OPINION OF ADVOCATE GENERAL GEELHOED

delivered on 15 March 2001 [1]

I — Introduction

1. By this reference under Article 177 of the EC Treaty (now Article 234 EC), the Oberlandesgericht Wien (Higher Regional Court, Vienna) (Austria), has submitted six questions to the Court for a preliminary ruling on the interpretation of Article 119 of the EC Treaty (Articles 117 to 120 of the EC Treaty have been replaced by Articles 136 EC to 143 EC) and Council Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women. The Oberlandesgericht essentially seeks to ascertain (i) whether classification in the same job category under a collective agreement is sufficient for work to be the same or of equal value, (ii) on whom the burden of proof regarding the alleged discrimination lies, and (iii) the extent to which a difference work effectiveness, which is demonstrable only *ex post facto*, may be a criterion justifying a difference in pay for the same work or work of equal value.

1 — Original language: Dutch.

II — The applicable provisions

A — *Provisions of Community law*

2. The first paragraph of Article 141 EC (formerly Article 119) provides as follows:

'Each Member State shall ensure that the principle of equal pay for male and female workers for equal work or work of equal value is applied.'

3. The second paragraph of Article 141 EC provides as follows:

'Equal pay without discrimination based on sex means:

(a) that pay for the same work at piece rates shall be calculated on the basis of the same unit of measurement;

(b) that pay for work at time rates shall be the same for the same job.'

4. Article 1 of Directive 75/117 reads as follows:

'The principle of equal pay for men and women outlined in Article 119 of the Treaty, hereinafter called "principle of equal pay", means, for the same work or for work to which equal value is attributed, the elimination of all discrimination on grounds of sex with regard to all aspects and conditions of remuneration.

In particular, where a job classification system is used for determining pay, it must be based on the same criteria for both men and women and so drawn up as to exclude any discrimination on grounds of sex.'

5. Article 4 of Directive 75/117 provides as follows:

'Member States shall take the necessary measures to ensure that provisions appearing in collective agreements, wage scales, wage agreements or individual contracts of employment which are contrary to the principle of equal pay shall be, or may be declared, null and void or may be amended.'

B — *National provisions*

6. As can be seen from the order for reference, under Austrian employment law, pay is in principle determined by the parties under a contract of employment. In many sectors, however, minimum pay is laid down in collective agreements. Whether the application of these collective agreements is mandatory depends on whether the employer is affiliated to the employers' organisation that was a party to the collective agreement. Collective agreements are usually concluded on the employees' side by voluntary occupational collectivities (trade unions) and on the employers' side by industrial sector organisations for the representation of employers' interests, but in some cases by voluntary associations or legal persons governed by public law (Paragraph 4 et seq. of the Arbeitsverfassungsgesetz (Law on the Organisation of Undertakings) *Bundesgesetzblatt* 22/1974).

Minimum rates of pay are usually determined in collective agreements on the basis of the specific activities in question, that is to say the activities that the employee actually performs, and a minimum rate of pay is usually set for those activities taking into account the number of years the employee has been performing those activities (particularly in the case of salaried staff). Collective agreements are interpreted in the same way as statutes in that regard.

In accordance with the 'most favourable case principle' laid down in Paragraph 3 of the Arbeitsverfassungsgesetz, it is, however, open to the parties to an individual contract of employment to depart from the minimum rates of pay and to agree a higher rate or higher supplements.

The rate of pay for salaried employees is usually fixed in relation to the normal working period (40 hours per week) or some other weekly working period laid down by collective agreement, calculated over a whole month.

7. The concept of 'fixed overtime' covers the payment for work done outside normal working time. That pay must not, on average, be less than the pay corresponding to the number of hours' overtime actually worked.

An obligation to work overtime may be provided for, *inter alia*, by the contract of employment.

Where a fixed amount of overtime has been agreed, the assumption is that the employee is obliged to work the specified number of hours' overtime if the employer so instructs him and that those overtime hours are remunerated by the specifically agreed pay. The employer may not, however, depart unilaterally from this agreement by not paying the fixed amount for overtime, that is to say, the agreed remuneration. Nevertheless, he may always dispense with overtime work, for example if the undertaking does not need its employees to work overtime. In any event, there is generally no right to perform such overtime work.

8. As regards the determination of the rate of pay, Article 2 of the collective agreement for bank employees and bankers at issue here provides for their jobs to be classified in job categories.

Job category V covers, *inter alia*, employees with 'specialist training in banking,

who carry out skilled banking tasks independently'. Article 6 of the collective agreement provides that the working period is 38.5 hours, and Article 7 lays down rules on the payment of overtime. Point I of Article 8 of the collective agreement provides that every new employee's job must be classified, and that for job category V, among others, the works council and the personnel department must try to reach agreement on classification. Point II of Article 8 provides, moreover, that the actual (principal) activities must always be the criterion in that regard.

III — The facts

9. At issue between the parties in the main proceedings, who are Susanna Brunnhofer and the Bank der österreichischen Postsparkasse (hereinafter 'the Bank'), is a difference in pay for male and female workers for the same work or work of equal value.

10. It is common ground that Ms Brunnhofer was employed by the Bank from 1 July 1983 to 31 July 1997 and that her initial monthly salary, including a fixed amount for overtime, was ATS 40 520. It is also established that a male colleague, engaged by the Bank on 1 August 1994, was appointed at a gross salary, including a withdrawable fixed amount for overtime, of ATS 43 871. It is not disputed that Ms Brunnhofer's basic salary, including the increases laid down by the collective agreement, was the same as that of her male colleague, that both their fixed amounts for overtime were calculated in accordance with Article 7 of the collective agreement applicable to banks and bankers and that neither Ms Brunnhofer nor her male colleague received special increases in salary, other than the rises under the collective agreement.

11. Ms Brunnhofer claims that she has suffered pay discrimination on grounds of her sex. Although the basic salary, including the increases laid down by the collective agreement, of the employees concerned was the same, there was still a difference in salary given that her male colleague received a monthly supplement as a result of which he earned around ATS 2 000 more than Ms Brunnhofer. Since the time when they entered employment, the two employees concerned had been classified in the same salary scale under the collective agreement.

12. Ms Brunnhofer argues that she performed the same work as her male colleague, or at any rate work of equal value. She was employed in the foreign department of the Bank and her task was to supervise loans. The intention was that, after an unspecified training period, Ms Brunnhofer would take over the management of that department. As a result of problems at

work and in her private life, however, she was not appointed head of the department. Ms Brunnhofer was subsequently placed in a post specially created for her in the legal department. There, too, she failed to fulfil expectations, whereupon she was dismissed.

13. The Bank denies the existence of any pay discrimination and maintains that objective factors explain the difference in salary. The Bank argues that, although the functions of the employees concerned had in principle been classified as equivalent, Ms Brunnhofer's male colleague, who acted as an adviser to important clients, also had to enter into binding external commitments, which meant that he had to be invested with authority to act. This was the reason for his higher supplement, according to the Bank. In Ms Brunnhofer's case, contact with clients was of secondary importance. Her male colleague's qualifications also justified his somewhat higher salary, in the Bank's opinion. He had studied business and had also worked abroad, which meant that he was better qualified to advise clients. The quality of the work was therefore different, in the Bank's opinion.

14. The Equal Treatment Commission of the Bundeskanzleramt (Federal Chancellor's Office), before which Ms Brunnhofer had brought the case, found that discrimination, within the meaning of the Austrian Gleichbehandlungsgesetz (Law on Equal Treatment), in the determination of pay could not be ruled out. Ms Brunnhofer subsequently brought an action against the Bank for payment of ATS 160 000 for pay discrimination on grounds of sex. After the court at first instance had rejected her claim, Ms Brunnhofer appealed to the Oberlandesgericht, Vienna.

IV — The questions submitted by the national court

15. Finding that the case required an interpretation of provisions of Community law, the Oberlandesgericht referred the following questions to the Court by order of 15 June 1999:

'(1)(a) In assessing whether work is "equal work" or constitutes "same job" within the meaning of Article 119 (now Article 141) of the EC Treaty or is "the same work" or "work to which equal value is attributed" within the meaning of Directive 75/117/EEC, is it sufficient, where individual contracts of employment stipulate supplements to pay fixed by collective agree-

ment, to ascertain whether the two workers being compared are classified in the same job category under the collective agreement?

(1)(b) If the reply to Question (1)(a) is in the negative:

In the situation described in Question (1)(a), is the same classification under the collective agreement evidence of the same work or work of equal value within the meaning of Article 119 (now Article 141) of the Treaty and of Directive 75/117/EEC, with the result that it is for the employer to prove that the work is different?

(1)(c) Can the employer rely on circumstances not taken into account in collective agreements in order to justify a difference in pay?

(1)(d) If the reply to Question (1)(a) or (1)(b) is in the affirmative:

Does this also apply if the classification in the job category under the collective agreement is based on a job description couched in very general terms?

(2)(a) Are Article 119 (now Article 141) of the Treaty and Directive 75/117/EEC based on a definition of "worker" which is uniform at least in so far as the worker's obligations under the contract of employment depend not only on generally defined standards but also on the individual capacity of the worker?

(2)(b) Are Article 119 (now Article 141) of the Treaty and Article 1 of Directive 75/117/EEC to be interpreted as meaning that the fixing of different pay may be objectively justified by circumstances which can be established only *ex post facto*, such as in particular a specific employee's work performance?'

V — Examination of the questions submitted by the national court

A — *Questions (1)(a) and (1)(b)*

16. I shall deal below with the first two parts of the first question together. They

essentially address two issues which can be summarised as follows:

(1) In the light of the facts set out in the order for reference, is the work concerned the same work?

and

(2) On whom does the burden of proving this fact lie?

17. Here we have two employees, one male and one female, both of whom are classified in the same job category under a collective agreement. As explained at point 6 above, under the Austrian employment legislation, minimum working conditions are laid down by collective agreement. More favourable conditions are possible on the basis of individual contracts of employment. Both Ms Brunnhofer and the male colleague to whom she compares herself receive the same basic salary. In addition, both receive a fixed amount for overtime which is not withdrawable in Ms Brunnhofer's case but is in her male colleague's case. Furthermore, both receive an extra monthly supplement which is lower for Ms Brunnhofer than for her male colleague.

Thus, at first sight there is pay discrimination on grounds of sex, since Ms Brunnhofer receives ATS 2 000 less supplement per month than her male colleague. For the purpose of answering the question whether there actually is sex discrimination in the matter of pay, it is crucial to determine whether the work they do is the same work or work of equal value. The answer depends on an assessment of the facts. If the referring court reaches the conclusion that the two employees perform the same work, then it would be obvious that the present case involves prohibited discrimination within the meaning of Article 141 EC.

18. The fact that both employees are classified in the same job category under a collective agreement is an indication that their work may be the same work or work of equal value. The mere fact that they have been so classified is not however, sufficient for their work to be regarded as the same work or work of equal value, even though point II of Article 8 of the relevant collective agreement applicable to bank employees and bankers provides that classification under job category V must be based on the (principal) activities actually performed by the employee: activities may still differ despite classification under the same job category. The collective agreement in question is a framework agreement with broadly defined job groups or categories. Within those categories, special working conditions may be agreed on an ad hoc basis, which, in fact, is what happened in

this case, as has already been described above. The question here, therefore, is whether the difference in pay also corresponds to a difference in the work done. If there is a difference in pay, this will in principle have to be reflected in different activities. If no difference in the activities can be established, however, the pay ought to be the same, unless the employer shows that the difference in pay can be objectively justified.

19. As can be seen from the case-law of the Court, the concept of the same work is a qualitative concept, that is to say that it is concerned exclusively with the nature of the activities in question. [2] The only criterion for determining whether work is the same work or work of equal value therefore lies in the activities actually performed by the employees. In order to determine whether work being done by different persons is the same, it is necessary to ascertain whether, taking into account a number of factors such as the nature of the work, the training requirements and the working conditions, those persons can be considered to be in a comparable situation. [3] The referring court will therefore have to assess, on the basis of those factors, whether Ms Brunnhofer's work (supervising loans) is the same as, or of equal value to, that of her male colleague (managing important clients). It is also for the national court to determine how much importance must be attached to the fact that Ms Brunnhofer's male colleague has an authority to act. Does this mean that the activities are so different as to be capable of justifying a difference in pay?

20. Then there is the question of the burden of proof. As can be seen from the foregoing, the case concerns direct discrimination. The Court has ruled in earlier cases that, in the event of direct discrimination, the burden of proof lies with the person alleging discrimination in the matter of pay. [4] Only in the case of indirect discrimination, which is in general more difficult for victims of the alleged discrimination to demonstrate, can the burden of proof be reversed. [5] The present case concerns direct discrimination, however, which means that the burden of proof lies with Ms Brunnhofer. It is therefore for Ms Brunnhofer to demonstrate that her work is the same or of equal value and that different pay is awarded for it. The fact that classification in the same job category may be evidence that the work is the same or of equal value does not release the person who believes that she is the victim of pay discrimination from the obligation to prove with detailed facts and evidence that the work really is the same or of equal value in the case in question. It is then for the employer to

2 — Case 129/79 *Macarthys* [1980] ECR 1275, paragraph 11.

3 — Case C-400/93 *Royal Copenhagen* [1995] ECR I-1275 and Case C-309/97 *Angestelltenbetriebsrat der Wiener Gebietskrankenkasse* [1999] ECR I-2865, paragraph 17.

4 — Case C-127/92 *Enderby* [1993] ECR I-5535.

5 — Case 109/88 *Danfoss* [1989] ECR 3199 and Case 170/84 *Bilka* [1986] ECR 1607.

demonstrate that there are grounds which can justify the difference in pay. As can be seen from the order for reference made by the Oberlandesgericht, the information concerning the pay itself is so transparent that there are no evidential difficulties standing in the way of demonstrating a difference in pay. Ms Brunnhofer appears to have shown this sufficiently. To substantiate her claim that unequal pay prohibited by the relevant Community law exists, however, she will also first have to show that the work is the same or of equal value. The referring court will ultimately have to establish, on the basis of the facts and evidence adduced by her, whether the case is one of unequal pay not justified by objective differences between the work actually done by Ms Brunnhofer and that actually done by her male comparator.

B — *Question (1)(d)*

21. The fourth part of the first question is asked only in the event that part (1)(a) or (1)(b) is answered in the affirmative. Since that is not the case, this question does not need to be answered.

C — *The other questions*

22. Questions (1)(c), (2)(a) and (2)(b) are all designed to give the referring court concrete criteria for answering the question whether and, if so, under what conditions, an established difference in pay can be justified in the light of Article 141 EC and Directive 75/117.

23. The answer to be given to Question (1)(c) can be inferred from the observations made in response to Questions (1)(a) and (1)(b). I have pointed out that, under Austrian employment law, collective agreements fix minimum working conditions and, moreover, set an often broadly defined framework within which individual working conditions must be agreed with the employees concerned. In a statutory and contractual framework of this kind, the working conditions of individual employees who are in the same job or pay category may differ. Such differences can also be justified through examination of their compatibility with the Community law at issue, provided that they are based on objective criteria such as the age, training and experience of the employees concerned and, furthermore, are applied to comparable cases in the same way. [6]

6 — Case 96/80 *Jenkins* [1981] ECR 911, paragraphs 11 to 14.

I infer from the *Bilka* judgment,[7] cited above, that the objective grounds of justification for such differences in pay must lend themselves to transparent application, that is to say, they must be reducible to objective economic reasons and match the objectives pursued by the undertaking.

24. By Question (2)(a), the referring court asks whether the definition of 'worker' on which Article 141 EC and Directive 75/117 are based is comparable and whether the worker's obligations under the contract of employment depend not only on generally defined standards but also on the individual personal aptitude of the worker himself. The answer to the first part of this question does not require lengthy observations. It can be seen from the judgment in *Jenkins*,[8] cited above, and also from those in *Kowalska*[9] and *Newstead*[10] that Directive 75/117 essentially seeks to help achieve the principle of equal pay for men and women laid down in Article 141 EC by facilitating the application of that principle in practice. Given that the aim of the directive is thus limited to giving practical effect to Article 141 EC, the only possible conclusion is that the core concepts of Article 141 EC and those of the Directive are substantively congruent. This of course also applies to the concept of 'worker'.

25. The answer to the second half of this question is more difficult because it is not possible to ascertain clearly from the order for reference the factual circumstances to which this question relates. The referring court could be alluding, purely hypothetically, to a situation in which, although the employees being compared do 'the same work', their levels of performance in carrying out that work differ. As the Commission too observes, the order for reference contains no finding or factual description on the basis of which the question can be understood as being anything other than hypothetical. In the absence of more facts, we must fall back on Article 141(2) EC to answer the question whether differences in individual aptitude can justify differences in pay. Under that provision, pay may take the form of piece rates or time rates. In the case of piece rates, Article 141(2)(a) EC provides that the same unit of measurement must be used. Depending on the degree of commitment and the individual productivity of the employees concerned, differences in pay are therefore possible according to the objectively verifiable results of the efforts made by the individuals concerned. This is not so in the case of time rates. Article 141(2)(b) EC provides that, if the work is paid at time rates, the pay must be the same for the same job. In view of the fact that in the present case the work is paid at a time rate, any differences in individual levels of performance must not result in differences in pay because the same work is being done in the same job. Whether the

7 — Cited in footnote 5, paragraph 36.

8 — Cited in footnote 6.

9 — Case C-33/89 *Kowalska* [1990] ECR I-2591.

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

work is in fact the same in the present case will, as has already been stated above in the answers to Questions (1)(a) and (1)(b), have to be decided on the basis of the objective facts and circumstances that determine the jobs of the employees being compared.

26. In my view, Question (2)(b) should be answered in the negative. If different pay is awarded for the same work on the basis of factors such as the particular aptitude of a given worker, which clearly can be established only after the contract of employment has been concluded and once the job is actually being performed, unequal treatment exists. Expectations can be no ground for differences in pay for work still to be performed which is in any event the same or of equal value. If it is established *ex post facto*, on the basis of the work already carried out, that there are objective differences in levels of personal performance, those differences can of course lead to different careers. The work is then, however, no longer the same.

VI — Conclusion

27. In the light of the foregoing, I propose that the Court give the following answer to the questions submitted by the Oberlandesgericht, Vienna:

(1)(a) When deciding whether work is 'equal work' or constitutes 'the same job' within the meaning of Article 119 of the EC Treaty (Articles 117 to 120 of the EC Treaty have been replaced by Articles 136 EC to 143 EC) or is 'the same work' or 'work to which equal value is attributed' within the meaning of Council Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women, it is not sufficient, where

supplements to pay fixed by collective agreement are agreed on an individual basis, to ascertain whether the two workers being compared are classified in the same job category under a collective agreement.

(1)(b) Although the same classification under a collective agreement is evidence of the same work or work of equal value within the meaning of Article 119 (now 141) of the Treaty and Directive 75/117, it does not have the result that in the case of direct discrimination the burden of proof lies with the employer to show that the work in question is different.

(1)(c) An employer can rely on circumstances not taken into account in collective agreements in order to justify a difference in pay in so far as they are based on objectively justified grounds.

(1)(d) This question is asked only in the event that the answer to Question (1)(a) or (1)(b) is in the affirmative and it therefore does not need a reply.

(2)(a) The provisions of Article 119 (now Article 141) of the Treaty and Directive 75/117 share a uniform definition of 'worker'. If it follows from the assessment of the activities performed that the work is the same work or work to which equal value is attributed, then, on the basis of the principle of equal pay for male and female workers, no difference whatever in pay is

permitted, even if there are differences in the levels of performance of the workers being compared.

(2)(b) Article 119 (now Article 141) of the Treaty and Article 1 of Directive 75/117 are therefore to be interpreted as meaning that a difference in pay cannot be justified on grounds whose existence is demonstrable only *ex post facto*.