OPINION OF MR ADVOCATE GENERAL LENZ
delivered on 31 May 1989 *

Mr President,
Members of the Court,

A — Facts

1. The reference for a preliminary ruling from a Danish industrial arbitration board on the interpretation of collective agreements is concerned with the interpretation and application of the principle of equal pay for men and women as contained in Article 119 of the EEC Treaty and Directive 75/117/EEC. [1]

2. The questions put to the Court are relevant in a dispute between the Handels- og Kontorfunktionærernes Forbund i Danmark (Union of Commercial and Clerical Employees, Denmark, hereinafter referred to as 'the plaintiff') and the Dansk Arbejdsgiverforening for Danfoss A/S (Danish Employers' Association, on behalf of Danfoss A/S, hereinafter referred to as 'the defendant') in relation to the non-discriminatory fixing of wages.

3. The contested wage is based on a national collective agreement of 9 March 1983 between the Danish Employers' Association and the plaintiff. A uniform minimum wage was fixed for all employees without distinction on grounds of sex. Article 9 of the agreement allows supplements to be paid for skill, independence and responsibility. In that respect the pay is fixed in the individual case by individual agreement.

4. There have already been proceedings before an industrial arbitration board prior to the present case. The plaintiff had applied for equal pay for two women from different wages groups under the job classification scheme. The average wage for men in these categories was higher than that for women. The plaintiff was unsuccessful, since the board considered that a case of unlawful discrimination on grounds of sex could be made out only if the plaintiff in the prior proceedings proved that the fixing of the wages in question tended to work to the detriment of women and that this could not be explained as a fortuitous result of the individual fixing of wages according to factual and lawful criteria.

5. The Industrial Arbitration Board puts the following questions to the Court:

6. '*1 (a)* Where it is established that a male and female employee do the same work of

* Original language: German.

1 — Council Directive 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).

equal value, who, in the view of the Court of Justice, is the person (employer or employee) on whom the burden lies of proving that a differentiation in pay between the two employees is attributable/not attributable to considerations determined by sex?

7. *1 (b)* Is it incompatible with the directive on equal pay to give higher pay to male employees who do the same work as female employees or work of equal value solely by reference to subjective criteria — for example, staff mobility?

8. *2 (a)* Is it contrary to the directive to give to employees of a different sex who do the same work or work of equal value, over and above the basic pay for the job, special supplements for length of service, special training, etc.?

9. *2 (b)* If so, how can an undertaking, without infringing the directive, make a differentiation in pay between individual members of staff?

10. *2 (c)* Is it contrary to the directive for employees of different sex who do the same work or work of equal value to be paid differently by reference to different training?

11. *3 (a)* Can an employee or an employees' organization, by proving that an undertaking with a large number of employees (e. g. at least 100) engaged in work of the same nature or value pays on average the women less than the men, establish that the directive is thereby infringed?

12. *3 (b)* If so, does it follow that the two groups of employees (men and women) must on average receive the same pay?

13. *4 (a)* In so far as it may be found that a difference in pay for the same work is attributable to the fact that the two employees are covered by different collective agreements, will it follow from that finding that the directive does not apply?

14. *4 (b)* Is it of importance in considering that question whether the two agreements in each case cover, exclusively or to an overwhelming degree, male and female employees respectively?'

15. Reference is made to the Report for the Hearing for a fuller account of the background to the case, the facts and the observations of the parties.

B — Legal assessment

I — *Whether the Court is properly seised of the questions referred to it*

16. Doubts may be raised as to whether the Court is properly seised of the questions referred to it, inasmuch as it could be open to question whether the Industrial Arbitration Board is a court or tribunal for the purposes of Article 177 of the EEC Treaty.

17. In its case-law the Court has laid down certain criteria which a court or tribunal making a reference must satisfy. The definition of a court or tribunal under Community law presupposes an independent body which is called upon to hear and determine disputes. The court or tribunal must be set up on a statutory basis as a permanent institution. Its jurisdiction must be mandatory and it must be called upon to apply rules of law in order to give decisions in contentious proceedings. [2]

18. The criteria have been given more concrete definition by the requirement that a court or tribunal must operate with the consent of the public authorities. [3] The Court recognized as a court an appeals committee whose decisions in proceedings were in fact treated as final so that in an area which involved the application of Community law there was in practice no effective appeal to the ordinary courts. [4]

2 — Judgment of 30 June 1966 in Case 61/65 *Vaassen (née Göbbels)* v *Management of the Beambtenfonds voor het Mijnbedrijf* [1966] ECR 261.

3 — See judgments of 6 October 1981 in Case 246/80 *C. Broekmeulen* v *Huisarts Registratie Commissie* [1981] ECR 2311 and of 23 March 1982 in Case 102/81 *Nordsee Deutsche Hochseefischerei GmbH* v *Reederei Mond Hochseefischerei Nordstern AG and Co. KG and Reederei F. Busse Hochseefischerei Nordstern AG and Co. KG* [1982] ECR 1095.

4 — See Case 246/80, *supra*.

19. The Industrial Arbitration Board which has made the reference is an independent body, which is required to determine disputes on the interpretation of collective agreements. It regularly intervenes at last instance in accordance with the standard rules of procedure for the various particular trades. Under Article 22 of the Law on the Labour Court of 13 June 1973, in the absence of any agreement on the procedure for settling a dispute of interpretation the provisions of 'Agreed Standard Rules', which in turn are based on an agreement between the Employers' Confederation and the Confederation of Employees' Unions, apply. The procedure for settlement must in any event satisfy certain minimum requirements from which the parties may not derogate.

20. Even though the establishment of the industrial arbitration board and the procedure to be observed are not determined in detail by statute, Article 22 of the Law on the Labour Court nevertheless constitutes the mandatory statutory structure. The Danish legislature has thus definitively brought the industrial arbitration boards and their activity within the compass of its legislative intent.

21. An industrial arbitration board is normally composed on an *ad hoc* basis, so that doubts arise as to its nature as a permanent body. However it is important not to fasten on its specific establishment in connection with a particular dispute but rather to bear in mind that these industrial arbitration boards have quite general jurisdiction for the determination of a particular type of legal dispute. The jurisdiction conferred by statute, under which the industrial arbitration boards are established and cases are brought before them, institutionalizes this model of industrial arbitration

boards. Such an arbitration board thus satisfies the criterion of a permanent body.

22. The arbitration boards must also be regarded as mandatory courts, for they alone are called upon to hear and determine disputes on the interpretation of collective agreements. As the Commission observed, without being contradicted, if a case is brought before a labour court in disregard of that division of jurisdiction, the labour court may rule that it has no jurisdiction having regard to that of the arbitration board.

23. Finally the board must give its decision according to legal rules and not for instance simply according to considerations of fairness. The rules which have to be interpreted and applied in proceedings before the industrial arbitration board are those of the collective agreement. The rules of law to be applied are not necessarily rules laid down by statute, for even collective agreements are capable of creating binding law. That is of course so in the first place as regards the parties to the agreement and their members. Collective agreements may, moreover, depending upon the structure of the labour law of the particular Member State, also give rise to legal obligations and rights for third parties, for example by means of a declaration of general applicability.

24. Indications that the Community legislature, too, has assumed that the principle of equal pay may be effectively implemented in a legally binding manner by collective agreements are to be found, for example, in Article 4 of Directive 75/117/EEC and Articles 3 to 5 of Directive 76/207/EEC.[5] The Court, too, in its judgments in Cases 143/83 and 165/82 proceeds on the basis that collective agreements can lead to a legally binding implementation of the principle of equal treatment. Thus, since the decisions of industrial arbitration boards are reached through the application of legal rules, the boards satisfy all the criteria of a 'court or tribunal' within the meaning of Article 177 of the EEC Treaty. Finally it may be noted that the determination of arbitration boards normally entail a final decision since they are no longer open to challenge by legal proceedings.

II — *On the answers to the preliminary questions*

25. Before replying to the question on the burden of proof in a case concerning discriminatory pay due to considerations relating to sex, it is necessary to make some preliminary observations for the purpose of clarification.

26. As a matter of principle, it is necessary to distinguish between direct and indirect discrimination. The requirements for proving their respective constituent elements are different. There is *direct discrimination* where pay is unequal, for reasons relating to sex, for the same work or work of equal value. That principle of equal pay moreover follows from Article 119 of the EEC

5 — Council Directive 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).

Treaty [6] which is already directly applicable but to implement which Directive 75/117/EEC, in that respect also directly applicable, was adopted.

27. A party complaining of discriminatory treatment must prove in such a case the existence of equal work or work of equal value for which a man and woman in the same firm are paid different wages. In cases of direct discrimination the pay of two employees of different sex must be specifically compared. Proof of unequal pay on grounds of sex in only a single case is already sufficient for the court to be able to find that there is wrongful discrimination in pay.

28. The situation is different where there is *indirect discrimination*. Such discrimination exists if the unequal treatment is based on neutral criteria or procedures which are normally complied with by the members of one sex and thus work to the disadvantage of the group of persons affected. A positive finding of indirect discrimination is however subject to the proviso that the disadvantage is not justified for compelling reasons or circumstances unrelated to the sex of the person concerned. [7]

29. The payment of a lower hourly rate to part-time employees than to full-time employees may, for example, amount to indirect discrimination if the group of part-time employees is composed exclusively or mainly of women and there are no objectively justified grounds for a difference in pay, such as to encourage full-time employment. [8]

30. In cases of indirect discrimination the female plaintiff's burden of proving discriminatory treatment is made considerably more difficult because she has to show that a neutral criterion which is applied in like manner to men and women is in practice in the great majority of cases satisfied by women and they as a sex are thus disadvantaged. If the defendant employer puts forward economic grounds, unrelated to sex, for the differentiation he can exonerate himself from the charge of discrimination.

31. It is not quite clear whether the present case is concerned with direct or indirect discrimination. The manner in which the wages practice functions makes it difficult, if not impossible, to compare in concrete terms the pay of men and women employees for equal work or work of equal value or to

6 — See judgments of 31 March 1981 in Case 96/80 *Jenkins* v *Kingsgate* [1981] ECR 911 and of 27 March 1980 in Case 129/79 *Macarthys Ltd* v *Wendy Smith* [1980] ECR 1275

7 — See, on the concept of indirect discrimination, Article 5 of the Proposal for a Council Directive on the burden of proof in the area of equal pay and equal treatment for women and men (OJ 1988, C 176, p. 5).

8 — See Case 96/80, *supra*, and the judgment of 13 May 1986 in Case 170/84 *Bilka Kaufhaus GmbH* v *Karin Weber von Hartz* [1986] ECR 1607

compare the pay of the two groups, male and female.

32. The wage to be actually paid to the individual employee is calculated on the basis of the basic wage laid down, in a manner free from any discrimination, in the collective agreement together with individual supplements applied according to the abstract criteria in Article 9 of the agreement. The exact amount of the supplement granted in respect of each subjective criterion is however not apparent. Even the employee concerned receives no break-down of his wage into its various components.

33. The problem classifying a possible discrimination consists in the fact that the grant of a supplement differentiated according to sex is a case of direct discrimination. If for example a male employee automatically receives a higher supplement than a female employee that would have to be regarded as *direct discrimination,* with the resulting consequences as regards the burden of proof. A specific comparison of two employees of different sexes would in such a case already suffice to establish the complaint of discrimination and it would, precisely, not fall to the female plaintiff, as part of the burden of proof incumbent on her, to allege the absence of a fortuitous result of the individual fixing of the wage on the basis of objective and lawful criteria. The very possibility of a fortuitous result to the detriment of the female employee points to discrimination on grounds of sex. It is for the defendant employer to provide an objective justification, unrelated to sex, for the difference in wage, if he is to exonerate himself from the charge of discrimination.

34. If it is assumed that the individual criteria for supplements are applied objectively in the same manner to male and female employees but that considerably more women than men are affected by one or more of the criteria, the problem arises of indirect discrimination. The same is true of the system of job classification which is decisive for the fixing of wages. The definition of jobs on the basis of particular characteristics does not pose any problem so long as the fact of taking a given characteristic as a basis does not lead to a considerably higher number of members of one sex being affected. In that respect, such an effect in itself does not yet amount to discrimination[9] but only a differentiation made on account of sex and, consequently, remuneration not justified on objective economic grounds. The allegation of indirect discrimination necessarily presupposes as a matter of evidence a comparison of the effects of the contested wages practice on the two sexes.

35. The lack of transparency in the contested wages practice should not in the present case adversely affect the female employees suffering from potential discrimination. The very impossibility of establishing a detailed comparison of pay must suffice for the purpose of alleging and proving that, in absolute figures, the pay for women is less than that for men. The requirements of proof cannot be more stringent than the objective obtainability of proof permits, for

9 — See the judgment of 1 July 1986 in Case 237/85 *Gisela Rummler* v *Dato-Druck* [1986] ECR 2101.

otherwise the principle of equality would be frustrated already at the procedural level.

36. By virtue of Article 6 of Directive 75/117/EEC it is expressly the task of the Member States to ensure that the principle of equal pay is applied in their legal systems. The concern to ensure that the principle of equal treatment is effective also underlies the case-law of the Court on the direct applicability of Article 119 of the Treaty or Article 1 of Directive 75/117/EEC. That is also the basis of the judgment in Case 14/83 which, unlike the present case, was concerned with the interpretation of Directive 76/207/EEC. On the implementation of the principle of equal treatment the Court held that 'it is for the national court to interpret and apply the legislation adopted for the implementation of the directive in conformity with the requirement of Community law, in so far as it is given discretion to do so under national law'. [10]

37. In order to establish with conclusive force discrimination in regard to wages it must suffice, in the given circumstances in the present case, that the pay for men and women for the same work or work of equal value is appreciably different. A system of job classification which is applied in practice may serve as basis for determining whether work is the same or is of equal value. In the case of direct discrimination that involves moreover no departure from the traditional distribution of the burden of proof, especially as it is not the plaintiff's task to prove the absence of criteria for distinction other than those based on sex. It must however not be overlooked that specific comparison always forms the basis for a finding of direct discrimination.

38. Assuming that the criteria relating to supplements are applied equally to male and female employees, the question of indirect discrimination arises. In considering the situation regarding the burden of proof in such a case, it has to be assumed that there is no direct discrimination. In accordance with the general rules on the burden of proof the plaintiffs would then have to show that one or more criteria relating to supplements apply disproportionately more frequently to members of one sex and that there is thus a disadvantage related to sex. It is therefore indispensable to compare representative groups of persons. The difficulty in this case lies in the fact that, even in the event of actual indirect discrimination, the plaintiffs would, owing to the lack of transparency in the system of pay, have no means of adducing the requisite evidence.

39. It is only in that context that relevance attaches to the question whether infringement of a directive may be proved by showing that for the same work or work of equal value women on average receive less pay than men (Question 3 (a)). Since it is in practice impossible for the plaintiffs to gather the requisite evidence, a system of proof should be accepted in this case, with a view to assuring the effectiveness of the principle of equal pay, whereby on proof of a lower average wage for a group of

10 — Judgment of 10 April 1984 in Case 14/83 *Sabine von Colson* and *Elizabeth Kamann* v *Land Nordrhein-Westfalen* [1984] ECR 1891.

employees defined according to their duties a presumption of discrimination can be established. Such a procedure does not imply any reversal of the burden of proof but merely constitutes a requirement in the matter of proof which is aligned on the factual circumstances. The employer would then have to refute the assessment according to which the lower pay constitutes discrimination by disclosing how the wages paid to the relevant group are made up and by giving objective reasons unconnected with sex for any difference in pay.

40. How the employees whose pay is to serve as basis for the calculation of the average wages to be compared should be selected depends upon the circumstances in the particular undertaking or firm. It is necessary that they should be representative groups whose conditions of employment should be as far as possible the same. It is not possible to state here an absolute figure for the minimum size of a reference group. The point of departure is of course that there should be the same work or work of equal value, so that possibly the employees of a department or of an assembly stage may constitute a reference group. If an undertaking has a job classification system, as is the case in the main proceedings, then there may be a comparison of the average pay for women and men in a particular category. It is for the national court to determine in the individual case whether or not the reference groups are representative.

41. The rule of evidence I have described would moreover in no way anticipate the proposal for a Council directive on the burden of proof in the area of equal pay and equal treatment for women and men, [11]

11 — OJ 1988, C 176, p. 5.

for there is no reversal of the burden of proof or even any general presumption of discrimination. On the contrary, the traditional sharing of the burden of proof is in principle left untouched, although the employer has the burden of proving facts which are exclusively within his sphere of influence.

42. The employer is generally free, and this is also expressly provided in Article 9 of the collective agreement of 9 March 1983, to grant supplements on the basis of certain individual characteristics of the employee. The grant of supplements must however make objective sense and the criteria applied must be lawful. A general reference to the existence of subjective criteria for an increase in wages in the specific case is not sufficient to justify a difference in pay (Question 1 (b)), since in that case it is not possible to justify objectively the fixing of wages or to reconstruct the system on which it is based.

43. Generally speaking, mobility, length of service and training are acceptable criteria for the grant of supplements in so far as these are granted without reference to sex and are objectively related to the activity which has to be carried out. Their objective justification follows from the economic value of the particular individual charac-

teristic for the work which has to be done (Questions 2 (a), (b) and (c)).

44. Since in the main proceedings only the collective agreement of 9 March 1983 applies both to women and men, Question 4 (a) and (b) do not call for an answer, for it is not the task of the Court in references for a preliminary ruling to answer abstract legal questions which are of no relevance for the purposes of the decision in the main proceedings. Since, however, the national court has a wide discretion in judging how far questions referred for a preliminary ruling are necessary for its decision and since it is not clear from the reference for a preliminary ruling itself that the answers to Questions 4 (a) and (b) can be of no importance for the judgment which has to be given, the following subsidiary considerations are put forward in relation to the answers to those questions.

45. It is in general to be assumed that the principles of equal pay (Article 119 of the EEC Treaty and Directive 75/117/EEC) and equal treatment (Directive 76/207/EEC) also apply to the parties to collective agreements. The Member States are required to ensure as much in their legislation. That is already apparent from the wording of the directives themselves (Article 4 of Directive 75/117/EEC and Articles 3 to 5 of Directive 76/207/EEC) and is confirmed by the judgments of the Court in Cases 165/82, 143/83, and 312/86. Parties to collective agreements cannot, therefore, derogate independently from the requirements resulting from the principle of equal pay. That is so both where one collective agreement applies and also where various collective agreements apply in the one undertaking.

46. It is to be observed, however, that frequently collective agreements are negotiated and concluded according to branches of trade or industry. The objective distinguishing criterion would then, in the event of different pay, be membership of the particular branch. That may be permissible if within the particular field of application of a collective agreement there is no difference in treatment of employees according to their sex, which presupposes that the individual collective agreement is devised in a non-discriminatory manner from the point of view of both direct and indirect discrimination. Furthermore, where the employees are members of different branches even the element of same work or work of equal value may be lacking.

47. The mere fact that a collective agreement covers predominantly male or female workers is not in itself a ground for concluding that there is discrimination. It is not, however, possible to answer on this general level the question whether separate collective agreements for groups of employees are lawful. The question must moreover in the first place be considered in the light of national employment law. Community law, for its part, requires that the principle of equal pay should also be observed in the concrete organization of working life by collective agreements.

Costs

48. As these proceedings are, in so far as the parties to the main proceedings are concerned, a step in the proceedings

pending before the national court, the decision as to costs is a matter for that court. The costs of the United Kingdom, the Governments of Denmark, Italy and Portugal and the Commission are not recoverable.

C — Conclusion

49. In view of the foregoing observations I propose the following answers to the questions referred to the Court for a preliminary ruling:

50. '*1 (a)* Where there is a difference in pay, on grounds relating to sex, for the same work or work of equal value (direct discrimination) the employee has the burden of proving that the work is the same or of equal value and that the pay is different for a female and a male employee in the same firm or undertaking. The employer may exonerate himself from the charge of discrimination on grounds of sex if he proves that the difference in pay is based on neutral criteria unrelated to sex.

51. If unequal treatment is based on neutral criteria which are typically satisfied by the members of one sex who are thereby placed at a disadvantage (indirect discrimination), the employee has the burden of proving that the employees of one sex are mainly or exclusively affected by the difference in pay due to neutral criteria and are thus placed at a disadvantage. The employer can exonerate himself from the charge of discrimination on grounds of sex if he proves that the difference is due to objective, economic considerations which are not related to the sex of the employee.

52. If the employee has no access to the facts required to prove indirect discrimination, a rule of evidence applies to the effect that on proof of a lower average wage for women within a representative group of employees there is a presumption of discrimination.

53. *1 (b), 2 (a), (b) and (c)* It is contrary to the principle of equal pay as it emerges from Article 119 of the EEC Treaty and Directive 75/117/EEC to pay, solely on the basis of subjective criteria, a male employee a higher wage than a female employee for the same work or work of equal value. It is not contrary to that principle to grant supplements in respect of individual characteristics such as

length of service, training or mobility, provided that the criteria are objectively justified, are related to the work to be performed and are applied without discrimination.

54. *3 (a) and (b)* Proof of a lower average pay for women within a representative group of employees may give rise to the presumption of discrimination. How a representative group must be composed for it to be representative depends on the factual circumstances in the undertaking or firm and is a matter for the national court to determine. That does not however mean that the average wage of women and men must always be the same, for differences may result from criteria which are independent of sex.

55. *4 (a)* Parties to collective agreements are also bound by the principle of equal pay. Nor may the parties to a collective agreement derogate from that principle by means of their agreement.

56. *4 (b)* The fact that a collective agreement covers mainly male or female employees does not in itself constitute a breach of the principle of non-discrimination. However, the manner in which the agreement is devised in the concrete case is decisive for the purposes of a final determination on the matter.'