

OPINION OF ADVOCATE GENERAL
LENZ

delivered on 30 September 1997 *

A — The facts

1. In these proceedings the Commission seeks a declaration that the Italian Republic has failed to comply with Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions.¹
- equal treatment when the concern for protection which originally inspired them is no longer well founded shall be revised (Article 5(2)(c)). Under Article 9(1), Member States have 30 months from the notification of the Directive to put into force the necessary provisions. However, Article 9(1) provides that as regards Article 5(2)(c), Member States shall carry out a first examination and if necessary a first revision of the provisions referred to therein within four years of notification of the Directive.

2. Under Article 2(1), the principle of equal treatment for women, as set out in the Directive, prohibits any discrimination on grounds of sex, either directly or indirectly. For the purposes of applying the principle of equal treatment in relation to working conditions, Member States are required to take all necessary measures to ensure that any provisions contrary to the principle of equal treatment are abolished (Article 5(2)(a)) and that provisions contrary to the principle of
3. In Italy, Article 5(1) of Law No 903 of 9 December 1977 (hereinafter referred to as 'the Italian Law') provides as follows: 'It shall be prohibited to employ women in factories and workshops between midnight and 6 a. m. This prohibition shall not apply to women in managerial positions or to women employed in ancillary services.' Under Article 5(2) of the Italian Law, this prohibition may be adapted or restricted through collective agreements or works agreements in relation to specific production requirements and taking account of working conditions and the organization of services. However, Article 5(3) of the Italian Law provides that

* Original language: German.

¹ — OJ 1976 L 39, p. 40.

there is to be no derogation from the prohibition in Article 5(1) in relation to the period between the commencement of pregnancy and the time when the infant reaches the age of seven months.

comply with the opinion within the prescribed period of two months, the Commission brought this action on 19 June 1996.

4. Those Italian provisions have been adopted in implementation of Convention No 89 of 9 December 1948 of the International Labour Organization (hereinafter referred to as 'the ILO') as ratified by the Italian Republic by Law No 1305 of 22 December 1952 prohibiting the employment of women for nightwork save for certain exceptions. The Italian Government denounced that Convention with effect from February 1993.

6. The applicant claims that the Court should:

Declare that, by not adopting within the prescribed period the laws, regulations and administrative provisions necessary to comply with Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, and by keeping in force within its own legal system rules prohibiting nightwork for women, contrary to Article 5 of that Directive, the Italian Republic has failed to fulfil its obligations under Community law.

5. The Commission considered the Italian legislation to be incompatible with Community law and, by letter of formal notice of 2 March 1994, initiated infringement proceedings. When it received no response from the Italian Republic within the period of two months granted for this purpose, the Commission issued, on 19 June 1995, a reasoned opinion in which it stated that, having regard to the denunciation of ILO Convention No 89, it was obliged to carry out the necessary adjustments. As the Italian Republic failed to

7. The defendant claims that the Court should:

Dismiss the action.

B — Analysis

8. Since the Italian Government asserts that the Commission's claim that the Italian Government has failed to adopt the laws, regulations and administrative provisions required to comply with the Directive was made only in its application to the Court and not in its earlier written observations, it is first necessary to define the subject-matter of the dispute. The subject-matter is defined by the grounds of complaint set out in the letter of formal notice.²

9. Both the letter of formal notice and the reasoned opinion of the Commission are in fact ambiguous in that they refer only to failure to adopt the measures required in relation to Article 5 of the Italian Law and not to any general failure to adopt the laws, regulations and administrative procedures required. This does not, however, constitute an unlawful extension of the subject-matter of the dispute. On the contrary, the two heads of claim set out in the Commission's applications relate to the same issue in that the Italian Republic is in fact charged with the same breach of obligations, allegedly committed through maintenance of Article 5 of the Italian Law, on the one hand, and failure to adopt the laws, regulations and administrative provisions necessary to abolish that provision, on the other. Since the

claim concerning the maintenance of Article 5 of the Italian Law is the more specific, that claim alone may be examined without any cause to dismiss the remainder of the application.

10. In their subject-matter these proceedings have a parallel with a recent case³ in which the Court was asked to grant a declaration finding that the French Republic, which, after renouncing ILO Convention No 89, continued to impose a prohibition on night-work in contravention of Article 5 of Directive 76/207, was in breach of its obligations under the Treaty.

11. The pleas in law and arguments of the Italian Republic are unclear in that, on the one hand, it concedes that the Italian provisions in question may well be incompatible with Community law, while, on the other hand, it argues that, although those provisions impose a general prohibition on night-work for women, such a prohibition has effectively been removed by the possibilities of derogation provided for. Rather than establishing formal equality of treatment between the sexes in regard to working time, the Italian legislature preferred a substantial form of equality between the sexes by maintaining the particularly flexible system of

2 — Case 211/81 *Commission v Denmark* [1982] ECR 4547, paragraph 8.

3 — Case C-197/96 *Commission v France* [1997] ECR I-1489.

prohibition which existed already. This solution was considered necessary in order to safeguard requirements in the personal and family sphere, the importance of which is emphasized in Article 2(3) of Directive 76/207⁴ and the first paragraph of Article 37 of the Italian Constitution.⁵

directives which, as far as their subject-matter is concerned, are unconditional, and sufficiently precise, Italian courts would disregard Article 5 of the Italian Law, considering the rule set out therein as having been abolished and replaced by the higher-ranking and directly applicable rule laid down by Article 5 of Directive 76/207.

12. To the extent that this argument is to be understood as denying the existence of a legislative provision contrary to the principle of equal treatment within the meaning of Article 5 of Directive 76/207, reference should be made to the *Stoeckel* case, which the Commission has rightly relied on, in which the Court ruled that Article 5 of Directive 76/207 imposes on Member States the obligation not to lay down, as a legislative principle, that nightwork by women is prohibited, even if it is subject to exceptions, where nightwork by men is not prohibited.⁶

13. The Italian Republic further asserts that notwithstanding the legislative inaction Italian law is compatible with Community law. On the basis of the direct applicability of

14. However, here, too, I must concur with the Commission in referring to consistent case-law of the Court according to which if a Member State introduces new legislation or fails to amend existing legislation which is incompatible with a provision of Community law, even when that provision is directly applicable in the legal systems of the Member States, this gives rise to a situation of ambiguity because individuals are uncertain as to the remedies available to them under Community law.⁷ Consequently, the incompatibility of national law with Community law, even where it is directly applicable, can only be finally eliminated by means of national laws of a binding nature having the same legal status as those which must be amended.⁸ The direct applicability of a directive does not therefore relieve a Member State of the obligation to take the measures necessary to ensure the correct transposition of the directive.

4 — Article 2(3) states as follows: 'This Directive shall be without prejudice to provisions concerning the protection of women, particularly as regards pregnancy and maternity.'

5 — The first paragraph of Article 37 states as follows: 'A female worker shall have the same rights and, for like work, receive the same remuneration as a male worker. Working conditions must enable women to carry out their essential role in the home and must ensure suitable and adequate protection for mothers and children.'

6 — Case C-345/89 *Stoeckel* [1991] ECR I-4047, paragraph 20.

7 — Case 74/86 *Commission v Germany* [1988] ECR 2139, paragraph 10; Case 168/85 *Commission v Italy* [1986] ECR 2945, paragraph 11; and Case 167/73 *Commission v France* [1974] ECR 359, paragraph 22.

8 — See *Commission v Italy*, referred to in footnote 7 (above), at paragraph 13.

15. This is in fact accepted by the Italian Government which points out that it is now preparing the formal measures for a complete adaptation of the Italian legislation to Community law.

the time-limit began to run again from February 1993, when the denunciation became effective, in which case the commencement of these proceedings against the Commission would be premature.

16. The time-limit for transposition prescribed by Article 9(1) of the Directive expired in 1978 for the measures referred to in Article 5(2)(a) and in 1980 for the measures referred to in Article 5(2)(c). However, until the coming into effect of the denunciation of ILO Convention No 89, the Italian Republic could not be expected to repeal Article 5 of the Italian Law because this provision was necessary to safeguard the fulfilment of obligations towards non-member States under that Convention, which was ratified before the entry into force of the EEC Treaty. Against that background, the Court of Justice accordingly acknowledged in the *Levy* case that Article 234 of the EC Treaty⁹ allows national courts to refrain from applying the obligations arising from Article 5 of the Directive¹⁰ until the incompatibility established has been eliminated. The question therefore arises as to whether

17. I do not consider this to be the case. Even where, as in a case such as this, the international obligations entered into by a Member State before the entry into force of the EEC Treaty initially prevent that State from fully implementing a directive, the period for transposition running from notification of the directive gives sufficient latitude to the Member State concerned for preparing the adaptation measures required. The Member State concerned must therefore make those adaptations immediately following the steps taken pursuant to the second paragraph of Article 234 of the EC Treaty in view of its transposition obligations arising under Community law. Moreover, the Italian Republic had sufficient time from February 1993, when the denunciation became effective, until August 1995, when the time-limit prescribed by the reasoned opinion expired, to repeal Article 5 of the Italian Law.

9 — The first paragraph of Article 234 provides: 'The rights and obligations arising from agreements concluded before the entry into force of this Treaty between one or more Member States on the one hand, and one or more third countries on the other, shall not be affected by the provisions of this Treaty', and the second paragraph of Article 234 provides: 'To the extent that such agreements are not compatible with this Treaty, the Member State or States concerned shall take all appropriate steps to eliminate the incompatibilities established ...'.

10 — Case C-158/91 *Levy* [1993] ECR I-4287, paragraph 22.

18. Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs.

C — Conclusion

19. In the light of the foregoing, I propose that the Court:

Declare that by keeping in force in its national legal system provisions prohibiting nightwork by women, contrary to Article 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, the Italian Republic has failed to fulfil its obligations under Community law;

Order the defendant to pay the costs.