OPINION OF ADVOCATE GENERAL DARMON

delivered on 25 November 1992 *

Mr President,
Members of the Court,

1. With this decision requesting a preliminary ruling, the Arbeitsgericht, Reutlingen, puts to the Court, in turn, two questions stemming from the exclusion of small businesses from the ambit of a system of protection against unfair dismissal. Having applied national law, the national court notes the lack of judicial review of the grounds for dismissal and wishes to know whether the exemption from the system of protection from which small businesses benefit can be described as aid within the meaning of Article 92(1) of the EEC Treaty and, should the Court not agree with that description, the national court asks that the Court determine whether it might not constitute indirect discrimination against women.

2. In order to give an account of the dispute, it is necessary to recall the national legislation in force as regards unfair dismissal. Those provisions of labour law, consolidated in the Kündigungsschutzgesetz (hereinafter 'the Law on unfair dismissal'), presented in the report for the hearing to which I refer the Court for the wording of the relevant texts, are characterized by the opportunity given in general to the dismissed worker to bring an action before the labour tribunal in order to test the justification of that dismissal.

3. Where it appears that the dismissal is socially unjustified, [1] the worker must be reintegrated into the undertaking. [2] Nevertheless, reintegration, which is the rule, may be replaced, if, in the view of both the employer and the worker, the employment relationship cannot be continued, by payment of compensation which may take one of two forms. It may be fixed either by the court itself, [3] or by agreement between the two parties, who avoid thereby proceedings before a court which may sometimes be long and costly. In the latter case, and according to the national court, the compensation '[ranges] between one-half and one month's salary [...] for each year of employment'. [4]

4. The two questions before the Court are based on the fact that the second and third sentences of Paragraph 23(1) of the Law on unfair dismissal exempts from judicial review as described above undertakings which I will describe as 'small' for the purposes of this account and which are those 'which normally employ no more than five employees (...). In determining the number of persons employed (...) account is to be taken only of

* Original language: French.

1 — Paragraph 1 of the Law on unfair dismissal defines a dismissal as socially unjustified where it is not based 'either on grounds relating to the person or behaviour of the employee or on overriding needs of the undertaking which preclude the further employment of the worker by that undertaking'.

2 — See the concept of 'protection of acquired rights' developed by the Commission at paragraph 4 of its written observations.

3 — Paragraphs 9 and 10 of the Law on unfair dismissal.

4 — Page 12 of the order for reference for a preliminary ruling (English translation)

those employees whose normal period of work exceeds 10 hours per week or 45 hours per month'. [5]

5. Before she was dismissed, the applicant in the main proceedings, Mrs Kirsammer-Hack, had been working for a year as an assistant at a dental practice which was staffed by two full-time workers, two workers (including the applicant) who worked in excess of ten hours per week or 45 hours per month, and finally by four workers who worked fewer than 10 hours per week or 45 hours per month. Thus, by employing fewer than five workers responding to the criteria above, [6] the undertaking came under the provisions of Paragraph 23(1) of the Law on unfair dismissal and the employer was only bound, on dismissal of staff, to give the usual notice, as was the case here. Mrs Kirsammer-Hack claimed nevertheless, despite the lack of applicable national provisions, that her dismissal was socially unjustified.

6. Since the application could not succeed at national level, since the applicant did not belong to a class of protected workers and could not avail herself of abuse of rights, the national judge decided to submit the provisions of the second and third sentences of Paragraph 23(1) of the Law on unfair dismissal to a test for compatibility with Community law. It therefore asks the Court to assess the conformity of that Paragraph, in particular the second sentence of Paragraph 23(1), with Article 92(1) of the EEC Treaty and, should the concept of aid not appear to the Court sustainable, to further examine the question on the basis of Articles 2 and 5 of 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, [7] hereinafter 'the Directive'.

7. Article 92(1) of the Treaty provides that '[s]ave as otherwise provided in this Treaty, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the common market'.

8. It is customary to emphasise that that article gives no detailed definition of aid, it merely determines its effects (aid which distorts competition) and its origin (aid is granted by a State or through State resources).

9. Nevertheless, the case-law of the Court has given the concept of aid a more precise definition.

10. In a judgment of 23 February 1961, [8] which related to the ECSC Treaty but whose criteria apply equally to the EEC Treaty, after having noted the lack of precision given to the concept of aid, the Court continued by widening the boundaries of a definition

5 — Second and third sentences of Paragraph 23(1) of the Law on unfair dismissal.

6 — Contrary to the calculation of the national court at pages 3 and 5 of the reference for a preliminary ruling, the number of workers must be four and not three before being taken into account by virtue of Paragraph 23(1) of the Law on unfair dismissal.

7 — OJ 1976 L 39, p. 40.

8 — Case 30/59 *Steenkolenmijnen* v *High Authority* [1961] ECR 1.

which has subsequently been turned to regularly:

'The concept of aid is nevertheless wider than that of a subsidy because it embraces not only positive benefits, such as subsidies themselves, but also interventions which, in various forms, mitigate the charges which are normally included in the budget of an undertaking and which, without, therefore, being subsidies in the strict meaning of the word, are similar in character and have the same effect'. [9]

11. Before examining in detail the elements which constitute aid, the complaint put forward by the Government of the Federal Republic of Germany [10] that it was impossible for an individual or a national court to rely on Article 92 if there is no Commission decision, should be answered first of all.

12. In support of its argument it cites paragraph 10 of the judgment of the Court of 22 March 1977 in *Steinike and Weinlig* v *Germany*, [11] which states:

'The parties concerned cannot (...), on the basis of Article 92 alone, challenge the compatibility of an aid with Community law before national courts or ask them to decide as to any compatibility which may be the main issue in actions before them or may arise as a subsidiary issue'.

13. There is no doubt that the role of the Commission as regards aid is definitive and that a finding of incompatibility cannot result from a procedure other than those provided for in Article 93 of the Treaty. The Court has already ruled on that point that

'(...) the provisions of Article 92(1) are intended to take effect in the legal systems of Member States, so that they may be invoked before national courts, where they have been put in concrete form by acts having general application provided for by Article 94 or by decisions in particular cases envisaged by Article 93(2)'. [12]

14. Nevertheless, although the judgment cited by the German Government provides a good answer to the problem raised, namely that of reliance on Article 92 within national legal systems be it on the part of an individual or of a court, it should however be pointed out that Article 177 of the Treaty enables a national court to invoke Article 92 without deciding itself whether aid is compatible.

15. In the judgment cited above the Court gave a very clear answer on that question, stating that:

'(...) a national court may have cause to interpret and apply the concept of aid contained in Article 92 in order to determine whether State aid introduced without observance of the preliminary examination procedure provided for in Article 93(3) ought to have been subject to this procedure. In any case under

9 — ECR 19 ibid.

10 — Page 3 of its observations.

11 — Case 78/76 [1977] ECR 595.

12 — Judgment in Case 77/72 *Capolongo* v *Maya* [1973] ECR 611, paragraph 6; see also the last part of paragraph 10 in the judgment in *Steinike and Weinlig*.

Article 177 of the Treaty the national courts which make a reference for a preliminary ruling must themselves decide whether the questions referred are necessary to enable judgment to be given.

(...) the provisions of Article 93 do not preclude a national court from referring a question on the interpretation of Article 92 of the Treaty to the Court of Justice if it considers that a decision thereon is necessary to enable it to give judgment; in the absence of implementing provisions within the meaning of Article 94 however a national court does not have jurisdiction to decide an action for a declaration that existing aid (...) or that a new aid (...) is incompatible with the Treaty.' [13]

16. There is nothing, therefore, which precludes an examination of Article 92(1) by the Court.

17. The case-law of the Court refers in that respect to the three concepts of origin, nature and effects of aid.

18. During the deliberations I dedicated a large part of my Opinion on the *Sloman Neptun* case [14] to the question of origin of aid.

19. I do not think it necessary to repeat them entirely and, without limiting myself to referring the Court to it, I will resume part of it in outline.

20. I first of all recalled the consistent case-law of the Court according to which

'Article 92 covers all aid granted by a Member State or through State resources and there is no necessity to draw any distinction according to whether the aid is granted directly by the State or by public or by private bodies established or appointed by it to administer the aid', [15]

and, more especially, the judgment of the Court in *Van Tiggele*, [16] in which the Court considered that a measure conferring on those benefitting from it advantages which are not granted 'directly or indirectly, through State resources within the meaning of Article 92' [17] 'cannot constitute an aid within the meaning of Article 92.' [18]

21. Secondly, I referred, in the question of subsidies, both to the position of principle taken by the Commission in its decision of 18 April 1985, [19] as well as to the case-law in *Fediol* v *Commission* [20] in which the concept of subsidy was held to imply a burden on the Treasury.

13 — Paragraphs 14 and 15 op. cit..

14 — Cases C-72/91 and C-73/91, Opinion delivered on 17 March 1992 (see in particular paragraphs 12 to 47).

15 — Judgment in Case 290/83 *Commission* v *France* [1985] ECR 439; see also the judgment in Case 78/76 *Steinike and Weinlig* [1977] ECR 595; the judgment in Case 57/86 *Greece* v *Commission* [1988] ECR 2855, paragraph 12; the judgment in Cases 67, 68 and 70/85 *Van der Kooy* v *Commission* [1988] ECR 219, paragraph 35.

16 — Case 82/77 [1978] ECR 25.

17 — Paragraph 25.

18 — Paragraph 24.

19 — Commission Decision 85/239/EEC of 18 April 1985 terminating the anti-subsidy proceeding concerning imports of soya meal originating in Argentina (OJ L 108, p. 28); see also Commission Decision 85/233/EEC of 16 April 1985 terminating the anti-subsidy proceeding concerning imports of soya meal originating in Brazil (OJ L 106, p. 19, paragraph 12.3).

20 — Judgment of 14 July 1988 in Case 187/85 [1988] ECR 4155.

22. While noting the nevertheless divergent positions adopted in that regard by the Community and the United States, and in the context of Community law on aid developing necessarily in parallel with anti-subsidy legislation, I proposed to the Court an interpretation of Article 92 which encompasses more closely the *ratio legis* of that provision, which is that of maintaining equal conditions of competition between rival traders.

23. I also pointed out that in my opinion the public nature of aid inherent in Article 92(1) relates more to the authority which adopted the measure — the State and its agencies — than to the body or the person financing the aid. I drew the conclusion that there was no special need to take account of the origin of the funds, since 'regard must primarily be had to the effects of the aid on the undertakings or producers favoured ...'. [21]

24. If the case-law of the Court is strictly adhered to, in particular the position the Court took in the judgment in *Van Tiggele*, and the Court refuses to follow the line I proposed, in other words, if the financing through State resources appears to the Court to be a constitutive element of aid, it will state that the measure at issue is not aid within the meaning of Article 92 of the treaty.

25. Indeed, the limited possibility for a worker in a 'small' undertaking to challenge in court his dismissal does not appear to entail a burden on the resources of Treasury. In that respect, apart from their nature of subsidy, the costs claimed after such proceedings are seen not as revenue of the public authority, but as reimbursement by the party concerned of costs incurred by the administration of the courts.

26. In the absence therefore of any financial 'sacrifice' on the part of the public authority, the Court should consider that the measure in question does not constitute aid and it should proceed to reply to the second question referred by the national court.

27. Nevertheless, I continue to believe that the absence of financing through State resources does not suffice to preclude a measure adopted by the State or its agencies from being classified as aid. I will therefore continue to examine in the rest of this exposition dedicated to the nature of the aid the case-law of the Court which considers that measures which may be justified by 'the nature or general scheme of (the) system' [22] do not fall under the prohibition of Article 92(1).

28. This examination postulates the nature of the measure at issue, replaced in the context of the legislation of all the Member States as regards dismissal of workers of 'small' undertakings.

21 — Judgment in *Steinike and Weinlig*, paragraph 21, cited above.

22 — Judgment of 2 July 1974 in Case 173/73 *Italy* v *Commission* [1974] ECR 709, third indent of paragraph 15.

29. As discussed above, [23] the purpose of the disputed measure is to confer on a particular class of undertakings, namely those which employ five or fewer workers within the meaning of national legislation, the benefit of exemption from the ordinary law of dismissal on the basis of a review of the grounds for dismissal based either on consideration of the conduct or the professional aptitude of the worker, or on the needs of the undertaking.

30. That class of 'small' undertakings is understood differently in that regard in each of the Member States.

31. Where it is taken into account as regards dismissal, the concept of 'small' undertaking is heterogenous since in the Federal Republic of Germany it relates to undertakings with five or fewer workers and in France to those with fewer than eleven workers.

32. Furthermore, certain states, such as Denmark, the Hellenic Republic and the Netherlands, make no distinction based on the size of the undertaking.

33. Others, such as Ireland, rejected an amendment to the existing law which consisted of excluding from the scope of application of the 'Unfair Dismissals Act 1977', which applies to all undertakings, workers in undertakings employing fewer than five persons.

34. Italy takes into account the concept of 'small' undertaking (that is, those which employ fewer than 15 workers or fewer than five in agriculture), [24] but only in order to include it in the obligatory system of protection and promote, in cases of unjustified dismissal, payment of compensation with interest, since reintegration into a close working environment may prove difficult.

35. Luxembourg law also recognizes that concept, but, as regards dismissal, confers on it minimal importance. An employer who employs fewer than 20 workers may, in his notice of dismissal, opt either to pay a dismissal allowance or extend the period of notice. [25]

36. Portuguese law applies a general system of protection against 'unlawful' unfair dismissal to 'small' undertakings. However, in order to simplify the procedure, it provides in undertakings which employ fewer than 20 workers, first of all the option not to consult staff representatives, and secondly, the possibility for the worker to opt for an oral or written hearing. [26]

37. Finally, the laws of the United Kingdom do not exclude 'small' undertakings from the general system. Moreover, the case-law, which does not fix a minimum number of workers, may set aside certain procedural requirements in their case.

38. This review of existing legislation leads to the conclusion that only France and Germany apply exemptions which exclude

23 — Supra, paragraphs 2 to 4.

24 — Article 18 of Law No 300 of 20 May 1970 ('Statuto dei lavoratori').

25 — Article 24(3) of the Law of 24 May 1989 on contracts of employment.

26 — Article 15 of Decree-Law No 64-A/89.

'small' undertakings from the general system of protection against unfair dismissal of staff. Indeed, those two Member States confer on the workers concerned less statutory protection than under the ordinary law.

39. While German legislation envisages, as the Court has seen, as regards dismissal from a 'small' undertaking, recourse solely to abuse of rights, French legislation is more complex.

40. The French system which applies to undertakings which employ more than 10 workers who have at least two years of employment [27] is as follows: where the court finds that the ground of dismissal is not genuine and serious and that reintegration is not possible, the worker may claim compensation at least equal to the salary for the last six months.

41. However, 'small' undertakings in France do not altogether avoid judicial review of the grounds of dismissal. Workers employed in undertakings with fewer than eleven workers may, on unfair dismissal, regardless of their years of service, claim compensation calculated in relation to the damage suffered; [28] there is no fixed minimum amount of compensation. It is then for the worker to prove the extent of the material and non-material damage suffered. That compensation may be added to that penalizing abuse of rights.

42. From this overall description, let me now determine whether, by its nature, a measure such as that at issue comes within the scope of the prohibition of Article 92(1).

43. The measure referred to in the second sentence of Paragraph 23(1) of the Law on unfair dismissal applies generally to the 'small' businesses sector, regardless of their production or their geographical location.

44. That type of measure, which is not explicitly referred to in the Treaty as an exception, is classified by legal literature in the category of aid which may be authorized by the Commission, has been assessed by the Commission with realism and flexibility.

45. As regards the precise position of the Commission with regard to aid to small and medium-sized businesses, it should be pointed out that, owing to their important contribution to the solidity of the industry and the maintenance of a certain level of employment, they are highly regarded.

46. Accordingly, the Commission, in an investigation report on 'Labour Law and Industrial Relations in Small and Medium-sized Enterprises in the EEC Countries', [29] clearly demonstrates their leading role from an economic, social and employment point of view.

27 — Article L. 122-14-4 of the Code du Travail.

28 — Article L. 122-14-5 of the Code du Travail.

29 — Luxembourg 1988, p. 4.

47. As regards individual dismissal, that report, with references for preliminary rulings in mind, [30] points out that,

'[i] n many Community countries, in fact, the rules on redundancies do not apply to smaller scale production units because it is usually accepted that, in smaller firms, there is a closer relation of trust between employer and employee based on personal knowledge and, secondly, because it is believed that disputes arising in such production units are difficult to settle.

(...)

The rules on redundancies are in practice designed to limit or at least to regulate the employer's right to dismiss and the power to do so is normally greater for the owners of small (or very small) firms, since the law normally sets only lower limits for the application of its provisions.

The so-called "threshold effect" applies also in the case of redundancies, in such a way that the employees of smaller firms sometimes have less protection than those of the biggest companies or sometimes are not even protected against arbitrary dismissal by the employer.'

48. The Commission is perfectly well aware that there is national legislation which accords 'small' undertakings exemptions which allow them to dismiss staff more easily and at less cost and has never taken the step of classifying them as aid.

49. The national court [31] cites three proposed directives and seems to indicate that the Commission is about to change its position in that respect. Let me note that the only proposal which concerns the Court in this case, namely that relating to certain employment relationships with regard to distortions of competition, [32] intends in Article 3 to ensure that part-time workers are afforded dismissal allowances in proportion to the hours worked, while noting that those provisions are not to apply to employees whose weekly working time is less than eight hours. That text, amended by the Commission on 7 November 1990, [33] has still not been adopted.

50. Furthermore, the Commission has recently reaffirmed, in a document relating to Community guidelines on State aid for small and medium-sized enterprises of 20 May 1992, the importance it attaches to them. [34]

51. The privileged position in which they are placed, as pointed out moreover by the German Government, [35] is reaffirmed in the second paragraph of Article 118a(2) of the Treaty which provides that '[s] uch directives

30 — Page 45

31 — Paragraph 11 of the order for reference for a preliminary ruling.

32 — COM(90) 228 final-SYN 280 (OJ 1990 C 224, p. 6. The Court should note that the other two proposed directives relating to working conditions and measures intended to promote the improvement of the health and safety of temporary workers does not contain any particular provision relating to dismissal.

33 — COM(90) 533 final-SYN 280 (OJ C 305, p. 8).

34 — 'The specific problems faced by SMEs (...) call for a degree of positive action by government to level the playing field and perhaps tip it slightly in their favour' (OJ 1992 C 213, p. 2. paragraph 1(4)).

35 — Page 7 of its observations.

shall avoid imposing administrative, financial and legal constraints in a way which would hold back the creation and development of small and medium-sized undertakings'.

52. Promoting the creation and the development of such undertakings may, therefore, be considered a Community objective. [36]

53. In order to answer the question referred by the national court, it should be considered, first of all, whether the disputed provision conceals a specific factor which finds expression in the fact that 'certain undertakings or the production of certain goods' are favoured by shielding them from the general scheme of the system and disturbing its equilibrium.

54. On the first point, namely, the selectivity of aid, [37] it should be determined whether the measure at issue contributes to favouring directly or indirectly a particular category of traders.

55. The Court has already been asked to rule on the validity of a 'general' measure of aid which entailed discrimination with regard to a certain category of workers.

56. Accordingly, in a *Commission* v *Italy* case [38] the Court declared that the Member State had failed to fulfil its obligations by failing to take the necessary measures to abolish a legislative measure which, in the reduction in employers' contributions to the sickness insurance scheme (which may be considered a general measure of aid), differentiated between the reduction granted for male employees (four percentage points) and that for female employees (ten percentage points). The dispute centred above all on the failure to abolish the disputed measure. Nevertheless, in her Opinion in that Case, Advocate General Simone Rozès pointed out that:

'The Commission has however admitted that *the system established* by Law No 33 of 23 February 1980 constituted only a first stage in the extension of the taking over by the State of employers' contributions to the sickness insurance scheme to the *whole* [39] of the Italian economy and *it is of a sufficiently general nature not to fall within the scope of Article 92(1) except on one point relating to the greater reduction for female employees.* That reduction had the effect of favouring certain sectors which were particularly active in trade between Member States and which employ a largely female workforce and it thereby constituted an aid incompatible with the common market.' [40]

57. In a *Commission* v *France*, [41] the Court ruled more precisely on a measure providing a preferential rediscount rate of exports differing by 1.5 points in relation to the general rate stating that:

36 — See Council Decision of 28 July 1989 on the improvement of the business environment and the promotion of the development of enterprises, and in particular small and medium sized enterprises, in the Community (OJ 1989 L 239, p.33).

37 — Expression used notably by A. Mattera in *Le marché unique européen, ses règles, son fonctionnement*, Jupiter, 1990, 2nd Edition, p.67.

38 — Judgment of 14 July 1983 in Case 203/82 [1983] ECR 2525.

39 — Underlined in the [French] text.

40 — My emphasis.

41 — Judgment in Joined Cases 6 and 11/69 [1969] ECR 523.

'Neither the fact that the preferential rate in question is applicable to all national products exported and only to them nor the fact that in establishing it the French Government may have resolved to approximate the rate to those applied in the other member countries can remove from the measure in question the character of an aid which is prohibited except in the cases and procedures provided for by the Treaty.' [42]

58. Nevertheless, the Court has not so far developed criteria which allow a general measure of economic policy to be differentiated from a general aid. According to C. Quiqley, to whom I refer in my Opinion in the *Sloman Neptun* case, [43] 'the dividing line between general aids and general measures of economic policy may be rather obscure'. The dividing line in this case is, in fact, difficult to draw, since the criterion which determines whether a measure is general or 'normal' may be placed at different points.

59. Accordingly, in the present case, it could be argued that the general rule is that the dismissed worker receives legal protection, and that therefore Paragraph 23(1) of the Law on unfair dismissal constitutes an exception.

60. However it is also quite possible to state that that provision constitutes a general measure, and it should be inquired whether exemptions exist within it, that is to say, particular categories of undertakings or workers who are to be favoured.

61. In other words, the generality of the system may be considered either with regard to labour law and the protection of the dismissed worker, or with regard to the specific system of 'small' undertakings.

62. However, whatever point of view is taken, if the justification of the measure on the basis of the nature or the general scheme of the system were established, it would remove it from this question.

63. Let me remind the Court that the concept of justification for an exemption on the basis of the nature or general scheme of the system, which is the basis of the Commission's written observations, appeared in the judgment of the Court in *Italy* v *Commission*, above. [44] The Court ruled then on the validity of a provision which established for the benefit of undertakings in the textile industry, for a period of three years, a reduction in their rate of contribution to the social charges from 15 to 10%. The Court stated that:

'[i] t must be concluded that the partial reduction of social charges pertaining to family allowances devolving upon employers in the textile sector is a measure intended partially to exempt undertakings of a particular industrial sector from the financial charges arising from the normal application of the general social security system, *without there being any justification for this exemption on the basis of the nature or general scheme of this system*'. [45]

64. In the present case, the exemption in question has a double justification: first, the personal relationship which prevails in

42 — Paragraph 21.
43 — Paragraph 50.
44 — See footnote 22.
45 — Third indent of paragraph 3. My underlining.

employment relationships in 'small' undertakings; secondly, the material impossibility of being able to offer the worker another post within the same structure.

65. As the Commission points out, [46] the general scheme of the system established as regards socially unjustified dismissal is to encourage the reintegration of the worker, while compensation laid down by a court or agreed out of court is only paid where the employment relationship cannot be maintained.

66. In 'small' undertakings, that 'protection of acquired rights' very quickly collides with the limits described above which justify the derogatory nature of the measure.

67. Consequently, it follows from the above that, by its nature, a measure such as that before the Court does not fall within the scope of the prohibition in Article 92(1).

68. If, however, the Court does not accept that solution, it must consider that such a measure is, by its nature, an aid, and it is for the Commission to measure its effects and establish that it affects trade between Member States and distorts or threatens to distort competition.

69. As the Court recently recalled in its judgment in *Société Commerciale de l'Ouest and Others* v *Receveur Principal des Douanes de La Pallice Port* [47]

'Such a parafiscal charge may, depending on the purpose to which the revenue it produces is put, constitute State aid incompatible with the Common Market *if the conditions for the application of Article 92 of the Treaty are met; whether those conditions are satisfied must be determined by means of the procedure provided for that purpose in Article 93 of the Treaty*'. [48]

70. Should the Court reply in the negative to the first question — which is what I propose — the national court asks the Court to indicate whether the third sentence of Article 23(1) of the Law on unfair dismissal entails indirect discrimination against women, in breach of Articles 2 and 5 of Directive 76/207/EEC.

71. The national provision in question is worded thus: 'In determining the number of persons employed for the purpose of the second sentence, account is to be taken only of those employees whose normal period of work exceeds 10 hours per week or 45 hours per month'.

72. The national court explains in its order that the Community provisions which it is considering in particular are Article 5(1) of the Directive, which lays down that 'application of the principle of equal treatment with regard to working conditions, including the conditions governing dismissal, means that men and women shall be guaranteed the same conditions without discrimination on grounds of sex', and Article 2(1), which is worded as follows: '...the principle of equal

46 — Paragraphs 10 and 11 of its observations.

47 — Joined Cases C-78/90 to C-83/90 [1992] ECR I-1847.

48 — Paragraph 35. My underlining.

treatment shall mean that there shall be no discrimination whatsoever on grounds of sex either directly or indirectly by reference in particular to marital or family status'.

73. First of all, and as the Commission points out in its written observations, [49] the possibility should be envisaged of an individual, in the present case Mrs Kirsammer-Hack, being able to avail him-or herself of obligations contained in a directive with regard to another individual, his employer.

74. The question whether the Directive has been transposed within the time-limit provided in Article 9 has never been raised in the course of either written or oral proceedings.

74. That omission could, at first sight, appear awkward. Most of the Court's decisions with regard to whether an individual may rely on the provisions of a directive in respect of another individual concerned cases where non-transposition had been proven.

76 Nevertheless, the lack of information on that point does not represent an insurmountable obstacle.

77. It should be recalled that the Court has already confirmed the unconditional and precise nature of Article 5(1) of the Directive, in particular in the judgment in *Marshall*, [50] where it ruled that

'...with regard to the question whether the provision contained in Article 5(1) of Directive 76/207, which implements the principle of equality of treatment set out in Article 2(1) of the Directive, may be considered, as far as its contents are concerned, to be unconditional and sufficiently precise to be relied upon by an individual as against the State, it must be stated that the provision, taken by itself, prohibits any discrimination on grounds of sex with regard to working conditions, including the conditions governing dismissal, in a general manner and in unequivocal terms. The provision is therefore sufficiently precise to be relied on by an individual and to be applied by the national courts.' [51]

78. The Court also recalled that

'a directive may not of itself impose obligations on an individual and that a provision of a directive may not be relied upon as such against such a person'. [52]

79. On the basis of the principle that failure to implement or poor implementation of a directive may only by relied upon against a State, which could not shield itself with that failure to implement Community law, the Court gave the concept of 'State' a wide interpretation which it resumed as follows in its judgment in *Foster and Others*: [53]

'(...) the Court has held in a series of cases that unconditional and sufficiently precise

49 — Paragraphs 25 and 26.

50 — Judgment of 26 February 1986 *Marshall* v *Southampton and South West Hampshire Health Authority*, Case 152/84 [1986] ECR 723.

51 — Paragraph 52.

52 — Paragraph 48.

53 — Judgment in Case C-188/90 [1990] ECR I-3313.

provisions of a directive could be relied on against organizations or bodies which were subject to the authority or control of the State or had special powers beyond those which result from the normal rules applicable to relations between individuals.

The Court has accordingly held that provisions of a directive could be relied on against tax authorities (the judgments in Case 8/81 *Becker*, cited above, and in Case C-221/88 *ECSC* v *Acciaierie e Ferriere Bussseni (in liquidation)* [1990] ECR I-495), local or regional authorities (judgment in Case 103/88 *Fratelli Costanzo* v *Comune di Milano* [1989] ECR 1839), constitutionally independent authorities responsible for the maintenance of public order and safety (judgment in Case 222/84 *Johnston* v *Chief Constable of the Royal Ulster Constabulary* [1986] ECR 1651), and public authorities providing public health services (judgment in Case 152/84 *Marshall*, cited above).

It follows from the foregoing that a body, whatever its legal form, which has been made responsible, pursuant to a measure adopted by the State, for providing a public service under the control of the State and has for that purpose special powers beyond those which result from the normal rules applicable in relations between individuals is included in any event among the bodies against which the provisions of a directive capable of having direct effect may be relied upon'. [54]

80. A private employer cannot in any way be treated as some public authority having special powers. Where there has been a failure to transpose legislation, the national court may not, therefore, apply directly to him even the clear, precise and unconditional provisions of a directive.

81. The effects of that principle are nevertheless mitigated by the concept developed in the case-law of interpretation of national law in conformity with Community law.

82. That concept appeared for the first time in the judgment of the Court in *Von Colson and Kamann* v *Land Nordrhein-Westfalen*. [55] The question which the national court had referred to the Court consisted in knowing whether the provisions of national law limiting rights to compensation of individuals who have been discriminated against to merely nominal damages were in conformity with the requirements of the Directive. The Court ruled that

'(...) the Member States' obligation arising from a directive to achieve the result envisaged by the Directive and their duty under Article 5 of the Treaty to take all appropriate measures, whether general or particular, to ensure the fulfilment of that obligation, is binding on all the authorities of Member States including, for matters within their jurisdiction, the courts. It follows that, in applying the national law and in particular the provisions of national law specifically introduced in order to implement Directive 76/207, *national courts are required to interpret their national law in the light of the wording and the purpose of the Directive in order to achieve the result referred to in the third paragraph of Article 189*,' [56]

54 — Paragraphs 18, 19 and 20.

55 — Case 14/83 [1984] ECR 1891.

56 — Paragraph 26. My underlining.

going on to the more precise conclusion that

'(...) [i] t is for the national court to interpret and apply the legislation adopted for the implementation of the Directive in conformity with the requirements of Community law, *in so far as it is given discretion to do so under national law*'. [57]

83. The Court then confirmed that position, leaving the national court, as far as possible, to apply the spirit and the purpose of a directive in interpreting the wording of national legislation intended to implement it. [58]

84. Advocate General Van Gerven went further, in the *Barber* [59] case, where he suggested that the Court should not limit the interpretation in conformity with Community law solely to the national law intended to implement Community legislation. He pointed out in particular that

'[i] n those circumstances we are concerned not with the direct effect of the directive in question as between individuals but with the natural effect of national law as interpreted by the courts in accordance with Community law (...). This means, in my view, that such an interpretation in conformity with the Directive *may not be restricted to the interpretation of national legislation subsequent* to the adoption of the directive concerned (...). Frequently, national implementing legislation will be involved — as in *Von Colson* — but that need not be the case', [60]

going on to be yet more precise in *Marleasing*: [61]

'The obligation to interpret a provision of national law in conformity with a directive arises whenever the provision in question is *to any extent* open to interpretation.' [62]

85. The Court then proceeded to hold in the judgment that, where there had been no transposition of Council Directive 68/151/EEC and consequently there was no national provision which applied and which could serve as a basis for interpretation,

'in applying national law, whether the provisions in question were adopted before or after the directive, the national court called upon to interpret it is required to do so, as far as possible, in the light of the wording and the purpose of the directive in order to achieve the result pursued by the latter and thereby comply with the third paragraph of Article 19 of the Treaty. [63]

(...) the requirement that national law must be interpreted in conformity with Article 11 of Directive 68/151 precludes the interpretation of provisions of national law relating to public limited companies in such a

57 — Paragraph 28, my underlining.

58 — See in particular the judgment in Case 222/84 *Johnston* v *Chief Constable of the Royal Ulster Constabulary* [1986] ECR 1651, at paragraph 53.

59 — Judgment of 17 May 1990 in Case C-262/88 [1990] ECR I-1889.

60 — My underlining.

61 — Judgment in Case C-106/89 [1990] ECR I-4135.

62 — Paragraph 8 of the Opinion, my underlining.

63 — Paragraph 8.

manner that the nullity of a public limited company may be ordered on grounds other than those exhaustively listed in Article 11 of the directive in question', [64]

coming to the conclusion that

'[t] he answer to the question submitted must therefore be that a national court hearing a case which falls within the scope of Directive 68/151 *is required to interpret* its national law in the light of the wording and the purpose of that directive in order to preclude a declaration of nullity of a public limited company on a ground other than those listed in Article 11 of the directive.' [65]

86. The Court, going beyond the case-law in *Von Colson*, has accordingly extended to national provisions as a whole, even those preceding or unrelated to the Directive, the scope of application of the principle of interpretation in conformity with Community law.

87. The Court should confirm that position.

88. The Commission also wishes to ascertain as a preliminary point whether the case-law on indirect discrimination, developed on the basis of Article 119 of the Treaty, may be applied in the present case, since it concerns Directive 76/207/EEC.

89. In the judgment in *Ruzius-Wilbrink* [66] relating to grant of entitlement to part-time workers of a disability allowance, the Court followed its consistent case-law on Article 119 on the basis of Article 4(1) of Directive 79/7/EEC, established in particular in the Court's judgment in *Jenkins* [67] in the following words:

'(...) Article 4(1) of Council Directive 79/7/EEC of 19 December 1978 must be interpreted as precluding a provision from creating, within the framework of national legislation which guarantees a minimum subsistence income to insured persons suffering from incapacity for work, an exception to that principle in respect of insured persons who had previously worked on a part-time basis and from limiting the amount of the allowance to the wage previously received, where that measure affects a much larger number of women than men, unless that legislation is justified by objective factors unrelated to any discrimination on grounds of sex'. [68]

90. Accordingly, the Court should consider that its case-law on indirect discrimination on the basis of Article 119 extends to directives enacted in order to apply that provision. The same should therefore apply to Directive 76/207/EEC.

91. With these preliminary points out of the way, let me now try to give the national court the assistance which will enable it to determine whether or not the third sentence of Article 23(1) of the Law on unfair dismissal is discriminatory in nature.

64 — Paragraph 9.

65 — Paragraph 13, my underlining.

66 — *Ruzius-Wilbrink* v *Bedrijfsvereniging voor Overheidsdiensten* Case C-102/88 [1989] ECR 4311.

67 — *Jenkins* v *Kingsgate* Case 96/80 [1981] ECR 911.

68 — Judgment in *Ruzius*, cited above, paragraph 17.

92. That provision, which provides a specific method of calculation, does not entail, directly, any discrimination on grounds of sex. Its wording is, in fact, neutral.

93. Accordingly, the Court should examine whether for 'small' undertakings, the fact of not taking into account employees who work less than ten hours per week or 45 hours per month is in the nature of indirect discrimination against women. It should again be clarified that the method of calculation itself is only discriminatory as a result of the fact that the undertaking in question is classified under the category of 'small' undertaking. Indeed, Mrs Kirsammer-Hack is squarely included among the undertaking's staff and is not one of those who, working fewer than ten hours per week or 45 hours per month, is not taken into account in calculating the number of staff. Therefore she may not rely on the general scheme of protection against unfair dismissal.

94. Consequently, as suggested by the Commission, [69] to reply to the question effectively implies that its scope must be extended to the disadvantage actually suffered by workers of 'small' undertakings, namely, that they do not benefit from the judicial review provided in the general system.

95. According to the case-law of the Court, it is for the national court first to establish whether there has in fact been discrimination, and secondly to verify whether that discrimination is justified by objective factors unrelated to sex.

96. On the first point — determination of the existence of discrimination — the Court has, on several occasions, stated that that element of fact comes within the jurisdiction of the national court. Accordingly, in the judgment in *Jenkins*, supra, in which the remuneration of part-time workers at a clothing manufacturing undertaking was at issue, the hourly pay being 10% lower than that applicable to full-time work the Court held that

'[w]here the hourly rate of pay differs according to whether the work is part-time or full-time it is for the national courts to decide in each individual case whether, regard being had to the facts of the case, its history and the employer's intention, a pay policy such as that which is at issue in the main proceedings although represented as a difference based on weekly working hours is or is not in reality discrimination based on the sex of the worker.' [70]

97. I would like to point out in that respect that the statistics mentioned both by the national court and the German Government are incomplete.

98. The national court mentions that '90% of all part-time workers in the Federal Republic of Germany are women' [71] without giving the precise proportion of those that work in 'small' undertakings.

99. The German Government, in reply to the questions put to the Court, does not put

69 — Paragraph 30 of its observations.

70 — Paragraph 14.

71 — Page 21 of the reference for a preliminary ruling.

forward any figures relating to the proportion of women who work in 'small' undertakings (including those of whom no account is taken owing to the fact that they work fewer than ten hours per week or 45 hours per month). The statistics based on the number of undertakings for 1987 show a much larger proportion of men (75%) than of women (25%) in undertakings employing between one and 4 employees.

100. On the second point — possible justification of the measure by objective factors unrelated to any discrimination — it is for the national court again, if it is established that there has been discrimination, to make findings of fact. The Court nevertheless laid down in its judgment in *Bilka* [72] principles of interpretation as regards examination of grounds put forward to justify the measure, holding that

'[i] f the national court finds that the measures chosen by Bilka correspond to a real need on the part of the undertaking, are appropriate with a view to achieving the objective pursued and are necessary to that end, the fact that the measures affect a far greater number of women than men is not sufficient to show that they constitute an infringement of Article 119.' [73]

101. Finally, in the judgment in *Rinner-Kühn*, [74] relating to a similar provision to that of the present case which was denounced since the obligation for the employer to continue to pay the wages during six weeks of a worker in the case of illness could not be applied to employees whose working time did not exceed ten hours per week or 45 hours per month, the Court stated, on the bases of Article 119, that

'[i] t is for the national court, which has sole jurisdiction to assess the facts and interpret the national legislation, to determine whether and to what extent a legislative provision, which, though applying independently of the sex of the worker, actually affects a greater number of women than men, is justified by reasons which are objective and unrelated to any discrimination on grounds of sex'. [75]

102. In the present case, the parties have, in both their written and oral observations, referred broadly to the motivation of the legislature as regards aid to 'small' undertakings. Accordingly, favouring the promotion of employment, and concentrating efforts in a sector of industry most able to adapt to economic changes figured among the objectives sought.

103. Consequently, I suggest that, in reply to the second question, the Court should state that it is for the national court to assess whether there has been any actual indirect discrimination and, should the national court find sufficient elements pointing to its existence, to determine whether or not the disputed measure is justified by objective factors unrelated to any discrimination based on sex.

72 — *Bilka* v *Weber von Hartz* Case 170/84 [1986] ECR 1607.

73 — Paragraph 36.

74 — *Rinner-Kühn* v *FWW Spezial-Gebäudereinigung* Case 171/88 [1889] ECR 2743.

75 — Paragraph 15.

104. A final observation. Without encroaching on the jurisdiction of the national court, it seems to me that, if the disputed measure is not to be considered an aid by reason of its justification by the nature or general scheme of the system, such justification should play a decisive role in that court's assessment.

105. In conclusion, I propose that the Court should rule as follows:

(1) A national provision which excludes businesses with five or fewer employees from the system of protection against unfair dismissal is incompatible with Article 92(1) of the EEC Treaty.

(2) Articles 2 and 5 of 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 precludes a national provision which excludes businesses with five or fewer employees from the system of protection against unfair dismissal if it is established that that exception actually affects a much greater number of women than men, unless it is justified by objective factors unrelated to any discrimination on grounds of sex.