OPINION OF ADVOCATE GENERAL LA PERGOLA

delivered on 18 May 1999 *

The questions submitted for preliminary ruling

1. The present case concerns alleged sex discrimination in recruitment to a select corps of the United Kingdom's armed forces. Six questions have been referred to the Court for a preliminary ruling on the scope of the EC Treaty in general and, more specifically, on the interpretation of Article 224 of the EC Treaty (now Article 297 EC) and Article 2(2) of Directive 76/207/EEC (hereinafter 'the Directive'). [1] In particular, the Industrial Tribunal, Bury St Edmunds, requests the Court to indicate whether a policy — which, for reasons dictated by the need to ensure the combat effectiveness of the armed forces during peace time and/or in preparation for war, excludes recruitment of women by the armed forces in general or by a select marine commando corps which is rigorously structured, as regards its organisation and its activities, on the principle of 'interoperability' [2] — falls *tout court* outside the scope of the EC Treaty and the Directive, or, in the alternative, falls outside the scope of the Directive by virtue of Article 224, or, in the further alternative, may be justified on the basis of the derogation set out in Article 2(2) of the Directive. The Industrial Tribunal has referred the following questions to the Court for a preliminary ruling:

'1. Are policy decisions which a Member State takes during peace time and/or in preparation for war in relation to access to employment in, vocational training for, working conditions in, or the deployment of its armed forces where such policy decisions are taken for the purposes of combat effectiveness outside the scope of the EC Treaty and/or its subordinate legislation, in particular Council Directive 76/207/EEC?

2. Are the decisions which a Member State may take in preparation for war and during peace time with regard to the engagement, training and deployment of soldiers in marine commando units of its armed forces designed for close engagement with enemy forces in the event of war outside the scope of

* 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 — According to the British Ministry of Defence, 'interoperability' may be summarised as the ability of an individual to perform more than one task. In the case of amphibious infantry commandos, this means being able to function as an army operative with a specific qualification (for example, as a chef) and as a full commando soldier (see paragraph 2 of the order for reference).

the EC Treaty or its subordinate legislation where such decisions are taken for the purpose of ensuring combat effectiveness in such units?

3. Does Article 224 of the EC Treaty [now Article 297 EC], on its proper construction, permit Member States to exclude from the ambit of Council Directive 76/207/EEC discrimination on grounds of sex in relation to access to employment, vocational training, working conditions, including the conditions governing dismissal, in the armed forces during peace time and/or in preparation for war for the purpose of ensuring combat effectiveness?

4. Is the policy adopted by a Member State of excluding all women during peace time and/or in preparation for war from service as interoperable marines capable of being excluded from the ambit of Council Directive 76/207/EEC by virtue of the operation of Article 224 [of the EC Treaty, now Article 297 EC]? If so, what guidelines or criteria should be applied in order to determine whether the said policy may properly be so excluded from the ambit of Directive 76/207/EEC by reason of Article 224 [of the EC Treaty, now Article 297 EC]?

5. Is the policy adopted by a Member State of excluding all women during peace time and/or in preparation for war from service as interoperable marines capable of being justified under Article 2(2) of Council Directive 76/207/EEC?

6. If so, what is the test to be applied by a national tribunal when considering whether or not the application of the policy is justified?'

The relevant provisions of Community law

2. Under Article 224, 'Member States shall consult each other with a view to taking together the steps needed to prevent the functioning of the common market being affected by measures which a Member State may be called upon to take in the event of serious internal disturbances affecting the maintenance of law and order, in the event of war, serious international tension constituting a threat of war, or in order to carry out obligations it has accepted for the purpose of maintaining peace and international security.'

The relevant provisions of the Directive are as follows: Article 2(1), which provides that 'For the purposes [of the Directive], the principle of equal treatment shall mean that there shall be no discrimination whatsoever on grounds of sex either directly or

indirectly'; Article 2(2), which states that 'This Directive shall be without prejudice to the right of Member States to exclude from its field of application those occupational activities and, where appropriate, the training leading thereto, for which, by reason of their nature or the context in which they are carried out, the sex of the worker constitutes a determining factor'; Article 3(1), according to which '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 access to all jobs or posts, whatever the sector or branch of activity, and to all levels of the occupational hierarchy'; and Article 9(2), which provides that 'Member States shall periodically assess the occupational activities referred to in Article 2(2) in order to decide, in the light of social developments, whether there is justification for maintaining the exclusions concerned. They shall notify the Commission of the results of this assessment'.

The facts of the main proceedings and the relevant national legislation

3. Mrs Sirdar was employed as a chef in the British Army in 1983, when she was 17 years old, and had been posted since 1990 to 29 Commando Regiment of the Royal Artillery (although not serving in a combative role). In February 1994 she was served with notice of redundancy to take effect one year thence. This redundancy, which at the time affected more than 500 chefs in the armed forces, formed part of the planned reduction in defence costs. There was, however, a shortage of chefs in the Chefs branch of the Royal Marines, and Colonel Brook, their deputy chief of staff logistics, invited those affected by the defence cuts to apply for transfer to the Royal Marines, which applications would, however, be conditional on the persons concerned passing an initial selection board and completing a training course. A standard letter to this effect was sent on 19 July 1994 by Colonel Brook to Mrs Sirdar, whose name was included on the list of those about to be made redundant. Shortly after sending that letter, Colonel Brook received information from 29 Commando Regiment that the candidate to whom the offer of transfer had been made was in fact a woman. In view of the fact that the Royal Marines do not admit women within their ranks (for reasons which will be explained below), Colonel Brook informed Mrs Sirdar that the letter offering transfer had been sent in error and that her application could for that reason not be considered. Mrs Sirdar's service was terminated on 28 February 1995. She thereupon instituted proceedings before the Industrial Tribunal claiming that she had been the victim of unlawful discrimination on grounds of sex.

4. During the main proceedings, the Secretary of State for Defence and the Army Board argued that the refusal to accept Mrs Sirdar, which resulted from a Ministry of Defence policy of excluding women from the Royal Marines in order to ensure the latters' combat effectiveness, ought to be treated as lawful as being based on the present wording of section 85(4) of the Sex Discrimination Act 1975 (hereinafter 'the SDA'). That provision, which sets out a derogation from the general principle of equal treatment for men and women, is worded as follows: 'Nothing in this Act shall render unlawful an act done for the

purpose of ensuring the combat effectiveness of the naval, military or air forces of the Crown'. [3]

The Royal Marines and the principle of interoperability

5. The select corps of the Royal Marines consists of some 5 900 soldiers, equivalent to approximately 2% of the United Kingdom's total armed forces. The Royal Marines constitute the landing force component of the United Kingdom's amphibious forces. According to Colonel Wilson, one of their commanding officers, 'the characteristics of this brigade size landing force are that it is a flexible, militarily balanced form of amphibious infantry, commando trained, mobile, at high readiness and able to operate in extremes of environment across the spectrum of military operations'. [4] In substance, the Royal Marines, a small force, are the point of the arrow head of the United Kingdom's armed forces and have the task of intervening first, particularly as commando infanteers.

6. According to the Ministry of Defence, the principle of interoperability is sufficient justification for the Royal Marines' refusal to employ Mrs Sirdar: the presence of women in that corps would, it is claimed, hinder interoperability and, consequently, the combat effectiveness of units. Interoperability, which informs in every aspect the organisation and activity of the Royal Marines, has been described by Colonel Wilson as a dual ability of the soldiers to whom it applies: first, the ability 'of an individual, regardless of specialisation [such as being a chef], to carry out a range of tasks within a formation, at short notice'; second, that (which represents the very essence of this concept) 'of an individual, regardless of specialisation, to be able to fight as an infanteer'. 'In this connection' — Colonel Wilson adds — 'all Royal Marines, officers and men, are trained as commando infanteers'. [5] In essence, it is not possible to join the Royal Marines solely to serve as a chef or in any other specialisation. By virtue of his training (which is identical to that of all Marines), the Royal Marines chef is also, and primarily, a commando infanteer.

7. According to the order for reference, the principle of interoperability is in fact

3 — The amended text of section 85(4) was inserted by the Sex Discrimination Act 1975 (Application to Armed Forces etc.) Regulations of 20 December 1994 (SI 1994/3276; hereinafter 'the SDA Regulations') pursuant to the obligations under the Directive. Prior to this amendment, the effect of section 85(4) previously in force was to bring the armed forces completely outside the scope of the SDA.

4 — See paragraph 14 of the order for reference. In view of their characteristics, the Royal Marines form part of NATO's Rapid Reaction Force. The Industrial Tribunal also states that the Royal Marines operate in small tactical units ('fire teams') consisting of a few men working in pairs and thereby achieving the maximum degree of team spirit.

5 — See paragraph 18 of the order for reference. Colonel Wilson goes on to state that 'The main reason why interoperability is of such fundamental importance to the Royal Marines is connected with its primary role of conducting amphibious operations. Once the Brigade has landed across the beaches, possibly on a hostile shore, it has to fend for itself until a lodgement is secured and follow-on forces arrive. The interior lines normally available to the Army, and over which an Army can reinforce and re-supply itself quickly, are not available to an amphibious force landed from the sea. Therefore the amphibious force must be self-contained and must rely on its own resources. Thus every Royal Marine in the brigade must be able to fight, wherever he may encounter the enemy, again demonstrating interoperability' (see paragraph 23 of the order for reference).

applied consistently and in every situation. The Industrial Tribunal refers, for example, to the case of the chefs from the Royal Marines Chefs branch who were actively engaged in fighting in the Falklands and some of whom were killed. Even those belonging to Royal Marines 'static units' (units not in active service) are required to maintain a high level of physical fitness and to take thrice annually a Marine Basic Fitness Test designed to ascertain their physical fitness.[6] On the basis of the evidence provided to it by the Ministry of Defence, the Industrial Tribunal concludes (in regard to the principle that all Royal Marines are liable to serve as infanteers anywhere) that 'the evidence is overwhelmingly that: (a) It happens in practice; (b) The Royal Marines are organised and trained on that basis and no other; (c) All men are recruited towards that end (We note in passing that we are concerned — on the agreed facts of the case — with the *recruitment* of an army chef into the Royal Marines); (d) There are *no* exceptions at the time of *recruitment*'.[7]

The substance

8. In light of the facts in the case before it, the Industrial Tribunal has stated that it thought it more appropriate to formulate the first four of the six questions submitted for a preliminary ruling by distinguishing the case of access to the armed forces in general (first and third questions) from that specifically concerning access to a select infantry commando corps (second and fourth questions). Essentially, however, all four of these questions present the Court with two problems, the solution to which cannot, in my view, differ according to whether the discrimination of the persons concerned on grounds of sex relates to the armed forces in general or solely to one corps within them. What the Court is really being asked is whether: (a) employment in the armed forces, either in those forces as a whole or in a special corps, is, by its very nature, outside the scope of the EC Treaty and the rules derived therefrom, or (b) it is Article 224 which allows Member States to exclude such employment — here too, either for those forces as a whole or for specific units or select corps — from the scope of the Directive specifically intended to guarantee equal treatment for men and women in regard to access to employment.

6 — The reasons why every Royal Marine, irrespective of specialisation, is required to maintain optimum physical condition are set out in a report entitled 'Revised Employment Policy for Women in the Army — Effect on the Royal Marines' published on 10 June 1994 (a few weeks before Colonel Brook wrote to Mrs Sirdar inviting her to apply for a transfer): '2(b) *Interoperability*. In a small corps, in times of crisis and manpower shortage, all Royal Marines must be capable at any time of serving at their rank and skill level in a commando unit. Manpower reallocation procedures require up to 1 150 men and officers to be re-deployed from training base, base and headquarters units to commando units and as battle casualty replacements when manning to meet major crises. Employment of women in the Royal Marines will not allow for interoperability' (see paragraph 42 of the order for reference).

7 — See paragraph 44 of the order for reference (underlining in the original). It should be pointed out that, according to the submissions of Mrs Sirdar, which have not been challenged by the United Kingdom Government, the sole exception at the time of recruitment appears to relate to the members of the military band of the Royal Marines, to which women are admitted and to which the rule of interoperability does not therefore apply.

The first and second questions refer to the problem indicated above under (a), the third and fourth to that under (b). I shall therefore examine together, on the ground that they are, as I have stated, connected, the questions contained in each of the groups just described.

The first and second questions

9. By its first two questions, the Industrial Tribunal is in essence asking the Court whether decisions on the conditions of employment in, including access to, the armed forces or one of their select corps, adopted by a Member State for the purpose of combat effectiveness, during peace time and/or in preparation for war, must be treated as falling outside the scope of the EC Treaty and of secondary law.

10. The United Kingdom Government, which, together with Mrs Sirdar, the French and Portuguese Governments and the Commission, has submitted observations, argues that Article 224 necessarily implies that such decisions fall outside the scope of the EC Treaty. The French and Portuguese Governments submit that the activities of the armed forces are intimately linked to the concept of sovereignty, which the Member States have, in accordance with the EC Treaty, 'shared' only in certain areas other than defence. Defence, therefore, remains within their exclusive competence [8] and the present case, which concerns defence, cannot be decided by reference to the case-law in which the Court considered the problem of equal treatment of men and women in relation, not to the armed forces, but to that of the police and internal security, [9] which, those Governments note, are matters entirely different from the external defence of the State. The French Government goes on to argue that the armed forces fall entirely outside the scope of the EC Treaty by virtue of Article 48(4) (now, after amendment, Article 39(4) EC), which excludes those employed in the public service from the scope of freedom of movement for workers guaranteed by the Treaty. Mrs Sirdar replies by pointing out that the decision to exclude women from the armed forces in order to ensure the latters' combat effectiveness cannot be treated as falling outside the ambit of the provisions of the EC Treaty or the Directive. Such a result, she argues, is not envisaged by any specific provision therein and cannot be inferred from the Community legal order in general. As for Article 224, on which the United Kingdom relies in support of the opposite conclusion, Mrs Sirdar submits that this envisages, evidently and exclusively, exceptional cases which have no relevance in the present context. The matter which needs to be clarified at the outset is whether the Court's decision in *Johnston* can constitute a useful precedent for formulating and resolving correctly the questions in the present case. The answer to that question

8 — The French Government, in particular, takes the view that defence should be treated in the same way as the other functions traditionally reserved to States, such as justice, diplomacy, public finances and the *police*.

9 — Judgment in Case 222/84 *Johnston* v *Chief Constable of the Royal Ulster Constabulary* [1986] ECR 1651.

ought, in my view, to be in the affirmative, for reasons which I shall set out below.

11. *Johnston* concerned the exclusion of women from police functions involving the carrying of firearms. That measure had been adopted by the United Kingdom authorities for the purpose of safeguarding public order, under serious threat by reason of the particular situation in Northern Ireland. In that case, the United Kingdom Government, referring to a series of EC Treaty derogations in regard to public safety (Articles 36 (now, after amendment, Article 30 EC), 48, 56 (now, after amendment, Article 46 EC), 223 (now, after amendment, Article 296 EC) and 224), concluded that neither the EC Treaty nor the law derived from it could have applied to the matter under consideration. [10] The Court, however, decisively rejected that argument in the following terms: 'it is not possible to infer from [the specific derogations in the EC Treaty, which are exceptional in nature] that there is inherent in the Treaty a general proviso covering all measures taken for reasons of *public safety*. If every provision of Community law were held to be subject to a general proviso, regardless of the specific requirements laid down by the provisions of the Treaty, this might impair the binding nature of Community law and its uniform application'. [11]

12. Such a clear and persuasive statement of the principle espoused by the Court covers, in my opinion, both the *external and internal* security of each Member State. I am unable to see why defence-related requirements should be raised to the status of a 'general proviso [inherent in the Treaty]' and thereby constitute a 'privileged' order in relation to the requirements of internal security, which the Court examined in *Johnston*, arriving at the above result. That is so on more than one ground. Since its judgment in *Costa* v *ENEL*, in particular, the Court has consistently rejected the contention that Member States have powers of general derogation inherent in the system of the Treaty: 'Wherever the Treaty grants the States the right to act unilaterally, it does this by *clear and precise* provisions (for example Articles 15 [repealed by the Treaty of Amsterdam], 93(3) [now Article 88(3) EC], 223, 224 and 225 [the latter now being Article 298 EC])'. [12]

13. Next, I would point out that the specific derogations relating to external security provided for by the Treaty are exceptional in their nature, *in the same way as* those concerning internal security. Thus, the derogations provided for under Articles 223 and 224 have a qualified exceptional character, in the sense that they are 'wholly exceptional' [13] and not simply 'exceptional', as are, in contrast, those provided for under Articles 36, 48(3) and 56(1). [14] In light of their nature, deroga-

10 — See paragraph 24 of the judgment.

11 — See paragraph 26 of the judgment (emphasis added).

12 — Judgment in Case 6/64 *Costa* v *ENEL* [1964] ECR 585, in particular p. 594 (emphasis added).

13 — *Johnston*, paragraph 27.

14 — The observation is from Advocate General Jacobs in his Opinion in the *Macedonia* case (point 46; order removing from the Register Case C-120/94 *Commission* v *Greece* [1996] ECR I-1513).

tions which are wholly exceptional ought, logically, to be subject to a *particularly* strict construction. It is, in any event, not valid to argue, merely because provision has been made for such derogations, that there is a general (State sovereignty) proviso underlying the EC Treaty. The Court has excluded this so far as internal State security is concerned. That should also be the case in regard to external defence and security. Apart from the *Johnston* case, the parallel relationship between the external and internal spheres of security appears in various regards to be clarified by the Court's own case-law (thus, for example, in relation to what is laid down in Article 36). [15] Significantly, it is precisely the text of Article 224 which places on a par the case of serious disturbances affecting the maintenance of law and order (to which the United Kingdom's defence in *Johnston* made reference) and that of war or serious international tension. [16]

14. I would add that, as Mrs Sirdar has pointed out, where the EC Treaty (see Article 48(4)) intended to exclude those employed in the public service, it has done so expressly, whereas there does not appear to me to be any rule (whether explicit, implicit or 'inherent') which excludes employment in the armed forces in general or in certain select corps from the scope of the EC Treaty or the Directive, save (where relevant) for the exception set out in Article 2(2) of that Directive (on which I shall dwell in what follows). For the rest, recognition of an implied general proviso would open the way for a potentially unlimited series of similar provisos, which would have the effect of highlighting yet further the negative effects on the cohesion and uniform application of Community law outlined by the Court in *Johnston*.

15. The United Kingdom, which is here arguing vigorously that the matter in issue falls outside the scope of the EC Treaty, has on a separate occasion demonstrated that it *expressly* recognises that not even employment in the armed forces falls outside the scope of Community law, in particular the Directive. The 1994 note accompanying the SDA Regulations, by which section 85(4) of the SDA was replaced pursuant to section 2(2) of the European Communities Act 1972, stated that it was necessary to amend the previous rule which excluded the armed forces entirely from the scope of that legislation, referring in this connection to the need to ensure 'that the 1975 Act accords with the obligations arising under

15 — Case C-367/89 *Richardt and 'Les Accessoires Scientifiques'* [1991] ECR I-4621, paragraph 22; Case C-70/94 *Fritz Werner Industrie-Ausrüstungen* v *Germany* [1995] ECR I-3189, paragraph 25; and Case C-83/94 *Leifer and Others* [1995] ECR I-3231, paragraph 26.

16 — Concerning the French Government's argument that the Member States have exclusive competence in relation to the functions, such as that of police, traditionally reserved to the Member States, I would also point out that, in line with *Johnston*, the Court, in its judgment in Case 318/86 *Commission* v *France* [1988] ECR 3559, had no hesitation in finding that the Directive applied to the active corps of the national police force (despite the fact that the French Government had stressed 'the fundamental requirement to maintain public order' (paragraph 21) and the need 'not to impair the proper performance of duties which serve public safety' (paragraph 22)) and the corps of prison officers (an activity involving regular contact with prisoners).

Council Directive 76/207/EEC ... *in relation to the armed forces of the Crown*'. [17] It should be noted in this connection that, like the United Kingdom, Belgium, [18] Denmark, [19] Greece, [20] Luxembourg [21] and the Netherlands [22] have taken the view that the Directive applies to employment in the armed forces, while provisions identical to those of the Directive apply in France. [23]

16. Next, I turn to the argument put forward by the French Government, to the effect that the subject-matter of the questions in this reference falls outside the scope of the EC Treaty by reason of Article 48(4), which excludes employment in the public service from the freedom of movement for workers. That is not a view which I share. As the Court has affirmed, 'it must be emphasised that both Directive 76/207 and Directive 75/117 [24] apply to employment in the public service. Like Article 119 of the EEC Treaty [Articles 117 to 120 of the Treaty have been replaced by Articles 136 EC to 143 EC], those directives are of general application, a factor which is inherent in the very nature of the principle which they lay down. New cases of discrimination may not be created by exempting certain groups from the provisions intended to guarantee equal treatment

17 — Explanatory Note accompanying the SDA Regulations (emphasis added). It seems to me that the very title of those Regulations ('Sex Discrimination Act 1975 (*Application to Armed Forces etc*) Regulations' is particularly significant. That Explanatory Note also states that 'the wording which appeared in [section 85(4), by which the armed forces were excluded from the scope of the Act] is now omitted *(so that the Act now applies to such service)*' (emphasis added). Next, I would point out that in 1991 the British Ministry of Defence acknowledged before the High Court that the policy which it had followed of discharging pregnant women from the army was contrary to the Directive, thereby acknowledging its relevance in relation to the armed forces (see Written Question E-2447/94 of 30 November 1994 put by Robin Teverson to the Commission, OJ 1995 C 81, p. 33). The policy of discharging pregnant women might also be regarded as necessary for the purpose of not jeopardising, to any extent whatsoever, the degree of combat effectiveness of the units to which those women belong, inasmuch as they are absent for a significant period of time and have to be replaced by other military personnel.

18 — A circular from the Ministry of Defence declares unequivocally that the Law of 4 August 1978 (implementing the Directive) is also applicable to military personnel.

19 — Article 13(1) of Law No 213 of 3 April 1978 implementing the Directive corresponds to Article 2(2) of the Directive itself and was applied for years by the Ministry of Defence with regard to the deployment of women in combat troop units and as fighter pilots. That derogation has not been used since 1993, from which date therefore women have been admitted to all sections of the Danish armed forces. It also follows from a recent NATO report that, by virtue of a new Law adopted on 19 February 1998, it is proposed that, with effect from 1 June 1998, there should no longer be any activities from which women are excluded in the Danish armed forces (see *Women in the NATO Forces — Year-In-Review 1998*, issued by the Advisory Office on Women in the NATO Forces, Brussels, 1998, pp. 14-16).

20 — Administrative case-law takes the view that a constitutional principle of non-discrimination resembling in all respects that provided for under the Directive applies to the armed forces and the police. On a number of occasions the Council of State has also directly referred to the Directive for the purpose of declaring illegal a ministerial decision setting annual quotas for the admission of women to military academies (see ΔΕΦΑΘ 2470/1991, ΣτΕ 2857/1993, ΣτΕ 1067/1994, ΣτΕ 744/1995 and ΣτΕ 870/1995).

21 — Following an action brought by the Commission under Article 169 of the EC Treaty (now Article 226 EC) (Case 180/86 *Commission* v *Luxembourg*, OJ 1986 C 215, p. 3; the case was subsequently removed from the Register), Luxembourg amended the provisions governing the organisation of its own armed forces which had proved to be at variance with the Directive (in particular, the rule providing that only men could serve as volunteers was repealed).

22 — Article 5(2) of the Wet gelijke Behandeling van Mannen en Vrouwen (Law on Equal Treatment of Men and Women) reproduces the wording of Article 2(2) of the Directive. A Ministry of Defence policy excludes women only from specific units such as submarine units and marine corps ('korps mariniers').

23 — While not expressly adopted to meet the obligations under the Directive, Article 6 of the Law of 13 July 1983 on the status of civil servants provides a derogation from the principle of equal treatment of men and women which is in all respects similar to that provided for under Article 2(2) of the Directive. That derogation also applies to the armed forces, and a decree of the Ministry of Defence of 29 April 1998 lists the posts in the armed forces and the gendarmerie which are not open to women (for the territorial army, in particular, it lists the posts involving the possibility of direct and prolonged contact with the enemy).

24 — 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).

of men and women in working life as a whole'.[25] The above decisions in *Johnston* (police force in Northern Ireland) and *Commission* v *France* (active units of the national police and prison officers),[26] in which the Court specifically applied the Directive to employment in the public service, are also in line with this case-law. That employment in the public service and in the armed forces in particular comes within the scope of the EC Treaty and secondary law is further confirmed by the wording of Article 3(1) of the Directive itself, which is extensive in its scope. The prohibition of discrimination on grounds of sex, which again is linked to the principle that men and women should be treated equally — one of the fundamental human rights —[27] is defined in Article 3(1) as being applicable '*whatever* the sector or branch of activity'; the only derogations are those provided for within the Directive itself. These include the derogation which features in Article 2(2).

17. I would, however, point out that Article 48(4) would not be applicable to Mrs Sirdar for two reasons. First, by reason of the purely internal nature of the (potential) employment: a woman of British nationality, who is not a migrant, has been refused employment in the United Kingdom. Second, the fundamental principle of equal treatment for men and women as regards access to employment derives from legislation (the Directive, adopted pursuant to Article 235 of the Treaty [now Article 308 EC]) forming part of the social policy of the European Community (Article 3(i) of the EC Treaty (now, after amendment, Article 3(i) EC)),[28] rather than part of the objective of an internal market characterised, *inter alia*, by the absence of obstacles to the free movement of persons (Article 3(c) EC) within the meaning of Article 48.

18. To what conclusion do the foregoing remarks lead me in regard to the first and second questions? That of rejecting the contention that employment in the armed forces, even in peace time, is a matter falling entirely and necessarily within national competence, by virtue of a general proviso vested in the Member States and underlying the EC Treaty itself: a matter in respect of which sovereignty is not 'shared' for the purposes of the process of integration. I shall explain below how the Directive has been used to bring the subject-matter here at issue within the Community legal system under the fundamental aspect of the guarantees linked to the equal treatment of men and women, subject to the derogation which Member States are recognised as having, in order to take proper account of those circumstances which they are entitled to assess. For

25 — Judgment in Case 248/83 *Commission* v *Germany* [1985] ECR 1459, paragraph 16.

26 — See also Case C-450/93 *Kalanke* v *Bremen* [1995] ECR I-3051, concerning the case of a horticultural technician in the Bremen Parks Department, and Case C-13/94 *P.* v *S. and Cornwall County Council* [1996] ECR I-2143, involving a manager with an educational establishment operated by the local area authority.

27 — The extensive case-law includes Case 149/77 *Defrenne* v *Sabena* [1978] ECR 1365, paragraph 27, Joined Cases 75/82 and 117/82 *Razzouk and Beydoun* v *Commission* [1984] ECR 1509, paragraph 16, and *P.* v *S.*, cited above, paragraph 19.

28 — Although the text of Article 3(i) EC differed from its present form when the Directive was adopted, it appears through time to have retained the substance of the objective at present pursued by the Community.

present purposes, it is the values of the rule of law, as well as those of national sovereignty, which have been 'shared' by those who drafted the Directive. This can be clearly inferred from the Court's judgment in *Johnston*. On the basis of what the Court held in that judgment, it follows that implementation of the principle of equal treatment for men and women is not subject to any general proviso in regard to measures adopted in peace time and/or in preparation for war which are necessitated by the need to ensure that the armed forces maintain their combat effectiveness.

The third and fourth questions

19. The problem posed by the third and fourth questions concerns the provisions of Article 224. The Court is requested to determine whether, on the basis of Article 224, the policy decisions concerning access to the armed forces which are the subject of the questions just considered may none the less be excluded from the ambit of the Directive.

20. The Portuguese Government discounts the possibility that the Article 224 derogation might be relevant to the present case. Exercise of the powers which the Member States are recognised as having under that article must be confined to situations which are quite exceptional and cannot apply to those cases where choices concerning the preparation and organisation of the armed forces, even if inspired by the preoccupation to ensure combat effectiveness, are made in a situation of normality. The United Kingdom and the Commission,[29] in contrast, argue that this case does come within the derogation provided for by Article 224. The power to adopt measures derogating from the EC Treaty 'in the event of war' applies, by necessary implication, also with regard to similar derogating decisions, in peace time but in preparation for war, which still serve the purpose of ensuring combat effectiveness; *a fortiori*, the United Kingdom notes — with reference to the words of Advocate General Jacobs in the *Macedonia* case — since 'war is by nature an unpredictable occurrence. The transition from sabre-rattling to armed conflict can be swift and dramatic'.[30] Mrs Sirdar, on the other hand, denies that Article 224 is in any way relevant to the present case, relying in this regard on a dual argument: (a) in *Johnston*, she submits, the Court qualified the derogation provided for by Article 224 as 'wholly exceptional' and, as such, not lending itself to an extensive interpretation (in this Mrs Sirdar shares the view taken by the Portuguese Government); (b) Advocate General Darmon, in *Johnston*, identified in Article 224 'a "safeguard clause" of general scope ... [which] applies only in the absence of special rules [such as Article 2(2) of the Directive]'.[31]

29 — This submission is, however, put forward by the Commission as an alternative to its main submission, in which it argues that Article 2(2) of the Directive, which is the subject of the last two questions, is applicable to this case. In its observations, the Commission follows the logical order of the reasoning in *Johnston*, in which the Court examined the question exclusively in the light of the Directive before declaring that it was not necessary to analyse the issue also on the basis of Article 224 (paragraph 60).

30 — Point 52 of the Opinion.

31 — See point 5 of the Opinion.

21. I agree with the observations made by the applicant in the main proceedings rather than with those of the intervening Governments and the Commission. In particular, fundamental importance seems to me to attach, for the examination which follows, to the Court's findings in *Johnston* to which Mrs Sirdar refers. Those findings distinguish clearly the case of derogations which are 'wholly exceptional' (Articles 223 and 224) from those which are merely 'exceptional' (Articles 36, 48 and 56). In addition, according to the principles laid down in *Salgoil*, the cases envisaged by Articles 223 and 224 are 'clearly defined and ... do not lend themselves to any wide interpretation'. [32] Those cases must therefore, necessarily, be strictly construed, in view of their 'qualified exceptional' nature and in view of the fact that, unlike the case in which derogations may be made from a specific aspect of the common market (for instance, Article 36 or Article 48(3)), Article 224 authorises derogations from the system of the common market in general. Having defined the criterion for the proper interpretation of the rule, I would point out that the cases envisaged by Article 224 concern temporary and non-permanent situations, but which are at the same time *crisis* situations, in the full and true sense, the occurrence of which represents a grave danger for vital interests, if not the very existence, of a Member State. [33] The United Kingdom itself adopted unilateral measures under Article 224 in a temporary situation of serious crisis which arose in 1982 when Argentine troops occupied the Falkland Islands, [34] a British overseas territory.

22. I agree with the argument put forward on this point by Mrs Sirdar, and with the similar argument of the Portuguese Government. In my opinion also, Article 224 cannot apply to policy decisions taken by the Member States with regard to engagement in the armed forces in situations which I might dare to describe as '*normal*', to distinguish them from those taken in the '*event of actual war*' or of '*serious* international tension constituting a threat of war'. It might be said that peace time is also

32 — Judgment in Case 13/68 *Salgoil* v *Italian Ministry for Foreign Trade* [1968] ECR 453, at III.2 (p. 463). To the same end, Advocate General Gand took the view in that case that the provisions of Article 224 'have a limited scope and cover a special situation. These are provisions authorising exceptions, which should be interpreted strictly, and which cannot be invoked to deny the existence of rights created by other provisions of the Treaty' (part IV of the Opinion, p. 470).

33 — According to J. Verhoeven, bearing in mind the text and spirit of Articles 223 and 224, it seems reasonable to take the view that Article 223 refers to the general measures which a State adopts in 'normal' times for the purpose of safeguarding its own security, whereas Article 224 refers to the *special* measures which prove necessary in *an actual crisis situation which has already developed* (see *Commentaire du Traité instituant la CEE*, edited by V. Constantinesco, J.-P. Jacqué, R. Kovar and D. Simon, Economica, Paris 1992, entry dealing with Article 224, point 2). According to P.J.G. Kapteyn and P. VerLoren van Themaat, the measures which Member States can adopt on the basis of Article 224 go far beyond those which can be adopted pursuant to Article 36, precisely in view of the *special* circumstances envisaged by Article 224 (see *Introduction to the Law of the European Communities*, Kluwer and Graham & Trotman, Deventer-London, 2nd edition, 1990, p. 406). Further, in the 'Megret Commentary', concerning Article 224, there is a reference to 'measures necessary in the event of *crises*' (various authors, *Le droit de la Communauté économique européenne*, University of Brussels, 1987, Vol. 15, p. 435), while the 'Quadri-Monaco-Trabucchi Commentary' refers to unilateral measures of 'strictly necessary duration' designed to deal with 'exceptional and particularly serious circumstances' (see R. Quadri, R. Monaco, A. Trabucchi, *Commentario al Trattato istitutivo della Comunità economica europea*, Giuffré, Milan, 1965, Vol. III, commentary on Article 224, pp. 1633 and 1634).

34 — See the second recital in the preamble to Council Regulation No 877/82 of 16 April 1982 suspending imports of all products originating in Argentina (OJ 1982 L 102, p. 1), which states that: '... following the measures already taken by the United Kingdom, the Member States have consulted one another pursuant to Article 224 of the [EC] Treaty establishing the European Economic Community'.

subject to the danger of disturbances. That is true: the preparation for war cannot, in practice, tolerate interruptions; after all, the Court has itself acknowledged that 'it is becoming increasingly less possible to look at the security of a State in isolation, since it is closely linked to the security of the international community at large, and of its various components'. [35] Specifically on this point, however, I would consider as unlawful, under the EC Treaty, the conduct of a Member State which adopts unilateral measures while sheltering behind Article 224, simply with a view to and in preparation for potential conflict. If the argument put forward by the United Kingdom and the Commission in this case were to be accepted, thereby providing justification for *any* unilateral measure *whatever* adopted by a Member State at *any* time *whatever* for the purpose of preparing its own armed forces for war, the situation envisaged by Article 224 as being wholly exceptional would, so to speak, be normalised and consequently treated as being nothing out of the ordinary. And that is not all. The risk, of which the Court expressed its apprehension in *Johnston*, that the binding force of Community law and its uniform application might be impaired would thereby be realised. [36]

23. As already mentioned, Mrs Sirdar has also cited the view taken by Advocate General Darmon in *Johnston*, to the effect that Article 224, in its capacity as a safeguard clause, constitutes 'the *ultima ratio* to which recourse may be had only in the absence of any Community provision enabling the demands of public order in question to be met'. [37] The fifth and sixth questions turn precisely on such a Community provision. The sagacious observation of Advocate General Darmon is thus also of practical significance for the purposes of the present case. Before passing on to those other questions, however, I would like to complete the analysis of the problem here under consideration by addressing another argument put forward by the French Government.

24. In reaching the conclusion that employment in the armed forces is excluded from the scope of the Directive, the French Government also employs certain remarks made by Advocate General Jacobs in the *Macedonia* case concerning the construction of Article 224 and of other principles enunciated by the European Court of Human Rights (hereinafter 'the ECHR') in interpreting Article 15 of the European Convention on Human Rights (hereinafter 'the Convention'), which is, under the Convention, a provision similar to Article 224. [38] Such

35 — *Werner*, cited above, paragraph 26, and *Leifer*, cited above, paragraph 27.

36 — See paragraph 26 of the judgment in *Johnston*.

37 — Point 5 of the Opinion.

38 — Article 15(1) ('Derogation in the event of a state of emergency'), provides that any Contracting Party may, in time of war or other public emergency threatening the life of the nation, take measures derogating from its obligations under the Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law. As can be seen, this provision is very similar in its wording to Article 224: both introduce a derogation from a general system (the protection of human rights and the common market respectively), but only in situations which are wholly exceptional and of such gravity as not to allow of any solution other than derogations of that kind.

jurisprudential principles[39] have been invoked in the present case by France in presenting its argument that, in regard to a measure adopted unilaterally by a Member State in defence of its own vital interests, judicial review is destined to be appreciably eclipsed, if not to disappear entirely as an effective means of controlling the measures and conduct which ought to be the subject of judicial assessment. The State concerned is alone in a position fully to determine whether there is a threat to its own security and to decide on the extent and nature of the measures to counter such a threat. So far as is relevant, this will have the following consequence: the measures by which a Member State organises its armed forces, recruiting them and preparing them to carry out their duties, cannot be fettered by conditions affecting the vital basis of sovereignty and compliance with which may only with difficulty be subjected to judicial review. The conditions for the application of Article 224 are clearly identified not only in the wording of that provision, but also through various clarifications in the relevant case-law, to which may be added the similar provisions of Article 15 of the Convention, as interpreted by the ECHR: a 'case of serious crisis',[40] 'a situation verging on a total collapse of [external] security',[41] '[a situation] threatening the life of the nation',[42] or 'a danger for the life of the nation'.[43] If I have properly understood, France takes the position that, in order to justify its view outlined above, it suffices that there should be a simple instrumental connection between the mandatory interests for the safeguarding of which each Member State is responsible, each within its own sphere, within the meaning of Article 224 and the measures adopted, even in peace time, for the purpose of safeguarding those interests. What can one say of the reasoning thus put before the Court for its consideration? I am certainly aware of the caution evident from the words of Advocate General Jacobs in the *Macedonia* case: they constitute a call to exercise the care which should inform any court having the task of assessing the legality of measures by which a Member State seeks to safeguard its own interests in cases, or for cases, of extreme danger. However, I do not feel that I should, on those grounds, go along with the view taken by the French Government, which leaves me perplexed for the following reasons.

25. First, the claim that, because it is scarcely amenable to judicial review, the matter in question falls outside the scope of the EC Treaty strikes me as an inversion of the logical order in which to consider the framework within which the Court can examine the question of interpretation

39 — According to Advocate General Jacobs, '... it is clear that the scope of the judicial review to be exercised under Article 225 [of the EC Treaty, concerning measures taken by a Member State pursuant to Article 224] is extremely limited... also because of the nature of the subject-matter' and '... there are no judicial criteria by which such matters [such as the appropriateness of a Member State's reaction to a threat against its vital interests] may be measured [by the Court]' (points 63 and 65 of the Opinion in the *Macedonia* case).
According to the ECHR, 'It falls in the first place to each Contracting State, with its responsibility for "the life of [its] nation", to determine whether that life is threatened by a "public emergency" and, if so, how far it is necessary to go in attempting to overcome the emergency. By reason of their direct and continuous contact with the pressing needs of the moment, the national authorities are in principle in a better position than the international judge to decide both on the presence of such an emergency and on the nature and scope of derogations necessary to avert it' (judgment of 18 January 1978, *Ireland* v *United Kingdom*, Series A, Vol. 25 (1978), pp. 78 and 79; passage cited by Advocate General Jacobs at point 55 of his Opinion in the *Macedonia* case).

40 — Advocate General Gand in Case 15/69 *Südmilch* v *Ugliola* [1969] ECR 363, in particular at p. 373, point III.1 of the Opinion.

41 — Advocate General Jacobs in the *Macedonia* case, where in point 47 of his Opinion he refers to a 'collapse of *internal* security'.

42 — Article 15(1) of the Convention.

43 — ECHR, *Ireland* v *United Kingdom*, cited above.

submitted to it. It is, before all else, necessary to establish that the matter governed by the measures to be examined falls outside the rules of Community law, whether primary or secondary. Only then, and in no other case, will those measures be exempt from the judicial review which — in a Community such as the European Community, based as it is on the rule of law — follows inevitably from the obligation resting on Member States to comply with the rules laid down by or deriving from the EC Treaty. Here, however, for the reasons which I have already stated and others that I shall explain in what follows, the measures at issue in the main proceedings come within an area which, since it is covered by provisions of Community law, does not fall outside the domain within which the EC Treaty produces its effects, and also cannot be excluded from that domain by way of interpretation.

26. Second, Article 225 of the EC Treaty expressly provides for the unilateral measures adopted by Member States pursuant to Article 224 to be made subject to judicial review. This is a power of review clearly conferred on the Court in the fullness of its attributes as the judicial body which guarantees compliance with Community law. Indeed, the Court has exercised that power (by order under Article 186 of the EC Treaty (now Article 243 EC)) against Greece in a case where that State argued that there was a situation of 'international tension constituting a threat of war'. [44] On that occasion, noting that the Commission's arguments were 'sufficiently pertinent and serious', the Court held that it had to 'ascertain whether ... the *essential requirements for the application* of Article 224 [of the EC Treaty] are not met in this case ... [even though this would make it] necessary to consider complex legal questions'. [45] On another occasion, in *Leifer*, the Court recognised the courts of the Member State concerned as having jurisdiction to review measures adopted (during a period of relative peace) [46] in order to safeguard national security, ruling that: '[in regard to the judicial review of quantitative restrictions on the exportation of goods capable of being used for military purposes] *it is for the national court* to decide [on the basis of the facts] which it is called on to appraise [whether grounds of public security *really exist*]'. [47]

27. Third, it is necessary to bear in mind the qualified nature of the exception provided for under Article 224, for which the interpretative criteria relating to application of that provision ought, in my view, to

44 — Order made under Article 186 in Case C-120/94 R *Commission* v *Greece* [1994] ECR I-3037, paragraph 31.

45 — See paragraph 69 of the order (emphasis added).

46 — The case in point concerned exports from Germany of dual-purpose goods (products which could be used to manufacture chemical weapons) to Iraq at a time when that State was at war with Iran (in the 1980s), a conflict during which chemical weapons were deployed (see the Opinion of Advocate General Jacobs, point 57).

47 — *Leifer*, paragraph 29 (emphasis added). To the same effect, see Case 30/77 *Regina* v *Bouchereau* [1977] ECR 1999, in which the Court ruled that 'In so far as it may justify certain restrictions on the free movement of persons subject to Community law, recourse by a national authority to the concept of public policy presupposes, in any event, the existence, in addition to the perturbation of the social order which any infringement of the law involves, of a *genuine and sufficiently serious* threat to the requirements of public policy affecting one of the fundamental interests of society' (paragraph 35 of the judgment: emphasis added), by which the Court undoubtedly intended to indicate that it must be possible to exercise judicial review as to whether the conditions for the national measure limiting a freedom protected by Community law are in fact satisfied.

be adjusted. By bringing the normal organisation of the armed forces within the ambit of Article 224, as the national Governments which have intervened in this case seek to do, the Member States would be authorised to apply the exception in a practically 'normal' manner, thereby unduly extending the scope within which the rule providing for that exception can be invoked (at this juncture I would refer back to what I said in points 21 and 22).

28. Finally, it must be borne in mind that the issue in the present case concerns a fundamental right of Mrs Sirdar, namely the right not to be discriminated against on grounds of sex in regard to access to employment. It should not be forgotten that Article 6 of the Directive requires the Member States to 'introduce into their national legal systems such measures as are necessary to enable all persons who consider themselves wronged by failure to apply to them the principle of equal treatment ... to pursue their claims by judicial process'. The argument put forward by the French Government appears to overlook this aspect of the present case, as well as the construction which the Court gave to Article 6 in *Johnston*, in which the issue was one of public order in a Member State and where the Court took the view that Article 6 'reflects a general principle of law which underlies the constitutional traditions common to the Member States'. [48]

29. I would like at this point briefly to restate my position on the first four questions. The issue of equal treatment for men and women in regard to access to employment in the armed forces does not fall outside Community law and cannot be excluded therefrom by way of Article 224. The Member States have not transferred to the Community powers in regard to the organisation and conduct of their armed forces; that, however, is not the matter here in issue. Community law does not seek to interfere in the organisation of the armed forces, but it does concern itself with the exceptional measures taken on the basis of Article 224 and the operation of the common market, draws the matter within its ambit and provides for the appropriate judicial control. In addition, the matter is regulated by the Directive itself, under the aspect of access to employment; the Directive also has a 'universal' sphere of application, in which the Court has already included internal security, a 'sovereign' power of Member States in the same way as defence. Nor can Article 224 authorise the Directive's application to be excluded (*a fortiori*, I would say, in the case of measures adopted in peace time). Rather, the fact is that Community law provides for the possibility of excluding matters from the scope of the Directive, but it does so pursuant to the Directive itself, and it is this problem which I shall now address in relation to the fifth and sixth questions.

The fifth question

30. In its fifth question, the Industrial Tribunal is asking the Court, in the further

48 — See paragraph 18 of the judgment; Advocate General Darmon also affirmed that 'the demands of public order may not justify the abandonment of judicial review' (point 5 of the Opinion). To the same effect, albeit in a different factual context, see Case 14/83 *Von Colson and Kamann* v *Land Nordrhein-Westfalen* [1984] ECR 1891, paragraph 18.

alternative, whether a Member State's policy of excluding all women during peace time and/or in preparation for war from service in an interoperable corps such as the Royal Marines is capable of being justified under Article 2(2) of the Directive. This question is designed precisely to ascertain whether sex constitutes a determinant condition for access to employment in a corps having the characteristics described in the order for reference.

31. Pointing to the similarities between the present case and that in *Johnston*, all of the intervening Governments and the Commission agree that service in the Royal Marines may be brought within the scope of the derogation provided for under Article 2(2) of the Directive by virtue both of the nature of that service and of the conditions under which it is performed. That appears to be accepted, at least in principle, by Mrs Sirdar.

32. As for the *nature* of the activities of military personnel serving in the Royal Marines, all of the intervening Governments and the Commission have emphasised the special characteristics of a corps designed to cope with extreme combat conditions, stressing the intense and continuous nature of the strenuous training, and the physical pressures to which commando infanteers are subject, particularly in combat operations. Those considerations do not, by themselves, strike me as sufficient to justify application of the derogation provided for under the Directive. [49] In *Johnston*, the Court reached the same conclusion on the basis of a context closely resembling that of the present case and which featured very similar national provisions. [50] These corresponded sufficiently closely to section 85(4) of the SDA,

49 — There are at least some women, particularly well trained and in optimal physical condition, who could, at the physical level, endure the same hardship as that to which Royal Marines are subject. The argument that women are physically inferior to men does not have any sound basis, so much so that in the armed forces of certain countries women are now permitted to exercise roles which were once considered an exclusively male domain on the mere ground of physical strength (according to the 1998 NATO Report cited above in footnote 19, women are deployed in one of the units performing functions which are among the most difficult and demanding, in absolute terms, of all the Canadian armed forces, namely 'Search and Rescue' (see p. 12); consideration should also be paid to the case of Belgium, Denmark and Norway, which permit women in all units, including, as I understand, those corresponding to the Royal Marines). Further, what can one say about the fact that the sporting records of women today in various fields exceed, often by a wide margin, the records set in past years by male athletes?
In *Commission* v *France*, concerning police activities where 'the use of force or a display of the capacity to use force are required', Advocate General Sir Gordon Slynn pointed out that, even though 'on average men are bigger and stronger than women', this 'would not necessarily be sufficient' for holding that 'sex could be a determining factor [within the meaning of Article 2(2) of the Directive]' ([1988] ECR 3559, at p. 3571).

50 — Equal treatment for men and women as regards access to employment in the police reserve in which Mrs Johnston served was guaranteed by the Sex Discrimination (Northern Ireland) Order 1976. Article 53(1) of the Order, which is quite similar to the SDA as regards its content and objectives, provides that none of its provisions prohibiting discrimination 'shall render unlawful an act done for the purpose of safeguarding national security or of protecting public safety or public order' (see paragraph 3 of the *Johnston* judgment).
Rejecting the argument that the *nature* of the occupational activity in the police force could justify discrimination on grounds of sex (paragraph 34 of the judgment), the Court implicitly rejected the United Kingdom Government's contention that the difference in physical strength between the sexes was one of the criteria to be taken into consideration with regard to police units in Northern Ireland (paragraph 31 of the judgment).
Still in *Johnston*, Advocate General Darmon stated that 'it does not appear that a national authority may bar women from access to employment as armed police officers because it adopts Hamlet's rebuke: "Frailty, thy name is woman"' (point 8 of the Opinion).

and — I should point out — like the rules governing the police force in Northern Ireland, the SDA applies (within the domain of the 'armed forces') to men and women without distinction. I accordingly take the view that I can borrow for the present case, *mutatis mutandis*, the formula which the Court adopted in *Johnston*: given that the SDA expressly applies to posts in the armed forces, and since no distinction is drawn in that regard between men and women, the *nature* of the occupational activity in the armed forces is not a relevant ground of justification for the discrimination in question. [51]

33. That said, it is necessary to determine whether, this time by reason of the particular *conditions* under which the Royal Marines operate, sex constitutes a legitimate distinguishing factor for the purpose of the present question. According to the order for reference, the Ministry of Defence policy of excluding women from the Royal Marines is dictated exclusively by the interest in ensuring the combat effectiveness of those soldiers, whose training and organisation, the United Kingdom Government points out, are directed to that end and do not depart in any case from the rule of interoperability. [52] The case-file in the main proceedings provides sound evidence that this rule is applied without exception at the time here relevant, namely that at which the soldier is engaged in or transferred to the Royal Marines. [53] The Royal Marines are trained in such a way as to be able to operate at very short notice in any circumstances or any environment: they constitute the point of the arrow head of the armed forces, as the United Kingdom puts it. The Ministry of Defence has sought to avert even the merest possibility that the inclusion of women in this essential component of the defence system might affect its combat effectiveness. There is (as Mrs Sirdar points out) no evidence of any such risk of adverse effects: effective experimentation would be extremely risky, since it would have to be conducted in the course of actual military operations. [54] There is, in contrast, a simple measure, which, the United Kingdom Government points out, results from a 'military evaluation'. It is, however, precisely an evaluation of the kind which, in my view, has a bearing on the Court's reply to the question. In order to determine what, for the purposes of the Directive, are the conditions governing the exercise of the activities entrusted to the Royal Marines, there is, I would say, no other reference criterion than that offered to the Court by the data, opinions and testimony submitted on this point by the national authorities responsible for the conduct and organisation of that armed corps. I have recalled those elements of the case which emerge from the clear and detailed exposé of the order for reference and the conclusions drawn by the United Kingdom Government. From these I derive a conviction which may be expressed in the following terms: the inflexible rule of

51 — See paragraph 34 of *Johnston*.

52 — See the report of 10 June 1994 entitled 'Revised Employment Policy for Women in the Army — Effect on the Royal Marines' (cited above in footnote 6). Reference may also be made to the report of February 1997 entitled 'Employment Policy for Women in the Royal Marines', cited in point 24 of the United Kingdom's observations: 'the introduction of women into small close-knit teams whose primary role is to close with and kill the enemy could have an adverse effect on the morale and cohesion of those teams, which would impact on combat effectiveness, with possible implications on the lives of our troops and, ultimately, on national security'.

53 — See point 7 of this Opinion.

54 — It might be possible to seek the collaboration or guidance of those countries which, like Belgium, Denmark and Norway (all NATO Member States), do not operate any type of exclusion as regards employment of women in their armed forces (see the above NATO report of 1998, pp. 7, 14 and 31).

interoperability, which prevents a chef being employed in the circumstances of the present case, informs, so to speak, the organisation and essential functioning of this élite corps of the armed forces. If the rule is justified — and I tend to the view that it is — one cannot discount the possibility that the resultant decision not to allow women to serve in the Royal Marines might also in turn be justifiable. The evidence given in the main proceedings by the Marines' commander sets out negative effects which the presence of any female element might have on the operational cohesion of a commando unit, resulting from the foreseeable preoccupation of infanteers to protect women, quite apart from the latters' (as yet untested) physical suitability for difficult offensive operations involving hand-to-hand combat for which the Marines are trained. I would leave these and similar appraisals to the national authorities which have made the choice — which, in a democracy, must always be based on reasoned and responsible decisions — to maintain the traditional male composition of a vanguard unit of the armed forces, which in the United Kingdom are now largely open to women: 'depending on the circumstances, the competent national authorities have a certain degree of discretion when adopting measures which they consider to be necessary in order to guarantee public security in a Member State'.[55] I am not, I repeat, in a position to discount with certainty the possibility that the presence of women in the Royal Marines might, at least in some respects and depending on the circumstances, adversely affect the results of the maximum effectiveness required in the deployment and operation of marine assault infantry, or have the consequence of exposing combatants to greater risks and weaken a major resource of national defence.

34. The result which I have reached is reinforced by the Court's judgment in *Johnston*. In that case, it was held that the decision to exclude women from active participation in armed police units responsible for maintaining public order in Northern Ireland, in a situation tantamount to what was in the true sense a civil *war*,[56] could be justified. The Court in that case upheld the submissions of the United Kingdom Government, which did not differ in any essential respects from those put forward in the present case. In *Johnston*, the United Kingdom had submitted that, in excluding women from those police units in Northern Ireland, account had been taken of the *foreseeable* risks which deployment of armed policewomen would have entailed. The Court accepted that the exclusion of women from armed police units could be justified when it ruled that: '*the possibility cannot be excluded* that in a situation characterised by serious internal disturbances the carrying of fire-arms by policewomen might create additional risks of their being assassinated and might therefore be contrary to the requirements of public safety'.[57] The same *ratio decidendi* applies in this case too: where the conditions for the exercise of the activity here in issue apply, the difference in the treatment of men and women is justifiable if it is not possible to discount the possibility that the factor of sex *may* prove determinant for the adoption of the distinguishing criterion here in question. I must, however, point

55 — *Leifer*, cited above, paragraph 35.

56 — 'Serious internal disturbances', in the Court's words; see paragraph 36 of the judgment.

57 — See paragraph 36 of the judgment; emphasis added.

out that, while the Court's finding just cited was not based on any actual evidence but merely on unsubstantiated 'forecasts' by the competent authorities, my conviction in the present case is at least based on information derived from military reports compiled at a period which dispels any suspicion, that is to say, at a period before the present dispute arose. [58]

35. It is also worth considering a final aspect of this question indicated by the Commission and the French Government. In order for the derogation to be considered applicable, it is necessary that the occupational activity for which sex constitutes a determinant condition, and which can for that reason be excluded from the scope of the Directive, should be *specific*. There can be no doubt that such a requirement is prescribed by the Directive. The Court stated as much in *Commission* v *France*: 'It follows [from Articles 2(2) and 9(2) of the Directive] that the exceptions provided for in Article 2(2) may relate only to specific activities'. [59] Well, the activity of the Royal Marines is *specific* for the purposes of Article 2(2). To phrase it better, there is a specificity in the *function* conferred on the Royal Marines as compared with that of the rest of the armed forces. What we find is a specific function which has the result that the individual operations constituted by the Royal Marines' training and offensive interventions must be treated as being characterised by their specificity. Their functions, organisation and characteristic method of operation render them, as I stated above, the point of the arrow head of the United Kingdom's armed forces and thus one of the pivotal elements of what is already a select team, namely NATO's Rapid Reaction Force.

36. Next, I do not accept that the 'specificity' of the Royal Marines' case is gainsaid by the rule that *all* military personnel serving with that corps are subject to interoperability. That rule is applied consistently, accommodates the *raison d'être* of a corps structured along those lines and, as the Industrial Tribunal making the reference states, is a 'fact' and not a 'fiction'. This case differs from that considered by the Court in *Commission* v *France*. In that earlier case, France had adopted a system for recruitment to five corps of the national police force [60] which limited the opportunities of access for women, who were considered unsuitable for police duties involving the use of force. According to the French legislation, all police officers must be *interchangeable* and able to perform such duties. [61] The Court upheld the Commission's application, ruling that the French legislation was too general and did not make it possible 'to verify whether the percentages fixed for the recruitment of each sex *actually* correspond to *specific* activities for which the sex of the persons to be employed constitutes a determining

58 — See the report cited in footnote 6.

59 — See paragraph 25 of the judgment; Advocate General Sir Gordon Slynn expressed himself to the same effect ([1988] ECR 3559, at pp. 3570 to 3571); see also the judgment in Case 165/82 *Commission* v *United Kingdom* [1983] ECR 3431, paragraph 16.

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

61 — Opinion of Advocate General Sir Gordon Slynn, at p. 3571, which anticipates the Court's decision on the point.

factor within the meaning of Article 2(2) of the Directive'.[62] The principle of 'interchangeability' invoked by France in that case may, in my opinion, be treated in the same way as that of 'interoperability' with which the Court is concerned in the present case. There were doubts, in *Commission* v *France*, as to whether the rule of interchangeability was necessary and was actually applied within all of the police corps concerned. In contrast, there can be no doubt that interoperability is necessary and is actually applied in the present case. Once that doubt has been dispelled, it becomes clear that interoperability, as applied within the corps of the Royal Marines, offers us additional confirmation enabling us to treat the case in which the derogation permitted under the Directive can be applied as sufficiently specific and unambiguous in its definition.

37. The construction of Article 2(2) of the Directive, as a rule justifying derogation from an important general principle, in *Commission* v *France* and *Commission* v *United Kingdom*,[63] seems to me to be entirely consistent with the case-law in which the Court has interpreted Article 48(4), which also permits a derogation (officials employed in the public service) from another important general principle (free movement of workers). By that case-law, the Court intended to adopt a functional criterion for application of Article 48(4) which restricted its validity to '*certain* activities in the public service'.[64]

38. Finally, the *conditions* under which the Royal Marines are required to operate point to the conclusion that the male-sex requirement for joining the corps is to be understood, for the purposes of the Directive, as determinant for the performance of the activities, that is to say the military functions, carried out by such units of the armed forces.

The sixth question

39. If the answer to the previous question is in the affirmative, the Industrial Tribunal seeks by its final question to ascertain which test it ought to apply when considering whether or not a policy such as that described in the order for reference comes within the scope of the derogation under Article 2(2) of the Directive.

40. The Commission and Mrs Sirdar consider that the national tribunal must determine specifically (and in accordance with a

62 — Paragraph 27 of the judgment (emphasis added).

63 — See point 35 above, footnote 59.

64 — Judgment in Case 152/73 *Sotgiu* v *Deutsche Bundespost* [1974] ECR 153, point 4; along the same lines, see also, from among the copious case-law, Case 149/79 *Commission* v *Belgium* [1980] ECR 3881, paragraph 10 et seq., and the same case reported at [1982] ECR 1845; Case 225/85 *Commission* v *Italy* [1987] ECR 2625; and Case C-4/91 *Bleis* v *Ministère de l'Éducation Nationale* [1991] ECR I-5627.

particularly rigorous test, given that a derogation is being applied here) whether the blanket exclusion of women from the Royal Marines is *proportionate* to the objective of ensuring maximum combat effectiveness. While the United Kingdom Government accepts that the tribunal can review the decision to exclude women from a specific corps, it argues that, given the nature of the interests safeguarded (national defence), the tribunal can take issue with that decision only if it is manifestly unreasonable. [65]

41. In *Johnston*, the Court replied to a preliminary question similar to that here before the Court. I have on several occasions remarked how close the *Johnston* case is to the present one. The reply to the question referred in *Johnston* seems to me to be entirely relevant today: 'in determining the scope of any derogation from an individual right such as the equal treatment of men and women provided for by the directive, the *principle of proportionality*, one of the general principles of law underlying the Community legal order, must be observed. That principle requires that derogations *remain within the limits of what is appropriate and necessary* for achieving the aim in view and requires the principle of equal treatment to be *reconciled* as far as possible with the requirements of public safety which constitute the decisive factor as regards the context of the activity in question ... By reason of the division of jurisdiction provided for in Article 177 of the EEC Treaty [now Article 234 EC], it is for the national court ... to ensure that the principle of proportionality is observed and to *determine whether* the refusal to renew Mrs Johnston's contract *could not be avoided* by allocating to women duties which, without jeopardising the aims pursued, can be performed without fire-arms'. [66] Thus, in *Johnston*, the Court did not make the national tribunal's power of review subject to the limitation invoked by the United Kingdom Government. And this 'in a situation characterised by serious internal disturbances', experiencing numerous terrorist attacks with hundreds of victims. For his part, Advocate General Darmon also stated as follows in *Johnston*: 'Let me be blunt: a derogation from a human right as fundamental as that of equal treatment must be appraised in a restrictive manner'. [67]

42. The policy of the Royal Marines excludes women *entirely* from all employment within their corps. Bearing in mind the fact that the question concerns a fundamental human right, the task for the national tribunal is to determine in this specific case whether the 'absolute nature' which appears to characterise that policy is strictly necessary or whether it does not rather go beyond what would be adequate to ensure that the Royal Marines still retain their combat effectiveness. It seems to me that, of the factors which the national

65 — Referring to the need to ensure combat effectiveness as constituting the basis for its policy of excluding women from the Royal Marines, the United Kingdom Government argues that an assessment as to the soundness of that reasoning and as to whether it can in fact justify that policy must be 'limited', and must thus take account of the fact that the Member State has 'a certain degree of discretion', bearing in mind that what is at issue is a measure 'consider[ed] to be necessary in order to guarantee public security' (*Leifer*, cited above, paragraph 35).

66 — Paragraphs 38 and 39 of the judgment (emphasis added).

67 — Point 9 of the Opinion.

tribunal might take into account in making the assessment referred to in the sixth question,[68] first and foremost must be the 'specificity' of the Royal Marines, in other words the fact that the derogation from the general principle concerns a corps which represents only 2% of the armed forces, whereas within those armed forces women have access to the majority of posts and make up more than 7% of operatives. Second, I attach importance to the fact that the principle of interoperability, which among the Royal Marines is characterised by its *absolute nature*, is *actually* applied in a *consistent* manner.

43. Next, it is necessary to consider carefully the significance of the exception to the rule of interoperability concerning members of the regimental band. This is the only exception. One might ask why there are not others, for instance in relation to the 'static' activities at headquarters, base or corps training base. However, it is easy to see that such a question raises the issue of organisational autonomy enjoyed by the Member States and their military authorities. The proposal to identify activities that can be removed from the ambit of interoperability necessarily implies an acceptance that, in a whole series of cases, it will be possible to identify *ex novo* tasks to be entrusted to non-'interoperative' marine infanteers. In *Johnston*, the Court did not venture that far. It limited itself to suggesting that women might be allocated duties which, while not compromising the aims pursued, could be performed without carrying firearms.[69] In that case, the police force in Northern Ireland performed a whole range of activities which did not require the carrying of arms. The competent authorities selected one particular activity and employed Mrs Johnston as a communications assistant.[70] In the present case, in contrast, the Royal Marines corps provides only for one activity: that of interoperative commando infanteer. To distinguish the activity of non-interoperative chef, within such a corps, would be tantamount to usurping the function of the competent national authorities by 'creating' a post where none existed before. A different logical argument might perhaps proceed from an analysis of the reasons why the Royal Marines band is not subject to the principle of interoperability, before then going on to determine whether any of those reasons might also be valid for posts such as, for example, that of chef at headquarters or training base. In addition, counsel for Mrs Sirdar pointed out during the hearing that '*some* chefs in the British Navy do not form part of the system of interoperability'.

44. Finally, I would attach little relevance in the present case to a suggestion made by the Commission, at least in the form in which it has been formulated. In order to determine whether the policy in question is proportionate, the Commission argues, account should also be taken of the results of the periodic assessment which the United Kingdom claims regularly to carry out

68 — 'Although it is for the national court, in preliminary-ruling proceedings, to establish whether such a necessity exists in the specific case before it, the Court of Justice, which is called upon to provide the national court with worthwhile answers, has jurisdiction to *give guidance based on the documents before the national court* ...' (judgment in Case C-328/91 *Secretary of State for Social Security* v *Thomas and Others* [1993] ECR I-1247, paragraph 13; emphasis added).

69 — See paragraph 39 of the judgment.

70 — See the factual part of the judgment, p. 1666.

pursuant to Article 9(2) of the Directive. Under that provision, Member States are required periodically to assess the activities which fall outside the Directive in order to decide, 'in the light of social developments', whether there is justification for maintaining such exclusions. In this case, the United Kingdom Government has not based itself on the present state of social developments in the country for the purpose of justifying its own policy, but has based itself rather on what are strictly military evaluations and forecasts. Although there are some indications in the case-file which point to a periodic re-examination of these evaluations, the results do not appear to indicate any major changes in regard to the corps to which Mrs Sirdar wishes to be transferred. [71]

45. While seeking to provide the national tribunal with concrete ideas concerning application of the proportionality criterion, the Commission proposal offers us, however, the starting point for what might be an alternative construction of Article 9(2) of the Directive. The Commission and the United Kingdom refer to the notion of the 'social development' of the general population in a Member State. However, bearing in mind the fact that, as has been noted, the 'world of the armed forces' presents many special features, so much so that one can speak of a culture that is in the true sense peculiar to it (these special features, moreover, are often governed by special legal provisions, if one thinks, for instance, of the military penal code), I take the view that, in accordance with the obligations imposed by the Directive, and in order to ensure that 'the harmonisation of living and working conditions [in the armed forces] while maintaining their *improvement* are ... *to be furthered* [as much as possible]', [72] it might be possible to place a 'modern' construction on that provision by carrying out a periodic examination of social developments within the armed forces themselves. While this would in large measure reflect general developments within a country, it might in certain respects show that changes have occurred in a certain sector of occupational activities, thereby providing justification for a gradual opening to women of activities still restricted to men. The starting point referred to derives from the finding that the essence of the United Kingdom Government's argument seeking to justify the exclusion of women from the Royal Marines on grounds of combat effectiveness lies in the apprehension that the participation of women could have an adverse effect 'on the morale and cohesion' of commando units ('fire teams'). [73] Along the same lines, but with a markedly more 'social' slant, are the observations of counsel for the United Kingdom Government contained in a document submitted to the national tribunal in the main proceedings and annexed to Mrs Sirdar's written observations. [74] I wonder if it might not be possible to ascertain, as in fact has already been done (at least on an experimental and limited basis) within the Canadian armed forces since the early 1980s, whether combat effectiveness can be safeguarded, even in cases in which women are allowed, taking particularly into account the way in which their presence is perceived by their male comrades in arms. The conclusions

71 — See point 2(b) of the report entitled 'Revised Employment Policy for Women in the Army — Effect on the Royal Marines' cited in footnote 6 above; see also the conclusions of a similar report dating from 1997 and cited in footnote 52 above.

72 — Third recital in the preamble to the Directive (emphasis added).

73 — See the passage taken from a 1997 military report quoted in the United Kingdom's written observations (see footnote 52 above).

74 — See Annex 4 to those observations, 'Further and Better Particulars of the Amended Grounds of Resistance', point 1(ii).

drawn from those experimental trials were positive. Not only was combat effectiveness not compromised, but the deployment of women, far from undermining military cohesion, in fact even reinforced the *esprit de corps*. [75]

46. Next, there is a separate consideration which might usefully be added to the factors likely to assist the national tribunal in determining whether a discriminatory measure, such as that here, might none the less be proportionate. Assessments might be made from the attitude shown by the Member State which confines itself to 'confirming' the state of social development of its own units without taking steps, in the spirit of the Directive, seeking to bring about an '*improvement*' in 'living and working conditions', [76] to increase, so far as possible, their sensitivity and the degree of acceptance of female comrades in arms; from what I understand, precisely this form of initiative was undertaken, also in the 1980s, within the Canadian armed forces, in particular the air force. [77] The American armed forces have likewise had considerable success in their efforts to encourage cohesion between 'white' and 'black' soldiers, albeit only thanks to 'careful leadership and planning'. [78]

47. In conclusion, I have indicated those factors from which the national tribunal might derive some assistance in determining, when carrying out the review which lies within its power and according to the principle of proportionality, whether the exclusion of women from the Royal Marines, which, as I have concluded above, is justifiable in principle, is in fact justified in the particular circumstances of this case.

75 — See the judgment of the Canadian Human Rights Tribunal ('the CHRT') of 20 February 1989, T.D. 3/89 *Gauthier and Others* v *Canadian Armed Forces*, Annex 5 to the written observations of Mrs Sirdar, point 6 of the judgment, in particular at p. 26; the trials carried out by the Canadian armed forces are known under the acronym 'Swinter' (Service Women in Non-Traditional Environments and Roles).

76 — See the third recital in the preamble to the Directive. The Court has also ruled along these lines: '[Article 119 (Articles 117 to 120 of the Treaty have been replaced by Articles 136 EC to 143 EC), which imposes an obligation to ensure that men and women receive equal pay] forms part of the social objectives of the Community, which is not merely an economic union, but is at the same time intended, by common action, to ensure social progress and *seek the constant improvement* of the living and working conditions of their peoples, as is emphasised by the Preamble to the Treaty' (judgment in Case 43/75 *Defrenne* v *Sabena* [1976] ECR 455, paragraph 10; emphasis added).

77 — See *Gauthier* v *CAF*, CHRT, part 8 of the judgment.

78 — See *Gauthier* v *CAF*, CHRT, part 10(d) of the judgment.

Conclusion

48. The questions submitted by the Industrial Tribunal, Bury St Edmunds, should therefore, in my view, be answered as follows:

(1) Decisions which a Member State takes for the purposes of combat effectiveness during peace time and/or in preparation for war in relation to the conditions of employment in its armed forces or in a select corps such as that described in the order for reference do not fall outside the scope of the Community legal system.

(2) Article 224 of the EC Treaty (now Article 297 EC) does not permit exclusion from the ambit of Council Directive 76/207/EEC of discrimination on grounds of sex in relation to the conditions of employment in the armed forces or in a select corps such as that described in the order for reference, during peace time and/or in preparation for war, for the purpose of ensuring combat effectiveness.

(3) The policy adopted by a Member State of excluding women, during peace time and/or in preparation for war, from service in a corps such as that described in the order for reference comes within the scope of the derogation provided for under Article 2(2) of Council Directive 76/207/EEC.

(4) In considering whether the grounds on which the Member State has based itself in applying that policy justify application of Article 2(2) of Council Directive 76/207/EEC, it is for the national court or tribunal to determine whether the measure in question complies with the principle of proportionality.