OPINION OF ADVOCATE GENERAL TRSTENJAK delivered on 31 March 2009 [1]

Table of contents

1 — Original language: Slovene.

I — Introduction

1. In the main proceedings a pregnant worker alleges that her employer's act of ordinary and extraordinary termination of her employment relationship is unlawful. She takes the view that such conduct may be challenged twofold: first, by an action for nullity; second, by an action for damages as also applies in other areas of national dismissal protection law. Furthermore, the referring court asks two questions concerning compatibility with the

relevant provisions of Community law of national time-limits for notification of the fact of pregnancy and for bringing proceedings following employer termination of the employment relationship during pregnancy.

II — Legal framework

A — *Community law*

1. Directive 76/207 [5]

3. Article 2 of Directive 76/207 provides:

‘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. For the purposes of this Directive, the following definitions shall apply:

2. In those circumstances the present reference for a preliminary ruling concerns the interpretation of Articles 10 and 12 of Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding (10th individual directive within the meaning of Article 16(1) of Directive 89/391/EEC) [2] and the interpretation of Article 2 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] as amended by Directive 2002/73/EC of the European Parliament and of the Council of 23 September 2002 [4] (‘Directive 76/207’).

2 — OJ 1992 L 348, p. 1.
3 — OJ 1976 L 39, p. 40.
4 — OJ 2002 L 269, p. 15.

5 — According to the first sentence of Article 2(1) of Directive 2002/73 (see point 2 of this Opinion and footnote 4 to this Opinion), Member States must bring into force the laws, regulations and administrative provisions necessary to comply with that directive by 5 October 2005 at the latest or must ensure, by that date at the latest, that management and labour introduce the requisite provisions by way of agreement.

— direct discrimination: where one person is treated less favourably on grounds of sex than another is, has been or would be treated in a comparable situation,

— indirect discrimination: where an apparently neutral provision, criterion or practice would put persons of one sex at a particular disadvantage compared with persons of the other sex, unless that provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary,

...

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

...

Less favourable treatment of a woman related to pregnancy or maternity leave within the meaning of Directive 92/85/EEC shall constitute discrimination within the meaning of this Directive.

...'

4. Article 3(1) of Directive 76/207 provides:

'Application of the principle of equal treatment means that there shall be no direct or indirect discrimination on the grounds of sex in the public or private sectors, including public bodies, in relation to:

...

(c) employment and working conditions, including dismissals, as well as pay as provided for in Directive 75/117/EEC;

…’

5. Article 6(1) and(2) of Directive 76/207 provide:

‘1. Member States shall ensure that judicial and/or administrative procedures, including where they deem it appropriate conciliation procedures, for the enforcement of obligations under this Directive are available to all persons who consider themselves wronged by failure to apply the principle of equal treatment to them, even after the relationship in which the discrimination is alleged to have occurred has ended.

2. Member States shall introduce into their national legal systems such measures as are necessary to ensure real and effective compensation or reparation as the Member States so determine for the loss and damage sustained by a person injured as a result of discrimination contrary to Article 3, in a way which is dissuasive and proportionate to the damage suffered; …’

6. Article 8d of Directive 76/207 provides:

‘Member States shall lay down the rules on sanctions applicable to infringements of the national provisions adopted pursuant to this Directive, and shall take all measures necessary to ensure that they are applied.

The sanctions, which may comprise the payment of compensation to the victim, must be effective, proportionate and dissuasive. …’

7. Recital 12 in the preamble to Directive 2002/73 states that the Court of Justice has consistently ruled that any unfavourable treatment of women related to pregnancy or maternity constitutes direct sex discrimination.

8. Recital 19 in the preamble to Directive 2002/73 states that, according to the case-law of the Court of Justice, national rules relating to time-limits for bringing actions are admissible provided that they are not less favourable than time-limits for similar actions of a domestic nature and that they do not render the exercise of rights conferred by the Community law impossible in practice.

9. According to recital 1 in its preamble, Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) [6] — which for reasons of time does not apply to the facts of the main proceedings — brings together, for reasons of clarity, and recasts in a single text the main provisions existing in this field. With effect from 15 August 2009, Article 34(1) of Directive 2006/54 repeals Directive 76/207 (as amended by Directive 2002/73) without prejudice to the obligations of the Member States in relation to the transposition of those instruments.

2. Directive 92/85 [7]

10. The ninth recital in the preamble to Directive 92/85 states that protection of the safety and health of pregnant workers, workers who have recently given birth or workers who are breastfeeding should not treat women on the labour market unfavourably nor work to the detriment of directives concerning equal treatment for men and women.

11. The 15th recital in the preamble to Directive 92/85 states that the risk of dismissal for reasons associated with their condition may have harmful effects on the physical and mental state of pregnant workers, workers who have recently given birth or who are breastfeeding, and for that reason provision should be made for such dismissal to be prohibited.

12. According to the definition in Article 2(a), for the purposes of Directive 92/85, a pregnant worker means 'a pregnant worker who informs her employer of her condition, in accordance with national legislation and/or national practice'.

13. Article 10 of Directive 92/85, headed 'Prohibition of dismissal', is worded as follows:

'In order to guarantee workers, within the meaning of Article 2, the exercise of their health and safety protection rights as recognised under this Article, it shall be provided that:

1. Member States shall take the necessary measures to prohibit the dismissal of workers, within the meaning of Article 2, during the period from the beginning of their pregnancy to the end of the maternity leave referred to in Article 8(1), save in exceptional cases not connected with

6 — OJ 2006 L 204, p. 23.

7 — It should be noted that there is currently a proposal for amendment: Proposal for a directive of the European Parliament and of the Council amending Council Directive 92/85/EEC on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding (COM(2008) 637 final).

their condition which are permitted under national legislation and/or practice and, where applicable, provided that the competent authority has given its consent;

2. if a worker, within the meaning of Article 2, is dismissed during the period referred to in point 1, the employer must cite duly substantiated grounds for her dismissal in writing;

3. Member States shall take the necessary measures to protect workers, within the meaning of Article 2, from consequences of dismissal which is unlawful by virtue of point 1.'

14. Article 12 of Directive 92/85, headed 'Defence of rights', is worded as follows:

'Member States shall introduce into their national legal systems such measures as are necessary to enable all workers who [consider] themselves wronged by failure to comply with the obligations arising from this Directive to pursue their claims by judicial process (and/or, in accordance with national laws and/or practices) by recourse to other competent authorities.'

B — *National law*

15. Chapter IV of the first book of the Luxembourg Code du travail (Labour Code), entitled 'Termination of an employment contract', contains in Part 1 provisions on ordinary termination under the heading 'Termination with notice' and in Part 2 provisions on extraordinary termination under the heading 'Termination for good reason'. Part 3 of that chapter which includes Articles L. 124-11 and L. 124-12 is entitled 'Wrongful termination of an employment contract by an employer'.

16. Article L. 124-11 of the Luxembourg Code du travail provides:

'(1) A dismissal which is contrary to law or is not based on genuine and serious grounds related to the capacity or the conduct of the employee or based on the operational requirements of the undertaking, the establishment or the service, [8] is wrongful and constitutes a socially and economically unacceptable measure.

8 — Accordingly, the law permits dismissals by reason of personal capacity or conduct or for operational reasons.

The same applies with regard to a dismissal which is contrary to the general criteria laid down in Article L. 423-1(3).[9]

(2) Legal proceedings for compensation in respect of the wrongful termination of a contract of employment shall be brought before the court having jurisdiction in employment matters within three months of notification of dismissal or communication of the reasons, or else be time-barred. If no reasons are given, time shall run from the expiry of the period laid down in Article L. 124-5(2).[10]

That period shall be validly suspended where a written complaint is submitted to the employer by the employee... That complaint shall cause a new period of one year to commence and proceedings shall be time-barred at the end of that period.'

9 — That provision concerns general criteria for the selection of workers for dismissal established by a 'comité mixte d'entreprises' (an enterprise-level body in enterprises with 150 or more employees composed of an equal number of employee and employer representatives, see J.-L. Putz, *Luxemburgisches Arbeitsrecht*, Luxembourg, 2006, p. 145, point 474).

10 — As a result, the period within which to bring proceedings is thereby extended by two months: Article L. 124-5(1) of the Code du travail provides that within one month of the notification of dismissal an employee may request the employer to state the grounds for such. According to Article L. 124-5(2) of the Code du travail, thereupon the employer has one month from notification of the employee's request in which to state the grounds in justification. If within that period no grounds are stated, the dismissal is regarded as wrongful. Article L. 124-5(3) of the Code du travail provides that an employee who allows the period provided for by Article L. 124-5(1) of the Code du travail to elapse may of his own volition use all means to demonstrate that the dismissal is wrongful. As a consequence, Article L. 124-5 of the Code du travail basically provides for a relaxation of the burden of proof in a case of wrongful dismissal.

17. Article L. 124-12 of the Code du travail provides:

'(1) Where the court having jurisdiction in employment matters determines that the right to terminate a contract of an indeterminate duration has been misused, it shall order the employer to pay damages to the employee having regard to the loss and damage suffered by him as a result of his dismissal.

(2) On determining the damages payable following the wrongful dismissal of an employee, on request by that employee in the course of the proceedings, the court having jurisdiction in employment matters may, if it considers the conditions for a continuation or a re-establishment of the employment relationship to be satisfied, recommend to the employer to consent to the reinstatement of the employee as redress for the wrongful dismissal.

The actual reinstatement of an employee subject to the retention of his rights acquired on account of prior service shall exonerate an employer from payment of the damages which he was ordered to pay as redress for the wrongful dismissal.

An employer who does not wish to consent to a recommendation by the

court having jurisdiction in employment matters to reinstate a wrongfully dismissed employee may be ordered on application by the employee concerned to pay in addition to the damages due under paragraph 1 of this Article a compensatory amount not exceeding one month's wages or salary.

…

(4) In cases in which as a matter of law a dismissal is regarded as null and void the court having jurisdiction in employment matters shall order the reinstatement of an employee … if he so requests. …

In actions for nullity the provisions of Article L. 124-11 shall apply.'

18. Article L. 337-1 of the Code du travail provides:

'(1) An employer may not inform a female employee of the termination of her employment relationship or, where relevant, call her to attend a preliminary interview where she has been medically certified as being pregnant or within 12 weeks of her giving birth.

Where notice of termination of employment is given before the pregnancy has been medically certified, the female employee may, within eight days of notification of the dismissal, supply evidence of her condition in the form of a certificate sent by registered post.

Any dismissal notified contrary to the prohibition of dismissal as set out in the preceding two paragraphs — and, where relevant, any notification to attend a preliminary interview — shall be deemed null and void.

Within 15 days of the termination of the contract, the female employee may, by ordinary application, request the president of the court exercising jurisdiction in employment matters, as a matter of urgency and in summary proceedings, after the parties have been heard or have been duly summoned to attend, to declare the dismissal null and void and order her continued employment, and, where appropriate, her reinstatement in accordance with the provisions of Article L. 124-12(4). …

The order of the president of the court exercising jurisdiction in employment matters shall be enforceable on a provisional basis. Within 40 days of service by the court registry an appeal against that order may be lodged by ordinary application before the judge presiding in the chamber of the Cour d'appel competent to hear appeals in employment law matters. …'

III — Facts of the main proceedings and questions referred for a preliminary ruling

19. Ms Pontin, the plaintiff in the main proceedings, has been employed by T-Comalux SA ('T-Comalux') as a full-time secretary/assistant under a contract of indeterminate duration since November 2005.

20. By registered letter of 18 January 2007, received by Ms Pontin on 22 January 2007, T-Comalux gave notice — without stating any reasons — to terminate her employment contract making reference to the statutory two-month notice period which it fixed as the period from 31 January to 30 March 2007.

21. In the main proceedings the parties disagree on whether by letter of 19 January 2007 Ms Pontin sent T-Comalux a certificate attesting to her unfitness to work.

22. On 24 January 2007, Ms Pontin sent T-Comalux an e-mail headed 'Subject: Extension of absence from work on grounds of ill-health', informing her employer that her health had hardly improved. For that reason, she would not return to the office as expected the following day. She stated that she would send T-Comalux her medical certificate as soon as possible.

23. By letter of 25 January 2007, sent by registered post with advice of delivery, T-Comalux terminated the employment contract with immediate effect. Unjustified absence for a period of more than three days was stated as the reason. In its letter T-Comalux noted that Ms Pontin had been absent from work since Friday 19 January 2007 but that at the date of the letter of immediate dismissal it had not received from her a certificate attesting to her unfitness to work. Moreover, the e-mail sent on the evening of 24 January 2007 did not indicate the likely duration of her incapacity for work. According to the letter, the dismissal was issued because of serious misconduct, since under the law an employee who is unable to work by reason of illness or accident is required, either personally or through another person, to notify the employer or his representative of that incapacity on the day on which it occurs. Further, on not later than the third day of his or her absence, an employee is required to submit to the employer a medical certificate attesting to incapacity for work and the likely duration thereof.

24. By letter of 26 January 2007, sent by registered post with advice of delivery and duly delivered to T-Comalux on 30 January

2007, Ms Pontin informed her employer of her pregnancy and the expected date of confinement, enclosing a medical certificate in support. Moreover, she indicated that she thus enjoyed protection against dismissal and accordingly the dismissal of which she had been notified was a nullity. Further, she requested to be informed in writing of the precise grounds for her dismissal. She included with her letter a medical certificate attesting to her incapacity for work for the period from 25 January 2007 to 4 February 2007.

25. As she received no reply to that letter, Ms Pontin lodged an application on 5 February 2007 with the tribunal du travail d'Esch-sur-Alzette (Labour Court, Esch-sur-Alzette) for a declaration that her dismissal was a nullity in accordance with the loi concernant la protection de la maternité de la femme au travail (Law on the protection of maternity and working women).

26. By judgment of 30 March 2007, that court, in a different composition, held that it did not have jurisdiction to hear Ms Pontin's application for a declaration that her dismissal on 18 January 2007 was a nullity. It justified that conclusion on the grounds that Ms Pontin should have applied to the president of the tribunal du travail for a declaration that her dismissal was a nullity, [11] as under Article L. 337-1 of the Luxembourg Code du travail, in relation to protection in cases of dismissal during pregnancy, only he has special jurisdiction to annul a dismissal. [12] Ms Pontin did not appeal against that judgment.

27. By a new application, Ms Pontin seeks damages for wrongful dismissal. In that connection, public hearings took place before the referring court on 11 December 2007 and 12 February 2008.

28. In that situation, by order of 12 February 2008, the tribunal du travail d'Esch-sur-Alzette referred to the Court of Justice the following questions:

'(1) Are Articles 10 and 12 of Directive 92/85 to be interpreted as not precluding the national legislature from making a legal action brought by a pregnant employee who has been dismissed during her pregnancy subject to time-limits fixed in advance, such as the eight-day period laid down in the second subparagraph of Article L. 337-1(1) of the Code du travail or the 15-day period laid down in the fourth subparagraph of that provision?

(2) If the answer to the first question is in the affirmative, are the 8- and 15-day periods

11 — According to the case-file, the plaintiff contends that her application was addressed for the attention of 'Monsieur le Président et de ses assesseurs' (Mr President and his fellow judges).

12 — In addition to the standard employment law procedure, an expedited procedure (*référé*) before the president of the court having jurisdiction in employment matters exists for cases which are regarded as urgent or incontrovertible (J.-L. Putz, above footnote 9, p. 477, point 1718; M. Feyereisen, *Droit du Travail*, Luxembourg, 2007, p. 323).

to be regarded as being too short to allow a pregnant employee who has been dismissed during her pregnancy to take legal proceedings to safeguard her rights?

(3) Is Article 2 of [Directive 76/207] to be interpreted as not precluding the national legislature from denying a pregnant employee who has been dismissed during her pregnancy the right to bring an action for damages for wrongful dismissal, which is reserved, under Article L. 124-11(1) and (2) of the Code du travail, to other employees who have been dismissed?'

IV — Procedure before the Court

29. The reference for a preliminary ruling was registered at the Court Registry on 18 February 2008.

30. Within the period established by Article 23 of the Statute of the Court the parties to the main proceedings, the Italian and Luxembourg Governments and the Commission lodged written observations.

31. On 14 January 2009, after the conclusion of the written procedure, a hearing was held, in which the parties to the main proceedings and the Commission took part.

V — Main arguments of the parties

A — *The first two questions*

32. *Ms Pontin* argues that the objective of Directive 92/85 is to ensure effective protection within the area to which it applies, inter alia, by prohibiting termination of the employment contract. In her view, Article 12 of that directive must be interpreted as requiring Member States to guarantee to pregnant workers effective protection against dismissal, including, inter alia, relevant provisions on legal recourse and judicial procedure. In determining the effectiveness of legal protection factors to be considered include the period available to injured parties in which to assert their rights and the action designated for that purpose.

33. In that regard — according to Ms Pontin — Luxembourg law does not satisfy the requirements of Directive 92/85. In her view, the formal period of eight days from

notification of dismissal in which an employee notified of dismissal prior to a medical finding of a pregnancy may prove her status through submission of a certificate by registered post is too restrictive and incompatible with a scheme of effective protection. Moreover, Luxembourg law requires a pregnant worker to apply to the president of the court having jurisdiction in employment matters, that is, a special jurisdiction, whereas otherwise employment law disputes must be lodged with the court having jurisdiction in employment matters, which sits as a chamber, that is, with a president and two other judges. In Ms Pontin's view, as a result, a pregnant worker has to have knowledge of subtle procedural details which runs contrary to the aim of effective legal protection pursued by Directive 92/85. Moreover, the period for commencing proceedings is limited only to 15 days, whereas otherwise Luxembourg employment legislation prescribes a limitation period of three months within which to commence an action to determine the nullity of a dismissal.

34. As regards the first question, *T-Comalux* argues that neither in relation to the period of eight days for notification of a pregnancy nor in relation to the 15-day limitation period does Luxembourg law infringe the provisions of Directive 92/85. In its view, the purpose of the eight-day notification period is to ensure that an employer receives notification of an existing pregnancy as swiftly as possible so that the protection established by Directive 92/85 may take effect without delay. It considers the 15-day limitation period to have the objective of protecting pregnant workers and promoting legal certainty. In the absence of both those time-limits the protection envisaged by the directive is incapable of taking effect.

35. As regards the second question, T-Comalux argues that this question should be answered only if the answer to the first question is in the negative. In its view, the two time-limits mentioned are not too short. For an individual to benefit from the directive's protection, an existing pregnancy has to be notified to the employer within as short a period as possible. If such notification was not effected prior to communication of a dismissal, that deficit should be made good as swiftly as possible. The time-limit for commencing proceedings ensures that if a dismissal is notified without knowledge of an existing pregnancy, as swift a reaction as possible ensues.

36. The *Italian Government* takes the view that it is compatible with Articles 10 and 12 of Directive 92/85 for national legislation to establish time-limits for claims to declare as a nullity a dismissal notified during pregnancy. However, having regard to the obligation to ensure effective achievement of the directive's aim, as follows in particular from *Marshall*, [13] it considers national time-limits such as those at issue in the present case as too short. Having regard to the psychological and physical condition of pregnancy, compliance with such brief time-limits is difficult to achieve.

13 — Case C-271/91 [1993] ECR I-4367.

37. The *Luxembourg Government* argues that the time-limits established by national law are not too brief. In relation to the action for nullity regard must be had — given the possibility of reinstatement — to the particular importance to an employer of the principle of legal certainty. Moreover, it follows from national case-law that a worker who, in fact, was incapable of making a claim, in particular, because she, herself, was unaware of her pregnancy, is not bound by the time-limits.

38. The *Commission* observes that the eight-day period in which to notify a pregnancy must be regarded as a national measure which implements Directive 92/85. In order to benefit from dismissal protection within the meaning of Article 10 of the directive, a worker must not only be pregnant but also notify her pregnancy to her employer in accordance with national practice.

39. It argues that in relation to the 15-day limitation period under national law regard must be had, inter alia, to *Preston and Others* [14] and *Levez* [15] which establish that, in principle, Member States are permitted to prescribe limitation periods for the bringing of claims asserting Community law rights. However, it contends that a limitation period such as that at issue in the present case which is shorter than that governing national claims for dismissal protection in general is not compatible with Community law, since it fails to respect the principles of effectiveness and equivalence. Such a regime makes it impossible or extremely difficult for a pregnant worker to exercise her rights. In that connection, it must also be noted that in the present case the limitation period begins to run when an employer posts the notification of dismissal. Thus, the time which elapses prior to receipt of the notification may, as a consequence, further reduce the limitation period. Moreover, according to the Commission, it is often difficult at short notice to obtain legal advice and representation. No convincing justification for the — in relative terms — shorter time-limit can be discerned.

B — *The third question*

40. In this connection, *Ms Pontin* argues that to afford to pregnant workers — in relation to the possibility to bring an action for damages following dismissal — different treatment in contrast to all other workers affected by the termination of their employment contract infringes Directive 76/207. No objective justification for that difference in treatment exists. In her view, that amounts to discrimination on grounds of sex contrary to the directive.

41. Moreover, she draws attention to the fact that earlier Luxembourg legislation on the protection of pregnant workers at work expressly provided for pregnant workers also

14 — Case C-78/98 [2000] ECR I-3201.
15 — Case C-326/96 [1998] ECR I-7835, paragraph 19.

to have the right to bring an action for damages. Under Luxembourg law, female workers dismissed by reason of marriage have the option to elect between an action for reinstatement and an action for damages.

42. On the third question, *T-Comalux* argues that Directive 76/207 does not preclude national legislation which denies a worker dismissed during pregnancy the possibility to bring an action for damages. During pregnancy special protection applies in the form of an action for nullity. Thus, in its view, the provisions do not discriminate.

43. As regards the third question, the *Italian Government* argues that all forms of less favourable treatment during pregnancy constitute discrimination on grounds of sex. In its view, to deprive a worker during pregnancy of the possibility to bring an action for damages, whereas such possibility exists in other dismissal cases including those on grounds of marriage, is not compatible with the notion of effective protection and infringes the directive. Moreover, it follows from the recent judgment in *Paquay*,[16] that Member States — having regard to the objective of Directive 76/207 — must penalise infringements of Community law under conditions, both procedural and substantive, which are analogous to those applicable to infringements of domestic law of a similar nature and importance. Legislation such as the Luxembourg provisions at issue in the present case does not satisfy that requirement. Nor — according to the Italian Government — does it make any difference in that respect that an opportunity exists to bring an action for nullity.

44. The *Luxembourg Government* argues that it is incorrect to assert that a pregnant worker who allows the time-limit of eight days and the 15-day limitation period to expire is precluded from bringing an action for damages. In its view, the reference for a preliminary ruling is based on a false interpretation of national law. Although Article L. 337-1 of the Code du travail establishes a special regime for the protection of pregnant workers, that does not imply that the general law on dismissal protection does not apply. Accordingly, Luxembourg law is compatible with the directive.

45. The *Commission* argues that it is discriminatory for a national legal system to deny to pregnant workers an opportunity to bring an action for damages which is otherwise generally available in the case of dismissal.

16 — Case C-460/06 [2007] ECR I-8511, paragraph 52.

VI — Legal appraisal

A — *Preliminary observations on the interlocking nature of both the directives mentioned in the questions referred*

46. The questions of the referring court concern both Directive 92/85 and Directive 76/207. Therefore, as a preliminary point, I should like to draw attention to the fact that both those directives do not operate merely in parallel with each other but are to a certain extent interlocked. [17]

47. Before Directive 92/85 entered into force, the Court held that a woman must be afforded protection against dismissal during pregnancy on the basis of the principle of non-discrimination and, in particular, by reason of Article 2(1) and Article 5(1) of Directive 76/207 (as in force prior to amendment by Directive 2002/73). [18] Following the entry into force of Directive 92/85, Article 10 of that directive, as a *lex specialis*, will presumably prevail in many cases over the more general provisions of Directive 76/207; [19] however, the latter remain important in relation to various issues, [20] as will be evident from my observations below.

48. The interlocking to which I have referred is expressed also in the ninth recital in the preamble to Directive 92/85, according to which protection of the safety and health of pregnant workers, workers who have recently given birth or workers who are breastfeeding, [21] codified in particular by Directive 92/85, should not work to the detriment of directives concerning equal treatment for men and women, including, that is, Directive 76/207.

49. An equivalent may be found in Directive 76/207, following amendment by Directive 2002/73, in particular in Article 2(7) thereof, which provides that the directive is without prejudice to provisions concerning the protection of women, particularly as regards pregnancy and maternity and stating

17 — That point is also made by K. Nebe, *Betrieblicher Mutterschutz ohne Diskriminierung*, Baden-Baden, 2006.

18 — To that effect, see Case C-179/88 *Handels- og Kontorfunktionærernes Forbund* [1990] ECR I-3979, paragraph 13. On that point, see also *Paquay*, above footnote 16, paragraph 29.

19 — See also A. Epiney and M. Freiermuth Abt, *Das Recht der Gleichstellung von Mann und Frau in der EU*, Baden-Baden, 2003, p. 177.

20 — In particular in relation to problems of accessing employment on account of pregnancy, see A. Epiney and M. Freiermuth Abt, above footnote 19, p. 177, and C. Barnard, *EC Employment Law*, 3rd edition, Oxford, 2006, p. 458. See also Case C-506/06 *Mayr* [2008] ECR I-1017, paragraph 40 et seq., in relation to *in vitro* fertilisation and dismissal.

21 — In the following sections, for ease of comprehension, I shall refer primarily to pregnant workers — as are at issue in the present case — and not expressly mention the workers who have recently given birth and workers who are breastfeeding also covered by the directive.

that less favourable treatment of a woman related to pregnancy or maternity leave within the meaning of Directive 92/85 constitutes discrimination within the meaning of the former directive.

50. As a result, it is evident that Directive 92/85 does not simply address the protection of a mother or mother-to-be and her child and their relationship to each other, [22] but this primary concern must be viewed in connection with the implementation of the principle of equal treatment. [23]

B — *Summary of the structural features of Luxembourg law on dismissal protection as derived from the case-file*

51. In order to appreciate more fully the problem arising in the present case I wish to summarise certain features of Luxembourg law on dismissal protection as derived from the case-file, [24] supplemented by certain information taken from the legal literature. [25] Clearly, according to those sources, a distinction must be made between a wrongful dismissal and a dismissal which is a nullity. In proceedings contesting dismissal, so it would appear, the remedies established are, in principle, compensation for loss of employment and nullification with continued employment; however, these are not available to the same extent in all cases.

52. On a judicial determination that a dismissal is wrongful, the resulting legal consequence appears, in general, to be the effectiveness of the dismissal and termination of the employment relationship subject, at the same time, to a requirement that the employer pay damages. [26] Although, according to the legal literature, Article L. 124-12(2) of the Luxembourg Code du travail provides — as an exception to the obligation to pay damages —

22 — That concerns, first, protection of a woman's biological condition during and after pregnancy and, second, protection of the special relationship between a woman and her child during the period following childbirth; see on that issue, inter alia, Case C-394/96 *Brown* [1998] ECR I-4185, paragraph 17, and Case C-203/03 *Commission* v *Austria* [2005] ECR I-935, paragraph 43.

23 — See K. Nebe, above footnote 17, p. 111 et seq. on the model underlying Directive 92/85.

24 — See the national legislation set out in point 17 of this Opinion.

25 — See, inter alia, R. Schintgen, *Droit du Travail*, Luxembourg, 1996, p. 38 et seq.; P. Schiltz and J.-L. Putz, *Droit du Travail — Mode d'emploi*, 2nd edition, Luxembourg, 2006, p. 137 et seq.; J.-L. Putz, above footnote 9, p. 301 et seq.; and M. Feyereisen, above footnote 12, p. 189 et seq.

26 — J.-L. Putz, above footnote 9, p. 382, point 1399. That legal consequence is provided for also, inter alia, in French law, whereas, for example, German, Austrian, Finnish, Portuguese, Spanish, Italian and Swedish law presume, in principle, following a determination that a dismissal is (socially) unjustified or unlawful, that such dismissal is ineffective (I. Laurent-Merle, *Le licenciement individuel dans les quinze états membres de l'Union européenne*, Villeneuve-d'Ascq, 2006, p. 225 et seq.).

for the possibility of reinstatement, in practice, that is regarded as irrelevant. [27] Such remedy simply consists in a proposal by the court which is subject to the employer's consent. Evidently, in such cases, reinstatement cannot be enforced contrary to an employer's wishes. Following a determination of wrongful dismissal, if a recommendation of reinstatement is not adopted, seemingly, the remedy is limited to the payment of damages and, where applicable, a further compensatory amount.

53. On the other hand, in certain cases, an employer is denied the right to terminate an employment contract. That includes the prohibition on ordinary dismissal during a period of maternity protection or parental leave and the prohibition on dismissal in relation to employee representatives. Apparently, in those cases, the nullity of a dismissal may be judicially determined and continuation of an employment relationship ordered without an employer's consent. [28]

C — Relevance of individual questions for resolution of the dispute in the main proceedings and the resulting order in which the questions should be answered

54. Having regard to the fact that by a judgment which is seemingly final [29] Ms Pontin's action for nullity has already been dismissed, [30] the first and second questions may be relevant to a resolution of the dispute in the main proceedings, and, thus, in the present case admissible, only if they are connected to Ms Pontin's action for damages now pending in the main proceedings. However, the question of whether, in a situation such as that of the main proceedings, recourse to an action for damages remains possible or is permissible in addition to an action for nullity appears in the present case to be uncertain. The referring court presumes that in circumstances such as those of the present case national law does not permit recourse to that action. [31] In that context, the third question aims to clarify whether in a situation such as that of the main proceedings an action for damages is required as a matter of Community law. As the question of whether time-limits may be imposed and, if so, what period in that regard is reasonable is relevant only if it remains open to the plaintiff in the main proceedings to have recourse to any legal action at all, I will commence my legal appraisal by answering the third question, thereafter considering the first and second questions if appropriate.

27 — J.-L. Putz, above footnote 9, p. 382, point 1400.

28 — See the classification in P. Schiltz and J.-L. Putz, above footnote 25, p. 139, from which it follows that nullity of a dismissal is relevant only in a few cases, namely in cases of dismissal during pregnancy or shortly after childbirth and during parental leave, dismissal of members of worker representation bodies and dismissal of workers who have been internally demoted.

29 — See point 26 of this Opinion, from which it follows that Ms Pontin did not appeal against the judgment of the tribunal du travail d'Esch-sur-Alzette of 30 March 2007. There is no indication that such an appeal was still possible at the date of the decision to refer.

30 — On that issue, see my observations in point 63 of this Opinion.

31 — In relation to the argument of the Luxembourg Government that also in a case such as the present national law permits recourse to an action for damages, see point 56 of this Opinion.

D — *The third question — Unavailability of an action for damages*

1. Subject-matter and relevance

55. By its third question, the referring court seeks in substance to establish whether Article 2 of Directive 76/207 must be interpreted as not precluding national provisions such as Article L. 124-11(1) and (2) of the Luxembourg Code du travail, according to which a pregnant worker whose employment relationship was terminated during pregnancy does not have the right to bring a legal action seeking damages for wrongful dismissal open to all other workers.

56. Admittedly, in relation to this question, the Luxembourg Government stated that the question referred is based on an incorrect interpretation of national law. It states that it is incorrect to assert that a pregnant worker who allows the time-limit of eight days and the 15-day limitation period to expire is precluded from bringing an action for damages.

57. In my view, that argument is irrelevant. In the spirit of cooperation between the Court of Justice and national courts which characterises the preliminary ruling procedure established by Article 234 EC, the present case must be approached on the basis of the questions asked by the national court in its capacity as the court having jurisdiction to hear the legal dispute.

2. Effective legal protection

58. Both directives mentioned in this reference for a preliminary ruling contain provisions on legal protection.

59. According to Article 6 of Directive 76/207, Member States must ensure that, inter alia, judicial procedures for the enforcement of obligations under that directive are available to all persons who consider themselves wronged by failure to apply the principle of equal treatment to them. The case-law on the predecessor provision, which in that regard said the same in somewhat different words, [32] established already that this implies an obligation to ensure that the provisions in question are sufficiently effective to achieve the objective of Directive 76/207 and are capable of being effectively relied upon by the persons concerned before national courts. [33] According to that case-law,

32 — At that time, Article 6 of Directive 76/207 was worded: 'Member States shall introduce into their national legal systems such measures as are necessary to enable all persons who consider themselves wronged by failure to apply to them the principle of equal treatment within the meaning of Articles 3, 4 and 5 to pursue their claims by judicial process after possible recourse to other competent authorities.'

33 — See *Marshall*, above footnote 13, paragraph 22, and *Paquay*, above footnote 16, paragraph 43.

there must be a guarantee of real and effective judicial protection, [34] which is a component part of Community protection against discrimination. [35] That obligation on the Member States to adopt all the measures necessary to ensure that the directive is fully effective, in accordance with the objective which it pursues, does not affect their freedom to choose the ways and means of ensuring that the directive is implemented. [36]

60. It follows from Article 12 of Directive 92/85 that Member States must introduce into their national legal systems such measures as are necessary to enable all workers who consider themselves wronged by failure to comply with the obligations arising from that directive to pursue their claims by judicial process (and/or, in accordance with national laws and/or practices) by recourse to other competent authorities. Point 3 of Article 10 of Directive 92/85 specifically states that Member States must take the necessary measures to protect pregnant workers or those who have recently given birth or are breastfeeding from the consequences of dismissal which is unlawful by virtue of point 1 of that provision. [37]

61. According to case-law, the same applies as regards Article 12 of Directive 92/85, as I have already set out in relation to Article 6 of Directive 76/207, namely that, although Member States are not bound to adopt a specific measure, none the less the measure chosen must be such as to ensure real and effective legal protection. [38]

62. It is the Member States' responsibility to ensure that the rights in question are effectively protected in each case. [39] In that connection, it should be recalled that the Member States' obligation arising from a directive to achieve the result envisaged by the directive, and their duty under Article 10 EC to take all appropriate measures, whether general or particular, to ensure the fulfilment of that obligation, is binding on all the authorities of Member States including, for matters within their jurisdiction, the courts. [40] It is the responsibility of the national courts in particular to provide the legal protection which individuals derive from the rules of Community law and to ensure that those rules are fully effective. [41] Moreover, the Court has already held that requirements of equivalence and effectiveness, which embody the general obligation on the Member States to ensure judicial protection of an individual's rights under Community law, apply equally to the designation of the courts and tribunals having

34 — See *Marshall*, above footnote 13, paragraph 24, and *Paquay*, above footnote 16, paragraph 45.

35 — The same view is taken in D. Schiek, 'Gleichbehandlungsrichtlinien der EU — Umsetzung im deutschen Arbeitsrecht', *Neue Zeitschrift für Arbeitsrecht*, 2004, p. 873 et seq., p. 877.

36 — To that effect, see Case 14/83 *von Colson and Kamann* [1984] ECR 1891, paragraph 15, and Case C-268/06 *Impact* [2008] ECR I-2483, paragraph 40.

37 — See also *Paquay*, above footnote 16, paragraph 47.

38 — See *Marshall*, above footnote 13, paragraph 24, and *Paquay*, above footnote 16, paragraphs 45 and 49. In general terms, every measure must have a genuine dissuasive effect with regard to the employer and must be commensurate with the injury suffered in order to attain the objective of arriving at real equality of opportunity, see *Paquay*, above footnote 16, paragraphs 45 and 49.

39 — See, for example, Case C-54/96 *Dorsch Consult* [1997] ECR I-4961, paragraph 40, and *Impact*, above footnote 36, paragraph 45, with further references to established case-law.

40 — *Von Colson and Kamann*, above footnote 36, paragraph 26, and *Impact*, above footnote 36, paragraph 41.

41 — Joined Cases C-397/01 to C-403/01 *Pfeiffer and Others* [2004] ECR I-8835, paragraph 111, and *Impact*, above footnote 36, paragraph 42.

jurisdiction to hear and determine actions based on Community law. [42] A failure to comply with those requirements at that level is — just like a failure to comply with them as regards the definition of detailed procedural rules — liable to undermine the principle of effective judicial protection. [43]

63. In the light of those clear requirements, I have serious reservations concerning the effectiveness of the legal procedure which must be followed according to the national law at issue in these proceedings in the case of an action for nullity brought in relation to a dismissal contrary to Directive 92/85. It appears [44] that recourse may be had only to the special expedited procedure before the president of the court having jurisdiction in employment matters sitting as an individual judge — in which, in principle, only a summary, not a detailed examination is undertaken [45] — not, however, to an examination on the merits before a chamber of the court. [46] Moreover, the outcome of Ms Pontin's first action [47] suggests that extremely strict formal requirements apply, which if not adhered to may result already in the dismissal of a claim. Her first action — which evidently did not bear the precise jurisdictional appellation prescribed — was dismissed seemingly for lack of jurisdiction, as within the court itself reallocation to the judge having jurisdiction appears not to have been possible. [48] Both aspects, the special procedure to be followed and the requirement to adhere meticulously to the jurisdictional appellation, demand a degree of special knowledge on legal procedure constituting an exacting entry threshold for potential claims. However, protection against unlawful dismissal may be regarded as effective only if a pregnant worker has recourse to a judicial or non-judicial action characterised to the minimum possible extent by procedure likely to dissuade her or by an unfavourable allocation of the burden of proof. [49] The apparent thresholds to recourse to legal enforcement in the present case are an even greater impediment where plaintiffs in first instance labour court proceedings may appear — as in Luxembourg [50] — without legal representation and, therefore, as a rule, may presume not to be faced with exaggerated

42 — *Impact*, above footnote 36, paragraph 47.

43 — Ibid., paragraph 48.

44 — That impression was confirmed by the observations of the parties to the main proceedings at the hearing of 14 January 2009; none the less, the defendant pointed out that a judge, even under the expedited procedure, might take the time to examine the matter not only summarily but in detail, although it was conceded that such examination was not a formal requirement but dependent on the assessment of the judge in question.

45 — See J.-L. Putz, above footnote 9, p. 478, point 1722.

46 — Ibid., p. 481, point 1728.

47 — On that issue, see point 26 of this Opinion.

48 — In passing, it should be noted that this may constitute an infringement of the fundamental principle guaranteeing a right to be heard (on the importance of that principle in Community law, see V. Skouris and D. Kraus, 'Die Bedeutung der Grundfreiheiten und Grundrechte für das europäische Wettbewerbsrecht', in G. Hirsch, F. Montag and F.-J. Säcker (eds), *Europäisches Wettbewerbsrecht, Münchener Kommentar zum Europäischen und Deutschen Wettbewerbsrecht [Kartellrecht]*, Volume 1, introduction, point 385) which must be observed when national rules (such as those in the present case governing dismissal protection for pregnant workers) fall within the scope of Community law (in the present case, in particular, Directive 92/85) (see on that point in particular Case C-81/05 *Cordero Alonso* [2006] ECR I-7569, paragraph 35, with further references).

49 — See also D. Coester-Waltjen, *Mutterschutz in Europa — Der Schutz der erwerbstätigen Frauen wahrend der Schwangerschaft und der Mutterschaft in der Mitgliedstaaten der Europäischen Gemeinschaften*, Munich, 1986, p. 177.

50 — In Luxembourg, before the courts having jurisdiction to hear employment matters, there is, in principle, no requirement to use the services of a lawyer, so that workers and employers may themselves commence proceedings and represent themselves before the court (J.-L. Putz, above footnote 9, p. 462, point 1695). Other Member States, too, do not impose any requirement to use a lawyer's services in labour law disputes, at any rate, at first instance; see, for example, the case of Greece (K. Kerameos and G. Kerameus, 'Arbeitsrecht in Griechenland', in M. Henssler and A. Braun (eds), *Arbeitsrecht in Europa*, 2nd edition, Cologne, 2007, p. 506, point 222) and Germany (Paragraph 11 of the Arbeitsgerichtsgesetz (Law on the labour courts), see on that issue, inter alia, U. Koch, '§ 11 ArbGG Prozessvertretung', in R. Müller-Glöge, U. Preis and I. Schmidt (eds), *Erfurter Kommentar zum Arbeitsrecht*, 9th edition, Munich, 2009, point 2).

formal requirements. However, it is unnecessary in the present case to explore this point further, as it does not constitute the explicit subject-matter of the question.

64. Contrary to the approach proposed by Ms Pontin at the hearing, in my view, in relation to an action contesting her dismissal a pregnant worker cannot derive from the provisions of Directive 92/85 alone — in order to ensure that the health protection aspect [51] emphasised in the recitals in the preamble to the directive is accounted for [52] — an option to choose between an action for nullity and an action for damages.

65. As I have already stated above, [53] neither Article 6 of Directive 76/207 nor Article 12 of Directive 92/85 obliges Member States to adopt a specific measure. Neither directive lays down explicit requirements concerning designation of the courts and tribunals having jurisdiction or on detailed procedural rules. The Court has consistently held that, in the absence of Community rules governing the matter, it is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from Community law. [54]

66. Moreover, that assessment is not called into question by Article 6 of Directive 76/207, as that provision does not permit any conclusions to be drawn in relation to judicial actions.

67. Therefore, in relation to the third question, contrary to the argument of Ms Pontin, a requirement for a particular legal action, in this case, an action for damages, cannot be derived simply from the provisions of Directive 92/85.

51 — The first recital in the preamble to Directive 92/85 is worded: 'Article 118a of the Treaty provides that the Council shall adopt, by means of directives, minimum requirements for encouraging improvements, especially in the working environment, to protect the safety and health of workers.' And from the fifth recital in the preamble — which makes reference to the Community Charter of the Fundamental Social Rights of Workers, adopted at the Strasbourg European Council on 9 December 1989 — it follows that every worker must enjoy satisfactory health and safety conditions in his working environment.

52 — In that regard, Ms Pontin argued that there may be situations in which a return to the workplace might be injurious to a worker's health because the circumstances of the dismissal — in particular if the dismissal was on improper grounds — destroyed the relationship of trust between employer and worker.

53 — See point 61 of this Opinion.

54 — See, for example, Case 33/76 *Rewe-Zentralfinanz and Rewe-Zentral* [1976] ECR 1989, paragraph 5, and *Impact*, above footnote 36, paragraph 44, with further references to established case-law.

3. Action provided for by national law and the equal treatment principle

68. The referring court's third question expressly refers to Article 2 of Directive 76/207 and, consequently, the equal treatment principle. The referring court compares the possibilities to take legal action open to pregnant workers on employer termination of the employment relationship with the possibilities to take legal action generally available under national law on employer termination of the employment relationship.

69. Accordingly, it must be examined whether — having regard to the fact that national law provides, in general, for the possibility of recourse to an action for damages on employer termination of the employment relationship — the equal treatment principle requires that action to be open also to pregnant workers in the event of their dismissal.

(a) Determination of the correct test for discrimination

70. First of all, it must be clarified which test of discrimination applies, that is, it needs to be analysed whether a situation such as that of the main proceedings may constitute a matter of direct or, alternatively, indirect discrimination.

71. The question of the correct test is particularly important from several points of view. As can be inferred from the second indent of Article 2(2) of Directive 76/207, the idea of indirect discrimination is rooted in a group-based approach, as is evident already from the use of the plural 'persons'. Moreover, establishing indirect discrimination is a two-stage process: the first stage examines the issue of less favourable treatment, the second stage concerns the justification, if any, advanced by the defendant. [55]

72. On the other hand, according to the definition in the first indent of Article 2(2) of Directive 76/207, the test for direct discrimination is entirely different. It is enough simply to treat only one person less favourably than another — in the present case, in the scope of Directive 76/207, a person of the opposite sex — and in that regard comparison not only with another 'real' person present or past [56] but also a hypothetical person [57] is

55 — In every case, it is for the defendant — in the main proceedings, that is, the employer — to put forward arguments in justification and, where necessary, to adduce proof thereof (see, inter alia, Case C-236/98 *JämO* [2000] ECR I-2189, paragraphs 53 and 62, and Case C-381/99 *Brunnhofer* [2001] ECR I-4961, paragraph 62). Of equal importance is the fact — codified in Article 4(1) of Council Directive 97/80/EC of 15 December 1997 on the burden of proof in cases of discrimination based on sex (OJ 1998 L 14, p. 6) — that at this stage of the proceedings the burden of proof, to which the burden of setting forth the fact is connected, is on the defendant. According to Article 4(2) of Directive 97/80, rules of evidence which are more favourable may be applied only to the benefit of plaintiffs.

56 — Evident from the wording 'is treated' and 'has been [treated]' in the first indent of Article 2(2) of Directive 76/207.

57 — Evident from the wording 'would be treated' in the first indent of Article 2(2) of Directive 76/207.

permitted. [58] A further important distinction relative to the analysis of indirect discrimination lies in the fact that as regards direct discrimination there is no possibility to examine possible justification, that is, simply a one-stage approach must be adopted. [59] That follows clearly from the wording used, which in the second indent of Article 2(2) of Directive 76/207 provides for a test of justification, but not, however, in the first indent of Article 2(2) of that directive. Accordingly, in relation to direct discrimination on grounds of sex there is no scope for justification; at best there may be scope for an exception if expressly provided for in the directive as, for example, in Article 2(6) of Directive 76/207. [60]

(b) Direct discrimination

73. According to the consistent case-law of the Court, dismissal of a worker by reason [61] of her pregnancy constitutes direct discrimination on grounds of sex, [62] since a dismissal occurring during the periods concerned affects only women. [63]

74. Likewise, in relation to a situation such as that issue here, it must be concluded that a provision of dismissal protection law which relates to dismissal protection during pregnancy affects only women and therefore must

58 — See also D. Schiek, above footnote 35, p. 874.

59 — The same view is taken by A. Epiney and M. Freiermuth Abt, above footnote 19, pp. 31 and 32. However, in the Court's case-law on direct discrimination on grounds of sex developed prior to the entry into force of the version of Article 2(2) of Directive 76/207 at issue here, arguments concerning justification are — at least in part — examined, although in all cases rejected. Examples of that practice are to be found in Case C-109/00 *Tele Danmark* [2001] ECR I-6993, paragraph 28, and Case C-320/01 *Busch* [2003] ECR I-2041, paragraphs 41 to 46. In that regard, however, in the case of direct discrimination, unlike situations of indirect discrimination, justification can never be used to establish that the less favourable treatment identified was based on grounds other than sex (this point is made — in my view, correctly — in E. Szyszczak, 'Community law on pregnancy and maternity', in D. O'Keeffe and T.K. Hervey (eds), *Sex Equality Law in the European Union*, 1996, p. 51 et seq., p. 58).

60 — Article 2(6) of Directive 76/207 states: 'Member States may provide, as regards access to employment including the training leading thereto, that a difference of treatment which is based on a characteristic related to sex shall not constitute discrimination where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate.' On the distinction between justification and exception, see also E. Szyszczak, above footnote 59, p. 58.

61 — In relation to the expression 'on grounds of pregnancy' (or 'by reason of pregnancy') in the case-law on Directive 76/207 it should be pointed out that the prohibition on dismissal established by point 1 of Article 10 of Directive 92/85 extends further and not only covers cases in which a worker was dismissed 'on grounds' of an existing pregnancy (or her maternity leave) but prohibits more broadly any dismissal 'during' ('durante' in Spanish, 'während' in German, 'pendant' in French and 'gedurende' in Dutch) pregnancy and maternity leave, although not without exception as the second part of the sentence indicates ('save in exceptional cases not connected with their condition …'). That distinction between the different spheres of protection of both directives is mentioned in the Court's case-law in Case C-438/99 *Jiménez Melgar* [2001] ECR I-6915, paragraphs 36 and 46, and *Tele Danmark*, above footnote 59, paragraphs 25 and 26 (see also D. Schiek, *Europäisches Arbeitsrecht*, 2nd edition, Baden-Baden, 2005, pp. 216 and 217, point 64). In that respect, the national law prohibitions on pregnancy-related dismissals are differently structured, some prohibit dismissal only 'on grounds' or 'for reasons' of pregnancy, many, however, in harmony with the directive 'during' pregnancy (see D. Coester-Waltjen, above footnote 49, p. 148 et seq. and the report from the Commission on the implementation of Directive 92/85, below footnote 69, p. 15).

62 — See, in particular, *Handels- og Kontorfunktionærernes Forbund*, above footnote 18, paragraph 13; *Tele Danmark*, above footnote 59, paragraph 25; and *Paquay*, above footnote 16, paragraph 29. On that point, see also E. Szyszczak, above footnote 59, p. 52.

63 — *Paquay*, above footnote 16, paragraph 29.

be measured against the yardstick of direct discrimination.

(c) Less favourable treatment

75. Consequently, in accordance with the first indent of Article 2(2) of Directive 76/207, it must be considered whether a person such as the plaintiff in the main proceedings is treated less favourably on grounds of sex than another is, has been or would be treated in a comparable situation.

76. In its case-law hitherto on discrimination during pregnancy — based, however, on the original version of Directive 76/207 which at the time did not contain an express definition of direct discrimination — the Court did not engage in a comparison with the situation of a male comparator. [64] For indeed, in the case of a pregnancy, it is impossible to find a person of the opposite sex who — in relation to that factor — is in a directly comparable situation. [65]

64 — See, for example, *Handels- og Kontorfunktionærernes Forbund*, above footnote 18; Case C-177/88 *Dekker* [1990] ECR I-3941; *Tele Danmark*, above footnote 59; and *Paquay*, above footnote 16. On this point, see also the observations made — in my view, correctly — by D. Schiek, above footnote 35, p. 874.

65 — See, inter alia, J. Kokott, 'Zur Gleichstellung von Mann und Frau — Deutsches Verfassungsrecht und europäisches Gemeinschaftsrecht', *Neue Juristische Wochenschrift* 1995, p. 1056, and D. Schiek, above footnote 35, p. 874.

77. However, if the requirement of a 'comparable situation' in a situation such as that at issue in the present proceedings relates simply to the factor of 'employer dismissal and legal action contesting such' and not the factor of 'pregnancy', a comparison as defined in the first indent of Article 2(2) of Directive 76/207 is certainly possible.

78. A woman in the situation of the plaintiff in the main proceedings is less favourably treated or is, in fact, even subjected to a disadvantage where national legislation on dismissal protection does not afford a pregnant worker dismissed during pregnancy the possibility to bring an action for damages otherwise generally available both to men and women. In that connection, it is unnecessary that this possibility is available to all other workers, as under the first indent of Article 2(2) of Directive 76/207 simply one person of the opposite sex suffices for comparison.

79. The argument advanced at the hearing by the defendant in the main proceedings — according to which no discrimination exists since in the absence of an opportunity to bring an action for damages only the possibility of continued employment remains, an option which, in its view, in the long term is preferable to damages — cannot be accepted. To not have the opportunity to bring an action

for damages ultimately implies a more restricted set of options than those available to the general population, a situation which, in principle, must be regarded as disadvantageous.

80. It must be observed that, even if only an action for nullity is provided for, that does not exclude the possibility to reach an agreement for voluntary severance subject to the payment of compensation. On the other hand, an action for damages implies an enforceable right, not simply a voluntary compromise.

81. Moreover, as to the notion of disadvantage, it must be recalled that according to established case-law the detailed procedural rules governing actions for safeguarding an individual's rights under Community law must be no less favourable than those governing similar domestic actions (principle of equivalence) and must not render practically impossible or excessively difficult the exercise of rights conferred by Community law (principle of effectiveness). [66]

82. All necessary measures must be taken to guarantee the application and effectiveness of Community law. [67] As the Court has already stated on several occasions, in choosing the appropriate solution for guaranteeing that the objective of a directive is attained, the Member States must ensure that infringements of Community law are penalised under conditions, both procedural and substantive, which are analogous to those applicable to infringements of national law of a similar nature and importance. [68]

83. In the light of the foregoing, I consider that pregnant workers in circumstances such as those of the main proceedings ultimately may choose between an action for nullity (required under Directive 92/85) and an action for damages (on grounds of equal treatment in relation to national law on dismissal protection).

(d) Interim conclusion

84. In the light of the foregoing, the answer to the third question is that the first indent of Article 2(2) of Directive 76/207 is to be interpreted as meaning, in circumstances such as those of the main proceedings, that where, in the event of dismissal by an employer, national law makes an action for damages generally available that action must

66 — See *Impact*, above footnote 36, paragraph 46, with further references to established case-law.

67 — Case C-354/99 *Commission* v *Ireland* [2001] ECR I-7657, paragraph 46.

68 — See Case 68/88 *Commission* v *Greece* [1989] ECR 2965, paragraph 24; *Commission* v *Ireland*, above footnote 67, paragraph 46; Case C-180/95 *Draehmpaehl* [1997] ECR I-2195, paragraph 29; and *Paquay*, above footnote 16, paragraph 52.

be available also to pregnant workers in the event of such dismissal.

E — *The first part of the first and second questions — Period for notification of a pregnancy*

85. By the first part of its first question, the referring court seeks in essence to establish whether, on a proper construction of Articles 10 and 12 of Directive 92/85, a period of eight days within which to notify an employer of an existing pregnancy, such as that provided for in the second subparagraph of Article L. 337-1(1) of the Luxembourg Code du travail, is incompatible with their provisions.

86. By the first part of its second question, the referring court seeks in essence to establish, should the first part of the first question be answered in the affirmative, whether such eight-day period must be regarded as too short a time to allow a pregnant worker dismissed during pregnancy to bring legal proceedings enforcing her rights.

87. According to the definition in Article 2(a) of Directive 92/85, for the purposes of that directive, a pregnant worker means 'a pregnant worker who informs her employer of her condition, in accordance with national legislation and/or national practice'. In relation to the prohibition on dismissal, the first point of Article 10 of Directive 92/85 refers explicitly to that definition, stating therein that Member States must take the necessary measures 'to prohibit the dismissal of workers, within the meaning of Article 2'.

88. According to a Commission report on the implementation of Directive 92/85, in most Member States a worker must inform her employer that she is pregnant, has recently given birth or is breastfeeding; only following notification does the relevant protection begin to operate. [69]

89. The fact that actual operation of the protection established by Directive 92/85 is conditional on pregnancy notification makes sense in the light of the directive's provisions, which logically presuppose an employer's awareness of the pregnancy so that the obligation of protection arising may be

69 — Report from the Commission on the implementation of Directive 92/85 of 15 March 1999 (COM(1999) 100 final), which states on page 7: 'In the UK, although there is no general requirement to inform the employer, unless he has been informed he is not required to undertake risk assessments and in Finland, Belgium and France, whilst there is no general legal requirement to inform the employer, entitlement to maternity rights and protection is dependent upon the employer being informed. In Spain a worker whose employer is aware of her pregnancy, even if [he has] not been officially informed of it, comes within the scope of the maternity legislation. In Ireland and in Portugal the employer must be informed in writing and can demand a medical certificate confirming the woman's condition. In Luxembourg the woman must send her employer by registered post a medical certificate that she is pregnant and/or breastfeeding. In Austria the Labour Inspectorate and the employer must be informed if a worker is pregnant and the employer can demand a medical certificate.'

acknowledged and protective measures in fact adopted, for example, to exclude the woman concerned from night work [70] or in implementation of the prohibition on exposure to certain agents and working conditions. [71]

90. However, I have reservations whether a failure to notify a pregnancy may without exception have the effect that the prohibition on dismissal during pregnancy does not apply. [72] Consider, for example, the position of a woman who at the time her dismissal is announced or within the extended notification period, if any, provided for by national law (as in the present case) is unaware of her pregnancy. My reservations result especially from the fact that — according to the recitals in the preamble — Directive 92/85 incorporates a highly developed protective logic towards pregnant workers, workers who have recently given birth and workers who are breastfeeding, placing particular emphasis on the protection of health. [73] In my view, it is hardly permissible for that extensive protection in relation to the prohibition on dismissal to be limited on grounds of an omission to notify a pregnancy, in particular, and, at any rate, not where the worker, herself, was unaware of the pregnancy. Moreover, legislation and case-law in Luxembourg appears already to adopt a similar approach, as is evident from the observations of the Luxembourg Government. [74] However, as these deliberations are not critical to the case in hand, more detailed consideration is unnecessary.

91. None the less, it must be observed that the definition in Article 2(a) of Directive 92/85, to which Article 10 of that directive establishing the prohibition of dismissal refers, refers to national law and/or national practice with regard to the notification of a pregnancy to an employer.

70 — See Article 7 of Directive 92/85.

71 — See Article 6 of Directive 92/85.

72 — The restriction on the protection established by Directive 92/85 resulting from the requirement to notify was considered problematic by the Commission, too, in its abovementioned report (above footnote 69, p. 20). In that regard, the report states that if a woman is obviously pregnant but has not formally informed her employer, she falls outside the personal scope of the Directive, even though in practice the employer is aware of the pregnancy. It indicates that the Commission intends in the future to work towards resolving that problem. Furthermore, the report states that the reference to national procedure not only leads to differences in treatment but could substantially limit the protection offered by the directive. That considerable difference in treatment is highlighted also in A. Epiney and M. Freiermuth Abt, above footnote 19, p. 168, and K. Nebe, above footnote 17, p. 141.

73 — See, in particular, the eighth recital in the preamble to Directive 92/85 ('pregnant workers, workers who have recently given birth or who are breastfeeding must be considered a specific risk group in many respects, and measures must be taken with regard to their safety and health') and the 15th recital (point 11 of this Opinion).

74 — See point 37 of this Opinion which states the position of the Luxembourg Government, namely that a worker who, in fact, was incapable of making a claim, in particular, because she, herself, was unaware of her pregnancy, is not bound by the time-limits established by national law.

92. The Luxembourg provision in Article L. 337-1 of the Code du travail [75] grants to a worker an additional period in which to notify an employer of an existing pregnancy; however, that applies only in cases where termination of the employment relationship is notified prior to medical certification of the pregnancy. That additional period [76] runs for eight days from notification of the dismissal and, thus, to the benefit of the pregnant worker, exceeds the wording of the relevant definition in Article 2(a) of Directive 92/85.

93. It must be made clear that, contrary to the impression created by the wording of the first question, the possibility under national law to bring proceedings evidently does not depend on compliance with the notification requirement at issue here. However, in my view, that wording must be understood to the effect that by its question the national court draws attention implicitly to the fact that compliance with that time-limit for notification has consequences for the operation of dismissal protection and, thus, also indirect consequences for the potential success of a claim. At issue in that regard is probably not the admissibility of an action for dismissal protection under national law but the merits of such action.

94. In a case such as the main proceedings, on the basis of the information available hitherto on the facts and given the wording of the definition in Article 2(a) of Directive 92/85, to which Article 10 of Directive 92/85 expressly refers, ultimately I do not see any grounds on which to criticise the duration of that additional period established by national law. Nor in relation to Article 12 of Directive 92/85 on legal protection can I discern — in circumstances such as those apparent in the present case — any infringement of Community law.

95. In the light of the foregoing, the answer to the first part of the first question is that Articles 10 and 12 of Directive 92/85 are to be interpreted as not precluding, in circumstances such as those apparent in the main proceedings, a time-limit fixed in advance of eight days in which to inform an employer of an existing pregnancy.

75 — See point 18 of this Opinion.

76 — An additional period (of different durations) features, for example, also in the German Gesetz zum Schutz der erwerbstätigen Mutter (Law on the protection of working mothers; the Mutterschutzgesetz or MuSchG, as published on 20 June 2002, BGBl. I, p. 2318, amended most recently by the Law of 5 December 2006, BGBl. I 2004, p. 2748), the Austrian Mutterschutzgesetz (Law on maternity protection or MSchG, BGBl. No 221/1979, amended most recently by BGBl. I, No 53/2007) and the French Code du travail (Labour Code) (in the latter case, the period concerned is 15 days from notification of dismissal, see H. Flichy and L. Gamet, *Licenciement: Procédure — Indemnités — Contentieux*, Paris, 2005, p. 66). The German MuSchG states in Paragraph 9 governing the prohibition of dismissal: 'Dismissal of a woman during pregnancy... shall be prohibited if at the time of dismissal the pregnancy... was known to the employer or is notified to him within two weeks of receipt of the notice of dismissal; however failure to observe that time-limit shall not result in any negative consequences where that failure arises for a reason not attributable to the woman and notification is effected without delay thereafter.' According to Paragraph 10(2) of the Austrian MSchG, a dismissal is ineffective if the pregnancy is notified to the employer within five working days of communication or service of the dismissal notice. In Poland, protection appears to be particularly extensive and free of any specific time-limit on notification (M. Kiedrowski, *Kündigungsschutz im polnischen Arbeitsrecht — ein Strukturvergleich mit dem deutschen Recht*, Hamburg, 2007, p. 273).

F — *The second part of the first and second questions — Limitation periods*

96. By the second part of the first question, the referring court seeks in essence to establish whether, on a proper construction of Articles 10 and 12 of Directive 92/85, a 15-day limitation period within which to bring proceedings, such as that established by the fourth subparagraph of Article L. 337-1(1) of the Luxembourg Code du travail, where non-compliance with such time-limit results in dismissal of the claim, is incompatible with their provisions.

97. Finally, if the second part of the first question is answered in the affirmative, by the second part of the second question the referring court seeks in essence to establish whether such a 15-day limitation period must be regarded as too short to allow a pregnant worker dismissed during pregnancy to bring legal proceedings to safeguard her rights.

98. As a preliminary point, I note that in its reference for a preliminary ruling the national court did not make clear whether, in its view, that limitation period is connected only to an action for nullity, which in the present case has been resolved by final judgment, or, also, may be relevant to an action for damages. As the latter possibility cannot be excluded entirely, I consider it appropriate to answer.

1. General admissibility of limitation periods for bringing actions enforcing Community law rights

99. Directive 92/85 does not contain any provision governing whether the Member States may apply a limitation period to actions seeking protection against dismissal during pregnancy.

100. As is known, in principle, the Court presumes appropriate national limitation periods to be compatible with Community law as an application of the fundamental principle of legal certainty, provided that in setting those periods the general principles of Community law are respected. [77]

101. As regards those general principles, the periods must respect the principles of equivalence and effectiveness already mentioned; [78] in particular, they may not be less favourable than those governing similar domestic applications and may not be framed in such a way

77 — See, in particular, *Rewe-Zentralfinanz and Rewe-Zentral*, above footnote 54, paragraph 5; Case C-261/95 *Palmisani* [1997] ECR I-4025, paragraph 28; *Preston and Others*, above footnote 14, paragraph 33; and Case C-125/01 *Pflücke* [2003] ECR I-9375, paragraph 33.

78 — See point 81 of this Opinion. Also, specifically in relation to limitation periods, see *Pflücke*, above footnote 77, paragraph 34.

as to render practically impossible or excessively difficult the exercise of rights conferred by Community law. The substance of those rights may not be impaired. [79]

102. Moreover, in conformity with that case-law, recital 19 in the preamble to Directive 2002/73 [80] states that national rules relating to time-limits for bringing actions are admissible provided that they are not less favourable than time-limits for similar actions of a domestic nature and that they do not render the exercise of rights conferred by the Community law practically impossible.

2. Factors which may influence the duration of limitation periods following dismissal

103. Limitation periods following dismissal are not of uniform duration across the Member States. In my view, in setting the duration of such periods account must be taken of very different factors. It should be borne in mind that the purpose of limitation periods is to establish legal certainty within a reasonable time frame.

104. Especially where an order for continuing employment, or, where applicable, reinstatement and reemployment are the legal consequences of an action for dismissal protection, it must be observed that from an employer's perspective, but also in the interests of the candidate for continued employment, it must be determined within a reasonable period whether or not the employment relationship has in fact been terminated. [81] In such cases, too long a limitation period may be problematic as, generally speaking, the work process requires legal certainty and clarity with regard to the filling of individual posts to be established very rapidly. However, if what is at stake is not continuation of employment, but termination subject to the payment of financial compensation, a much longer limitation period is acceptable.

105. As a further factor relevant to determining the duration of limitation periods for dismissal protection actions, I should like to mention the issue of timely access to legal advice. If in a legal system limitation periods generally run for several weeks or months and

79 — See *Pflücke*, above footnote 77, paragraph 34, and *Preston and Others*, above footnote 14, paragraph 34.

80 — See point 8 of this Opinion.

81 — In Member States where the law on dismissal protection aims to ensure continuing employment or reinstatement, the limitation periods appear in fact to be fairly short. For example, in Poland a period of seven days from service of the dismissal notice applies (see J. Zimoch-Tuchołka and M. Malinowska-Hyla, 'Arbeitsrecht in Polen', in M. Henssler and A. Braun, above footnote 50, p. 1039 et seq., p. 1081, point 138), in Germany a period of three weeks from receipt of written notice of dismissal (Paragraph 4 of the Kündigungsschutzgesetz (Law on dismissal protection), BGBl. I, p. 1317, for the latest amendment see BGBl. I, p. 602) and in Latvia one month from receipt of the dismissal notice or from the dismissal itself (V. Kronbergs, 'Arbeitsrecht in Lettland', in M. Henssler and A. Braun, above footnote 50, p. 717 et seq., p. 727, point 49).

only in few specific exceptional cases very short limitation periods are provided for, it is conceivable that the relevant legal system is not primed to deal adequately with short limitation periods and it is difficult, for example, at short notice to obtain an appointment to consult a lawyer; remembering, moreover, that enough time must remain, should it be necessary, to draft and lodge pleadings. [82] One would expect the position to be different in a legal system in which, for example, all dismissal protection actions are subject to short limitation periods and dealing with such is a routine element of the overall legal system including provision of legal counselling. In such latter cases, the awareness of the general public — and therefore that of potential claimants — of the brevity of limitation periods ought also to be greater than in legal systems in which short limitation periods constitute an exception.

106. Moreover, it must be borne in mind that a reasonable limitation period must not only be of sufficient duration to allow, in fact, for consultation with a lawyer but ought to be of sufficient duration to allow an individual who has been dismissed to obtain an overview of the entire situation, including, where appropriate, details of future labour market opportunities and armed with that information to weigh up what steps should be taken.

82 — Even if there is no requirement to use the services of a lawyer in first instance proceedings before labour courts (see above footnote 50), if desired, however, it must be possible to make use of such services unthwarted by excessively short limitation periods.

107. Furthermore, I should like to mention the fact that in the case of dismissal during pregnancy account must be taken of the specific situation mentioned already in the 15th recital in the preamble to Directive 92/85. In particular, in the light of the negative effects of such a dismissal on the physical and mental state of pregnant workers (and workers who have recently given birth or who are breast-feeding) the directive prohibits dismissal of those workers during the periods in question. That concern underlying the prohibition on dismissal during pregnancy constitutes an additional factor which must be taken into account in setting the duration of the limitation period.

3. The 15-day limitation period under national law

108. Both in relation to the principles of effective legal protection already mentioned [83] and in relation to the principles of equivalence and effectiveness, [84] I have considerable doubts whether the 15-day limitation period established by national law in relation to an action challenging dismissal during preg-

83 — See point 58 et seq. of this Opinion.
84 — See points 81 and 101 of this Opinion.

nancy is compatible with the requirements of Community law.

109. A limitation period of 15 days, that is approximately two weeks, is in itself probably a very short period in which to obtain an initial overview of the situation, to consult an adviser and, where appropriate, to draft and lodge an action. In addition, having regard to my observations above [85] on the routine operation of the system for legal protection, account must be taken of the fact that the Luxembourg law on dismissal protection appears in general to provide for a period of three months in which to lodge an action for dismissal protection, the aim of which, however, is not to obtain an order for continued employment but an order for payment of damages. The possibility cannot be excluded that the existence of this standard limitation period of three months results in the legal system being incapable, as a whole, of reacting in an adequate manner to a limitation period as short as that at issue in the present proceedings.

110. Moreover, it must be borne in mind that, according to the case-file, [86] possibly not the day of receipt but the day of posting of the notice of dismissal operates as the start date for the limitation period, a practice which further reduces the already very short limitation period to the disadvantage of a pregnant worker. The period available to her, in fact, depends on the mail delivery time and, seemingly, also is not limited to working days. In the least favourable case, for example, in periods including several public holidays such as the Christmas and New Year period, it is conceivable that the period available to the worker within which to lodge a claim is ultimately reduced to a few days.

111. Furthermore, I should like to point out that, according to the case-file, a defendant employer is granted a substantially longer period in which to lodge any appeal, that is, 40 days from service of the first instance order. [87] Also that substantially longer period, as it begins to run from the service of the first instance order, is not reduced by mail delivery times and thus is available in its entirety to the employer.

85 — See point 105 of this Opinion.

86 — See point 39 of this Opinion. At the hearing, both parties to the main proceedings mentioned the fact that the fourth subparagraph of Article L.337-1(1) of the Luxembourg Code du travail (point 18 of this Opinion) provides that an action must be lodged within 15 days 'following dismissal', whereas otherwise 'from service of the termination notice' applies as the start date for the limitation period.

87 — See point 18 of this Opinion.

4. Interim conclusion

112. In the light of the foregoing, the answer to the second part of the first question and to the second part of the second question is that the application of a 15-day limitation period in which to lodge an action for dismissal protection in the case of the termination by an employer of an employment relationship during pregnancy which commences already on the posting of the notice of termination is incompatible with Articles 10 and 12 of Directive 92/85 if the duration of that period fails to respect the principle of effective legal protection and the principles of equivalence and effectiveness.

VII — Conclusion

113. For the foregoing reasons, I propose that the Court reply as follows to the questions referred by the tribunal du travail d'Esch-sur-Alzette:

(1) The first indent of Article 2(2) 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, as amended by Directive 2002/73/EC of the European Parliament and of the Council of 23 September 2002, is to be interpreted as meaning, in circumstances such as those of the main proceedings, that where, in the event of dismissal by an employer, national law makes an action for damages generally available that action must be available also to pregnant workers in the event of such dismissal.

(2) Articles 10 and 12 of Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are

breastfeeding (10th individual directive within the meaning of Article 16(1) of Directive 89/391/EEC) are to be interpreted as not precluding, in circumstances such as those apparent in the main proceedings, a time-limit fixed in advance of eight days in which to inform an employer of an existing pregnancy.

(3) The application of a 15-day limitation period in which to lodge an action for dismissal protection in the case of the termination by an employer of an employment relationship during pregnancy which commences already on the posting of the notice of termination is incompatible with Articles 10 and 12 of Directive 92/85 if the duration of that period fails to respect the principle of effective legal protection and the principles of equivalence and effectiveness.