OPINION OF ADVOCATE GENERAL KOKOTT
delivered on 18 May 2004 [1]

I — Introduction

1. The present case looks at the concept of 'work on demand'. The essential question here is whether a form of contract without fixed working hours agreed in advance is in breach of Community-law prohibitions on discrimination.

2. It is against this background that the Austrian Oberster Gerichtshof (hereinafter also: 'the referring court') in its request for a preliminary ruling raises various questions on the interpretation of various social-policy provisions of Community law, particularly on non-discrimination against part-time workers as compared to full-time workers and on the prohibition of sex discrimination.

1 — Original language: German.

II — Legal background

A — *Community law*

3. Article 141(1) EC provides:

'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.'

4. The first paragraph of Article 1 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 [2] (hereinafter, '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.'

5. Article 5(1) 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 [3] (hereinafter: 'Directive 76/207') in the version applicable in the present case is worded as follows:

'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.' [4]

6. Article 2(1) of Council Directive 97/81/EC of 15 December 1997 concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC [5] (hereinafter: 'Directive 97/81') provides:

'Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive not later than 20 January 2000, or shall ensure that, by that date at the latest, the social partners have introduced the necessary measures by agreement, the Member States being required to take any necessary measures to enable them at any time to be in a position to guarantee the results imposed by this Directive. ...'

7. Article 7 of Directive 97/81 provides:

'This Directive shall enter into force on the day of its publication in the *Official Journal of the European Communities*.' [6]

2 — OJ 1975 L 45, p. 19.

3 — OJ 1976 L 39, p. 40.

4 — Article 5(1) of Directive 76/207 has since been replaced by Article 3(1)(c) of that Directive, as amended. The new version came into force on 5 October 2002 pursuant to Article 3 of Directive 2002/73/EC of the European Parliament and of the Council of 23 September 2002 amending Directive 76/207 (OJ 2002 L 269, p. 15). The time-limit for transposition of the amendments is 5 October 2005.

5 — OJ 1998 L 14, p. 9 (corrigendum in OJ 1998 L 128, p. 71).

6 — It was published in the Official Journal on 20 January 1998.

8. The purpose of the Framework Agreement on part-time work printed in the Annex to Directive 97/81 is, according to Clause 1:

'(a) to provide for the removal of discrimination against part-time workers and to improve the quality of part-time work;

(b) to facilitate the development of part-time work on a voluntary basis and to contribute to the flexible organisation of working time in a manner which takes into account the needs of employers and workers.'

9. Clause 2(1) of the Framework Agreement on part-time work provides:

'This Agreement applies to part-time workers who have an employment contract or employment relationship as defined by the law, collective agreement or practice in force in each Member State.'

10. Clause 3(1) of the Framework Agreement on part-time work defines 'part-time worker' as an employee whose normal hours of work, calculated on a weekly basis or on average over a period of employment of up to one year, are less than the normal hours of work of a comparable full-time worker.

11. Clause 4 of the Framework Agreement on part-time work provides inter alia:

'1. In respect of employment conditions, part-time workers shall not be treated in a less favourable manner than comparable full-time workers solely because they work part-time unless different treatment is justified on objective grounds.

2. Where appropriate, the principle of pro rata temporis shall apply.

...'

12. Clause 6 of the Framework Agreement on part-time work states *inter alia*:

'1. Member States and/or social partners may maintain or introduce more favourable provisions than set out in this agreement.

...

4. This Agreement shall be without prejudice to any more specific Community provisions, and in particular Community provisions concerning equal treatment or opportunities for men and women.

5. The prevention and settlement of disputes and grievances arising from the application of this Agreement shall be dealt with in accordance with national law, collective agreements and practice.'

13. In addition to the above provisions, reference should also be made to the Community Charter of the Fundamental Social Rights of Workers [7] that was adopted by the European Council in Strasbourg on 9 December 1989, excerpts from which read as follows:

'5. All employment shall be fairly remunerated.

To this effect, in accordance with arrangements applying in each country:

— workers shall be assured of an equitable wage, i.e. a wage sufficient to enable them to have a decent standard of living;

— workers subject to terms of employment other than an open-ended full-time contract shall receive an equitable reference wage;

...

7. The completion of the internal market must lead to an improvement in the living and working conditions of workers in the European Community. This process must result from an approximation of these conditions while the improvement is being maintained, as regards in particular the duration and organisation of working time and forms of employment other than open-ended contracts, such as fixed-term contracts, part-time working, temporary work and seasonal work.

...

9. The conditions of employment of every worker of the European Community shall be

7 — Published in Commission document COM(98) 471 of 2 October 1989.

stipulated in laws, in a collective agreement or in a contract of employment, according to arrangements applying in each country.

...

10. According to the arrangements applying in each country:

— every worker of the European Community shall have a right to adequate social protection and shall, whatever his status and whatever the size of the undertaking in which he is employed, enjoy an adequate level of social security benefits...'

B — *National law*

14. The following provisions of Austrian national law are of particular significance: the Gleichbehandlungsgesetz (Law on equality, hereinafter 'the GlBG') and the Arbeitszeitgesetz (Law on working time, hereinafter 'the AZG') of 6 June 1994.[8]

8 — BGBl. 1994 I, p. 1170.

15. Under Paragraph 2(1) of the GlBG all direct or indirect discrimination on grounds of sex is prohibited, including inter alia discrimination in the formation of an employment relationship, in the determination of pay and in other conditions of employment. In the event of discrimination in connection with the determination of pay the worker is entitled to claim payment of the difference from the employer (Paragraph 2a(2) of the GlBG).

16. Paragraph 3 AZG provides that the basic length of normal working time should be 40 hours a week and eight hours a day.

17. In relation to the positioning of normal working time Paragraph 19c AZG provides as follows:

'(1) The positioning of normal working time and any changes are to be agreed unless already determined by principles of collective labour law.

(2) Notwithstanding paragraph 1, the positioning of normal working time may be changed by the employer if

1. it is substantively justified on objective grounds associated with the nature of the job,

2. the worker is given at least two weeks' prior notice of the positioning of normal working time for the week concerned,

3. the worker's allowable interests do not preclude such an arrangement, and

4. there is no agreement in existence to the contrary.

(3) If necessary in the event of unforeseen circumstances, Paragraph 19c(2)(2) may be disregarded in order to prevent a disproportionate economic disadvantage if other measures would be unreasonable. Provisions contrary to Paragraph 19c(2) (2) may be allowed under principles of collective labour law in the event of job-specific requirements.'

18. Paragraph 19d AZG provides (excerpts only):

'(1) Work is part-time where the agreed weekly working time is, on average, less than normal statutory working time or any shorter period of normal working time determined according to principles of collective labour law.

(2) The amount and positioning of working time and changes thereto are to be agreed unless determined by principles of collective labour law. Paragraph 19c(2) and (3) shall apply.

...

(6) Workers employed part-time must not, because of working part-time, be discriminated against as compared to workers employed full-time unless there are objective reasons justifying different treatment ... In the event of a dispute the employer must prove that discrimination is not due to working part-time.'

19. It is also apparent from the Order for Reference that the collective agreement governing commercial employees in Austria provides that normal working time is 38.5 hours a week; it also contains rules on how that normal working time is to be calculated over long periods.

III — Facts and main proceedings

20. In the period between October 1998 and June 2000 the claimant in the main proceedings, Ms Wippel, was employed by the defendant in the main proceedings, Peek & Cloppenburg GmbH & Co KG (hereinafter: 'P&C'), a firm in the retail clothing business. The employment relationship was based on a framework contract of employment according to the principle of 'work on demand'.

21. That framework contract of employment provided, in particular, that there should be no fixed working hours but that the duration and positioning of working time should be determined by agreement between the parties in each individual case. In particular, P&C were to request Ms Wippel's services according to the workload and she could accept or refuse the job placement offered without having to give any reason for doing so. In practice, P&C's sales manager would draw up a work schedule and allocation plan at the beginning of each week for the following week. Any employee could mark on a list when he or she did not wish to work during the following week. Job placements were then determined by P&C in accordance with those wishes expressed by staff. The court files also show that Ms Wippel stated on several occasions that she would not be able or willing to work on certain days.

22. The framework contract of employment also provided that Ms Wippel would not be guaranteed any fixed income as both parties expressly ruled out determination of any specific amount of work. P&C merely held out to the claimant the prospect of being able to work about three days a week and two Saturdays a month. Her pay was EUR 6.54 per hour plus sales commission.

23. Ms Wippel actually worked on an irregular basis during the course of her employment from October 1998 to June 2000; the amount of her pay therefore varied accordingly from month to month. The highest number of hours worked by her in one month was 123.32 hours during the month of October 1999.

24. Before the framework contract of employment was concluded Ms Wippel, who was 19 years old and had just left school when the employment relationship began, had had the advantages and disadvantages of her chosen form of contract explained to her by P&C. Ms Wippel intimated that she was not reliant upon a regular income.

25. The parties in the main proceedings are now in dispute with regard to a pay claim made by Ms Wippel. In June 2000 she brought legal proceedings against P&C in the Arbeits- und Sozialgericht Wien (Vienna

Labour and Social Court) claiming payment of EUR 11 929.23 with costs and interest. She is claiming that P&C should pay her retrospective remuneration based on the difference between the maximum amount of work that could have been asked of her and the actual number of monthly working hours worked by her. Ms Wippel is alleging that the largest possible amount of working time that she achieved during the month of October 1999 should have formed the basis of her pay for *every* month during which she worked for P&C. On that basis she is claiming a gross monthly salary in the sum of EUR 807.98 for the period up to December 1999 and of EUR 825.93 for the period from January to June 2000.

26. The Arbeits- und Sozialgericht Wien dismissed the claim by reference to Paragraph 19d(2) AZG; in her case each individual job placement was determined by agreement between the parties to the proceedings. The Oberlandesgericht Wien (Vienna Higher Regional Court), as court of appeal, set aside the lower court's judgment, referred the matter back to the court of first instance for an examination of the actual course of employment and gave leave to appeal. Both parties lodged appeals with the Oberster Gerichtshof.

27. The Oberster Gerichtshof states, in relation to Austrian law, that whilst the amount and positioning of normal working time are prescribed in the AZG for full-time workers, there is no statutory rule in the AZG for part-time workers as regards the actual amount and positioning of their working time — nor even a provision of a subsidiary nature.

28. In the light of the objective of the provisions of the law on working time an agreement such as the one in the present case is invalid. It means that the worker waives his or her statutory right to have the amount of his or her working time determined by contract and leaves the positioning of working time to the discretion of the employer.

29. The Oberster Gerichtshof also refers to statistics according to which over 90% of all part-timers are women, whilst the percentage of full-timers who are women is approximately 40%. As P&C have not argued that these proportions are very different in their own business it must therefore be assumed that the proportion of women employed part-time is considerably higher than the proportion of women employed full-time, not only in general but also in P&C's business.

IV — Reference for a preliminary ruling and proceedings before the Court of Justice

30. By order of 8 August 2002 the national court referred the following questions to the Court of Justice of the European Communities for a preliminary ruling:

'1. (a) Are Article 141 EC, Article 1 of Council Directive 75/117 and Clause 2 of the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC, which was implemented by Council Directive 97/81, and Point 9 of the Community Charter of the Fundamental Social Rights of Workers of 9 December 1989 to be construed in such a way (concept of 'worker') that constant protection is to be afforded even to persons such as the claimant in the present case who, in a comprehensive framework agreement on employment, agree terms on pay, termination of employment and the like but also stipulate that the amount and positioning of working time should be governed by the workload and agreed by the parties in the light of the individual circumstances of each case?

(b) Does the concept of 'worker' within the meaning of Question 1(a) apply where there is a prospect of work on approximately three days a week and two Saturdays in each month without any binding commitment?

(c) Does the concept of 'worker' within the meaning of Question 1(a) apply where work is actually carried out on approximately three days a week and two Saturdays in each month?

(d) Is the Community Charter of the Fundamental Social Rights of Workers of 9 December 1989 legally binding, at least in so far as reliance is placed on it in the interpretation of other rules of Community law?

2. Are Article 141 EC, Article 1 of Directive 75/117 and Article 5 of Directive 76/207 and Clause 4 of the Framework Agreement on part-time work to be construed as meaning that it constitutes objectively unjustified unequal treatment if, in the case of full-time workers (approximately 60% men and 40% women), provision is made by statute or collective agreement for there to be rules not only on the

amount of working time but also (to some extent) regarding its positioning, the observance of which a full-time worker is entitled to demand even in the absence of a contractual arrangement, whereas there are no such rules for part-timers, the vast majority of whom are women (approximately 90% women and 10% men), even where the contracting parties have not come, as required by statute, to a contractual arrangement on this point?

3. Are Article 141 EC, Article 1 of Directive 75/117 and Article 5 of Directive 76/207 and Clause 4 of the Framework Agreement on part-time work to be construed as meaning that it constitutes objectively unjustified unequal treatment if, in the case of part-timers, on the assumption that the vast majority of them are women (approximately 90% women and 10% men), an employer expressly rules out an agreement on the positioning and amount of working time, whereas in the case of full-time workers, on the assumption that women are not in that same majority, both the amount and, to some extent, the allocation of working time are already laid down by statute or collective agreement?

4. Are Article 141 EC, Article 1 of Directive 75/117 and Article 5 of Directive 76/207 and Clause 4 together with Clause 1(b) (facilitation of the development of part-time work) of the Framework Agreement on part-time work to be construed as meaning that in order to compensate for objectively unjustified unequal treatment it is necessary and permissible

(a) with regard to the amount of working time, to presume a definite amount, and, if so, to presume

(i) normal working time, or

(ii) the maximum length of weekly working time actually worked, unless the employer can prove that this was due to unusually high demand for work at that particular time, or

(iii) the demand ascertained at the date of conclusion of the contract of employment, or

(iv) average weekly working time, and

(b) with regard to the positioning of working time, in order to compensate for the extra burden on the worker caused by flexibility and for the benefit afforded to the employer, to award the worker

(i) a 'reasonable' supplement on the hourly wage, determined in the light of the individual circumstances in question, or

(ii) a minimum supplement equal to that paid to full-time workers who work more than normal working hours (eight hours a day or 40 hours a week), or

(iii) irrespective of the amount of time worked, compensation for time not remunerated as working time during which, under the agreement, it would be possible to schedule working time (potential working time), if the length of prior notice of a job placement should be less than

— 14 days or

— a reasonable amount of time?

31. Ms Wippel, P&C, the Governments of the Republic of Austria and of the United Kingdom and the Commission have submitted written observations to the Court.

V — Appraisal

A — *Admissibility of the questions referred for a preliminary ruling*

32. In its Order for Reference the Oberster Gerichtshof states that the concept of work on demand is unacceptable under national law and that the framework contract of employment concluded between Ms Wippel and P&C is partially invalid. In the light of that statement the Commission expresses the view in its written and oral observations that the main proceedings are principally concerned with issues of Austrian national law. The Commission is therefore indirectly raising the issue of the admissibility of the request for a preliminary ruling under Article 234 EC and of the Court's competence to answer the questions referred to it.

33. It must be borne in mind in this context that, as the Court has consistently held, it is for the national courts alone to determine, having regard to the particular features of each case, both the need for a preliminary

ruling to enable them to give judgment and the relevance of the questions which they refer to the Court. A request for a preliminary ruling from a national court may be rejected only if it is quite obvious that the interpretation of Community law sought by that court bears no relation to the actual nature of the case or the subject-matter of the main action. [9]

35. The reference for a preliminary ruling does not therefore clearly bear no relation to the main proceedings. The questions referred are admissible.

B — *The first question, paragraph (d): the legal standing of the Community Charter of Fundamental Social Rights*

34. In the present case the Oberster Gerichtshof is intending to apply provisions of national law such as the AZG and the GlBG, some of which at least have been enacted in order to transpose instruments of Community law. [10] In accordance with the principle of interpretation in conformity with directives [11] the manner of interpretation of Community law can also be relevant to the application of national legislation. As far as the main proceedings are concerned, this applies not only to the factual elements of non-discrimination under Community law but also — as the Commission properly observes — to the legal consequences thereof, that is to say the outcome that would be the result of any discrimination from the Community-law point of view.

36. Question 1(d) concerns the legal standing of the Community Charter of the Fundamental Social Rights of Workers. The referring court asks whether this Charter is legally binding and wants to know whether reliance should be placed upon the Charter when interpreting Community law. I propose to examine this question first of all because it affects the answer to all of the other questions submitted by the referring court.

37. The Community Charter of the Fundamental Social Rights of Workers was adopted at the European Council meeting in Strasbourg on 9 December 1989 in the form of a declaration. [12] It does not therefore have the legally binding status of primary

9 — See the judgments in Case C-415/93 *Bosman* [1995] ECR I-4921, paragraphs 59 to 61, Case C-230/96 *Cabour* [1998] ECR I-2055, paragraph 21, Case C-281/98 *Angonese* [2000] ECR I-4139, paragraph 18, and Joined Cases C-480/00, C-481/00, C-482/00, C-484/00, C-489/00, C-490/00, C-491/00, C-497/00, C-498/00 and C-499/00 *Ribaldi* [2004] ECR I-2943, paragraph 72.

10 — Directives 76/207 and 97/81 are of particular relevance in this context.

11 — See, with regard to the principle of interpretation in conformity with directives under the third paragraph of Article 249 EC in conjunction with Article 10 EC, the judgment in Case C-91/92 *Faccini Dori* [1994] ECR I-3325, paragraphs 19 to 26, and the case-law cited there.

12 — This declaration was adopted by the Heads of State or Government of eleven of the then twelve Member States and has not been published in the Official Journal; see the conclusions drawn by the Presidency at Bull. EC 12-1989 pt. 1.1.10.

legal acts as do the Treaty and, under Article 311 EC, the protocols annexed to it. Nor can the Charter be considered a binding instrument of secondary legislation because the European Council does not have legislative competence. It is simply a declaration of general socio-political aims the purpose of which is to provide the Union with impetus for its development in the field of social policy. [13]

38. Although, therefore, the Community Charter of the Fundamental Social Rights of Workers is not a binding legal instrument as such, [14] various provisions of Community law do nevertheless reveal a close connection with it that should reasonably be taken into account when interpreting and applying Community law. The Court of Justice has also already called on the Charter as an aid to interpretation with regard to provisions of this kind. [15]

39. As far as Article 141 EC is concerned, this provision is to be found in the Chapter of the Treaty relating to social policy, the introductory provision of which (the first paragraph of Article 136 EC) now makes express reference to the Charter following the coming into force of the Treaty of Amsterdam. [16] The same applies to Directive 97/81, the third recital in the preamble to which also makes direct reference to the Charter. Even Directives 75/117 and 76/207, which came into force before the Charter was adopted, give effect to the principle of equal treatment for workers in the employment field and therefore also relate to an element of the Charter [17] in the light of which they therefore have to be interpreted and applied.

40. However, quite apart from such provisions that are closely linked to it by their specific socio-political content, the Community Charter of the Fundamental Social Rights of Workers does have to be taken into account when interpreting and applying Community law. The aims of social progress and a high level of social protection, as stated in Article 2 EC, in the second and third recitals in the preamble to the Treaty Establishing the European Community and in the eighth recital in the preamble to the Treaty on European Union, apply to all Community activities. The fourth recital in

13 — See also Article 4 EU which, although it had not yet come into force in 1989, can nevertheless be deemed a statement of the role of the European Council and the Heads of State or Government of the Member States represented on it before the Treaty on European Union was adopted.

14 — Advocate General Jacobs also ultimately concludes that the Charter is not binding in his Joined Opinions in Cases C-67/96, C-115/97 to C-117/97 and C-219/97 *Albany and Others* [1999] ECR I-5751, I-5754, paragraph 137.

15 — Judgment in Case C-151/02 *Jaeger* [2003] ECR I-8389, paragraph 47, and similarly the judgment in Case C-173/99 *BECTU* [2001] ECR I-4881, paragraph 39. Both judgments related to Council Directive 93/104/EC of 23 November 1993 concerning certain aspects of the organisation of working time (OJ 1993 L 307, p. 18; hereinafter, 'Directive 93/104'), the fourth recital in the preamble to which expressly refers to the Community Charter of the Fundamental Social Rights of Workers.

16 — On 1 May 1999.

17 — See point 16 of the Community Charter of the Fundamental Social Rights of Workers.

the preamble to the Treaty on European Union also makes such express reference to the Charter defining those aims.

41. The answer to be given to the referring court must therefore be that the Community Charter of the Fundamental Social Rights of Workers, although not legally binding, is to be taken into consideration as an aid to interpretation of provisions of Community law.

C — *Question 1(a) to (c): concept of 'worker'*

42. By Question 1(a) to (c) the referring court essentially wishes to establish whether the concept of 'worker' within the meaning of Article 141 EC, Directive 75/117, the Framework Agreement on part-time work and the Community Charter of the Fundamental Social Rights of Workers also encompasses persons who are employed only to a limited extent and carry out their work on demand without fixed working hours having been stipulated in advance.

43. There is no single definition of worker in Community law; the meaning of the term depends upon the particular provision concerned. [18] A distinction should therefore be drawn in this respect between the Framework Agreement on part-time work, on the one hand, and Article 141 EC, Directive 75/117, Directive 76/207 and the Community Charter of the Fundamental Social Rights of Workers, on the other.

1. The concept of worker under the Framework Agreement on part-time work

44. Firstly, as far as the Framework Agreement on part-time work is concerned, the Agreement applies, according to Clause 2(1), 'to part-time workers who have an employment contract or employment relationship as defined by the law, collective agreement or practice in force in each Member State.'

45. Consequently, for the purposes of the Framework Agreement, the term 'worker' is not a Community-law concept. Indeed, the personal scope of application of the Framework Agreement is defined by reference to the national law applicable in each case. The term 'worker' therefore has to be defined in reliance upon the law, collective agreements and practices in force in each Member State. The Member States have wide discretionary powers in this respect. Only the very broad-

18 — Case C-85/96 *Martínez Sala* [1998] ECR I-2691, paragraph 31, and Case C-256/01 *Allonby* [2004] ECR I-873, paragraph 63.

est limits can be determined in this respect by reference to Community law. It could therefore constitute a breach of the duty of cooperation (Article 10 EC) if a Member State were to define the term 'worker' so narrowly under its national law that the Framework Agreement on part-time work were deprived of any validity in practice and achievement of its purpose, as stipulated in Clause 1, were greatly obstructed. However, there is no sign of this here.

46. In the Order for Reference the Oberster Gerichtshof states that in its opinion Ms Wippel is to be considered a worker within the meaning of Austrian law despite no fixed working hours having been agreed in advance. Under Clause 2(1) of the Framework Agreement on part-time work she therefore comes within its personal scope of application.

2. The concept of worker under Article 141 EC, Directives 75/117 and 76/207 and under the Community Charter of the Fundamental Social Rights of Workers

47. As far as Article 141 EC, Directives 75/117 and 76/207 and the Community Charter of the Fundamental Social Rights of Workers are concerned, these do not contain any express definition of the term 'worker'. It is therefore necessary, in order to determine its meaning, to apply generally recognised principles of interpretation, having regard to the context in which the term is used and the objectives of the Treaty. [19]

48. According to Article 2 EC, the Community is to have as its task inter alia to promote, amongst other things, equality between men and women. Article 141(1) EC constitutes a specific expression of the principle of equality for men and women, which forms one of the guiding principles of the Community and of the fundamental principles protected by the Community legal order. [20] According to Article 3(2) EC, the aim of the Community is to eliminate inequalities and to promote equality between men and women. Article 136(1) EC states, with reference to the European Social Charter [21] and the Community Charter of the Fundamental Social Rights of Workers, [22] that the objectives of the Community are, amongst other things, improved living and working conditions and proper social protection.

49. In the light of this objective of social protection the concept of 'worker' in Article 141 EC, as in Directives 75/117 and 76/207 and in the Community Charter of the

19 — See the *Allonby* judgment (cited in footnote 18, paragraph 64).

20 — See the *Allonby* judgment (cited in footnote 18, paragraph 65); see also Case 43/75 *Defrenne II* [1976] ECR 455, paragraph 12, and Joined Cases C-270/97 and C-271/97 *Deutsche Post* [2000] ECR I-929, paragraph 57.

21 — Signed at Turin on 18 October 1961.

22 — Particularly points 7 to 10 of the Charter.

Fundamental Social Rights of Workers, is to be considered a Community concept and afforded a wide interpretation. [23] The definition that the Court of Justice has developed in the context of freedom of movement for workers under Article 39 EC [24] can be taken as the guideline for this purpose.

50. In its established case-law on Article 39 EC the Court of Justice has stated, based on the assumption of reciprocal rights and obligations under an employment relationship, that there must be considered as a worker a person who, for a certain period of time, performs services for and under the direction of another person in return for which he receives remuneration. [25] The concept of worker does nevertheless require there to be an activity which is effective and genuine, to the exclusion of activities on such a small scale as to be regarded as purely marginal and ancillary. [26]

51. It is for the referring court to determine on the basis of all of the circumstances in this particular case whether the activity exercised by Ms Wippel is to be considered in the main proceedings as effective and genuine or whether her activity was on such a small scale as to be purely marginal and ancillary. [27] However, the Court of Justice, which is called on to provide answers of use to the national court, may provide guidance based on the documents before the court and on the written and oral observations which have been submitted to it, in order to enable the national court to give judgment. [28]

52. The Court of Justice has already ruled in the *Raulin* case that a person who works on call and only to a limited extent can still be regarded as a worker. [29] That case also has certain parallels with the facts in the main proceedings. In *Raulin* there was similarly no guarantee as to the number of hours that were to be worked and it was often the case that only a very few days a week or a few hours a day were actually worked. The employer was liable to pay wages and grant social benefits only in so far as the worker had actually performed work. Conversely, however, the employee was not obliged to heed the employer's 'call' for him to work.

23 — *Allonby* judgment (cited in footnote 18, paragraph 66).

24 — See also in this context the judgment in *Allonby* (cited in footnote 18, paragraph 67).

25 — Judgment in Case 66/85 *Lawrie-Blum* [1986] ECR 2121, paragraph 17, Case 344/87 *Bettray* [1989] ECR 1621, paragraph 12, Case C-337/97 *Meeusen* [1999] ECR I-3289, paragraph 13, and Case C-413/01 *Ninni-Orasche* [2003] ECR I-13187, paragraph 24, and *Martinez Sala* (cited in footnote 18, paragraph 32).

26 — Case C-357/89 *Raulin* [1992] ECR I-1027, paragraphs 10 and 12, Case 53/81 *Levin* [1982] ECR 1035, paragraph 17, and the judgments cited in footnote 25 in *Lawrie-Blum*, paragraph 21, *Meeusen*, paragraph 13, and *Ninni-Orasche*, paragraph 25.

27 — *Raulin* (cited on footnote 26, paragraph 13) and *Allonby* (cited in footnote 18, paragraph 69).

28 — Established case-law in the context of social policy; see, for example, Case C-77/02 *Steinicke* [2003] ECR I-9027, paragraph 59, and Joined Cases C-4/02 and C-5/02 *Schönheit and Becker*, not yet officially reported, paragraph 83.

29 — *Raulin* (cited in footnote 26, paragraphs 9 to 11).

53. Although case-law concedes that, when assessing the status of 'worker', account may be taken of the irregular nature and limited duration of the services actually performed, [30] the papers do nevertheless show that Ms Wippel's work was intended to continue over a long period and encompassed, on average, three days a week and two Saturdays a month. It should also be noted that, according to the case-law of the Court of Justice, even persons who work only a few hours a week and whose income might possibly be lower than the guaranteed minimum wage are to be considered workers. [31]

54. By simply applying the concept of 'worker' developed in the context of freedom of movement under Article 39 EC, it follows that Ms Wippel should be classified as a worker. It is therefore not necessary in this case to determine whether the term 'worker' in a social policy context should also be given a wider interpretation because of its social protection objective than it is given in the context of freedom of movement under Article 39 EC. [32]

55. All in all, therefore, the answer to be given to the referring court should be that the term 'worker' in the context of Article 141 EC, Directive 75/117, Directive 76/207 and the Community Charter of the Fundamental Social Rights of Workers does, in any event, cover any person who performs services for and under the direction of another person in return for which he or she receives remuneration, unless those services do not constitute activities which are effective and genuine or constitute activities that are on such a small scale as to be regarded as purely marginal and ancillary. It is of no relevance in this respect whether fixed working hours were determined in advance.

D — *Preliminary remark on the second and third questions: the applicability of Directives 97/81 and 76/207*

56. In its second and third questions the Oberster Gerichtshof refers to Article 141 EC, to Directives 75/117 and 76/207 and to the Framework Agreement on part-time work. Before discussing these questions in detail I would suggest that it is necessary to clarify, first of all, whether and to what extent the provisions quoted should apply to this case.

1. Applicability of Directive 97/81 and the Framework Agreement on part-time work to periods prior to 20 January 2000

57. For the purposes of answering the second and third questions it should be

30 — *Raulin* (cited in footnote 26, paragraph 14).

31 — *Levin* (cited in footnote 26, paragraphs 15 and 16) and *Lawrie-Blum* (cited in footnote 25, paragraph 21).

32 — The Commission and P&C advocate this in their written observations.

noted, in connection with Directive 97/81 and the Framework Agreement on part-time work annexed to it, that the time-limit for its transposition did not expire until 20 January 2000 [33] — that is to say, until *after* the commencement of the employment relationship between Ms Wippel and P&C.

58. The question, therefore, is what significance is to be attached to that Framework Agreement in this case in so far as parts of the employment relationship affected took place prior to 20 January 2000 and, in particular, whether the national law has to be interpreted and applied in conformity with the directives with regard to that period as well. [34]

59. In principle, directives enter into force on the date specified in them or, in the absence thereof, on the twentieth day following that of their publication. [35] They have legal effect from that moment on. [36] During the period allowed for transposition of a directive, the Member States must refrain from taking any measures liable seriously to compromise achievement of the result prescribed by the directive. [37]

60. However, in addition to that prohibition on frustrating the objective of a directive, it is also possible for directives to have legal effect even before the time-limit for their transposition has expired. As far as Directive 97/81 is concerned, it is apparent from its wording that it *came into force* on the day of its publication in the Official Journal —, that is to say, on 20 January 1998. [38] Although the Member States were given a time-limit for transposition that came to an end on 20 January 2000, that deadline only relates to the bringing into force of the necessary *laws, regulations and administrative provisions* and *agreements between the social partners*. [39] The purpose of and reason for such a period for transposition is to allow sufficient time to undertake any legislative procedure and contractual negotiations between the social partners that might be required. [40] Apart from in that particular

33 — Article 2(1) of Directive 97/81.

34 — Different views are taken with regard to the scope of the duty of interpretation of national law in conformity with directives before the expiry of the time-limit for transposition. Whilst Advocate General Darmon is of the opinion that there is a general duty to interpret national law in conformity with directives even before the expiry of the period for implementation (Joined Opinions in Cases C-177/88 and C-179/88 *Dekker and Others* [1990] ECR I-3941, I-3979, paragraph 11, Advocate General Jacobs does not go quite so far but does nevertheless assume that national measures implementing a directive that are already in force are required to be interpreted by the national court in accordance with that directive (Opinion in Case C-156/91 *Hansa Fleisch* [1992] ECR I-5567, paragraphs 23 and 24).

35 — Second sentence of Article 254(1) EC and second sentence of Article 254(2) EC. Directives that are not addressed to all Member States take effect upon notification to those to whom they are addressed.

36 — Case C-129/96 *Inter-Environnement Wallonie* [1997] ECR I-7411, paragraph 41. See also the Opinion of Advocate General Alber in Case C-157/02 *Rieser*, ECR I-1477, paragraph 112.

37 — Paragraph 3 of Article 249 EC in conjunction with paragraph 2 of Article 10 EC. See also — with regard to the adoption of legislation — *Inter-Environnement Wallonie* (cited in footnote 36, paragraph 45) and Case C-14/02 *ATRAL* [2003] ECR I-4431, paragraph 58, and Case C-157/02 *Rieser*, cited in footnote 36, paragraph 66.

38 — Article 3 of Directive 97/81.

39 — Article 2(1) of Directive 97/81.

40 — See also *Inter-Environnement Wallonie* (cited in footnote 36, paragraph 43) and *Rieser* (cited in footnote 37, paragraph 68).

case, however, directives become legally binding with regard to the purpose to be achieved, and are also binding on the courts in the Member States, right from the date on which they come into force. [41]

61. The political value judgments of the Community legislature in relation to part-time work and hence the objective of Directive 97/81, in particular, had already been determined by the time that the directive came into force. Those value judgments are to be taken into account wherever the national courts are called upon to interpret and apply general terms or undefined legal concepts of national law.

62. Where national laws, regulations and administrative provisions containing general terms and undefined legal concepts are already in existence prior to the adoption of a directive, the argument that courts should not anticipate the legislature's decision when transposing a directive must also be invalid [42] since, in as much as a national court is simply exercising in conformity with a directive that discretionary power of interpretation already afforded to it by the legislature under pre-existing national legislation, it is simply performing its fundamental duty.

63. I am therefore of the opinion that provisions of national law, particularly general terms and undefined legal concepts, must be interpreted and applied in accordance with directives even before the period prescribed for their transposition has expired. In the present case the value judgments of the Community legislature on part-time working affect, in particular, the national prohibitions on discrimination in existence before the time-limit for transposition expired and can influence their interpretation and application. [43] Furthermore, account should also be taken of the same value judgments in as much as the main proceedings are concerned with the concept of breach of public policy under national law; according to the information provided by the referring court, that concept played a role in evaluating certain patterns of part-time working in Austria — at least before Paragraph 19d was incorporated in the AZG.

41 — *Inter-Environnement Wallonie* (cited in footnote 36, paragraphs 40 and 41); Case C-106/89 *Marleasing* [1990] ECR I-4135, paragraph 8, and Case C-318/98 *Fornasar and Others* [2000] ECR I-4785, paragraphs 41 and 42. The judgment in *Rieser* (cited in footnote 37, paragraph 67) does not find that there is no duty of interpretation in conformity with directives before the period prescribed for their transposition has expired; it simply makes it clear that until the period prescribed for transposition has expired there is no question of direct application of the directives and pre-existing national rules do not have to be disapplied. Conversely, however, the issue of interpretation in conformity with directives is one that relates to the application of pre-existing national law.

42 — See paragraph 24 of the Opinion delivered by Advocate General Jacobs in *Hansa Fleisch* (cited in footnote 34).

43 — A prohibition on discrimination against part-time workers was already contained in Paragraph 19d(6) of the AZG, as amended at BGBl I No 46/1997. See also the prohibition on sex discrimination in Paragraph 2 GlBG.

2. Scope of application of Directive 76/207 *ratione materiale*

64. Furthermore, as far as sex discrimination might possibly be concerned, it is necessary to clarify whether Article 141 EC and Article 1 of Directive 75/117 or Directive 76/207 should apply and also to clarify the situation regarding Directive 97/81 incorporating the Framework Agreement on part-time work.

65. Article 141 EC and Article 1 of Directive 75/117 prohibit discrimination based on sex in relation to *pay*, whereas it is sex discrimination with regard to *working conditions* that is addressed by Article 5(1) of Directive 76/207. The scope of application of these two rules is mutually exclusive. [44]

66. In this case the parties in the main proceedings are not primarily in dispute about the actual payment of wages. Ms Wippel's pay claim is just a consequence of her dispute with P&C regarding the organisation of working time — that is to say, regarding working conditions. The fact that differences in working conditions between the workers concerned might always have a financial impact that could, in certain circumstances, give rise to legal action does not preclude the application of Directive 76/207. [45] It is not Article 141 EC and Article 1 of Directive 75/117 that are relevant to such disputes, but Article 5(1) of Directive 76/207 as the more specific provision.

67. Furthermore, the prohibition on discrimination in Directive 76/207 is also applicable alongside the prohibition on discrimination against part-time workers under the Framework Agreement on part-time work [46] because the two provisions relate to different facts and pursue different objectives. Their particular prohibitions on discrimination are based on different circumstances. There is no relationship between them of general rule to special rule.

E — *Question 2: discrimination in legislation*

68. In its second question the referring court is essentially asking whether, from the point of view of Community law, it constitutes

44 — See *Steinicke* (cited in footnote 28, paragraphs 48 to 51), as well as my Opinion in Case C-19/02 *Hlozek*, not yet reported, points 96 and 97, together with further references.

45 — *Steinicke* (cited in footnote 28, paragraphs 49 to 51).

46 — See also the Opinion delivered by Advocate General Tizzano in Case C-77/02 *Steinicke*, cited in footnote 28 points 41, 42 and 58. See also Clause 6(4) of the Framework Agreement on part-time work.

unlawful discrimination for full-time workers to have the benefit of specific provisions on working time provided by statute or collective agreement, when there is no such rule (even of subsidiary application) in existence for part-time workers.

69. Consideration should therefore be given in this respect, firstly, to the (gender-neutral) prohibition on discrimination between part-time and full-time workers and, secondly, to the prohibition on (indirect) discrimination based on sex.

1. Prohibition on discrimination against part-time workers

70. The Framework Agreement on part-time work contains a prohibition on discrimination against part-time workers: Clause 4(1) provides that, in respect of employment conditions, part-time workers are not to be treated in a less favourable manner than comparable full-time workers unless different treatment is justified on objective grounds.

71. In order to ascertain whether a legal situation such as the one appertaining in Austria has a discriminatory effect in this sense it is necessary to examine two issues: the first question to be asked is whether there is any less favourable treatment of part-time workers as against comparable full-time workers. If so, it is then necessary to investigate whether that less favourable treatment can be justified on objective grounds.

(a) Absence of less favourable treatment in relation to the positioning of working time

72. Firstly, as far as the *positioning of working time* is concerned, [47] according to the information given by the referring court, Austrian law provides that for both part-time and full-time workers (Paragraph 19c(1) and Paragraph 19d(2) AZG) there should only be an arrangement by contract or collective agreement. In neither case does the legislation mentioned by the referring court contain any separate provisions on the positioning of working time, or even any provisions of subsidiary application. [48] As the legislation is therefore the same for both part-time and full-time workers it does not lead to less favourable treatment of part-time workers.

47 — The 'positioning of working time' ascertains when work is to be performed.

48 — In particular, provisions on full-time workers exceeding normal working time do not provide any adequate information on the positioning of their working time; they refer to the length of that working time.

(b) Absence of less favourable treatment with regard to the length of working time

73. The question that now needs to be asked is whether there is less favourable treatment of part-time workers with regard to the *length of working time.*[49] In Paragraph 3 AZG Austrian law provides that normal working time should be 40 hours a week and eight hours a day. If one accepts the view taken by the Austrian Government, this rule is certainly not a special provision applicable only to full-time workers. The maximum limits stated do indeed apply equally to full-time and part-time workers; if part-timers work irregular hours then the limit on daily working hours, in particular, may have an impact upon them.

74. Unlike the Austrian Government, however, the referring court and Ms Wippel appear to be assuming that the normal working time of 40 hours a week and eight hours a day provided under Paragraph 3 AZG is a rule that specifically applies to full-time workers and that Austrian law does not have any kind of legislative model for part-time workers. Austrian law does not, in particular, have any provision on working time (even one of subsidiary application) such as is to be found in Germany, for example, to cover the eventuality of working on call.[50]

75. Even if one were to be guided by the above example, it would nevertheless be questionable whether such *unequal treatment* under the law could be considered *less favourable treatment* of part-time workers. The answer to this question should be construed from the overall context of the Framework Agreement on part-time work as well as from its meaning and objective.

(i) The objectives of reasonable social protection, promotion of employment and more flexible organisation of working time

76. In the first paragraph of Article 136 EC the Community and the Member States state as their objectives inter alia the promotion of employment, improved living and working

49 — The 'length of working time' ascertains how much work is to be performed.

50 — Paragraph 12(1) of the German Law on part-time work and fixed-term contracts of employment of 21 December 2001 (Part-time and Fixed Contracts Act, BGBl I p. 1966) provides: 'Employers and employees may agree that the employee should render his services according to workload (work on call). The agreement must stipulate a specific duration of weekly and daily working time. If the duration of weekly working time should not be stipulated, working time of ten hours shall be deemed agreed. If the duration of daily working time should not be stipulated, the employer shall call upon the employee to do work each time for at least three consecutive hours.'

conditions and proper social protection. Point 7 of the Community Charter of the Fundamental Social Rights of Workers requires, so as to lead to an improvement in living and working conditions, improvements in the duration and organisation of working time and recourse to 'forms of employment other than open-ended contracts', such as part-time working and seasonal work.

77. Finally, as far as the Framework Agreement on part-time work itself is concerned, the general considerations that precede it state that it is particularly concerned to reconcile professional and family life, promote employment, increase intensity of employment and achieve more flexible organisation of work.[51] The objective of flexible organisation of working time in a manner which takes into account the needs of employers and workers is also to be found in a prominent position in Clause 1(b) of the Framework Agreement.

78. A comparison of these statements of aims shows that, when interpreting and applying the Framework Agreement on part-time work, particular attention is to be paid not only to proper social protection but also to the promotion of employment, the more flexible organisation of working time and the particular needs of employers and workers. Flexibility and innovative arrangements in an employment relationship are to be construed as contributing to the promotion of employment and the improvement of living and working conditions — and not necessarily as an obstacle to those objectives.

(ii) No evaluations to the contrary in Directives 93/104 or 91/533

79. Nor can any different value judgments on the part of the Community legislature be derived from other directives on labour law mentioned by the referring court.

80. Firstly, as far as Directive 93/104 is concerned, Article 6(1) requires that 'the period of weekly working time is limited by means of laws, regulations or administrative provisions or by collective agreements or agreements between the two sides of industry'. As is evident, however, from the heading and from the introduction to that provision, the intention is only to introduce a *maximum limit* on working time in order to ensure protection of the health and safety of workers.[52]

51 — Points 4 and 5 of the General Considerations to the Framework Agreement on part-time work; see also the fifth recital in the preamble to Directive 97/81.

52 — This view is confirmed by the fifth and eighth recitals in the preamble to Directive 93/104. See also Case C-84/94 *United Kingdom* v *Council* [1996] ECR I-5755, paragraphs 12, 22, 29 and 45.

81. Secondly, as far as Directive 91/533 [53] is concerned, this provides that an employee is to be informed in writing of the length of his or her normal working day or week. [54] However, the sole aim of this provision is to inform employees of existing rights and obligations, to make it easier for them to prove such rights and obligations and all in all to create greater transparency on the labour market. [55] Directive 91/533 should not be understood to mean that it is designed, in addition to merely making information obligatory, to effect substantive harmonisation of national law on contracts of employment in the sense, for example, of a legal obligation to make it compulsory for fixed working hours to be agreed in advance in all kinds of employment relationships. [56] In an employment relationship without fixed working hours it must indeed be possible to comply with the duty to provide information in some other appropriate manner — for example, by the employer providing the employee with job schedules at regular intervals. [57]

82. All in all, therefore, it is not possible to construe from Directive 93/140 or Directive 91/533, nor from Point 9 of the Community Charter of the Fundamental Social Rights of Workers, the converse conclusion that employment relationships whose distinguishing feature is the absence of regular working hours should be prohibited.

(iii) No less favourable treatment of part-time workers

83. In the light of these considerations it cannot from the outset be considered less favourable treatment of part-time workers as compared to full-time workers if legislation does not specifically determine the length of their working time — even by provisions of subsidiary application — and, in particular, does not prescribe any minimum amount of working time for them. The more leeway that the legislature allows employers and employees in arranging their employment relationships flexibly, the easier it is to create jobs and the sooner it is possible to meet the specific requirements of certain groups of persons.

84. Working on demand, for example, whereby the wishes of the parties with regard to job placements are decisive, also allows the employee the greatest possible freedom. It is therefore particularly appropriate for employees who are only able or willing to work irregular hours in varying amounts or who are only looking to top up their

53 — Council Directive 91/533/EEC of 14 October 1991 on an employer's obligation to inform employees of the conditions applicable to the contract or employment relationship (OJ 1991 L 288, p. 32; hereinafter, 'Directive 91/533').

54 — Article 2(2)(i) in conjunction with Article 3(1)(c) of Directive 91/533.

55 — See also the second recital in the preamble to Directive 91/533.

56 — The eighth recital in the preamble to Directive 91/533 and Article 1(2)(b) thereof ('casual work') demonstrate, for example, that the intention of the Community legislature was not to lay down a rigid rule precluding all flexibility.

57 — As submitted by the Austrian Government in its oral observations.

earnings. This would be so, for example, in the case of persons who primarily wish to look after their own children or care for dependants, as well as in the case of schoolchildren and students. Furthermore, according to the information provided by the referring court, Ms Wippel also wanted 'to go out to work on a temporary basis and save money'.

85. It is true that it would be helpful to workers who are to a certain extent reliant upon a regular income or to whom it is important that their working hours should be ascertainable in advance, if working time were to be laid down by law under a provision of subsidiary application, thereby furthering the aim of social protection, the principle of fair pay [58] and improvements in living and working conditions. At the same time, however, such a rule can reduce incentive to create new jobs with innovative contractual arrangements and therefore make it more difficult to earn a living — at least for those who are not willing or able to work on a regular basis for the same constant amount of time. Statutory determination of working time for part-time workers is therefore not always an advantage and the absence thereof is not necessarily a disadvantage to the persons involved.

86. The different bargaining positions of employer and employee in an employment relationship — and particularly any misuse of contractual arrangements without fixed working hours on the part of the employer — can be taken into account when the prohibition on discrimination is specifically applied to the individual circumstances concerned. [59] The Framework Agreement on part-time work does not make it compulsory to restrict, right at the legislative stage, the opportunities available to employers and employees to make their own arrangements with regard to working time.

87. The Member States are still, of course, quite free to exceed the level of protection provided under Community law in pursuit of the stated objectives and to legislate for stricter provisions on the protection of part-time workers, such as a rule on minimum working hours. [60] However, there is no obligation under Community law to bring in more far-reaching legislation. The Community-law provisions on part-time working are simply minimum standards. [61]

58 — See Point 5 of the Community Charter of the Fundamental Social Rights of Workers.

59 — See the observations below on the third question, particularly paragraphs 108 to 112.

60 — In Belgium, for example, legislation stipulates minimum working hours for part-time workers, which are one-third of the working hours of a comparable full-time worker (Article 11a of the Law of 3 July 1978 on contracts of employment, Moniteur Belge of 28 August 1978). In Germany there is a legislative provision of subsidiary application in existence to cover the special case of work on call (see above, footnote 50). In other Member States collective agreements can contain provisions on minimum working hours.

61 — See Article 137(2)(b) EC (this provision replaces Article 2(2)(1) of the Agreement on social policy signed in Maastricht on 7 February 1992), the eleventh recital in the preamble to Directive 97/81 and Clause 6(1) of the Framework Agreement on part-time work.

(c) Interim conclusion

88. Legislation such as the Austrian AZG which refrains from enacting any provision on the amount and positioning of working time for part-time workers — even a provision of subsidiary application — does not constitute unlawful discrimination as compared to full-time workers within the meaning of Clause 4 (1) of the Framework Agreement on part-time work.

2. Prohibition of discrimination on grounds of sex

89. It is now necessary to consider whether the absence of any statutory provision — even of subsidiary application — on the amount and positioning of working time for part-time workers under Austrian law constitutes unlawful discrimination on grounds of sex within the meaning of Article 5(1) of Directive 76/207.

90. If one accepts the view of the referring court, [62] Austrian law affords different treatment to full-time and part-time workers. By providing for normal working time of 40 hours a week and eight hours a day, Paragraph 3 AZG makes specific provision for full-time workers without including any provision — even of subsidiary application — on working time for part-timers.

91. The wording of the AZG is gender neutral in this respect. It is well settled, however, that where national rules, although worded in neutral terms, work to the disadvantage of a much higher percentage of persons of one sex, they constitute indirect discrimination unless that difference in treatment is justified by objective factors unrelated to any discrimination on grounds of sex. [63]

92. According to the information provided by the referring court, full-time workers in Austria are made up of approximately 60% men and 40% women whilst 90% of part-timers are women and only 10% are men. The absence of a provision on working time

62 — For the view of the referring court, see point 74 of this Opinion; for the opposing view taken by the Austrian Government, see point 73 of this Opinion.

63 — Case C-322/98 *Kachelmann* [2000] ECR I-7505, paragraph 23, and Case C-226/98 *Jørgensen* [2000] ECR I-2447, paragraph 29; see also Case 170/84 *Bilka Kaufhaus* [1986] ECR 1607, paragraphs 29 to 31, Case 171/88 *Rinner-Kühn* [1989] ECR 2743, paragraph 12, the *Steinicke* judgment (cited in footnote 28, paragraph 57) and the judgment in Case C-187/00 *Kutz-Bauer* [2003] ECR I-2741, paragraph 50. The prohibition of indirect discrimination in relation to working conditions also follows from Article 2(1) of Directive 76/207.

for part-time workers — even of subsidiary application — therefore has a considerably greater impact on women than on men.

93. As the Commission rightly states, however, full-time workers and part-time workers are not at all comparable in this specific context. As far as the amount of working time is concerned, full-time work in Austria is quite impervious to individual contractual provision: the number of hours to be worked is determined according to normal statutory working time under Paragraph 3 AZG (or any more favourable provision in a collective agreement). Part-time employment, on the other hand, presupposes a contractual agreement on working time, whether in the form of a fixed number of regular hours or in the form of a variable number of hours according to the concept of work on demand.

94. However, even if — contrary to the view taken here — full-time and part-time workers were to be deemed comparable in this particular regard, objective factors that are unrelated to any discrimination on grounds of sex might justify refraining from enacting any specific rule on working time for part-time workers. The pursuit of flexibility in working conditions serves to promote employment and therefore ultimately to improve living and working conditions as well. Furthermore, as already mentioned, the absence of a legislative provision for part-time workers is not necessarily detrimental. [64]

95. To summarise, therefore: legislation such as the Austrian AZG which refrains from enacting any provision on the amount and positioning of working time for part-time workers — even a provision of subsidiary application — does not constitute unlawful discrimination on grounds of sex within the meaning of Article 5(1) of Directive 76/207.

F — *Question 3: discrimination in the contract of employment*

96. The referring court's objective in its third question is to set out in concrete terms the employment relationship in the main proceedings. It essentially wishes to establish whether, from the point of view of Community law, there is unlawful discrimination where a contract such as the framework contract of employment on demand used by P&C does not make provision for fixed working time agreed in advance.

64 — See paragraphs 83 to 85 of this Opinion.

97. The issue involved here is again, firstly, the gender-neutral prohibition of discrimination between part-time and full-time workers and, secondly, the prohibition of (indirect) discrimination on grounds of sex.

1. Prohibition on discrimination against part-time workers

98. At first sight the concept of work on demand practised by P&C does not absolutely conform to traditional ideas of part-time working. However, the term 'part-time worker' in the Framework Agreement on part-time work is extremely wide. Clause 3(1) of that Framework Agreement defines as a part-time worker 'any employee whose normal hours of work, calculated on a weekly basis or on average over a period of employment of up to one year, are less than the normal hours of work of a comparable full-time worker'. The court files show that this was so in Ms Wippel's case. An employee such as Ms Wippel is therefore a part-time worker within the meaning of the Framework Agreement and therefore comes within the scope of its protection.

99. Clause 4(1) of that Framework Agreement requires that, in respect of employment conditions, part-time workers should not be treated in a less favourable manner than comparable full-time workers unless different treatment is justified on objective grounds.

100. The framework contract of employment agreed between Ms Wippel and P&C did not make provision for any fixed number of working hours — indeed, the length and positioning of her working time were to be determined by agreement between the parties in each individual case in accordance with a work on demand arrangement.

101. A contractual arrangement such as this differs, in principle, from the normal working time of 38.5 hours a week applicable to comparable full-time workers prescribed in advance by collective agreement. [65] However, it is now necessary to consider whether such *unequal treatment* also constitutes *less favourable treatment* of part-time workers.

(a) Summary of the arguments submitted

102. The referring court, Ms Wippel and the Austrian Government are essentially arguing

65 — The Order for Reference refers in this respect to the collective agreement governing commercial employees in Austria. It is for the referring court to ascertain pursuant to Clause 3(2) of the Framework Agreement on part-time work that this collective agreement applies to the comparable full-time workers within P&C's establishment.

that, as a result of work being done on demand without working time being stipulated in advance, the commercial risk is transferred from the employer to the employee, a permanent bargaining position is created between the two parties and the amount and positioning of working time is left entirely to the discretion of the employer.

103. In her written and oral observations Ms Wippel also points out the possible social consequences of the chosen contractual arrangement: if staff available on demand were not used for some time this could be used as a means of reducing liability for holiday pay, sick pay, maternity pay and redundancy payments (so-called 'termination payments') to almost nothing at all. If absolutely nothing is paid during a particular salary period, the worker also has to be deregistered from the local health insurance fund. The contractual arrangement of work on demand also enables the employer to avoid statutory protection against dismissal.

104. P&C contends that the concept of work on demand is extremely popular amongst its staff and is also strongly advocated by its staff representative body (works council). The amount of time worked is determined by agreement in each individual case according to expected sales or workload, on the one hand, and the wishes of the employees, on the other. The advantages and disadvantages of such an arrangement were expressly pointed out to the claimant. It was also expressly stated that the framework contract did not guarantee the claimant any income and that she was free to refuse job placements in individual cases without being prejudiced for doing so. Nor did the claimant have to be on call at any time. Staff available on demand were entitled to 30 working days' paid holiday a year, to additional payments under the collective agreement and to statutory termination payments and sick pay. Staff available on demand were also covered by the social insurance scheme. There could not therefore be any question of an immoral shifting of corporate responsibility onto the employee.

(b) Interpretation of the prohibition of discrimination

105. The prohibition of less favourable treatment of part-time workers under clause 4(1) of the Framework Agreement on part-time work must be interpreted and applied in the light of its overall context and of the meaning and objective of this provision. [66]

66 — See in detail points 76 to 78 of this Opinion.

(i) No general discrimination against part-time workers

106. Although a contractual arrangement that does not provide for fixed working hours agreed in advance does have a detrimental effect on those employees who are to a certain extent reliant on a regular income or to whom it is important that their job placements be determined in advance, that same contractual arrangement can nevertheless be beneficial to employees who are only able or willing to work irregular hours and in varying amounts or who are just looking to top up their earnings.[67] The positive attitude towards the concept of work on demand displayed by P&C's works council, as its elected staff representative body, can be considered further indication that such a contractual arrangement does not unilaterally advantage the employer and disadvantage the employee.

107. In the light of the foregoing a contractual arrangement without fixed working time agreed in advance cannot generally be deemed disadvantageous to part-time workers. This would be contrary to the objectives of flexible organisation of working time and the promotion of employment on which the Framework Agreement on part-time work is based and would not adequately take into account the interests of certain workers.[68]

(ii) Proper social protection and prohibition of misuse

108. However, when interpreting and applying the prohibition on discrimination in an individual case, the objective of proper social protection,[69] in particular proper regard for the interests of employees, should not be overlooked.

109. Firstly, that objective requires the employer to ascertain, when taking on an employee, whether he or she has been made sufficiently aware of the pros and cons of a contractual arrangement without fixed working time being agreed in advance and whether this arrangement is in his or her interests. If necessary, it must provide him or her with reasonable clarification on this point. In the present case Ms Wippel was indisputably given a detailed explanation before she was taken on and she herself said that she was not reliant upon a regular

67 — See point 84 of this Opinion and the examples given there.

68 — See point 84 of this Opinion for examples.

69 — Article 136(1) EC and Point 10 of the Community Charter of the Fundamental Social Rights of Workers.

income. In general, according to its own undisputed submissions, P&C used the pattern of work on demand only in relation to staff who were not reliant upon a regular income.

110. Secondly, it is possible to construe from the objective of proper social protection a prohibition on misuse (or abuse) covering the whole duration of the employment relationship. If the employer under a system of work on demand should therefore fail, in an abusive manner, to offer an employee work, this could have the social consequences described by Ms Wippel, such as in relation to the existence or computation of certain entitlements linked to the employment relationship like holiday pay, sick pay, maternity pay or medical insurance protection. Abuse of this kind might be established, for example, if — against their will and for no objective reason — work were to be offered to certain employees but not to others, or only offered to a much lesser extent.

111. Nevertheless it cannot be concluded from the purely abstract risk of misuse by an employer that a contractual arrangement without fixed working hours being agreed in advance does *in general* have a discriminatory effect on part-time workers. An abusive failure to offer work in a particular case would have to be assessed in exactly the same way as any other abusive conduct on the part of an employer during the course of an employment relationship and could be subject to the penalties imposed for that purpose under the national employment law in question. [70] The Member States and their judiciaries therefore retain wide discretion in this respect under the Framework Agreement on part-time work. Misuse or abuse can lead, for example, to claims in damages, injunctions and other claims on the part of the employee according to the formulation of the national law concerned.

112. It is for the referring court to ascertain that no such abuse occurred in the particular case pending before it; in any event, Ms Wippel has not argued in the proceedings before the Court that this was the case.

(c) Interim conclusion

113. For the reasons stated it does not constitute unlawful discrimination against part-time workers under Clause 4(1) of the Framework Agreement on part-time work if a framework contract of employment does

70 — See Clause 6(5) of the Framework Agreement on part-time work which refers, with regard to the prevention and settlement of disputes and grievances, to national law, collective agreements and practice.

not make provision for fixed working hours agreed in advance, unless the employee was not sufficiently aware of the advantages and disadvantages of that contractual arrangement or the employer subsequently fails, in an abusive manner, to offer work to the employee.

2. Prohibition of discrimination on grounds of sex

114. It is now necessary to consider whether the pattern of work on demand without fixed working hours being agreed in advance, as used by P&C, leads to discrimination on grounds of sex within the meaning of Article 5(1) of Directive 76/207.

115. This pattern of working is formulated in a manner that is gender neutral; work on demand is available to employees of both sexes. According to established case-law, however, provisions which, although worded in neutral terms, work to the disadvantage of a much higher percentage of members of one sex constitute indirect discrimination unless that difference in treatment is justified by objective factors unrelated to any discrimination on grounds of sex. [71]

(a) Absence of discrimination against women

116. The mere finding that the proportion of women in a quite specific group — considered in isolation — for example, the group of persons employed on demand, is considerably higher than the proportion of men is not sufficient to create the presumption of sex discrimination against women. The concept of discrimination requires that a comparison be drawn with other groups of workers in the same establishment.

117. In its written observations P&C has stated, without any contention, that in its establishment 84.84% of workers employed on demand are women, whilst the proportion of women amongst full-time and part-time workers with *fixed* working hours is 75.82%. P&C also stated during the oral procedure, in answer to an enquiry, that the proportion of full-time workers who are female — considered in isolation — is approximately 65% whilst the proportion of part-time workers who are female — both part-timers with fixed working hours and part-timers working on demand — is approximately 85%. [72]

71 — See point 91 of this Opinion and the cases cited in footnote 61.

72 — According to P&C the figures of 65% and 85% are based on an overview of its establishments in Germany and Austria.

118. It is for the national court to assess whether statistical data such as these are meaningful. [73] The Court of Justice, which is called on to provide answers of use to the referring court, may nevertheless provide it with guidance in order to enable it to give judgment.

119. The proportion of women amongst employees working on demand is virtually the same as the proportion of women who are part-time workers with fixed working hours — that is to say, approximately 84%-85%. If one compares part-time staff employed on demand with full-time and part-time workers with fixed working hours, the proportion of female employees amongst those working on demand is approximately ten percentage points higher (84.84% compared to 75.82%). A comparison of all part-time staff with full-time staff leads to the following result: although female employees also constitute the overwhelming majority of full-time staff, the proportion of women — at approximately 65% — is approximately 20 percentage points lower than in the case of part-time staff.

120. These figures show that there is a constantly high proportion of P&C employees who are of the female sex. Any contractual arrangement chosen by P&C (whether full-time employment, part-time employment with fixed working hours or work on demand) therefore has an especially great impact on women.

121. Since the problem raised in the present case principally concerns the absence of fixed working hours agreed in advance, particular significance is to be attached to the comparison between employees *with fixed working hours* (whether employed part-time or full-time) and those *without fixed working hours*. The difference in the proportion of women in these two groups is only approximately 10 percentage points. In *Seymour-Smith and Perez* the Court of Justice considered such a difference to be insignificant. [74] In the light of the foregoing I take the view that there cannot be any question of unequal treatment based on sex if fixed working hours are applied at P&C to full-time and certain part-time workers but not to those working on demand.

122. General principle: if a contractual arrangement without fixed working hours agreed in advance does not have a considerably greater impact on workers of one sex

73 — Case C-167/97 *Seymour-Smith and Perez* [1999] ECR I-623, paragraph 62.

74 — Judgment cited in footnote 73, paragraphs 63 and 64.

than other contractual arrangements, this does not constitute unlawful discrimination on grounds of sex within the meaning of Article 5(1) of Directive 76/207.

(b) Alternatively: justification

123. Even if the referring court should come to the conclusion that the contractual arrangement of work on demand within P&C's establishment does have a considerably greater impact on women than other contractual arrangements and therefore leads to unequal treatment based on sex, it would still be necessary to examine whether that unequal treatment is justified by objective factors unrelated to any discrimination on grounds of sex.

124. As already stated, the particular concept of work on demand in question here cannot be considered generally disadvantageous to the parties involved. [75] There could be particular objective factors that favour a flexible contractual arrangement, such as the wishes of the employees themselves to work irregular hours and in varying amounts. In that eventuality, refraining from agreeing fixed working hours in advance is not tantamount to (indirect) discrimination based on sex.

125. The particular circumstances of the case might nevertheless be construed differently if employees of one sex were to be much more affected by working on demand than by other contractual arrangements and if the advantages and disadvantages were not adequately explained when they were taken on. In such cases, in particular, there would be a considerable risk of the agreed conditions of employment, on an objective consideration, not fulfilling the interests of the parties concerned so that they would be in breach of the prohibition on discrimination. The same might be assumed if those employees were not, in an abusive manner, to be offered work during the continuation of their employment relationship. [76]

G — *Question 4: compensation for any discrimination*

126. By its fourth question the referring court essentially wishes to establish how financial compensation is to be made for any discrimination.

127. If the second and third questions should be answered as recommended above there will be no need to answer the fourth question.

75 — Points 106 and 107 of this Opinion.

76 — Points 109 and 110 of this Opinion.

VI — Conclusion

128. In the light of the foregoing considerations it is recommended that the questions referred to the Court by the Austrian Oberster Gerichtshof should be answered as follows:

(1) The Community Charter of the Fundamental Social Rights of Workers, which was adopted at the meeting of the European Council in Strasbourg on 9 December 1989, is not legally binding. However, reference is to be made to it as an aid to interpretation of the provisions of Community law.

(2) Under Article 141 EC, 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, 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, and the Community Charter of the Fundamental Social Rights of Workers, the concept of 'worker' in any event encompasses any person who performs services for and under the direction of another person in return for which he or she receives remuneration, unless those services do not constitute activities which are effective and genuine or are activities on such a small scale as to be regarded as purely marginal and ancillary. It does not depend upon whether fixed working hours are agreed in advance.

The concept of 'worker' within the meaning of Clause 2(1) of the Annex to Council Directive 97/81/EC of 15 December 1997 concerning the Framework

Agreement on part-time work concluded by UNICE, CEEP and the ETUC is to be defined having regard to the laws, collective agreements and practices in force in each Member State.

(3) Legislation such as the Austrian Arbeitszeitgesetz which does not contain any statutory provision — even of subsidiary application — on the amount and positioning of working time for part-time workers does not constitute unlawful discrimination against part-time workers within the meaning of Clause 4(1) of the Annex to Directive 97/81 nor does it constitute unlawful discrimination on grounds of sex within the meaning of Article 5(1) of Directive 76/207.

(4) If a framework contract of employment does not make provision for fixed working hours agreed in advance this does not constitute unlawful discrimination against part-time workers within the meaning of Clause 4(1) of the Annex to Directive 97/81 unless the employee was not sufficiently aware of the advantages and disadvantages of that contractual arrangement or the employer subsequently fails, in an abusive manner, to offer work to the employee.

If a contractual arrangement without fixed working hours agreed in advance does not have a much greater impact on employees of one sex than other contractual arrangements, this does not lead to unlawful discrimination on grounds of sex within the meaning of Article 5(1) of Directive 76/207.