OPINION OF ADVOCATE GENERAL STIX-HACKL

delivered on 28 November 2002 [1]

I — Introductory remarks

1. In Germany there is a general duty to perform military service which applies to men only. The subject-matter of the present proceedings is the compatibility of that duty with 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 [2] ('Directive 76/207') and with various provisions of the EC Treaty.

II — Legal background

A — *Directive 76/207*

2. Article 1(1) reads:

'The purpose of this Directive is to put into effect in the Member States the principle of equal treatment for men and women as regards access to employment, including promotion, and to vocational training and as regards working conditions and, on the conditions referred to in paragraph 2, social security. This principle is hereinafter referred to as "the principle of equal treatment".'

3. Article 2(1) reads:

'For the purposes of the following provisions, the principle of equal treatment shall mean that there shall be no discrimination whatsoever on grounds of sex either directly or indirectly by reference in particular to marital or family status.'

4. Article 3(1) reads:

'Application of the principle of equal treatment means that there shall be no discrimination whatsoever on grounds of sex in the conditions, including selection criteria, for

1 — Original language: German.
2 — OJ 1976 L 39, p. 40.

access to all jobs or posts, whatever the sector or branch of activity, and to all levels of the occupational hierarchy.'

B — *National law*

5. Grundgesetz für die Bundesrepublik Deutschland (Basic law for the Federal Republic of Germany (GG))[3]

Article 12a(1) and (4) reads:

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

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

6. Wehrpflichtgesetz (Law on compulsory military service (WPflG))[4]

Paragraph 1(1), in extract, reads:

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

Paragraph 3(1), in extract, reads:

'The obligation to perform military service is satisfied by military service or, in the case referred to in Paragraph 1 of the Kriegsdienstverweigerungsgesetz (Law on refusal to perform war service)... by civilian service...'

3 — BGBl. I 1949 in the version of BGBl. 2000 I, p. 1755.

4 — BGBl. I 1956 p. 65, in the version of BGBl. 1995 I, p. 1756.

III — Facts and principal arguments in the main proceedings

7. Mr Dory, the claimant in the main proceedings, who is of an age liable to military service, made an application to the Kreiswehrersatzamt competent for his call-up to service to be exempted from the obligation to perform military service. As grounds he stated that the German Wehrpflichtgesetz was contrary to Community law. He relied on the judgment of the Court of Justice in the *Kreil* case.[5] The application was refused. The authority gave as reasons that that judgment related only to voluntary service in the armed forces by women, not to compulsory military service. Questions of national defence such as compulsory military service were outside Community law. Following an unsuccessful appeal to the competent appellate body, Mr Dory brought an action before the court which has made the reference. The defendant in the main proceedings is the Federal Republic of Germany.

8. In the proceedings before the national court, Mr Dory again relied on the *Kreil* judgment. He put forward the view that following that judgment there were no longer any objective reasons which could justify excluding women from compulsory military service on sex-specific grounds. The obligation of military service laid down in Article 12a(1) of the Grundgesetz for men only constituted unlawful discrimination against men, since women now have the right to serve and bear arms but not the duty to perform military service.

9. The Federal Republic of Germany contended in particular that the Grundgesetz contains the 'constitutional mandate for a peaceable State capable of defence', which is implemented by the introduction of compulsory military service for men. This is part of the 'organisational power over the armed forces', to which Community law does not relate.

10. The Federal Republic of Germany further submitted *inter alia* that the equality article of the Charter of Fundamental Rights of the European Union was binding only on the institutions and bodies of the EU and applied to the Member States only when they implement Community law. Directive 76/207 was not applicable, because it covers occupational activities only. Compulsory military service is a service obligation, however, and must thus be distinguished from access to the military profession.

5 — Case C-285/98 *Kreil* [2000] ECR I-69.

11. The national court entertains doubts as to the correctness of the position taken by the Federal Republic of Germany. It observes that compulsory military service results in any event in delayed access for men to employment or vocational training. Citing the Court's judgment in *Schnorbus*, [6] the national court considers it possible that this is a case of discrimination caught by Directive 76/207. Referring to Article 2(4) of Directive 76/207, according to which 'positive discrimination' is permitted in the interests of actual equal treatment of the sexes, it considers that compulsory military service for men only may be justified. It observes here that 'the statistically substantiated fact that in the course of their lives German women nowadays give birth to an average of 1.3 children... gives rise, on average, to a period of professional absence exceeding the duration of military service'.

IV — The question referred and the further course of the proceedings

12. By order of 4 April 2001, the Verwaltungsgericht Stuttgart referred the following question to the Court for a preliminary ruling:

Does German military service for men only conflict with European law?

13. On 26 September 2001 Mr Dory received a call-up order requiring him to start his military service on 1/5 November 2001.

14. By letters of 28 September 2001, Mr Dory applied to the national court to grant suspensive effect to his appeal against the call-up order and, on the same date, made an application to the Court of Justice for interim relief against the Federal Republic of Germany. That relief was to consist of a suspension of enforcement of the call-up order pending the Court's decision in the present proceedings. The application to the national court was granted by order of 19 October 2001. The application to the Court of Justice was dismissed as inadmissible by order of 24 October 2001 (Case C-186/01 R).

6 — Case C-79/99 *Schnorbus* [2000] ECR I-10997.

V — The question referred for a preliminary ruling

A — *Admissibility of the question*

15. The national court asks as to the compatibility of German compulsory military service, in other words German law, with 'European law'.

16. For the Court of Justice to be able to give the national court an answer which will be of use in the main proceedings, the question must be reformulated.

17. Thus the Court has no power in the context of Article 234 EC to rule either on the interpretation of provisions of national laws or regulations or on their conformity with Community law. It may, however, supply the national court with an interpretation of Community law that will enable that court to resolve the legal problem before it. [7]

18. 'Finally, according to settled case-law, it is for the Court alone, where questions are formulated imprecisely, to extract from all the information provided by the national court and from the documents in the main proceedings the points of Community law which require interpretation, having regard to the subject-matter of those proceedings.' [8]

19. It may be seen from the information in the order for reference that the national court puts the question exclusively with respect to Community law on the equal treatment of men and women. [9]

20. It therefore makes sense to reformulate the question as follows:

Must Articles 3(2) EC, 13 EC and 141 EC and Directive 76/207 be interpreted as precluding a national provision such as German compulsory military service which applies to men only?

7 — Case C-107/98 *Teckal* [1999] ECR I-8121, paragraph 34, and Case C-17/92 *Distribuidores Cinematográficos* [1993] ECR I-2239, paragraph 8.

8 — Case C-107/98, cited in note 7, paragraph 34, Case 251/83 *Haug-Adrion* [1984] ECR 4277, paragraph 9, Case C-168/95 *Arcaro* [1996] ECR I-4705, paragraph 21, and Case C-162/00 *Pokrzeptowicz-Meyer* [2002] ECR I-1049.

9 — The question does not relate in this context to other areas of Community law, for example the right to freedom of movement for workers (Article 39 EC) or the freedom to provide services (Article 49 et seq. EC).

B — *Essential submissions of the parties*

21. Mr *Dory* did not comment in the written procedure before the Court. At the hearing he opposed the view that compulsory military service is excluded generally from the application of Community law because it is a measure for guaranteeing external security. He argued that it is (also) a measure which interferes with the freedom to pursue an occupation. That is covered by Community law in the shape of Directive 76/207.

22. Mr Dory takes the view that compulsory military service for men only is incompatible with Directive 76/207. It follows from Article 1 of the directive that it is applicable to national measures concerning access to employment. What he is concerned about is his access to general civilian employment. Whether compulsory military service may itself be regarded as 'employment' within the meaning of Directive 76/207 is therefore immaterial for the answer to the question.

23. During performance of compulsory military service there is an absolute prohibition of employment for men. Furthermore, after performance of military service, access to employment exists only in delayed form. Even though military service currently lasts for only nine months, its effect on access to employment is obvious if one imagines that a Member State were to take it into its head, for example, to enact a law (for reasons of population policy, for instance) that women were admitted to vocational training only from the age of 25. With compulsory military service, admittedly, there was no intent to affect men's access to employment, but it nevertheless directly affects that access and is therefore 'occupation-orientated'. Employers also hesitate to employ men of that age, because of the risk of absence as a result of the obligation to perform military service.

24. To counter the argument that compulsory military service for men only has other purposes than regulating access to the labour market, Mr Dory refers to the *Marshall* judgment. [10] That case concerned an automatic termination of service on reaching the age of eligibility for an old-age pension, which differed for men and women. The Court held that that was within the scope of Directive 76/207, although the national provision was based on grounds of social insurance law.

25. Furthermore, since the Treaty of Amsterdam, primary law contains in Article 3(2) EC a general duty of equal

10 — Case 152/84 *Marshall* [1986] ECR 723.

treatment of men and women. Directive 76/207 may thus no longer be understood as being applicable only where a national measure is deliberately targeted at sex-specific access to employment.

26. The *German* Government refers to the importance of general compulsory military service in Germany. It is intended to create close contact between the armed forces and the population, thereby ensuring the democratic transparency of the military apparatus. The general obligation to perform military service is moreover the centrepiece of national defence in Germany: the increase in numbers of troops from peacetime to a state of defence cannot be done without the corresponding number of reserves recruited from the category of persons subject to compulsory military service.

27. The extent and structure of compulsory military service are part of the organisation of the armed forces, which remains within the competence of the Member States as an essential part of public security. That position was acknowledged by the Court in the *Kreil* and *Sirdar* [11] judgments.

28. As follows from the first paragraph of Article 5 EC and the second subparagraph of Article 7(1) EC, the principle of limited individual competence of the Community applies with respect to the relationship between Community competence and national competence. The organisation of national defence as such is not within the competence of the Community.

29. The limitation of compulsory military service to men is also, however, not covered by Community law with respect to its indirect consequences for access to employment.

30. Article 3(2) EC, which states that the Community aims to promote equality between men and women, is applicable only to specific measures taken by the Community on the basis of other powers.

31. The same conclusion is reached with respect to Article 13. That article only empowers the Council to take measures to combat discrimination on grounds of sex 'within the limits of the powers conferred by [the Treaty] upon the Community'.

32. Article 141 EC and Directive 76/207 for their part merely regulate employment

11 — Case C-285/98, cited in note 5, and Case C-273/97 *Sirdar* [1999] ECR I-7403.

or service relationships voluntarily entered into, and consequently do not apply to a general obligation of service such as compulsory military service, which is clearly distinguished from the — always voluntarily chosen — profession of soldier, which was the sole subject-matter of the *Kreil* judgment.

33. Directive 76/207, which concerns the elimination of barriers to access to employment and vocational training, is not material in the present case. The pay given to persons performing military service, simply because of its small amount, is not a remuneration for work with which one can earn one's living. A 'certain superficial resemblance' between a military service relationship and an employment relationship is not enough to make the directive applicable.

34. The particular quality of compulsory military service as a civic duty is the decisive reason why it does not constitute employment within the meaning of Directive 76/207. International law too, as a matter of settled practice, evaluates a call-up to perform military service as an act of the exercise of State power, which is also reflected in the fact that foreigners, including those from other Member States of the EU, must be exempt from it because of the conflict of loyalties. The special quality of that civic duty also follows from the fact that military service is expressly excepted under Article 4(3)(b) of the European Convention on Human Rights from the prohibition of forced labour. This is also laid down, in almost the same words, in Article 8(3)(c)(ii) of the UN Covenant on Civil and Political Rights.

35. In contrast to that is Article 6(1) of the UN Covenant on Economic, Social and Cultural Rights, which lays down the right of everyone 'to gain his living by work which he freely chooses or accepts' without any restriction as regards military service. From that it may be concluded that that Covenant does not regard the performance of compulsory military service as work in the usual meaning of the word.

36. The German Government emphasises, moreover, that the Court itself held in *Schnorbus* [12] that a provision to counterbalance the career delays resulting from compulsory military service is compatible with Community law. It thereby implicitly acknowledged the lawfulness of compulsory military service for men only.

37. The *French* Government takes the view that the performance of compulsory mili-

12 — Cited in note 6.

tary service cannot be equated with the exercise of an occupational activity and therefore falls neither under the social provisions of the EC Treaty nor under Directive 76/207. Military service is a measure of national defence which falls within the exclusive competence of the Member States. The national decision to impose compulsory military service on men only does not fall as such within the scope of Community law.

38. The Court indeed ruled in the *Kreil* and *Sirdar* judgments that national decisions on the organisation of the armed forces are not completely excluded from the application of Community law. It also held in *Sirdar*, however, that only such national measures as affect access to employment or vocational training or working conditions in the armed forces are subject to the Community law principle of equal treatment of men and women.

39. That approach cannot be applied here, however, since compulsory military service is performed by persons who are not comparable with employees within the meaning of the provisions of Community law on equal treatment of the sexes. A person subject to military service does not provide services for a third party in return for which he receives remuneration, but fulfils a civic duty in connection with which compensation is paid.

40. Further, in *Schnorbus* the Court ruled on the compatibility with Community law of provisions which concerned not compulsory military service as such but its consequences for the potential service relationship between candidates for practical legal training and the administration offering that training. It is significant, moreover, that the Court did not answer the sixth question referred in that case, which related to the discriminatory character of the limitation of compulsory military service to men.

41. The *Finnish* Government points out that under Article 127 of the Finnish Constitution men and women are obliged to take part in national defence. The duty to serve under arms is however laid down by law only for men. It is possible, however, for women to perform military service on a voluntary basis.

42. Decisions of principle in the field of defence policy fall, as the Court decided in *Kreil*, within the competence of the Member States, and Community law is thus not applicable in the main proceedings.

43. Compulsory military service does not at any rate affect the conditions of access to

the profession of soldier and so does not fall within the scope of Directive 76/207. The circumstance that compulsory military service is limited to men does not, moreover, lead in Finland to women's careers in the armed forces being adversely affected, since women may perform military service voluntarily.

44. The *Commission* submits that it follows from Article 12a of the German Grundgesetz and Paragraph 1 of the WPflG that compulsory military service, as it developed in the traditions of many European States from the end of the 18th century, constitutes a unilateral public-law service obligation and does not give rise to an employment relationship. The person performing military service provides services — perhaps even against his will — while the State merely grants him a certain financial support, but not a wage. Military service is not therefore part of the labour market.

45. As the Court held in the *Kreil* and *Schnorbus* judgments, the mere fact that military interests are concerned is not relevant for the inapplicability of Community law. What is decisive is rather whether the service relationship is outside the scope of Community law on the basis of its purpose and structure.

46. That is the case with compulsory military service. Just as national defence is not a task of the Community, military service is not part of the labour market or training with a view to the requirements of the labour market. The main proceedings thus differ substantially from the cases previously decided by the Court.

47. The Commission emphasises, citing the judgment in *Lawrie-Blum*,[13] that, while the public-law nature of an activity does not in itself exclude in principle the application of Directive 76/207, certain public-law duties of service which have developed historically, examples of which, besides military service, include national particularities such as the German dike maintenance duty of island or coastal residents, cannot, however, be covered by Community provisions aimed at working life. It would be different if for reasons of social and health policy a Member State were to introduce a general duty to care for old and sick people.

48. Accordingly, neither Articles 13 EC and 141 EC nor Directive 76/207, which was adopted on the basis of Article 235 of

13 — Case 66/85 *Lawrie-Blum* [1986] ECR 2121.

the EC Treaty (now Article 308 EC), applies to compulsory military service.

49. The Member States may thus rely on Article 6(3) EU and Article 5 EC to exercise their defence sovereignty in traditional national style.

50. Nor would taking into account the consequences of military service for access to employment lead to a different conclusion. Compulsory military service does not restrict the scope of Community law any more than is inherent in its nature. There is no need to discuss whether military service for men could be justified in the context of Directive 76/207. The Court, in *Schnorbus*, could only uphold the compatibility of the national provisions with that directive, since it did not regard the restrictions inherent in compulsory military service as a breach of Community law.

51. At the hearing the Commission submitted additionally that, since compulsory military service is outside the jurisdiction of the Community, consequences which arise for Community law must be accepted. It cannot be the case that it is always only Community law which displaces national law; national law asserts its own sphere of validity to a certain extent.

52. On the Charter of the European Union, the Commission submits that Articles 20, 21 and 23 of the Charter concerning the principle of equality and the prohibition of discrimination between men and women apply, in accordance with Article 51(1) of the Charter, to legal acts of the Member States only where they implement the law of the Union, which is not the case here.

C — *Assessment*

53. Compulsory military service in Germany is, according to the unchallenged submissions of the German Government, an essential part of the national provisions for guaranteeing the external security of the Federal Republic of Germany.

54. The heart of the national court's question is whether the question of compulsory military service and hence of its structure is completely outside the scope of Community law because it is for the Member States to take suitable measures to guarantee their external security, and hence to make

decisions on the organisation of their armed forces. Should that not be the case, the question would arise of what Community law could be applicable and whether it precluded compulsory military service for men only.

1. Basic principles of the applicability of Community law to national measures for guaranteeing external security

55. It follows from the principle of limited individual powers (Article 5 EC) that the Member States have sole competence where no powers have been conferred on the Community legislature or — apart from the case of exclusive competence — where despite Community competence there are no Community rules.

56. The Court has, however, stated on numerous occasions, as settled case-law, that there are certain areas in which, even though they fall in principle within the exclusive normative power of the Member States, Community law sets limits to that power. [14]

57. The Court has also examined in this respect *inter alia* national measures in the field of public security, which includes external as well as internal security. [15] In the Court's view, it is initially 'the Member States, which retain exclusive competence as regards the maintenance of public order and the safeguarding of internal security, [which] unquestionably enjoy a margin of discretion in determining what measures are most appropriate'. [16]

58. In the *Sirdar* judgment, [17] in which the Court had to consider restrictions on access

14 — For example, concerning criminal law and criminal procedure law, Case C-274/96 *Bickel and Others* [1998] ECR I-7637, paragraph 17; concerning further: the organisation of the educational system and educational policy, Case 9/74 *Casagrande* [1974] ECR 773 and Case 293/83 *Gravier* [1985] ECR 593; the structure of social security systems, Case C-229/89 *Commission* v *Belgium* [1991] ECR I-2205, Case C-317/93 *Nolte* [1995] ECR I-4625 and Case C-120/95 *Decker* [1998] ECR I-1831; direct taxes, Case C-107/94 *Asscher* [1996] ECR I-3089; membership of religious or philosophical associations, Case 196/87 *Steymann* [1988] ECR 6159; or rules of administrative and judicial procedure, Case 33/76 *REWE Zentralfinanz* [1976] ECR 1989, Case C-312/93 *Peterbroeck and Others* [1995] ECR I-4599 and Joined Cases C-430/93 and C-431/93 *Van Schijndel and van Veen* [1995] ECR I-4705.

15 — For example, Case C-367/89 *Richardt and 'Les Accessoires Scientifiques'* [1991] ECR I-4621, Case C-83/94 *Leifer and Others* [1995] ECR I-3231 and Case 222/84 *Johnston* [1986] ECR 1651.

16 — Case C-265/95 *Commission* v *France* [1997] ECR I-6959, paragraph 33.

17 — Cited in note 11, paragraph 15 et seq.

by women to certain posts for professional soldiers, it further stated:

'It is for the Member States, which have to adopt appropriate measures to ensure their internal and external security, to take decisions on the organisation of their armed forces. It does not follow, however, that such decisions must fall entirely outside the scope of Community law.

As the Court has already held, the only articles in which the Treaty provides for derogations applicable in situations which may affect public security are Articles 36, 48, 56, 223 (now, after amendment, Articles 30 EC, 39 EC, 46 EC and 296 EC) and 224, which deal with exceptional and clearly defined cases. *It is not possible to infer from those articles that there is inherent in the Treaty a general exception covering all measures taken for reasons of public security.* [18] To recognise the existence of such an exception, regardless of the specific requirements laid down by the Treaty, might impair the binding nature of Community law and its uniform application...

Furthermore, some of the derogations provided for by the Treaty concern only the rules relating to the free movement of goods, persons and services, and not the social provisions of the Treaty, of which the principle of equal treatment of men and women... forms part...

It follows that application of the principle of equal treatment for men and women is not subject to any general reservation as regards measures for the organisation of the armed forces taken on grounds of the protection of public security...'

59. Those observations may be found in almost identical terms in the Court's judgment in *Kreil*. [19] While *Sirdar* and *Kreil* concerned access to posts in a professional army, classification as a 'measure for the organisation of the armed forces' can in principle have no different results for a professional army and compulsory military service.

60. In judgments in other cases too which concerned national measures of external security or foreign policy, the Court indicated that it is not possible to derive from Community law an inherent reservation excluding all measures taken in the interest of public security from the scope of Community law. [20]

18 — Emphasis added.

19 — Cited in note 5, paragraph 15 et seq.

20 — Case C-423/98 *Albore* — area of military importance — [2000] ECR I-5965, paragraph 19 et seq., Case C-70/94 *Werner* [1995] ECR I-3189, paragraph 10, Case C-83/94 — disturbance of external relations —, cited in note 15, Case C-283/99 *Commission* v *Italy* — private security services — [2001] ECR I-4363, and Case C-265/95 *Commission* v *France* — public disorder —, cited in note 16.

61. Finally, Advocate General Jacobs dealt in his Opinion in *Commission* v *Greece* [21] with a unilateral national embargo on trade which was motivated exclusively by security policy. External trade policy falls within the exclusive competence of the Community. It was therefore doubtful whether Greece's action was to be tested for compatibility with Article 113 of the EC Treaty (now, after amendment, Article 133 EC) or fell outside Community law as a measure of national security policy. Advocate General Jacobs said:

'In my view, the decisive element is not the purpose of the embargo but its effects. A measure which has the effect of directly preventing or restricting trade with a non-member country comes within the scope of Article 113, regardless of its purpose.' [22]

62. To sum up, then, national measures for guaranteeing public security are not completely outside Community law. The organisation of the armed forces as an essential part of guaranteeing external security admittedly falls as such within the exclusive competence of the Member States. If, however, the national measures adopted for that purpose produce effects in areas regulated by Community law, so that the scope of Community law is affected, those effects are to be tested by reference to Community law (which takes precedence [23]). [24]

63. Applied to the present case, that means that the introduction of a general national obligation to perform military service is and remains, as a measure of organisation of external security, a political decision of

21 — Opinion in Case C-120/94 *Commission* v *Greece* [1996] ECR I-1513.

22 — Cited in note 21, point 42.

23 — The Court's judgment in Case 6/64 *Costa* v *ENEL* [1964] ECR 585 is fundamental.

24 — On the comprehensive discussion in relation to women in the armed forces *inter alia* in the German-speaking world, see for example von Wilmowsky, 'Ausnahmebereiche gegenüber EG-Grundfreiheiten', *Europarecht* 1996, p. 362; Streinz, 'Frauen an die Front', *Deutsches Verwaltungsblatt* 2000, p. 585; Tobler, 'Kompetenzanmaßung der EG via den EuGH? — Zur Rechtsprechung des EuGH über Anwendbarkeit des EG-Gleichstellungsrechtes auf Arbeitsverhältnisse in den Streitkräften der Mitgliedstaaten', *Aktuelle juristische Praxis* 2000, p. 577; Stahn, 'Streitkräfte im Wandel — Zu den Auswirkungen der EuGH-Urteile Sirdar und Kreil auf das deutsche Recht', *Europäische Grundrechte Zeitschrift* 2000, p. 121; Hühn, 'Die Waffen der Frauen: Der Fall Kreil — erneuter Anlass zum Konflikt zwischen europäischer und deutscher Gerichtsbarkeit?', *Schriften zur europäischen Integration Nr. 51* (2000), p. 5; Zuleeg, 'Fällt die Wehrpflicht in Deutschland durch Richterspruch?', *Europäische Zeitschrift für Wirtschaftsrecht* 2002, p. 545; see also Ellis, 'Can Public Safety Provide An Excuse For Sex Discrimination?', *The Law Quarterly Review* 1986, p. 496; Müller-Graff/Bulst, 'New Issues in A Sensitive Relationship — Tanja Kreil between secondary EC-law and national constitutional law', *Europarättslig tidskrift* 2000, p. 295; for a critical view, Scholz, 'Frauen an die Waffe kraft Europarecht', *Die öffentliche Verwaltung* 2000, p. 417; Rupp, 'Bemerkungen zum europarechtlichen Schutz der "nationalen Identität" der EU-Mitgliedstaaten', *Völkerrecht und deutsches Recht: Festschrift für Walter Rudolf zum 70. Geburtstag* (2001), p. 173; Köster/Schröder, 'Eine bemerkenswerte Kompetenzüberschreitung — Frauen an die Waffe', *Neue Juristische Wochenschrift* 2001, p. 273; Stein, 'Über Amazonen, Europa und das Grundgesetz', *Die Macht des Geistes: Festschrift für Hartmut Schiedermair* (2001), p. 737.

the Member State which introduces it. It is for the Member States to decide *whether* and *how* to organise national armed forces to guarantee their external security.

64. But that does not mean that the specific form taken by national measures adopted in this context is not to be examined with respect to their effects on other legal positions protected under Community law.

65. It may be seen from the order for reference that the present case concerns the Community law requirement of equal treatment of men and women in connection with access to employment.

66. It should therefore first be ascertained below what requirements Community law contains as to equal treatment of the sexes and what fields of application they define in each case. If the form taken by a general military service obligation such as that in Germany falls as regards its effects within the scope of a provision of Community law thus ascertained and if those effects are contrary to Community law, it should then further be examined whether the breach of equal treatment is perhaps covered by a derogation provided for in the provision of Community law itself and might thus be permissible, or could finally — in the case of indirect discrimination — be justified.

67. In accordance with the national court's question as reformulated,[25] Articles 3(2) EC, 13 EC and 141 EC and Directive 76/207 should be examined in this respect in the present case.

2. Provisions of the EC Treaty

68. The requirement laid down in Article 3(2) EC of eliminating inequalities between men and women and promoting equal treatment of the sexes is to be observed only in connection with actions of the Community. However, compulsory military service is a national measure. Since the national legislature is not an addressee of this provision, Article 3(2) EC is not in itself a criterion of assessment.[26]

69. Article 13 EC merely contains a basis of competence for the Community legislature, and that only 'within the limits of the powers conferred by [the Treaty] upon the Community'. This mere basis of competence cannot thus in itself give rise to any rights to equal treatment of men and women beyond the existing secondary law.

25 — See point 20 above.

26 — That does not, however, exclude reference to it in the interpretation of secondary law; see in particular point 105 below.

70. Article 141(1) EC (formerly Article 119(1) of the EC Treaty), according to settled case-law of the Court,[27] gives a direct entitlement to equal treatment of men and women. However, it is applicable only in questions of equal 'pay', not where equal access to paid employment is concerned. From Article 141(2) EC, which contains a definition of 'pay', it is apparent that the discrimination alleged in the present case in connection with access to the civilian labour market is not covered by Article 141. Article 141(4) EC admittedly relates generally to 'ensuring full equality... between men and women in working life'. That provision, however, contains merely a clarification as regards the possibility of maintaining or adopting sex-specific advantages in the legal systems of the Member States. As regards Article 141(3) EC, what was said above in relation to Article 13 EC applies by analogy. That provision too merely contains a basis of competence for the creation of Community law measures concerning equal treatment for men and women in matters of employment and occupation.[28]

71. The conclusion must therefore be that neither Article 3(2) EC nor Article 13 EC nor Article 141 EC precludes a national obligation of military service for men only.

3. Directive 76/207

72. It must first be examined whether the form taken by compulsory military service or its effects fall within the material scope of Directive 76/207. Only if that is the case will the question of discrimination on grounds of sex have to be considered.

(a) Whether compulsory military service must itself be regarded as 'employment' within the meaning of Article 3(1) of Directive 76/207

73. Several parties raised the question whether Directive 76/207 is applicable to compulsory military service at all. It was doubted whether activities in connection with military service could be regarded as 'employment' within the meaning of Article 3(1) of Directive 76/207. Since compulsory military service is a unilateral civic duty imposed by authority with no entitlement to pay, this could indeed be doubtful.

27 — Case 43/75 *Defrenne* [1976] ECR 455.

28 — The amendment to Directive 76/207 which has recently come into force is therefore based on Article 141(3) EC; see note 49.

74. It may be observed to begin with that the Court has already ruled that the public-law nature of a service relationship does not in itself constitute a ground for not applying Directive 76/207.[29] In my opinion, however, that is not the problem. however, the material scope of Directive 76/207 is undoubtedly engaged in principle.

(b) Whether the effects of compulsory military service on access by men to the civilian labour market are covered by the material scope of Directive 76/207

75. That is because the context in which Directive 76/207 speaks of 'jobs' and 'posts' should be borne in mind. Article 3 is intended as protection against discrimination on grounds of sex in connection with 'access' to employment. Mr Dory's submissions do not concern an allegation of discrimination on grounds of sex in access to military service. According to the order for reference, the proceedings are also not concerned with whether the lack of access of women to military service may be a disadvantage to them if they wish, for instance, to pursue a career as a professional soldier.[30]

77. It must first be ascertained what consequences compulsory military service has or may have for access of men to the civilian labour market. During the performance of military service, access to the labour market is prohibited altogether in practice, simply because of the duty of attendance. It cannot therefore be doubted that during that period men — unlike women of the same age — in principle have no 'access to employment' at all, in the sense of civilian employment. After military service, access to the labour market exists without restriction, but access for men who have performed military service is delayed compared to equivalent women of the same age.[31]

76. Mr Dory's argument relates, rather, to the alleged effects of compulsory military service on access by men to the civilian labour market after they have completed their military service. In relation to aspects of access to the civilian labour market,

78. Before examining whether those positions, different from that of women, as regards access to the civilian labour market

29 — *Sirdar*, cited in note 11, paragraph 17, *Kreil*, cited in note 5, paragraph 18, and *Schnorbus*, cited in note 6, paragraph 28; Case 248/83 *Commission* v *Germany* [1985] ECR 1459, paragraph 16, and Case C-1/95 *Gerster* [1997] ECR I-5253, paragraph 18.

30 — Probably for this reason, Finland created the possibility of voluntary military service for women; see point 41 above.

31 — This general conclusion applies regardless of any national measures which compensate or are intended to compensate for such delays (for example, in the field of social security).

are 'discrimination' within the meaning of Directive 76/207, the general question first arises of whether Article 3(1) of Directive 76/207 covers only national measures which are aimed at regulating access to employment, or also those which merely have or may have an effect on access to employment without being aimed at regulating access. The temporarily prohibited and subsequently delayed access of men to the civilian labour market complained of in this case is not the content of the WPflG but rather a consequence of it.

(i) The Court's case-law in relation to national measures aimed at regulating access to the labour market

79. In its case-law on Directive 76/207 the Court has so far mainly examined national measures whose content was a — directly sex-specific — regulation of access to particular employment. [32]

80. In the *Kreil* and *Sirdar* judgments [33] too, a corresponding relationship may be seen between the measure to be assessed in the light of the directive and the situation in relation to which an instance of unequal treatment manifests itself, different from the one in the present case. Those two cases concerned access to service in the armed forces, in other words specific prohibitions of employment, and in both cases measures whose content directly regulated access to that service had to be assessed by reference to the directive.

81. In the case of direct sex-specific prohibitions of access, however, the material scope of Directive 76/207 is beyond doubt.

82. The Court has also recognised sex-specific quotas [34] for admittance to certain fields of employment as falling within the scope of Directive 76/207. These too, however, were national measures which were clearly directed to regulating access to a particular labour market in each case, so that the material scope of Directive 76/207 was beyond doubt here too.

83. In *Schnorbus* [35] the Court had to deal with unequal treatment with respect to access to vocational training (Article 4 of Directive 76/207). In that case the unequal

32 — For example, Case C-345/89 *Stoeckel* [1991] ECR I-4047 concerning a prohibition of nightwork for women only.

33 — *Sirdar*, cited in note 11, and *Kreil*, cited in note 5. *Sirdar* concerned decisions preventing access of women to certain marine commando units and *Kreil* statutory provisions by which women were excluded generally from armed service in the armed forces.

34 — Case 318/86 *Commission* v *France* [1988] ECR 3559.

35 — Cited in note 6.

treatment consisted in the fact that men who had completed military or substitute service had preference over other candidates or were admitted to vocational training more quickly. Since the regulation of admittance to vocational training was the national measure which had to be tested for discrimination, as it was the basis of the unequal treatment, the material scope of Directive 76/207 was again beyond doubt in view of the content of the national measure. [36]

(ii) The Court's case-law relating to national measures whose effect is differences of access to the labour market

84. I should like to base my discussion of whether a national measure also falls within the material scope of Directive 76/207 if it is not directed to regulating access to the labour market, but nevertheless has or may have the effect of differences of access, on the Court's judgments in three cases. These are the judgments in *Jackson and Cresswell* [37] and *Meyers* [38] on the one hand, and the *Schnorbus* [39] judgment on the other. Although these cases differ in content, they appear to me to share a common point of view as regards the scope of Directive 76/207.

The Jackson and Cresswell and Meyers cases

85. In both cases the women applicants in the main proceedings were concerned as to the conditions for entitlement to State social benefits in favour of persons who did not belong to the regular labour market. It was claimed that those conditions for entitlement had the consequence that single parents (who are generally mothers) were disadvantaged as regards access to the regular labour market.

86. The Court held in paragraph 28 of the *Jackson and Cresswell* judgment: [40]

'Nevertheless, such a scheme will fall within the scope of that directive only if

36 — One could also mention: Case 184/83 *Hofmann* [1984] ECR 3047, which concerned maternity leave which only women were entitled to. Since this was a measure aimed directly at the regulation of 'working conditions' under Article 5 of Directive 76/207, the applicability of the directive was equally obvious. The national provision which was the subject of the *Marshall* case (cited in note 10) — on which Mr Dory also *inter alia* relies — concerned the automatic termination of employment relationships when the age threshold, which differed between the sexes, for an old-age pension was reached. There too the national measure was thus directed at the regulation of 'working conditions' under Article 5 of Directive 76/207.

37 — Joined Cases C-63/91 and C-64/91 *Jackson and Cresswell* [1992] ECR I-4737.

38 — Case C-116/94 *Meyers* [1995] ECR I-2131.

39 — Cited in note 6.

40 — Cited in note 37.

its subject-matter is access to employment, including vocational training and promotion, or working conditions.'

In paragraph 30 the Court then concluded:

'Consequently, the assertion that the method of calculating claimants' actual earnings, which are used as the basis for determining the amount of the benefits, might affect sole mothers' ability to take up access to vocational training or part-time employment, is not sufficient to bring such schemes within the scope of Directive 76/207.'

87. In paragraph 13 of *Meyers*[41] the Court held, referring to the above judgment:

'... the directive is not rendered applicable simply because the conditions of entitlement for receipt of benefits may be such as to affect the ability of a single parent to take up employment...'.

41 — Cited in note 38.

The Court then went on to examine the characteristics of the social benefit at issue, and came to the conclusion in paragraph 21:

'That being so, family credit is concerned with access to employment, as referred to in Article 3 of the directive.'

88. It might then be thought that the Court interpreted the material scope of Directive 76/207 narrowly in those two judgments, and ruled that it is not applicable in the case of — certain — national measures which are merely capable of producing restrictions on access to employment without having such access as their content ('subject-matter'). In this respect there are obvious parallels with the national obligation of military service for men only — that too results in sex-specific differences in access to the labour market, but its 'subject-matter' is quite different, however, namely the guaranteeing of external security.

89. It appears doubtful, however, whether the Court in fact laid down a general principle in that comprehensive sense in *Jackson and Cresswell*.

90. The contrary is suggested, first, by the fact that that interpretation of the material

scope of Directive 76/207 in those cases was connected with the fact that the main proceedings concerned social security benefits which were alleged to take a form which resulted in discrimination against women in connection with access to the labour market. Benefits which originate in the field of social security are, however, according to the Court's case-law, [42] excluded from the scope of Directive 76/207 under Article 1(2) of the directive. [43] That exclusion is in turn interpreted strictly by the Court, in accordance with general principles. The result is that the Court starts by giving a broad interpretation to the scope of Directive 76/207, seen in this way. Thus it concludes that a national measure which as regards its origin is a social security benefit *nevertheless* — but *only then* — falls within the scope of Directive 76/207 if its 'subject-matter' is one of the areas covered by the directive, that is to say, access to employment, including vocational training and promotion, or working conditions. Ultimately, therefore, the Court adopted a narrow interpretation not only of the exception but also of the rule, namely which measures are in fact covered by the scope of the directive.

91. What the Court did not formally examine in those judgments is the general question — to be kept separate from the question of a measure's origin in the field of social security — whether national measures which *have the effect* of making access to employment different and hence more difficult according to sex, although access to employment is not their 'subject-matter', fall within the scope of the directive.

92. Although the cited case-law of the Court does not compel an (ultimately) narrow interpretation of the material scope of Directive 76/207, I nevertheless consider that such an interpretation may be justified. The Court makes it clear, conversely, that for a national measure to be outside the scope of the directive, regardless of its (formally) belonging to a social security system, only the content of the national measure is relevant. It delimits equally clearly, however, the content of the measure which it reserves for examination by reference to the directive. Precisely because it proceeds, in accordance with its case-law, from a narrow interpretation of an exception, a national measure *cannot* be tested against Directive 76/207 *only* if falls within *none* of the fields mentioned in Articles 3 to 5 of the directive.

93. Directive 76/207 focuses on the 'classic' sex-specific restrictions of those fields. Thus Article 3(2)(c) evidently concerns the abolition of national provisions which

42 — Case 192/85 *Newstead* [1987] ECR 4753.

43 — 'With a view to ensuring the progressive implementation of the principle of equal treatment in matters of social security, the Council, acting on a proposal from the Commission, will adopt provisions defining its substance, its scope and the arrangements for its application.'

regulate (in a sex-specific way) access to 'typical' women's or men's occupations (the same is true of Article 5(2)(c) with respect to working conditions). The list of exceptions in Article 2(2) to (4) also shows that the directive is in principle directed to eliminating national measures which are aimed at regulating access to employment, vocational training or working conditions. There is no indication in the directive, on the other hand, that national measures which are not aimed at regulating the fields covered but merely have the effect of creating differences there are also to be subject to examination.

The Schnorbus case

94. It seems to me that the Court also adopted a comparable approach — regardless of the other conditions — in its judgment in *Schnorbus*. [44] The subject of its examination by reference to the directive with respect to access to practical legal training was not the provisions on compulsory military service as such but rather the provisions which 'govern the circumstances in which the admission of applicants to practical legal training may... be delayed...'. [45]

95. At the level of access to practical legal training, that is, in the particular case the level of access to civilian employment, [46] the Court examined the measure which directly regulated the conditions of the access in question, since only that measure regulated 'access to employment' within the meaning of the directive. At the level of 'access to employment' the measure whose subject-matter was the regulation of access referred to compulsory military service, however, only as an example of the 'completion of compulsory service'. Compulsory military service was thus clearly a condition for the measure, but was not itself subject to examination by reference to the directive, since it did not itself regulate 'access to employment' within the meaning of Directive 76/207. The Court thus did not even have to consider the sixth question referred in *Schnorbus*. [47]

96. Here too the Court clearly proceeded — albeit not expressly — in this respect from a concept of the scope of Directive 76/207 according to which national measures which merely have the effect of restricting access to vocational training but do not regulate it as their 'subject-matter' are outside the scope of the directive.

97. This appears logical, in the light of the above considerations, since the unequal treatment to be examined was a consequence of compulsory military service, not its 'subject-matter'.

44 — Cited in note 6.

45 — *Schnorbus*, cited in note 6, paragraph 28.

46 — *Schnorbus*, cited in note 6, paragraph 29.

47 — See point 40 above.

Preliminary conclusion

98. I am therefore of the opinion that the material scope of Directive 76/207 must for the above reasons be limited in principle to national measures whose 'subject-matter' is the regulation of working conditions or access to employment or to vocational training.

99. In my opinion, therefore, in connection with compulsory military service from the point of view of access to the normal labour market, where Mr Dory considers himself discriminated against in the present case, the only provisions to be tested against Directive 76/207 are those which have the conditions of access to civilian employment as their 'subject-matter', such as compensatory measures, as in *Schnorbus*, which use the completion of compulsory military service as an (objective) distinguishing criterion.

100. Compulsory military service as such, on the other hand, is in a sufficiently direct relationship to the question of equal treatment to raise a question of discrimination under Directive 76/207 only with respect to access to posts in a professional army. [48] In other words, compulsory military service can enter the scope of the directive only in so far as discrimination on grounds of sex is concerned in connection with access to employment in the armed forces, not to employment in the ordinary labour market.

(iii) The possible relevance of Article 3(2) EC in the interpretation of the material scope of Directive 76/207 in relation to national measures which have sex-specific effects on access to the labour market

101. The above considerations do not, however, justify the conclusion that any purported 'subject-matter' of a national measure would be capable of removing altogether from review by reference to Directive 76/207 a measure which merely has the effect of thus producing sex-specific disadvantages in access to the labour market.

102. That is because, in my opinion, in interpreting the scope of Directive 76/207, Article 3(2) EC must now also be taken into account. That provision of primary law was not yet in force at the time when the directive was drawn up. However, the Community is now expressly required by

48 — See point 75 above.

that provision actively to promote equality between men and women.

103. As regards the scope of Article 3(2) EC, it may be seen that it applies to the Community's 'activities referred to' in Article 3(1) EC. Community law concerning the equal treatment of men and women in access to employment may be regarded as 'social policy' within the meaning of Article 3(1)(j) EC.[49] As regards the 'activities referred to', Article 3(2) EC imposes an obligation on 'the Community'. That presumably includes the Court when dealing, in connection with a reference for a preliminary ruling, with the interpretation of secondary law in the field of social policy.

104. As to content, Article 3(2) EC obliges the Community to 'promote' equality of men and women. It appears scarcely compatible with that requirement of promotion to interpret the material scope of Directive 76/207 so that national measures (with sex-specific consequences for access to the labour market) were always exempted from review by reference to the directive if the Member State could simply put forward any — other — 'subject-matter' to justify them.

105. In my view, it follows from the requirement to promote equality in Article 3(2) EC that an interpretation of the material scope of Directive 76/207 such as that put forward above[50] requires the following clarification: These national measures should initially be excluded from the scope of the directive only if they are shown to have *exclusively* a 'subject-matter' other than access to employment, including vocational training and promotion, or working conditions. National measures of the kind referred to which, for example, pursue as it were as a secondary aim a sex-specific regulation of access to the labour market would thus indeed be covered by the scope of Directive 76/207. In addition, it could be considered whether the alleged 'subject-matter' of the national measure in question ought not also to be made amenable to some extent to a *review of content* by reference to the aims of Article 3(2) EC, at least where that 'subject-matter' concerns one of the fields referred to in Article 3(1) EC.[51] It might have to be examined here whether and to what extent the 'subject-matter' was consistent with the promotion requirement in

49 — Directive 76/207 was adopted on the basis of Article 235 of the EC Treaty. The directive which has just entered into force (5 October 2002), Directive 2002/73/EC of the European Parliament and of the Council of 23 September 2002 amending Council Directive 76/207/EEC 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 2002 L 269, p. 15), was adopted on the basis of Article 141(3) EC. That article is part of Title XI, Chapter 1, 'Social provisions'.

50 — See point 98 above.

51 — For clarity, I point out again that this is not intended to assert that the requirement of promotion in Article 3(2) EC is aimed at national measures. The above considerations relate to the 'subject-matter' of national measures only in so far as it is the relevant criterion for the applicability of secondary law on equal treatment of the sexes.

Article 3(2) EC. Review of the content of the alleged 'subject-matter' would be ruled out, however, if it as such were not covered by Community law at all.

(iv) Application of the above considerations on the material scope of Directive 76/207 to national compulsory military service for men only

106. Applied to the present case, that means the following. The national obligation of military service for men only produces the effect of access to the labour market which differs according to sex.

107. Since, according to submissions which are not in dispute in this respect, national compulsory military service for men only has a subject-matter other than access to employment, including vocational training and promotion, or working conditions — namely the guaranteeing of the external security of Germany by means of a specific form of organisation of the armed forces — this national measure is in principle outside the material scope of Directive 76/207.

108. National compulsory military service for men only serves, according to submissions which are not in dispute in this respect either, *exclusively* for guaranteeing external security. Guaranteeing national external security is — as described above [52] — as such *not covered by Community law*, so that the narrow interpretation of Directive 76/207 is compatible in the present case with Article 3(2) EC.

(c) Conclusion

109. If a national obligation of military service for men only does not therefore fall within the material scope of Directive 76/207 despite its effects on the access of men to the labour market, there is no need for any further examination by reference to the directive with respect to whether there is discrimination or whether it may be justified.

110. In conclusion, it must therefore be stated that Directive 76/207 does not preclude a national obligation of military service for men only, such as that at issue in the main proceedings.

52 — See point 63 above.

VI — Conclusion

111. In the light of the foregoing, I propose that the Court give the following answer to the question as reformulated:

Articles 3(2) EC, 13 EC and 141 EC 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 are to be interpreted, as Community law now stands, as not precluding a national provision such as the German obligation of military service which applies to men only.