OPINION OF ADVOCATE GENERAL GEELHOED
delivered on 16 March 2006 [1]

I — Introduction

1. This is the second time [2] that questions have been asked about the interpretation of a certain term used in Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation [3] (hereinafter 'the Directive' or 'Directive 2000/78'). [4]

2. The Directive prohibits direct and indirect discrimination on a number of grounds, including disability. This case concerns the interpretation of the term 'disability', which is not defined in the Directive. The questions have been posed against the background of a sick employee who was dismissed while certified as being unfit for work. More specifically, it is asked whether sickness may be regarded as a disability in the context of the Directive and, if not, whether discrimination on grounds of sickness comes within the scope of the Directive.

II — Legislative background

A — *Community law*

3. Article 13 EC reads:

'Without prejudice to the other provisions of this Treaty and within the limits of the powers conferred by it upon the Community, the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.'

1 — Original language: Dutch

2 — The Court ruled on the Directive in Case C-144/04 *Mangold* [2005] ECR I-9981.

3 — OJ 2000 L 303, p. 16.

4 — The Directive is also the subject of infringement proceedings initiated by the Commission against a number of Member States for failure to transpose it on time. The first judgment delivered in those infringement cases was the judgment in Case C-70/05 *Commission* v *Luxembourg* (not published in the ECR). Whether or not discrimination on grounds of age could be justified within the meaning of Article 6(1) of Directive 2000/78 was considered in the *Mangold* judgment (cited in footnote 2).

4. Directive 2000/78 was adopted on the basis of Article 13 EC. Article 1 of the Directive makes it clear that its purpose is to lay down a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation, with a view to putting the principle of equal treatment into effect in the Member States.

5. Recital 17 in the preamble to the Directive states:

'This Directive does not require the recruitment, promotion, maintenance in employment or training of an individual who is not competent, capable and available to perform the essential functions of the post concerned or to undergo the relevant training, without prejudice to the obligation to provide reasonable accommodation for people with disabilities.'

6. Article 3 of the Directive stipulates:

'1. Within the limits of the areas of competence conferred on the Community, this Directive shall apply to all persons, as regards both the public and private sectors, including public bodies, in relation to:

...

(c) employment and working conditions, including dismissals and pay;

...'

7. Article 5 of the Directive reads:

'In order to guarantee compliance with the principle of equal treatment in relation to persons with disabilities, reasonable accommodation shall be provided. This means that employers shall take appropriate measures, where needed in a particular case, to enable a person with a disability to have access to, participate in, or advance in employment, or to undergo training, unless such measures would impose a disproportionate burden on the employer. This burden shall not be disproportionate when it is sufficiently remedied by measures existing within the framework of the disability policy of the Member State concerned.'

8. The fourth recital in the preamble to Council Recommendation 86/379/EEC of 24 July 1986 on the employment of disabled people in the Community [5] states that:

'... for the purpose of this Recommendation, "disabled people" includes all people with

5 — OJ 1986 L 225, p. 43.

serious disabilities which result from physical, mental or psychological impairments;'

9. Point 26 of the Community Charter of the Fundamental Social Rights of Workers of 9 December 1989 reads:

'All disabled persons, whatever the origin and nature of their disablement, must be entitled to additional concrete measures aimed at improving their social and professional integration.

These measures must concern, in particular, according to the capacities of the beneficiaries, vocational training, ergonomics, accessibility, mobility, means of transport and housing.'

B — *National legislation*

10. Article 14 of the Constitution stipulates that all Spaniards are equal before the law, with no distinction made on grounds of birth, race, sex, religion, opinion or any other personal or social condition or factor.

11. The main instrument governing industrial relations is the Estatuto de los Trabajadores (Workers' Statute; hereinafter 'WS'). Article 55.3 of the WS sets out the different types of dismissal: lawful, unlawful and void.

12. Article 55.4 provides that a dismissal is unlawful when the breaches of contract alleged to have been committed by the employee are not substantiated or when the manner of the dismissal does not meet the requirements laid down by law.

13. Article 55.5 provides that a dismissal is void when it is based on any of the causes of discrimination prohibited under the Constitution or the law, or when it takes place in breach of the fundamental rights and public freedoms of the worker.

14. Article 55.6 provides that void dismissal entails a right, on the part of the employee, to be reinstated immediately and to receive any unpaid remuneration.

15. The consequences of unlawful dismissal are described in Article 56 of the WS. It provides that, in the case of unlawful dismissal, save where the employer chooses to reinstate him, the employee loses his job but receives compensation.

16. Article 17.1 of the WS was amended by Law No 62/03 transposing Directive 2000/78 into national law, which entered into force on 1 January 2004. The current version of Article 17.1 of the WS reads:

'Regulatory provisions, clauses in collective agreements, individual agreements, and unilateral decisions by an employer, which involve direct or indirect unfavourable discrimination on grounds of age or disability, or positive or unfavourable discrimination in employment, or with regard to remuneration, working hours, and other conditions of employment based on sex, origin, including racial or ethnic origin, civil status, social status, religion or beliefs, political ideas, sexual orientation, membership or lack of membership of trade unions or compliance with their agreements, the fact of being related to other employees in the undertaking, or language within the Spanish State, shall be deemed void and ineffective.

...'

17. This last provision defines and elucidates, in the context of labour relations, the principle of equality before the law and of the prohibition of discrimination as adopted by the Spanish legal system and laid down in Article 14 of the Spanish Constitution.

III — The main action and the questions referred for a preliminary ruling

A — *Background to the request for a preliminary ruling*

18. Ms Chacón Navas is, or was, employed by Eurest Colectividades SA (hereinafter 'Eurest'), an undertaking specialising in catering. Since 14 October 2003 she has been certified as unfit for work on medical grounds and in receipt of temporary incapacity benefit.

19. On 28 May 2004 Eurest gave her written notice of her dismissal as of 31 May 2004, without stating any reasons. In the letter of dismissal Eurest acknowledged that the dismissal was unlawful under Article 56 of the WS and therefore offered compensation.

20. As Ms Chacón Navas did not agree to her dismissal, she challenged it in court. In her application of 29 June 2004 she stated that the dismissal was void because it amounted to unequal treatment and discrimination, in that she had been on leave of absence from her employment and temporarily unfit to work for eight months. She demanded to be reinstated.

21. During the hearing held on 16 September 2004 Eurest argued that the claimant had produced no evidence of discrimination or infringement of fundamental rights. Ms Chacón Navas reiterated what she had stated in her application: she had been certified as unfit for work on grounds of sickness since 14 October 2003 (the documents before the court in the main action show that she is awaiting an operation) and contended that there were sufficient indications for the dismissal to be classified as discriminatory.

22. On 21 September the national court requested the medical inspectorate to report on the state of Ms Chacón's temporary incapacity for work, and particularly to indicate the date on which her absence commenced and whether her condition was ongoing. A reply was received on 11 November 2004, stating that Ms Chacón Navas was certified as unfit to work on grounds of sickness on 14 October 2003, that she was still unfit to work and that it was not envisaged that she would return to work in the short term.

23. As Ms Chacón Navas has shown that she was dismissed while certified as unfit for work on grounds of sickness and as her employer has not produced any facts or evidence from which valid reasons for her dismissal are apparent, which results in a reversal of the burden of proof, the conclusion to be drawn, according to the referring court, is that Ms Chacón Navas was dismissed solely on account of the fact that she was absent from work because of sickness.

24. The referring court points out that, according to Spanish case-law, this kind of dismissal is classified as unlawful rather than void. This is evident from the judgment of the Tribunal Supremo of 29 January 2001, which has since been followed by all the high courts. The reason for this is that there is in Spanish law no explicit provision which determines that the personal condition of sickness is material for the purposes of preventing, in that regard, discriminatory practices and of enforcing the prohibition of discrimination in relationships between private individuals.

25. The referring court takes the view that a right to protection may possibly be derived from primary and secondary Community law, and specifically from Directive 2000/87.

26. It wonders whether there is some kind of connection between 'disability' and 'sickness'. It believes that the World Health Organisation's International Classification of Functioning, Disability and Health (ICF) might be consulted. The ICF defines disability as a generic term covering defects, limitation of activity and restriction of participation, to emphasise the negative aspects affecting the interaction between an individual with a health condition and his contextual, environmental and personal factors.

27. The referring court points out that sickness is a health condition capable of causing defects which disable individuals. It

maintains that, under the prohibition of discrimination on the grounds of disability, a worker should also be protected as soon as the sickness is established. Otherwise, the protection intended by the legislature would, in large measure, be nullified, because, since sickness is a health condition which might result in a disability, that route could be used to foster uncontrolled discriminatory practices.

28. Should it be concluded that sickness and disability are distinct concepts and that Directive 2000/78 is not therefore applicable to the former concept, the court wonders whether the protective umbrella of the Directive would not also extend to sickness as an identifying attribute as distinct from the identifying attribute of disability referred to in the Directive.

B — *The questions referred for a preliminary ruling*

29. As there are doubts about the correct interpretation, the Juzgado de lo Social n° 33 de Madrid (Spain) has decided to refer the following questions to the Court:

'1. Does Directive 2000/78, in so far as Article 1 thereof lays down a general framework for combating discrimination on the grounds of disability, include within its protective scope an employee who has been dismissed by her employer solely because she is sick?

2. In the alternative, if it should be concluded that sickness does not fall within the protective framework which Directive 2000/78 lays down against discrimination on grounds of disability and the first question is answered in the negative, can sickness be regarded as an identifying attribute in addition to the ones in relation to which Directive 2000/78 prohibits discrimination?'

C — *The proceedings before the Court*

30. In these proceedings written comments have been submitted by Eurest, the German, Netherlands, Austrian, Spanish, Czech and United Kingdom Governments and the Commission.

IV — Analysis

A — *Admissibility*

31. In their written comments the defendant in the main action and the Commission argue that there are grounds for declaring the referring court's questions inadmissible.

32. According to the defendant in the main action, the questions are inadmissible because the Tribunal Supremo has already ruled that the dismissal of a worker certified as unfit for work does not as such amount to prohibited discrimination.

The Commission doubts that the questions are admissible because the description in the order for reference of the underlying facts is so incomplete that the accurate answers to the questions which are needed for the settlement of the main action are impossible. In particular, the absence of any indication of the nature and — expected — course of the sickness made it impossible from the outset to determine whether a disability was at issue in this case.

33. The argument advanced by the defendant in the main action against the admissibility of the questions is, in my view, unacceptable. The fact that the Tribunal Supremo has already ruled that dismissal because of sickness cannot be regarded as an action falling within the scope of the prohibition of discrimination on grounds of disability cannot make the questions referred inadmissible. Their very subject-matter is the scope of the prohibition of discrimination laid down in Directive 2000/78. If that prohibition were regarded as also extending to — long-term — sickness, that might have implications for the interpretation of the relevant Spanish legislation and its application to the actual situation in the main action.

34. At first glance, the Commission's argument appears to carry more weight. The description in the order for reference of the underlying facts, and especially the nature, seriousness and duration of Ms Chacón Navas's sickness, is indeed very brief. An analysis of the documents before the court in the main action, as attempted by the Commission, does not produce a great deal more to go on.

35. None the less, I consider that the grounds stated in the order for reference make it sufficiently clear why the referring court needs a firmer basis on which to apply the prohibition of discrimination laid down in Directive 2000/78 on the grounds of disability to the facts of the case in which it is required to deliver a judgment.

As the consequences of irregular dismissal because of sickness are very different in Spanish employment law from the consequences of irregular dismissal because of disability — in the former case, dismissal is deemed unlawful, and the worker concerned receives compensation, in the latter case, it is deemed void, and the worker must be immediately reinstated and receives any unpaid remuneration — the requested interpretation of the material scope of the Community prohibition of discrimination on the grounds of disability is certainly relevant to the decision in the main action.

36. From the fact that six Member States have submitted written comments with contents pertinent to the particular context of this case it can, moreover, be inferred that the order for reference provides a sufficiently sound basis. The Commission, too, evidently saw the wording of the order for reference as no obstacle to a substantive reply to the questions.

37. I therefore conclude that there are no convincing arguments for declaring the questions referred for a preliminary ruling to be inadmissible.

B — *Preliminary comments*

1. Article 13 as the legal basis of Directive 2000/78

38. The order for reference refers not only to Article 13 EC but also to Articles 136 and 137 EC as the legal basis of Directive 2000/78. The referring court therefore seems to be suggesting that the latter provisions, too, are important for the answers to the questions referred.

39. This suggestion does not seem correct to me. According to the wording of the pertinent citation in its preamble, Directive 2000/78 is based solely on Article 13 EC.

40. Article 13 EC was introduced into the EC Treaty by the Treaty of Amsterdam. It gives the Community the authority to take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.

41. It is clear from the words 'Without prejudice to the other provisions of this Treaty' that Article 13 EC is of a subsidiary nature. Another Treaty provision does not therefore have to be considered as the legal basis of the action to be taken under Article 13 EC.

42. With regard more particularly to the protection of disabled people in the labour market, a legal basis might also be found in Article 137 EC, which authorises the Community to take action to support and complement the policies of the Member States, inter alia in combating social exclusion (Article 137(1)(j) EC).

43. That legal basis is, however, different in nature from that provided by Article 13 EC. It creates a legal basis for the complementary harmonisation of aspects of the Member

States' social policies. As a result, it is broader both *ratione personae* and *ratione materiae* than Article 13 EC, in that it is also applicable to other categories of the 'excluded' than those referred to in Article 13 EC and is able to pursue objectives other than the mere prohibition of discrimination.

44. The difference of purpose is also reflected in the types of measures which may be taken under Article 137(1)(j) EC. They may provide, for example, for special stimulating and protective measures to bring to an end certain forms of exclusion, which the Member States must transpose into their national legislation. The prohibition of discrimination on the grounds of disability laid down in Article 13 EC, as elaborated in Directive 2000/78, includes a general qualitative condition with which the Member States must comply in any legislation and decision-making relating to the employment and occupations of disabled people and which also applies to the horizontal relationships between employers and employees in the labour market.

45. The choice of Article 13 EC as the sole legal basis for a general prohibition of discrimination on the grounds of disability is therefore correct. The questions referred must consequently be answered in the light of the wording and purpose of that article.

2. The interpretation of Article 13 EC and Directive 2000/78

46. The evolution and wording of Article 13 EC reflect the restraint shown by the authors of the Treaty in the drafting of this complementary non-discrimination provision. The initial proposals for such a provision were increasingly curtailed as the conclusion of the Treaty of Amsterdam neared. [6]

47. That restraint is evident from the wording of Article 13 EC.

Firstly, it provides a legal basis only for the taking of 'appropriate action'.

Secondly, the description of the prohibited grounds for discrimination is exhaustive. This contrasts with classical international human rights treaties and, for example,

6 — See inter alia M. Bell and L. Waddington, The 1996 Intergovernmental Conference and the Prospects of a Non-Discrimination Treaty Article, 25 *Industrial Law Journal* (1996), pp. 320-326; R. Barents, *Het Verdrag van Amsterdam*, Deventer 1997, pp. 40 to 43; and Olivier de Schutter, 'Les droits fondamentaux dans le Traité d'Amsterdam', in: Yves Lejeune (ed.), *Le Traité d'Amsterdam*, Brussels 1999, pp. 154 to 188, particularly pp. 184 to 187.

Article II-81 of the Constitutional Treaty, where the lists of prohibited grounds for discrimination are worded without limitation.

The limitation due, thirdly, to the subsidiary nature of the provision has been discussed above.

Fourthly, the application of Article 13 EC requires the measure under consideration to be 'within the limits of the powers conferred by [the Treaty] upon the Community'.

48. I maintain that when interpreting Article 13 EC and the 'appropriate action' taken on the basis thereof, as provided for in Directive 2000/78 in this instance, there are convincing arguments for taking into account the definitions and delineations laid down therein. Being of comparatively recent date, they reflect the express will of the authors of the Treaty and of the Community legislature.

49. However, apart from these arguments based on the history of the Treaty and grammar, there are also substantive arguments against an extensive interpretation.

50. The object of some of the prohibitions of discrimination listed in Article 13 EC, such as that based on age and disability, means that the identification of prohibited formal inequality of treatment will always entail a substantive claim to equal access to or continued employment in an occupation or business, equal conditions of employment, the availability of special training or of facilities which compensate for or alleviate the limitations due to age or disability. In view of the potentially far-reaching consequences, economic and financial, which such prohibitions of discrimination may have in horizontal relationships among citizens and in vertical relationships between public authorities and interested citizens, national legislatures tend to provide precise definitions of such prohibitions of discrimination in terms of their scope — including justified exceptions and limitations and the provision reasonably to be made for compensatory facilities.

51. The greater detail which Directive 2000/78, and especially Articles 5 and 6 thereof, adds to the prohibitions of discrimination on the grounds of age and disability, suggests that the Community legislature, too, was aware of those potentially far-reaching economic and financial consequences.

52. The definitions and delineations set out in Directive 2000/78 should be taken ser-

iously, since the economic and financial effects of the prohibition of discrimination on grounds of disability are felt primarily in areas which are indeed covered by the Treaty, but where the Community has at best shared, but for the most part complementary powers. This is true of employment policy, where the Community has a limited, coordinating power, under Articles 125 to 130 EC, and of social policy, where, according to the first sentence of Article 137(1) EC, the Community is required to 'support and complement' the activities of the Member States in a number of fields. In the areas of education and vocational training (Articles 149 and 150 EC), and public health (Article 152 EC), which are also relevant in the present context, the Community's powers are similarly of a complementary nature.

53. I infer from this that the Court must respect the choices made by the Community legislature in the rules on the application of Article 13 EC with regard to the definition of the prohibition of discrimination and the substantive and personal delineation of that prohibition and must not stretch them by relying on the general qualification reflected in that article by the words 'Within the limits of the powers conferred by [the Treaty] upon the Community.' There is even less room, in my view, for widening the scope of Article 13 EC by relying on the general policy of equality.

54. So broad an interpretation of Article 13 EC and of the rules adopted by the Community legislature on the implementation of that article results, as it were, in the creation of an Archimedean position, from which the prohibitions of discrimination defined in Article 13 EC can be used as a lever to correct, without the intervention of the authors of the Treaty or the Community legislature, the decisions made by of the Member States in the exercise of the powers which they — still — retain. Given that, according to the EC Treaty, the core of those powers continues to rest with the Member States, even if the Community competence in that respect is activated by the Community legislature, this is an undesirable outcome from the viewpoint of both the system underlying the Treaty and institutional balance.

55. I would also point out, for the sake of completeness, that the implementation of the prohibitions of discrimination of relevance here always requires that the legislature make painful, if not tragic, choices when weighing up the interests in question, such as the rights of disabled or older workers versus the flexible operation of the labour market or an increase in the level of participation of older workers. Not infrequently the application of these prohibitions of discrimination necessitates financial compensation, the reasonableness of which partly depends on available public resources or the general level of prosperity in the Member States concerned. Within the national sphere such considerations do not take place in a legal vacuum. As a rule, they are examined for their compatibility with fundamental

national constitutional rights and the relevant provisions of international human rights treaties. That being the case, the Court must surely, as the Community's judicial authority, have an indisputable and superior basis of competence if it wishes to correct decisions taken by a national legislature within the limits set by the national constitution and international law, and in accordance with its retained powers.

56. In view of the foregoing arguments I therefore advocate a more restrained interpretation and application of Directive 2000/78 than adopted by the Court in the *Mangold* case.[7] So saying, I am already anticipating the answer to the second of the referring court's questions.

3. The concept of 'disability' as a concept of Community law

57. The concept of 'disability' is an indeterminate legal concept, which is susceptible to many different interpretations in its application. The fact that the term occurs in Article 13 EC, which seeks to prohibit discrimination based on disability, a prohibition which is then activated and elaborated on in Directive 2000/78, is a compelling argument for defining that concept as a matter of Community law.

58. There is all the more reason for this as the concept of 'disability', in not only its medico-scientific but also its social sense, is undergoing fairly rapid evolution. It cannot be excluded in this context that certain physical or mental shortcomings are in the nature of 'disability' in one social context, but not in another.

59. On the one hand, the variability and contextual sensitivity of the term 'disability' may lead to major differences in the interpretation and application of the prohibition of discrimination. That suggests there is a need for a uniform interpretation. On the other hand, the combination of dynamic changes and variation in the scientific perception and social treatment of the phenomenon of disability calls for caution in any efforts to achieve uniformity. I will revert to this later.

60. In the course of the social history of the past two centuries the number of people regarded as disabled has undeniably grown. This is partly due to the tremendous improvement in public health in the more prosperous societies. The result has been that persons who were unable to benefit from that prosperity because they were handicapped by more or less permanent physical or mental afflictions became more visible.

61. Developments in the biomedical sciences have led to a better understanding

7 — Cited in footnote 2.

of the physical and mental afflictions underlying disabilities. They have also helped to widen the concept of 'disability'. Greater vulnerability to serious ailments owing to a genetic defect may result in serious limitations for those concerned.

62. The last example indicates that the particular social environment of disabled people may also be relevant when it comes to assessing whether they are regarded as such. As long as the genetic defect has not been identified, the person in question faces no discrimination. This may change once it becomes known, because employers or insurers do not want to risk employing or insuring those concerned.

63. One of the characteristics often referred to in the literature to distinguish disabilities from diseases is the permanence of the physical or mental defect. In most cases this is indeed a sound basis. However, there are progressive diseases entailing serious and long-lasting losses of function which impede the functioning of the patients so badly that they do not differ significantly in society from 'permanently' disabled people.

64. The foregoing leads me to the conclusion that the concept of disability in Directive 2000/78 is a Community legal concept which must be interpreted autonomously and uniformly throughout the Community legal system, with account taken of the context of the provision and the purpose of the legislation in question. [8]

65. It also goes without saying that a uniform Community interpretation of 'disability' is needed for substantive reasons, if only to ensure a minimum of the necessary uniformity in the personal and substantial scope of the prohibition of discrimination. The persons to be protected and the delineation of the functional limitations to be considered must not vary. Otherwise, the protection afforded by that prohibition of discrimination would vary within the Community.

66. None the less, in developing a uniform interpretation of the term 'disability' account should be taken of the aforementioned dynamic aspect of society's perception of the phenomenon of 'disability' as a functional limitation resulting from a mental or physical defect, the evolution of medical and

8 — See inter alia Case 327/82 *EKRO* [1984] ECR 107, paragraph 11; Case C-287/98 *Linster* [2000] ECR I-6917, paragraph 43; Case C-357/98 *Yiadom* [2000] ECR I-9265, paragraph 26; Case C-245/00 *SENA* [2003] ECR I-1251, paragraph 23; Case 373/00 *Adolf Truley* [2003] ECR I-1931, paragraph 35; and Case C-497/01 *Zita Modes* [2003] ECR I-14393, paragraph 34.

biomedical understanding and the major contextual differences in the assessment of a wide variety of disabilities.

67. This suggests that we should not endeavour to find more or less exhaustive and fixed definitions of the term 'disability'. The Court's interpretation of the term must provide the national court with Community law criteria and points of reference with whose aid it can find a solution to the legal problem it faces. [9]

68. The convergent interpretation and application in the Community of the term 'disability' can thus be ensured without harming the open nature of that term. In this respect I share the views put forward by the Netherlands Government on the subject. [10]

4. Disability, discrimination and compensation

69. Over the years the legislatures in the social States of Europe, with systems based as the rule of law, have addressed the protection of people with disabilities in three ways.

70. Even as social security legislation was emerging, special provisions were made for people who, having become permanent invalids as a result of industrial accidents, were no longer employable. Subsequently, a guarantee of subsistence was created for people whose disabilities made it impossible for them to support themselves.

71. That disabilities are no reason for unjustified discrimination in the labour market and elsewhere in society is a notion which gradually gained currency after the Second World War. It led to the differentiation of the principle of equality, tailored to discrimination on grounds of disability. In Community law this differentiation finds expression in Article 13 EC and Directive 2000/78.

72. The consequence of the development of medical understanding combined with growing technological possibilities has been that, in an increasing number of cases in which the special treatment of disabled people for whom special treatment had previously been justified in the labour market and elsewhere in society because they did not meet — or no longer met — the requirements of an occupation or other activity, compensation

9 — This conforms, moreover, to the Court's settled case-law on the nature of the cooperation between the Community's judicial authority and national courts. See Case 20/64 *Albatros* [1965] ECR 29.

10 — On the Netherlands Government's behalf it has been pointed out in particular that the open nature of the term makes a conclusive definition neither necessary nor desirable. It contends that the significance of what a disability is is ultimately determined by the particular circumstances in each case (paragraph 23 of the written comments).

could be made for the deficiency and/or limitation due to the impediments in such a way that they were able — again — fully or partly to resume their occupation or activity.

73. The wider availability of reasonable means of compensating for disabilities, or of limiting their consequences, means that the scope for an acceptable justification for a difference in treatment on grounds of disability is shrinking. This positive side, in terms of the employer's obligations, of what is in principle a negative prohibition of discrimination is developed in Article 5 of Directive 2000/78. [11]

74. In the light of these four preliminary comments I will attempt to find answers to the questions referred for a preliminary ruling.

C — *The first question referred for a preliminary ruling*

75. The answer to the first question is easily deduced from the third and fourth preliminary comments.

11 — This provision develops the contents of point 26 of the Community Charter of the Fundamental Social Rights of Workers, cited in paragraph 9 of this Opinion.

76. Disabled people are people with serious functional limitations (disabilities) due to physical, psychological or mental afflictions.

77. From this two conclusions can be drawn:

— the cause of the limitations must be a health problem or physiological abnormality which is of a long-term or permanent nature;

— the health problem as cause of the functional limitation should in principle be distinguished from that limitation.

78. Consequently, a sickness which causes what may be a disability in the future cannot in principle be equated with a disability. It does not therefore provide a basis for a prohibition of discrimination, as referred to in Article 13 EC in conjunction with Directive 2000/78.

79. An exception to this rule is admissible only if during the course of the sickness permanent functional limitations emerge which must be regarded as disabilities despite the continuing sickness.

80. A dismissal because of sickness can thus constitute discrimination on the grounds of disability, which is prohibited by Directive 2000/78, only if the person concerned is able to make a reasonable case that it is not the sickness itself but the resulting long-term or permanent limitations which are the real reason for the dismissal.

81. I would add, to complete the picture, that in that hypothesis the dismissal may none the less be justified if the functional limitations — the disability — make impossible or seriously restrict the pursuit of the occupation or business concerned. [12]

82. However, that justification is admissible only if the employer has no reasonable means of alleviating or compensating for the disability concerned in such a way that the disabled person is able to continue pursuing his occupation or business. [13]

12 — See Article 4(1) of Directive 2000/78.

13 — See Article 5 of Directive 2000/78.

83. What is reasonable is also determined by the cost of appropriate resources, the proportionality of those costs if they are not reimbursed by the authorities, the reduction of or compensation for the disability thus made possible and the accessibility of the disabled person concerned to other occupations or forms of business where his disability will be no obstacle or far less of an obstacle.

D — *The second question referred for a preliminary ruling*

84. The answer to the second question can be deduced from the second preliminary comment:

— neither the history nor the wording of Article 13 EC and Directive 2000/78 allow sickness to be seen as the separate object of a prohibition of discrimination;

— nor can such a prohibition of discrimination be construed as an exception to the general principle of equality.

V — Conclusion

85. In view of the foregoing I propose that the Court should answer the questions referred to it by the Juzgado de lo Social n° 33 de Madrid for a preliminary ruling as follows:

'(1) A sickness which causes what may be a disability in the future cannot in principle be equated with a disability. It does not therefore provide a basis for a prohibition of discrimination based on disability, as referred to in Article 13 EC in conjunction with Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation. An exception to this rule is admissible only if during the course of the sickness long-term or permanent functional limitations emerge which must be regarded as disabilities. When relying on the prohibition of discrimination on the grounds of disability, the person concerned must then make a reasonable case that it is not the sickness itself, but the resulting long-term or permanent limitations which are the real reason for the dismissal.

(2) Neither the history nor the wording of Article 13 EC and Directive 2000/78 allow sickness to be seen as a separate ground for a prohibition of discrimination. Nor can such a prohibition of discrimination be construed as an exception to the general principle of equality.'