been consistent on this point since the judgment in Case C-262/88 *Barber* [1990] ECR I-1889, paragraphs 34 and 35.

inclusion of a characteristic element of such cases in proceedings which, as the national court points out, are concerned with equal treatment. [10]

provisions — such as the clause providing for conversion in the event of sale to third parties — which may in themselves have objective discriminatory effects to the detriment of female medical specialists.

9. Let us turn to consider the individual questions referred for a preliminary ruling. The first contains an initial point in respect of which the national court asks the Court to clarify whether, in an equal treatment case such as the present proceedings, the possible existence of indirect sex discrimination must be assessed by reference to Directives 76/207/EEC and 86/613/EEC. In view of that preliminary point, it is appropriate to make various general observations on the Community rules applying in the main action, the issue in which — let it be recalled — concerns the equal treatment of persons who are self-employed. As to the substance of the first question referred, the national court wishes to know whether, in order to determine whether or not there is indirect discrimination on grounds of sex, it is necessary to make a point-by-point comparison of all the elements of the reorganisation scheme applicable to specialist doctors since 1990, or a global evaluation of those elements as a whole. As already mentioned, the national court has stated that, even if the reorganisation scheme, assessed as a whole, does not contain elements of discrimination on grounds of sex, it nevertheless contains

10. By its second question, the national court is asking the Court of Justice to clarify whether 'considerations relating to budgetary stringency, savings and medical practice planning may be treated as objective and relevant considerations' such as to justify possible indirect discrimination on grounds of sex. As is apparent from the order for reference, that question is dependent on an affirmative answer to the first question, to the effect that it is necessary to adopt the approach of a point-by-point comparison of the individual elements at issue in the main proceedings, from which — according to the national court — the existence of indirect discrimination would automatically be inferred.

11. The third and the fourth questions concern the same subject-matter. The national court is asking whether the consideration for goodwill which a medical specialist could obtain on a sale of his practice to a third party once he reaches retirement age can be likened to an employee's pension savings. If the answer to that question is in the affirmative, the national

10 — The parties to the main proceedings agree on this point. Also, as will be seen, the third and fourth questions referred do not involve the legal aspects of the case pending before the national court.

court wishes to know whether the principle established in *Grau-Hupka*, [11] according to which Member States are not obliged to grant advantages in the matter of old-age pension insurance to persons who have brought up children or to provide benefit entitlements where employment has been interrupted by child-rearing, should be applied in this case.

Preliminary observations concerning the relevant Community legislation

12. One cannot but share the national court's view that the present case concerns the equal treatment of men and women. [12] Remuneration aspects, however, are of minimal relevance in a case such as this, since it relates to self-employed workers who are not employed under a contract but are merely members of a professional association which has concluded an agreement with the body responsible for administering the health insurance scheme. Neither Article 119 of the EC Treaty (Articles 117 to 120 of the EC Treaty have been replaced by Articles 136 EC to 143 EC), which was concerned only with equal pay, [13] nor Directive 75/117/EEC, [14] which implements those principles, is therefore applicable here.

13. However, the Court's attention has rightly been drawn to Directives 76/207/EEC and 86/613/EEC, both of which are designed to implement the principle of equal treatment of men and women. Of the two directives in question, I consider that Directive 86/613/EEC is more relevant to this matter, the issue in which concerns an agreed measure relating to self-employed workers such as medical specialists. Directive 86/613/EEC, adopted by the Council on the basis of Articles 100 and 235 of the EEC Treaty, has not been interpreted by the Court, even though, in order to interpret it, recourse may be had to certain principles already established by the Court in relation to Directive 76/207/EEC. At all events, there is no doubt that the scope of Directive 86/613/EEC covers the situation of the applicant in the main proceedings. Article 1 of that directive states that its purpose is to ensure 'application in the Member States of the principle of equal treatment as between men and women engaged in an activity in a self-employed capacity, or contributing to the pursuit of such an activity', whilst Article 2 states that the term 'self-employed workers' refers to 'all persons pursuing a gainful activity for their own account, under the conditions laid down by national law, including farmers and members of the liberal professions'. The subject-matter of Directive 86/613/EEC may therefore be

11 — Case C-297/93 *Grau-Hupka* [1994] ECR I-5535.

12 — This expression refers in principle to all aspects of equal treatment between the sexes, with the exception of equal pay.

13 — Articles 137(1) EC and 141(3) EC henceforth refer to equal treatment, but they were not in force at the material time, having entered into force with the Treaty of Amsterdam on 1 May 1999.

14 — 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 (OJ 1975 L 45, p. 19).

seen as independent from that of Directive 76/207/EEC, the provisions of which are in the nature of rules to protect employed workers. That autonomy is apparent both from the preamble [15] and from basis provisions [16] of Directive 86/613/EEC.

14. Article 3 of Directive 86/613/EEC provides that 'the principle of equal treatment implies the absence of all discrimination on grounds of sex, either directly or indirectly', thus reflecting the very similar wording contained in Article 2(1) of Directive 76/207/EEC. The notion of indirect discrimination, moreover, is not clearly identified either in Directive 86/613/EEC or in Directive 76/207 EEC. It can clearly be inferred not only from the abundant case-law on the point [17] but also from Article 2(2) of Directive 97/80/EEC, [18] which provides as follows: 'For the purposes of the principle of equal treatment..., indirect discrimination shall exist where an apparently neutral provision, criterion or practice disadvantages a substantially higher proportion of the members of one sex unless that provision, criterion or practice is appropriate and necessary and can be justified by objective factors unrelated to sex'.

15. For its part, Article 4 of Directive 86/613/EEC provides: 'As regards self-employed persons, Member States shall take the measures necessary to ensure the estimation of all provisions which are contrary to the principle of equal treatment as defined in Directive 76/207/EEC, especially in respect of the establishment, equipment or extension of a business or the launching or extension of any other form of self-employed activity, including financial facilities'. The reference by that article to Directive 76/207/EEC does not make very clear reading. The provision in question does not in fact seem to allude to the definition of the principle of equal treatment contained in Article 2(1) of Directive 76/207/EEC, since its wording, which is identical to that of Article 3 of Directive 86/613/EEC, does not in any way serve to elucidate the latter. It seems to me more reasonable to regard the reference under discussion as alluding instead to the entire body of interpretative criteria used to define, in the context of Directive 76/207/EEC, the legal notion of equal treatment, irrespective of the factual circumstances — access to employment, vocational training and promotion, and working conditions — in which the practical application of that notion has had a means of expression. I consider, moreover, that reference may also usefully be made to Articles 3, 4 and 5 of Directive 76/207/EEC, each of which contains a corresponding provision requiring the Member States to take the necessary

15 — The sixth recital in the preamble states that, 'as regards persons engaged in a self-employed capacity,.. the implementation of the principle of equal treatment should be pursued through the adoption of detailed provisions designed to cover the specific situation of these persons'.

16 — Thus, Article 1 states that the purpose of the directive is to ensure application of the principle of equal treatment as regards those aspects not covered by other directives.

17 — Starting with the judgment in Case 96/80 *Jenkins* [1981] ECR 911, relating to equal pay.

18 — Council Directive 97/80/EC of 15 December 1997 on the burden of proof in cases of discrimination based on sex (OJ 1998 L 14, p. 6). The deadline for transposition of that directive is 1 January 2001.

measures to ensure — *inter alia* — that 'any provisions contrary to the principle of equal treatment which are included in collective agreements, individual contracts of employment, internal rules of undertakings or in rules governing the independent occupations and professions shall be, or may be declared, null and void or may be amended'. [19]

16. It may assist, for the purposes of this case, to recall that Danish Law No 244 of 19 April 1989 on equal treatment between men and women in regard to employment and maternity leave has brought the Danish legal system into line with the provisions of Directives 76/207/EEC and 86/613/EEC, from which much of its contents are drawn. In particular, paragraph 5(1) of that law extends the application of the principle of equal treatment to persons working in a self-employed capacity.

The first question

17. By its first question, the national court is seeking to know, first of all, whether in a dispute such as this, concerning equal treatment, indirect discrimination on grounds of sex must be determined by reference to Directives 76/207/EEC and 86/613/EEC. In the light of the foregoing observations regarding the applicable Community rules, I consider that contractual provisions such as those laid down by the reorganisation scheme introduced by the Agreement of 1 June 1990 between the FAS and the SFU concerning health insurance may fall within the scope of Directive 86/613/EEC, as interpreted in the light of Directive 76/207/EEC. The issue in the main action concerns the application of the principle of equal treatment with reference to alleged indirect discrimination adversely affecting female medical specialists. Articles 3 and 4 of Directive 86/613 are therefore relevant in this regard, whilst the reference made by Article 4 to Directive 76/207/EEC makes it possible to take into consideration rules of a contractual nature such as those at issue in the present case: as will be recalled, Articles 3, 4 and 5 of the latter directive also cover 'provisions contrary to the principle of equal treatment which are included in collective agreements', and the latter wording — 'collective agreements' – must also include in its scope an agreement between a professional association such as the Danish medical specialists' association and the public authority which administers the health insurance scheme. [20] Moreover, it has on several occasions been held in the case-law of the Court that, by virtue of its mandatory nature, 'the prohibition of discrimination between male and female workers... not only applies to the action of public authorities but extends also to all agree-

19 — Articles 3(2)(b), 4(b) and 5(2)(b).

20 — I do not think it is helpful, however, for the purposes of the present case, to deal with the question whether the agreement in question is of a public or private nature.

ments which are intended to regulate paid labour collectively, as well as to contracts between individuals'.[21] That case-law can be extended without any problem to the present case.

18. Once this preliminary aspect of the first question is resolved, it is possible to move on to an examination of the central issues which it raises. As mentioned above, the national court is asking whether, in order to establish whether discrimination on grounds of sex exists in an equal treatment case, it is necessary to carry out a point-by-point comparison of all the elements of the reorganisation scheme or to undertake a global assessment of those elements as a whole.

19. All the parties in the case, as well as the Commission, are agreed that the approach involving a point-by-point comparison of the constituent elements of a neutral set of rules allegedly producing indirect discriminatory effects based on sex is typical in cases concerning equal pay. This is confirmed by the judgment in *Barber*, in which it was held that 'application of the principle of equal pay must be ensured in respect of each element of remuneration and not only on the basis of a comprehensive assessment of the consideration paid to workers'.[22] However, in cases concerning equal treatment, no comparable principle has ever been established regarding the scope of Directive 76/207/EEC. One may legitimately wonder, therefore, whether such silence must be construed as implicitly precluding the adoption of a point-by-point approach in the assessment of cases concerning equal treatment, as the defendants in the main action maintain, or as referring to the usefulness of such an approach in the field of equal treatment also, as claimed by the applicant in the main proceedings and the Commission in its written observations.

20. In my view, it is necessary in this regard to accept the defendants' argument that, because the issues which they involve are more far-reaching and complex than those raised by equal pay disputes,[23] equal treatment cases necessitate the application of appropriate interpretative methods. The point-by-point approach would not therefore constitute the norm in cases concerning equal treatment. In my Opinion of 12 October 1999 in Case C-196/98 *Hepple and Others*, concerning equal treatment of men and women in social security matters, I expressed the view that, for the purposes of determining the amount of an additional benefit designed to restore equal treatment,

21 — Case C-33/89 *Kowalska* [1990] ECR I-2591, paragraph 12. See also Case 43/75 *Defrenne* [1976] ECR 455, paragraph 39, and Case C-184/89 *Nimz* [1991] ECR I-297 paragraph 11. Finally, see the recent judgments in Case C-281/97 *Krüger* [1999] ECR I-5127, paragraph 20, and Case C-333/97 *Lewen* [1999] ECR I-7243, paragraph 26.

22 — Judgment in *Barber*, cited above, paragraph 35.

23 — Such as matters relating to unfair dismissal, maternity leave or recruitment procedures.

recourse must be had to a global assessment of all the relevant factors in the matter, taking into account not only the different advantages or disadvantages related to age but also all the various advantages from which the person discriminated against benefits by reason of other aspects of the social security system. [24] Such a position is also confirmed in the relevant case-law. In *Hertz*, [25] the Court took into consideration all the Danish rules concerning dismissal and examined all aspects of that particular case in order to establish whether dismissal for absence due to illness relating to pregnancy or confinement was compatible with Directive 76/207/EEC. Advocate General Darmon emphasised in his Opinion [26] the need to take into account all the possible consequences of such dismissal, including the financial difficulties which might be faced by an employer who is obliged to keep on his staff an employee who is unable to work. An analogous approach was also adopted by the Court in its judgement in *Habermann-Beltermann*, [27] concerning the consequences of prohibiting pregnant or nursing mothers from working at night, as provided for by the German law on the protection of mothers ('Mutterschutzgesetz'), as well as in the more recent judgment in *Høj Pedersen*, [28] regarding the prejudicial effects of Danish legislation which penalised female workers on grounds connected with pregnancy. In the latter case, in order to assess the possible existence of discrimination on grounds of sex, the Court examined the entire body of Danish rules in issue and opted for solutions which took into consideration infringement both of the principle of equal pay and of the principle of equal treatment.

21. For the purposes of establishing whether there has been a breach of the principle of equal treatment, the foregoing considerations prompt me to favour an approach involving a global assessment of all aspects of the present case. That approach does not conflict with the principle of transparency in the Court's review of national measures which may be contrary to equal treatment. As the FAS and the SFU have pointed out, equal treatment cases, unlike disputes concerning equal pay, normally involve issues concerning rules the content and practical implementation of which are of a general nature. Consequently, if the point-by-point comparative method is followed, excessive importance may be attached to the analysis of the detailed points regarded as discriminatory, to the detriment of the substantive content of the rules in question. Obviously, it is necessary to reach agreement as to the significance and the scope of the global assessment. In my view, only those elements of the present case which are sufficiently homogenous can be taken into account, so that it is necessary to disregard those

24 — Points 40 and 41 of the Opinion. I arrived at that conclusion by working from the premiss that the right to comprehensive benefits is legally based on the Community principle of equal treatment and that, in order to ensure real equality, it is necessary to take as one's parameter the *entire* treatment accorded to the persons in question, as well as to those not discriminated against; that parameter is necessarily made up of all the advantages which the national legislation guarantees to the persons in question by way of invalidity benefit.

25 — Case C-179/88 *Handels-og Kontorfunktionærernes Forbund* [1990] ECR I-3979, known as the *Hertz* case.

26 — The same Opinion was delivered in Cases C-177/88 and C-179/88 ([1990] ECR I-3956, points 43 to 50).

27 — Judgment of 5 May 1994 in Case C-421/92 ([1994] ECR I-1657).

28 — Judgment of 19 November 1998 in Case C-66/96 [1998] ECR I-7327).

which, by their very nature, cannot form part of the subject-matter of any comparison.

22. The present case affords an illustration of the validity of the interpretative approach described above. Considered in isolation, the clause providing for the conversion of a specialist's practice in the event of its transfer to a third party is not particularly significant. As the FAS and the SFU stated at the hearing, without being challenged on the point, that clause, provided for under point 6 of the reorganisation scheme, has involved, since its entry into force, only 22 specialist doctors, of whom 14 are women and 8 are men, out of a total of 1 680 specialists entered on the register as at 1 June 1991, of whom 302 were women and 1 378 were men.[29] As can be observed, the number of doctors concerned by the application of the clause is very low — representing approximately 1.3%.[30] In order to understand the full significance and scope of the clause in question, it must necessarily be considered, analysed and assessed within the framework of the entire reorganisation scheme introduced in 1990, by reference to a homogeneous class of professionals to whom the rules apply, namely specialist doctors operating practices on a full-time basis (as in the case of Dr Jørgensen). If the provisions of the reorganisation scheme applying to full-time specialist doctors are taken into consideration on a global basis, it will be seen that three situations may arise: (a) practices with a turnover lower than the minimum level, which have had to be changed to part-time practices; (b) practices with a turnover higher than the minimum level but falling within the intermediate band which have been able to continue on a full-time basis but are subject to the conversion clause (as in the case of Dr Jørgensen); (c) practices with a turnover higher than the minimum and the intermediate band, which have remained full-time without any restriction, albeit subject to reductions in fees as provided for by the reduction scheme. In those circumstances, the adoption of a global assessment approach necessitates an examination of the effects of all those rules as regards full-time male and female specialists.

23. In order to reach a conclusion concerning the first question referred, I consider that contractual rules such as those provided for by the reorganisation scheme introduced in the context of the agreement of 1 June 1990 between the FAS and the SFU fall within the scope of Directive 86/613/EEC, interpreted in the light of Directive 76/207/EEC, and that the analysis of the rules in issue which is needed in order to ascertain whether or not there exists indirect discrimination on grounds of sex must be carried out by means of a global assessment of the effects of all the

29 — These figures are taken from Professor Lauritzen's report, included in the pleadings in the case. Their objectivity is not contested by Professor Conradsen in his report.

30 — According to a table annexed to Professor Lauritzen's report, in 1989 there was only one specialist in rheumatology whose turnover fell within the band ranging from DKK 400 000 to DKK 500 000.

different elements of the rules applicable to full-time specialist doctors, whether male or female.

24. I would add that, according to settled case-law, [31] it is for the national court, applying the global comparison approach, to establish whether or not indirect discrimination based on sex exists. In particular, the national court will need to verify whether the available statistical data 'cover enough individuals, whether they illustrate purely fortuitous or short-term phenomena and whether, in general, they appear to be significant', [32] and therefore to establish, in the light of those data, whether the reorganisation scheme, viewed as a whole, adversely affects a significantly higher number [33] of full-time female specialist doctors than male specialist doctors.

The second question

25. Next, the national court has referred a question concerning the grounds of justification for the indirect discrimination which may possibly result from the contractual rules in issue. However, that question is framed on an apparently conditional basis ('if the answer to Question 1 is in the affirmative ...'). I understand the reason for this: only if recourse is had to the option of a point-by- point comparison it is possible to envisage the existence of indirect discrimination on grounds of sex and consequently to analyse the possible grounds of justification for such discrimination. Since recourse cannot be had to a point-by-point comparison in the present case, it would seem impossible — according to the reasoning of the national court — to envisage the existence of any indirect discrimination, so that no purpose is served by enquiring into the possibility of justification. If one adopts that point of view, there is no need to answer the second question. However, it appears to me that such a conclusion, despite its apparent logic, is not wholly tenable, having regard to the legal context in which the national court will be called upon to determine the main proceedings. In the first place, it may have at its disposal new statistical data or new factual evidence which could modify its initial assessment concerning the existence of discrimination. Second, it is not inconceivable that the national court may modify that initial assessment when, for the purposes of gauging the discriminatory effects of the rules in issue, reference is made only to those specialist doctors who operate their practices on a full-time basis. It does not, therefore, seem at all superfluous to answer the second question, bearing in mind the complexity of the matters ultimately in dispute. Moreover, in its case-law, the Court has always favoured an assessment of the existence of indirect discrimination on grounds of sex by reference both to

31 — See the recent judgment in Case C-167/97 *Seymour-Smith and Perez* [1999] ECR I-623, paragraphs 61 and 62.

32 — Case C-127/92 *Enderby* [1993] ECR I-5535, paragraph 17.

33 — As regards that quantitative criterion, the case-law concerning indirect discrimination on grounds of sex has been settled since the judgment in *Jenkins*, cited above, paragraph 13.

statistical data and to possible justification founded on objective factors unrelated to any discrimination based on sex. [34]

26. That said, it is necessary to ask oneself whether considerations relating to 'budgetary stringency, savings and medical practice planning' can constitute pertinent, objective factors capable of justifying the possible existence of indirect discrimination based on sex. Those considerations stem from the general aims of the 1990 reforms, which consisted essentially in a progressive restriction of public spending in the health sector and the improved planning of medical resources. I shall examine separately (a) the question of budgetary stringency and the consequent restrictions on public spending and (b) the question of the planning of medical resources.

27. As regards budgetary stringency and the control of public spending, the Court held in *Roks* [35] that although such 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' [36]. The reason for that position is clear: '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... 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'. [37] That line of reasoning is also applicable to the present case.

28. As regards the considerations concerning the planning of medical resources, I take the view, in the light of the most recent case-law on the point, that, in order for them to constitute justification for discrimination on grounds of sex, these must involve a choice of social policy. The reorganisation scheme was primarily designed to rationalise the operation of full and part-time practices so as to meet the demands of those using them: one of the objectives of the reforms is in fact to 'guarantee patients the provision of specialised medical care... by doctors practising, in principle, on a full-time basis'. [38] From that point of view it is for the national court to verify whether the adoption of the reorganisation scheme is in fact capable of reflecting a specific planning need linked to

34 — See the recent judgment in *Seymour-Smith and Perez*, cited above, paragraph 60.

35 — Case C-343/92 ([1994] ECR I-571, paragraphs 35 to 37).

36 — Ibid., paragraph 35.

37 — Ibid., paragraph 36.

38 — See clause 2.2 of the 1990 Agreement, the text of which is reproduced in the order for reference. The note to clauses 13 and 14 of the agreement, cited above, likewise appears to be inspired by the same principle.

social policy. On that view, it should be borne in mind that, as the the Court has consistently recognised in its case-law, social policy considerations may justify even serious forms of indirect discrimination based on sex, [39] provided of course that the discriminatory effect does not go beyond what is strictly necessary for the effective attainment of the objectives pursued. [40]

29. I therefore propose that the answer to the second question should be that the consequence of the combined provisions of Articles 3 and 4 of Directive 86/613/EEC, as interpreted in the light of Directive 76/207/EEC, is that indirect discrimination based on sex, of the kind at issue in the main proceedings, can be justified only by reference to social policy considerations, provided of course that the discriminatory effect does not go beyond what is strictly necessary for the effective attainment of the objectives pursued.

39 — Case 171/88 *Rinner-Kühn* [1989] ECR 2743, paragraph 14, concerning national legislation excluding the continued remuneration of workers who did not work for more than 10 hours per week or 45 hours per month; Case C-229/89 *Commission* v *Belgium* [1991] ECR I-2205, paragraphs 19 to 25, concerning a system of unemployment or invalidity benefits based on discriminatory conditions; Case C-226/91 *Molenbroek* [1992] ECR I-5943, paragraph 19, concerning an old-age insurance scheme under which a supplementary pension could be granted on a discriminatory basis; Case C-444/93 *Megner and Scheffel* [1995] ECR I-4741, paragraph 24, concerning national legislation excluding minor and short-term employment from compulsory membership of the statutory sickness and old-age insurance schemes; Case C-278/93 *Freers and Speckmann* [1996] ECR I-1165, paragraph 28, concerning rules limiting compensation for loss of earnings due to attendance at training courses for staff committee members employed on a part-time basis; *Seymour-Smith and Perez*, cited above, paragraph 69, concerning national legislation making the reinstatement of an unfairly dismissed worker conditional on that worker having been continuously employed for at least two years.

40 — *Commission* v *Belgium*, cited above, paragraph 19.

The third and fourth questions

30. I firstly have to say that the reasons for which the national court considered it opportune to refer the third and fourth questions is not clear to me. To judge from the literal wording of the order for reference, they appear to involve a sort of *extrema ratio* to justify, at least in part, the reorganisation scheme: in so far as it is possible to envisage a form of discrimination based on sex which cannot be justified by any of the considerations referred to in the second question, to qualify as pension savings the value of the 'goodwill' which the applicant in the main proceedings may receive on selling her practice once she reaches retirement age, would ultimately have the effect of rendering applicable in the present case the solutions arrived at by the Court in its decision in *Grau-Hupka*, [41] in which it held *inter alia* that Member States are not obliged to grant advantages in the matter of old-age pension insurance to persons who have brought up their children. Understood in this way, the two questions may be of some relevance — even if only marginal — for the correct determination of the dispute, and for that reason I consider it opportune to give answers to them. It is for the national court to 'determine in the light of each case the necessity for a preliminary ruling and the relevance of the questions referred to the Court'. [42]

31. It should be recalled that clause 30 of the 1990 agreement lays down specific

41 — Cited above, paragraph 27.

42 — *Roks*, cited above, paragraph 16.

provisions concerning the value of the goodwill, and that the clause converting a practice from full-time to part-time following its sale to a third party certainly results in a reduction of the price which the purchaser is required to pay to the owner for that goodwill. In the case of Doctor Jørgensen, an extremely precise calculation of that loss of value has in fact been carried out by a firm of accountants,[43] which mentions the figure of DKK 380 565.42, rather than DKK 505 395.14, as the maximum which could have been obtained in the absence of the conversion clause.

32. I would add that, in order to satisfy the demands of legal reasoning, the two questions under review require an interpretation of specific provisions of Community law, which cannot in the present case be those of Directive 86/613/EEC since that directive is not concerned with the pension aspects of self-employed workers. Although the national court does not refer to them, I consider that it is necessary instead to refer to provisions of Directive 79/7/EEC,[44] the scope of which *ratione personae* also includes self-employed persons (Article 2) and which is applicable *inter alia* to statutory old-age schemes (Article 3(1)(a), third indent). It should be borne in mind that the abovementioned decision in *Grau-Hupka* makes express reference to that directive, in particular to Article 7(1)(b) thereof, which recognises the right of Member States to exclude from its scope any advantages in respect of old-age pension schemes granted to persons who have brought up children and the acquisition of benefit entitlements following periods of interruption of employment due to the bringing up of children. Instead, contrary to what the Commission maintains,[45] Directive 86/378/EEC,[46] to which the decision in *Grau-Hupka* does not make reference and which concerns a sector — that of occupational social security schemes — not taken into account in the order for reference, does not seem to me to be applicable in the present case.

33. That said, I consider that Article 3(1) of Directive 79/7/EEC must be interpreted as meaning that the value of the goodwill which a specialist doctor may obtain from the sale of his practice to a third party when he reaches retirement age cannot be equated to the retirement pension contributions of a worker. Goodwill is an incorporeal element of the practice of a specialist doctor in his capacity as an economic operator, and is included as such in the assets shown on the balance sheet.[47] For that reason, the price of the goodwill which a specialist doctor receives on the sale of his practice to a third party is exclusively linked to the transfer of that practice and cannot be assimilated to retirement pension benefits payable up to a fixed amount

43 — The firm of Coopers & Lybrand, whose report of 28 October 1996 is referred to in the order for reference.

44 — 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 (OJ 1979 L 6, p. 24).

45 — See its written observations, point 118.

46 — Council Directive 86/378/EEC of 24 July 1986 on the implementation of the principle of equal treatment for men and women in occupational social security schemes (OJ 1986 L 225, p. 40), as amended by Council Directive 96/97/EEC of 20 December 1996 (OJ 1997 L 46, p. 20).

47 — See in that regard the Fourth Council Directive 78/660/EEC of 25 July 1978 based on Article 54(3)(g) of the Treaty on the annual accounts of certain types of companies (OJ 1978 L 222, p. 11), and the successive amendments and integrations thereof, according to which the goodwill, in so far as it has been purchased for valuable consideration, must be included as an intangible asset in the balance sheet (Articles 10 and 11).

determined by the contributions paid. The goodwill relates to the business, whereas retirement pension schemes concern workers: the two things are entirely different in nature. That conclusion is not in my view affected even by the fact that, in practice, specialist doctors often attribute to the value of their goodwill the character almost of a retirement fund, on account of the fact that the sale of a practice normally takes place when such professionals reach retirement age and decide to stop working.

Conclusions

34. In the light of the above, I propose that the Court should answer the questions referred by the Østre Landsret as follows:

(1) Contractual rules such as those provided for by the reorganisation scheme introduced in the framework of the agreement concluded on 1 June 1990 between the Association of Specialist Doctors and the Health Insurance Negotiation Committee fall within the scope of Council Directive 86/613/EEC, interpreted in the light of Directive 76/207/EEC. In order to determine whether or not indirect discrimination on grounds of sex exists, it is necessary to assess globally the effects which the various elements of the rules in issue have on full-time specialist doctors, whether male or female. That assessment, which is a matter for the national court, must be carried out on the basis of meaningful, concordant statistical data, in such a way as to show that the

rules in issue, considered as a whole, adversely affect a significantly higher number of female full-time specialist doctors than their male counterparts.

(2) The consequence of the combined provisions of Articles 3 and 4 of Directive 86/613/EEC, as interpreted in the light of Directive 76/207/EEC, is that indirect discrimination on grounds of sex, of the kind at issue in the main proceedings, can be justified only by reference to social policy considerations, provided that the discriminatory effect does not go beyond what is strictly necessary for the effective attainment of the objectives pursued.

(3) Article 3(1) of Directive 79/7/EEC must be interpreted as meaning that the value of the goodwill which a medical specialist receives on the sale of his practice to a third party when he reaches retirement age cannot be equated to contributions designed to guarantee the pension of a worker.