OPINION OF ADVOCATE GENERAL JACOBS
delivered on 8 July 2004 [1]

1. In this action brought under Article 226 EC, the Commission claims that Austrian legislation prohibiting the recruitment of women to specific posts in the mining industry and to posts involving work in a high-pressure atmosphere and as divers is incompatible with Articles 2 and 3 of the Equal Treatment Directive [2] ('the Directive').

The legal framework

Community law

2. Article 2 of the Directive provides in so far as relevant:

'(1) For the purposes of the following provisions, the principle of equal treatment shall mean that there shall be no discrimination whatsoever on grounds of sex either directly or indirectly by reference in particular to marital or family status.

(2) This Directive shall be without prejudice to the right of Member States to exclude from its field of application those occupational activities and, where appropriate, the training leading thereto, for which, by reason of their nature or the context in which they are carried out, the sex of the worker constitutes a determining factor.

(3) This Directive shall be without prejudice to provisions concerning the protection of women, particularly as regards pregnancy and maternity.

...'

1 — Original language: English.

2 — 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, OJ 1976 L 39, p. 40.

3. Article 3 provides in so far as relevant:

'(1) Application of the principle of equal treatment means that there shall be no discrimination whatsoever on grounds of sex in the conditions, including selection criteria, for access to all jobs or posts, whatever the sector or branch of activity, and to all levels of the occupational hierarchy.

(2) To this end, Member States shall take the measures necessary to ensure that:

(a) any laws, regulations and administrative provisions contrary to the principle of equal treatment shall be abolished;

...'

4. As a matter of Community law, Austria was required to implement the Directive by 1 January 1995, the date of its accession to the European Community. However, pursuant to the Agreement on the European Economic Area, [3] it was required to implement the Directive by 1 January 1994, the date when that Agreement entered into force.

5. Article 307 EC provides in so far as relevant:

'The rights and obligations arising from agreements concluded before 1 January 1958 or, for acceding States, before the date of their accession, between one or more Member States on the one hand, and one or more third countries on the other, shall not be affected by the provisions of this Treaty.

To the extent that such agreements are not compatible with this Treaty, the Member State or States concerned shall take all appropriate steps to eliminate the incompatibilities established. ...'

3 — The Agreement is attached to Decision 94/1/EC ECSC, of the Council and the Commission of 13 December 1993, OJ 1994 L 1, p. 3. See in particular Article 70 and paragraph 18 of Annex XVIII.

International law

6. Article 2 of Convention No 45 of the International Labour Organisation of 21 June 1935 concerning the employment of women on underground work in mines of all kinds ('ILO Convention No 45') provides:

'No female, whatever her age, shall be employed on underground work in any mine.'

7. Article 3 provides:

'National laws or regulations may exempt from the above prohibition:

(a) females holding positions of management who do not perform manual work;

(b) females employed in health and welfare services;

(c) females who, in the course of their studies, spend a period of training in the underground parts of a mine; and

(d) any other females who may occasionally have to enter the underground parts of a mine for the purpose of a non-manual occupation.'

8. Article 7 provides:

'1. A Member which has ratified this Convention may denounce it after the expiration of 10 years from the date on which the Convention first comes into force, by an act communicated to the Director-General of the International Labour Office for registration. Such denunciation shall not take effect until one year after the date on which it is registered.

2. Each Member which has ratified this Convention and which does not, within the year following the expiration of the period of

10 years mentioned in the preceding paragraph, exercise the right of denunciation provided for in this Article, will be bound for another period of 10 years and, thereafter, may denounce this Convention at the expiration of each period of 10 years under the terms provided for in this Article.'

9. Convention No 45 of the ILO entered into force on 30 May 1937. It could therefore have been denounced in the year following 30 May 1997. Austria is a contracting party, having ratified the Convention in 1937.

National law

10. Article 16 of the Arbeitszeitordnung (Law regulating working time) of 30 April 1938 [4] ('the Law of 1938'), which was in force, according to the Commission, until 31 July 2001, but which, according to the Austrian Government, was repealed by a law of 19 August 1999, [5] provided:

'(1) Female workers shall not be employed in mines, saltworks, processing plants, underground quarries or open-cast mines, nor shall they be employed above ground in extraction (except processing (separation and washing)), transport or loading.

(2) Female workers shall further not be employed in coking plants or in the transport of raw materials for any type of construction.

(3) The Reichsarbeitsminister [Minister for Employment] may totally prohibit the employment of female workers, or make it dependent on certain conditions, for particular types of undertaking or work which entail particular risks for health and morality.'

11. From 1 August 2001, the employment of women in the underground mining industry is regulated by the Verordnung des Bundesministers für Wirtschaft und Arbeit über Beschäftigungsverbote und –beschränkungen für Arbeitnehmerinnen (Law of the Federal Minister of the economy and of

4 — Deutsches RGBl. I, p. 447; GBl.f.d.L.Ö 231/1939.

5 — Bundesgesetz zur Bereinigung der vor 1946 kundgemachten einfachen Bundesgesetze und Verordnungen (Federal law repealing simple federal laws and regulations adopted before 1946), BGBL.I, 191/1999.

employment concerning prohibitions and restrictions on the employment of women) of 4 October 2001 [6] ('the Law of 2001').

12. Article 2 of the Law of 2001 provides:

'(1) Female workers shall not be employed in the underground mining industry.

(2) Paragraph 1 does not apply to

1. female workers with management or technical responsibilities who do not carry out strenuous physical work;

2. female workers who work in a social or health service;

3. female workers who must do vocational training as part of their studies or comparable instruction, for the duration of that training;

4. female workers who are employed only on an occasional basis in the underground mining industry in an occupation which is not physically strenuous.'

13. Article 4 provides:

'(1) Female workers shall not be employed in work which through lifting, carrying, pushing, turning or otherwise transporting loads exposes them to particular physical strain involving physiological stress which is harmful to them.

(2) In assessing the work referred to in paragraph 1, the determining factors to be taken into consideration as regards the strain and the stress are, above all, the weight, the

6 — BGBl. II, 356/2001.

type and form of the load, the means and speed of transport, the duration and frequency of the work and the fitness of the female workers.

(3) Paragraph 1 shall not apply to work in which female workers are merely employed for brief periods or in conditions which are not expected to endanger their life or their health.'

14. Article 8 of the Druckluft- und Taucherarbeiten-Verordnung (Law on work in a high-pressure atmosphere and as divers) of 25 July 1973 [7] ('the Law of 1973') provides in so far as is relevant:

'(1) Only male workers aged 21 or over who are fit for it from the point of view of health may be employed in work in a hyperbaric atmosphere.

(2) ... Where the health requirement in paragraph 1 is satisfied, female workers aged 21 or above may also be employed as supervisory staff or in other work in a hyperbaric atmosphere which does not involve any greater physical effort.'

15. Article 31 provides in so far as is relevant:

'Only those male workers aged 21 or over who are fit for it from the point of view of health and who possess the specialised knowledge and professional experience necessary for health and safety purposes may be employed as divers.'

Procedure

16. By letter of 29 September 1998 the Commission wrote to the Austrian authorities to request detailed information on the prohibition on the recruitment of women to specific posts in the mining industry and to posts involving work in a high-pressure atmosphere.

7 — BGBl. 501/1973.

17. Austria complied with that request by letter of 2 March 1999. It sent the Commission the relevant provisions of the Law of 1938 and the Law of 1973, referred to the derogation in Article 2(3) of the Directive and explicitly stated that there was no intention to amend the rules on the employment of women in mining.

18. Considering that the prohibitions on the employment of women set out in the Laws of 1938 and 1973 were incompatible with the Directive, the Commission sent Austria a formal notice by letter of 29 April 1999.

19. In its response of 2 July 1999 Austria referred to its previous letter. It added that Article 16 of the Law of 1938 did not apply to all mining operations and that, in addition, the mining authority had accepted the introduction of a number of exceptions to that law. Austria also stated that it was planning an assessment of the legislation on occupational health and safety in the mining sector, which would cover the two provisions at issue.

20. The Commission was not satisfied with that response and sent Austria a reasoned opinion on 7 February 2002. Austria replied on 11 April 2002 explaining that its legislation concerning the prohibition on the recruitment of women into the mining industry had been amended by the Law of 2001.

21. Having taken the view that the prohibitions on the employment of women set out in the Law of 1973 and the Law of 2001 were contrary to Community law, the Commission brought the present proceedings in which it seeks a declaration that Austria had failed to fulfil its obligations under Articles 2 and 3 of the Directive and Article 10 EC read in combination with Article 249 EC.

Admissibility

22. Austria submits that the action is inadmissible as regards the prohibition on the employment of women in the underground mining industry. It contends that, in accordance with settled case-law, [8] the Commission's reasoned opinion and the application to the Court must be based on identical complaints and that it is only in cases in which the measures contested in the pre-

8 — Case C-105/91 *Commission* v *Greece* [1992] ECR I-5871 and Case C-11/95 *Commission* v *Belgium* [1996] ECR I-4115.

litigation procedure have been maintained in their entirety that amendments to national legislation adopted between the issue of the reasoned opinion and the application to the Court do not affect the admissibility of the action. That is not the case here because the measures have not been maintained in their entirety.

23. It is certainly the case that the subject-matter of an application made under Article 226 EC is circumscribed by the pre-litigation procedure provided for by that article and that the Commission's reasoned opinion and the application to the Court must therefore be based on the same objections. [9]

24. However, the Court has specifically stated that that requirement cannot go so far as to make it necessary that the national provisions mentioned in the reasoned opinion and in the application should always be completely identical. Where a change in the legislation occurred between those two procedural stages, it is sufficient that the system established by the legislation contested in the pre-litigation procedure has, on the whole, been maintained by the new measures adopted by the Member State after the issue of the reasoned opinion and challenged in the application. [10]

25. The amendments to the Austrian legislation have not brought about any significant substantive change in the prohibition on the employment of women in the underground mining industry. The Law of 1938 established a difference of treatment as regards several types of activities which amounted to a wide prohibition on the employment of women in the mining industry, whilst the Law of 2001 set out a single, general prohibition and provided for a limited number of exceptions which targeted very specific activities, such as, for example, work experience undertaken in the mining industry. It follows that the system established by the legislation contested in the pre-litigation procedure has, on the whole, been maintained by the new measures adopted by Austria.

26. Moreover, the Court has also stressed that it is not necessary that the wording of the reasoned opinion and the subject-matter of the proceedings should be exactly the same if the subject-matter of the proceedings has not been extended or altered but has simply been limited. [11] In the present case, Austria submits in its defence on the merits that the Law of 2001 no longer provides for an absolute prohibition on the employment of women in mines but simply maintains certain specific prohibitions and restrictions on such employment. It would appear therefore that, to the extent that the legisla-

9 — *Commission* v *Belgium*, cited in note 8, paragraph 73 of the judgment.

10 — *Commission* v *Belgium*, cited in note 8, paragraph 74 of the judgment, and the case-law there cited.

11 — Case C-139/00 *Commission* v *Spain* [2002] ECR I-6407, paragraph 19 of the judgment.

tion has changed, the effect is that the subject-matter of the Commission's action has simply been limited.

27. Finally I would add that it is implicit in Austria's argument based on Article 307 EC [12] that the Law of 2001 is essentially a re-enactment of the Law of 1938.

28. In the light of the above, I consider the objection of inadmissibility to be unfounded.

The prohibition on the employment of women in the underground mining industry

The Directive

29. The Commission submits that the prohibition on the employment of women in the underground mining industry contained in Article 2 of the Law of 2001 is contrary to the Directive, Article 3(1) of which prohibits discrimination on grounds of sex in the conditions for access to employment. It adds that Austria implicitly recognises the disproportionate nature of the prohibition since in all other sectors Article 4 of the Law of 2001 provides for assessment on a case-by-case basis of whether women should be permitted to undertake physically demanding work.

30. It is common ground that the legislation at issue treats men and women differently as regards employment in the mining industry. The question therefore is whether, as Austria submits, such different treatment is permissible because it falls within the derogation set out in Article 2(3) of the Directive.

31. Austria contends in particular that it is clear, as a general rule and from a biological point of view, that women do not have the same build as men and are physically weaker. In consequence, physically strenuous work in the underground mining industry entails greater physical strain on their part and exposes them to greater health risks than men. Austria submits that that is not the

12 — See paragraph 39 et seq. below.

case as regards night work which exposes women and men to the same physical strain. The Court's case-law holding that prohibitions on night work for women are contrary to the Directive, invoked by the Commission, is accordingly not analogous. [13]

32. Austria concludes that it is therefore justified under Article 2(3) of the Directive in maintaining the prohibition on the employment of women in the mining industry which, it contends, aims to protect women.

33. In my view that provision, as indeed is clear from the case-law of the Court, is intended to address needs which are specific to women and which may therefore justifiably be protected in certain situations. The Court has in particular stated that, by permitting Member States to retain or introduce provisions which are intended to protect women in connection with 'pregnancy and maternity', the Directive recognises the legitimacy, in terms of the principle of equal treatment, of protecting a woman's needs in two respects. First, it is legitimate to ensure the protection of a woman's biological condition during pregnancy and thereafter until such time as her physiological and mental functions have returned to normal after childbirth; secondly, it is legitimate to protect the special relationship between a woman and her child over the period which follows pregnancy and childbirth, by preventing that relationship from being disturbed by the multiple burdens which would result from the simultaneous pursuit of employment. [14]

34. Article 2(3) does not therefore allow women to be excluded from a certain type of employment on the ground that they should be given greater protection than men against risks which affect men and women in the same way and which are distinct from women's specific needs of protection, such as those expressly mentioned. [15]

35. It may be noted that, despite the use of the word 'particularly' in Article 2(3), the Court has not accepted the use of the derogation for any reason other than considerations linked to pregnancy and maternity. Although the word 'particularly'

13 — Case C-345/89 *Stoeckel* [1991] ECR I-4047, Case C-158/91 *Levy* [1993] ECR I-4287 and Case C-197/96 *Commission* v *France* [1997] ECR I-1489.

14 — Case 184/83 *Hofmann* [1984] ECR 3047, paragraph 25 of the judgment.

15 — Case 222/84 *Johnston* [1986] ECR 1651, paragraph 44 of the judgment, and Case C-285/98 *Kreil* [2000] ECR I-69, paragraph 30.

indicates that situations other than pregnancy and maternity may fall within the derogation, those words colour the scope of the exceptions. [16]

36. The types of situation envisaged by Article 2(3) are thus clearly different from those targeted by the Austrian law, which excludes all women from such work regardless of their physical capabilities and condition.

37. It makes no difference in my view that, as is stressed by Austria, its legislation provides for exceptions to the general prohibition. The Court has clearly stated that the principle of equal treatment does not permit a general exclusion of women from a certain employment, even if there are exceptions, where such employment is not prohibited for men. [17] In any event, the exceptions under the Austrian legislation are extremely limited in scope.

38. I accordingly conclude that the prohibition on the employment of women in mines does not fall within the scope of the derogation in Article 2(3) of the Directive.

The ILO Convention

39. Austria submits that the restrictions on the employment of women are justified by its international law obligations arising out of ILO Convention No 45 which, since it predated Austria's accession to the EC Treaty, remains binding on it by virtue of Article 307 EC.

40. The first paragraph of Article 307 EC provides that the rights and obligations arising from agreements concluded before the entry into force of the Treaty between one or more Member States on the one hand, and one or more non-member countries on the other, are not affected by the provisions of the Treaty. Article 307 is of general scope and applies to any international agreement, irrespective of subject-matter, which is capable of affecting the application of the Treaty. [18]

41. Austria contends that as a result of that provision as interpreted by the Court [19] Member States do not have to apply Community law where its application would be incompatible with their obligations arising out of an international treaty or convention

16 — Opinion of Advocate General Sir Gordon Slynn in Case 312/86 *Commission* v *France* [1988] ECR 6315.

17 — *Stoeckel*, cited in note 13, paragraph 19 of the judgment.

18 — Case 812/79 *Burgoa* [1980] ECR 2787, paragraph 6 of the judgment, and Case C-84/98 *Commission* v *Portugal* [2000] ECR I-5215, paragraph 52.

19 — *Levy*, cited in note 13.

concluded with non-member States before their accession to the EC Treaty. It relies in particular on the judgments of the Court in *Levy* [20] and *Minne* [21] in support of its argument that the prohibition on the employment of women is permitted by virtue of Article 307.

42. Those cases raised the question whether the principle of equal treatment precluded a Member State from prohibiting night work by women in circumstances where another ILO Convention pre-dating the Treaty required such a prohibition. The Court ruled essentially that although such a prohibition was contrary to the principle of equal treatment, the Directive could not apply to the extent to which the national provisions were adopted in order to ensure the performance by the Member State of obligations arising under an agreement within the scope of Article 307.

43. The Commission however refers to the second paragraph of Article 307, which obliges Member States to take all appropriate steps to eliminate any incompatibilities between such an agreement and the Treaty, and submits that Austria should therefore have denounced the Convention on 30 May 1997 pursuant to Article 7. [22]

44. Both *Levy* and *Minne* came to the Court by way of a request for a preliminary ruling. In neither case did the national court making the reference ask for guidance on the effect of the second paragraph of Article 307. Nor was that issue raised by any of the parties submitting observations to the Court, although in *Minne* the Court noted that the Member State in question (Belgium) had in fact denounced the convention concerned. [23]

45. In the present case, in contrast, the Court is being asked to rule that Austria has infringed Community law. I have already expressed the view that the Law of 2001 is indeed contrary to the Directive. In order to decide whether Austria may, as it submits, invoke Article 307 EC to justify its legislation, it is necessary to determine whether in accordance with the second paragraph of that provision it has taken all appropriate steps to eliminate incompatibilities between that legislation and its obligations under

20 — Cited in note 13.

21 — Case C-13/93 [1994] ECR I-371.

22 — Set out in paragraph 10 above.

23 — See paragraph 15 of the judgment.

Community law. That issue has moreover been raised by the parties. If the Court were satisfied that Austria could have eliminated the incompatibility between the national provisions and the relevant Community law, but had failed to do so, Austria would no longer be able to rely on Article 307.

46. The judgment of the Court in *Commission* v *Portugal*[24] expressly addresses the problem faced by a Member State when its international law and EC law obligations are in conflict. In that case, the Court held that although in the context of Article 307 EC the Member States have a choice as to the appropriate steps to be taken, they are nevertheless under an obligation to eliminate any incompatibilities existing between a pre-Community convention and the EC Treaty. If a Member State encounters difficulties which make adjustment of such an agreement impossible, an obligation to denounce that agreement cannot therefore be excluded.[25] The Court concluded that, by failing either to denounce or to adjust an agreement with a third country which conflicted with a Community regulation, Portugal had failed to fulfil its obligations under that regulation.[26]

47. The second paragraph of Article 307 thus covers, as its wording suggests, situations in which a convention can be renegotiated by the contracting parties or unilaterally denounced in accordance with its terms. With regard to the present case, it may be noted that 13 contracting parties, including six Member States,[27] have already denounced ILO Convention No 45. The majority of those denouncing parties have given as reasons for their denunciation that the Convention is incompatible with the principle of equality of treatment between men and women. In addition, in 1996 the Governing Body of the ILO invited the States party to ILO Convention No 45 to contemplate ratifying ILO Convention No 176 of 1995 on Safety and Health in Mines, which it describes as the 'the up-to-date standard in this area [which] in practice comprised the scope of Convention No 45', and possibly denouncing Convention No 45.[28] Convention No 176 applies equally to men and women.

48. It follows that in circumstances such as those at issue, in which Austria had the opportunity lawfully to denounce ILO Con-

24 — Cited in note 18

25 — Paragraph 58 of the judgment.

26 — Paragraph 61 of the judgment.

27 — Finland, Ireland, Luxembourg, the Netherlands, Sweden and the United Kingdom.

28 — See the Reports of the ILO Governing Body for the 267th Session (November 1996), GB.267/LILS/WP/PRS/2, the 268th Session (March 1997), GB.268/LILS/WP/PRS/2, the 270th Session (November 1997), GB.270/15, and the 274th Session (March 1999), GB.274/LILS/WP/PRS/1 (available on the ILO's website www.ilo.org).

vention No 45 in the year following 30 May 1997 [29] and thereby ensure equal treatment of men and women in accordance with the Directive as regards access to employment in the underground mining industry, Austria is precluded from relying in these proceedings on the first paragraph of Article 307 EC to justify national legislation which is incompatible with the Directive.

49. Austria submits however that it could not have known, in time to denounce ILO Convention No 45, that its legislation was contrary to Community law or that the Commission deemed the provisions in question to be contrary to Community law, the Commission's first communication on the subject having been sent in September 1998.

50. That argument cannot be accepted. As mentioned above, [30] the Directive became applicable to Austria on the entry into force on 1 January 1994 of the EEA Agreement, and as a matter of Community law Austria was required to implement the Directive by 1 January 1995. Austria was thus required pursuant to Article 3(2) of the Directive to abolish at the earliest opportunity any laws contrary to the principle of equal treatment, and the date of any communication from the Commission is not material in that respect.

51. It follows from the above that Austria cannot rely in these proceedings on ILO Convention No 45 in order to avoid the performance of its obligations under the Directive.

The prohibition on the employment of women in posts involving work in a high-pressure atmosphere and as divers

52. The Commission submits that the prohibition on the employment of women in posts involving work in a high-pressure atmosphere and as divers contained in Articles 8 and 31 of the Law of 1973 is contrary to Community law.

53. Austria responds that that prohibition is in conformity with the requirements of the Directive and in particular that it is justified for the same reasons as the prohibition on

29 — See Article 7 of the Convention, set out in paragraph 8 above.

30 — See paragraph 4 above.

work in mines, that is, because of the physically demanding nature of the work coupled with women's generally weaker physical capacities, such as their inferior respiratory capacity.

54. It is true that, as in the case of mining work, the activities targeted by the Austrian law may involve some physical strain on the part of the person undertaking them. Since however Austria has not adduced any evidence that such work gives rise to risks which affect men and women differently or to risks which are specific to women and from which they need particular protection within the meaning of Article 2(3) of the Directive, that fact cannot justify excluding all women from the exercise of such activities. [31]

55. The fact that the prohibition on women working in a hyperbaric atmosphere has two limited exceptions (in contrast to the general prohibition on women undertaking diving work which allows for no exceptions) does not make it compatible with the Directive. First, the Court has explicitly stated that the principle of equal treatment does not permit a general exclusion of women from a certain employment, even if there are exceptions, where such employment is not prohibited for men. [32] Second, it is in any event clear that the exceptions are not objectively justified within the meaning of Article 2(3) because they allow women only to undertake a supervisory role or work in a hyperbaric atmosphere which does not involve excessive physical strain on their bodies. They do not therefore fall within the category of derogations connected to pregnancy or maternity which are envisaged by Article 2(3).

56. I accordingly consider that the prohibition on the employment of women in posts involving work in a high-pressure atmosphere and as divers is incompatible with the Directive.

31 — See the discussion in paragraphs 33 to 36 above.

32 — *Stoeckel*, cited in note 13, paragraph 19 of the judgment.

Conclusion

57. I am therefore of the opinion that the Court should:

(1) declare that the Republic of Austria, by maintaining Articles 8 and 31 of the Law on work in a high-pressure atmosphere and as divers of 25 July 1973 and introducing Articles 2 and 4 of the Law of the Federal minister of the economy and of employment concerning prohibitions and restrictions on the employment of women of 4 October 2001, has failed to fulfil its obligations under Articles 2 and 3 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;

(2) order the Republic of Austria to pay the costs.