

Katharina Rinke v Ärztekammer Hamburg

Reference for a preliminary ruling from the Bundesverwaltungsgericht

Equal treatment for men and women – Interpretation of Directives 76/207/EEC, 86/457/EEC and 92/16/EEC – Requirement to complete a minimum period of full-time training within a part-time training scheme in order to be allowed to use the title general medical practitioner

Case C-25/02

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I – Introduction

1. This case concerns whether the requirement to complete a number of periods of full-time training as part of part-time training in general medical practice, as laid down in Council Directive 93/16/EEC of 5 April 1993 to facilitate the free movement of doctors and the mutual recognition of their diplomas, certificates and other evidence of formal qualifications (2) (hereinafter: Directive 93/16), indirectly discriminates against women, how this directive relates to Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions (3) (hereinafter: Directive 76/207), and whether the prohibition of discrimination on grounds of sex constitutes a basic unwritten right under Community law that overrides any conflicting rule in secondary legislation.

II – Legal framework

2. The purpose of Directive 76/207, in accordance with Article 1 thereof, is to put into effect in the Member States the principle of equal treatment for men and women as regards access to employment, including promotion, and to vocational training and as regards working conditions (4) and social security.

3. Under Article 2 of Directive 76/207, the principle of equal treatment means that there must be no discrimination whatsoever on grounds of sex either directly or indirectly by reference in particular to marital or family status.

4. Under this Directive, (5) application of the principle of equal treatment means that there must be no direct or indirect discrimination on the grounds of sex – whatever the activity and at all levels of the professional hierarchy – in relation to conditions for access, vocational guidance, vocational training, advanced vocational training and retraining. To that end, Member States must take the necessary measures to ensure that any laws, regulations or administrative provisions contrary to the principle of equal treatment are abolished.

5. Specific training in general medical practice was introduced by Council Directive 86/457/EEC of 15 September 1986 on specific training in general medical practice (6) (hereinafter: Directive 86/457). Under Article 2(1)(b) of that directive, such training must be a full-time course lasting at least two years. Article 5 of the directive also permits part-time training provided a number of conditions are met. When Directive 93/16 was adopted the content of Directive 86/457 was reproduced therein. Article 34 of Directive 93/16 has a wording similar to that of Article 5 of Directive 86/457.

6. Article 34 of Directive 93/16 reads as follows:

1. Without prejudice to the principle of full-time training laid down in Article 31(1)(b), Member States may authorise specific part-time training in general medical practice in addition to full-time training where the following particular conditions are met:

- the total duration of training may not be shortened because it is being followed on a part-time basis,
- the weekly duration of part-time training may not be less than 60% of weekly full-time training,
- part-time training must include a certain number of full-time training periods, both for the training conducted at a hospital or clinic and for the training given in an approved medical practice or in an approved centre where doctors provide primary care. These full-time training periods shall be of sufficient number and duration as to provide adequate preparation for the effective exercise of general medical practice.

2. Part-time training must be of a level of quality equivalent to that of full-time training. It shall lead to a diploma, certificate or other evidence of formal qualification, as referred to in Article 30.

7. Article 25 of Directive 93/16 allows the Member States to authorise part-time training as a specialist, under conditions approved by the competent national authorities, when training on a full-time basis would not be practicable for well-founded individual reasons. By contrast with Article 34, Article 25 does not require that a particular period of training be full-time.

III – Facts and procedure

A – Main proceedings

8. Mrs Rinke, the applicant in the main proceedings, holds an officially recognised diploma in medicine. She claims the right to be able to use the title *praktische Ärztin* (general medical practitioner) on the basis of part-time training she undertook at a general medical practice in Hamburg.

9. Mrs Rinke originally undertook her further training to become a specialist in general medical practice in accordance with the Further Training Regulation issued by the Ärztekammer, the defendant in the main proceedings. She was employed full-time from 1988 to 1992 in the general medicine department of a hospital. The Ärztekammer recognised two years of that time as full-time training.

10. After having two children Mrs Rinke opted for the significantly shorter specific training in general medical practice. From 1 April 1994 to 31 March 1995 she worked part-time (60% of normal working hours) as a further training assistant at a general medical practice.

11. On 4 May 1995 Mrs Rinke applied for a certificate of completion of specific training in general medical practice conferring the right to use the title general medical practitioner. By a notice of 5 May 1995 the defendant rejected that application on the ground that, under Paragraph 13(b)(2)(1) of the Hamburgisches Ärztegesetz (Hamburg law on doctors), at least six months of the prescribed training in general practice had to be undertaken full-time. Unlike the Further Training Order for Specialist Training, that law contains no provision for any exception.

12. The applicant, having unsuccessfully entered an objection against that decision, brought an action claiming that Paragraph 13(b)(2)(1) of the Hamburgisches Ärztegesetz infringed the Community law prohibition on discrimination in Council Directive 76/207. She argued that the requirement in the third indent of Article 5(1) of Council Directive 86/457 on specific training in general medical practice, to the effect that at least part of the training for general medical practice must be undertaken full-time, is overridden by the basic prohibition on discrimination.

13. The Ärztekammer, on the other hand, submitted that the full-time training requirement was justified on objective grounds. The rule is intended to ensure that the prospective general practitioner is given an overview of the tasks that fall to be performed in general practice and becomes acquainted with the full range of activities to be mastered. If he were to train part-time only, the trainee might not gain any experience of home visits, or might witness particular phases only of the progress of patients' illnesses.

14. The Verwaltungsgericht (Administrative Court) dismissed the action. An appeal against that decision was also dismissed by a judgment of the relevant court of 18 February 1999. The court held that Paragraph 13(b)(2)(1), in conjunction with Paragraph 13(a)(3)(3), of the Hamburgisches Ärztegesetz, clearly requires that a period of at least six months' full-time work be undertaken in a general practice as part of the specific training in general medical practice, and that that requirement had not been met by the applicant. In the view of that court, there was no need to determine whether the mandatory rule to the effect that part of the training be completed full-time constituted indirect discrimination on grounds of sex within the meaning of Articles 2(1) and 3(1) of Directive 76/207/EEC on equal treatment. The rule established by the Hamburg legislature was in any event justified in Community law terms by Article 34(1) of Directive 93/16/EEC. The third indent of that provision – which is consistent with Article 5(1) of Directive 86/457/EEC – prohibits national rules that permit training in general practice to be undertaken on an entirely part-time basis. Following general principles, this rule prevails over that in the Equal Treatment Directive because it is the more specific and recent of two rules that are essentially equal in rank. The rule infringes neither the prohibition on arbitrariness nor the principle of proportionality. The requirement to complete at least part of the training in general practice full-time is based on objective grounds, having regard to the notion of the family doctor that underpins the directive.

15. The Bundesverfassungsgericht (Federal Constitutional Court) overturned that decision on an appeal by the applicant in a ruling of 9 January 2001 and remitted the proceedings to the Bundesverwaltungsgericht. It stated that the Bundesverwaltungsgericht infringed the applicant's right to a hearing before the statutory court, which Article 101(1)(2) of the Grundgesetz (Basic Law) granted to her, because it failed to refer the question concerning the relationship between the third indent of Article 34(1) of Directive 93/16 and Directive 76/207 on equal treatment to the Court of Justice for a preliminary ruling under the second paragraph of Article 234 EC. It is not clear that the principles of interpretation relied on in the decision, to the effect that the more specific and recent rule takes precedence, also apply in Community law. Further, it must also be borne in mind that the prohibition on discrimination in Community law has now acquired the status of a basic right and so prevails over Directive 93/16.

16. Consequently, the Bundesverwaltungsgericht stayed proceedings and referred a number of questions to the Court for a preliminary ruling. The national court made the following comments to clarify these questions.

17. The first area of doubt is whether the requirement in the third indent of Article 34(1) of Directive 93/16, to the effect that specific training in general medicine – and, in particular, the part undertaken at an approved general practice – must include some periods of full-time training, constitutes indirect discrimination on grounds of sex within the meaning of Directive 76/207. Although there is no question that the impossibility of completing the entirety of such training part-time affects women more than men, since it is clear from past experience that women take advantage of the possibility of part-time work in significantly greater numbers than men, there is some doubt as to whether the Equal Treatment Directive applies here because – so far as this court is aware – this is not a question that has hitherto been addressed in the case-law of the Court of Justice. The Court's case-law has generally been concerned with discrimination against part-time workers as compared to full-time workers. However, the issue here is not that certain methods of working have unfavourable legal consequences. Rather the legislature is excluding all potential workers from a particular way of working, namely part-time work. The Court of Justice has yet to determine whether the Equal Treatment Directive also covers a rule of this kind and, to the extent appropriate, what criteria are to be applied.

18. It is also possible that the prohibition on discrimination is not applicable, because the requirement that training in general medical practice be undertaken full-time may be justifiable on the basis of factors unrelated to discrimination on grounds of sex. The Chamber's observations in its overturned judgment on the role of the family doctor, for instance, point to that possibility. But nor should the fact that Article 25 of Directive 93/16 does not require any periods of further training in general medicine to be completed full-time be overlooked.

19. If the requirement to train full-time does infringe the prohibition on discrimination on grounds of sex, the question arises how the conflict between Article 34(1) of Directive 93/16 and Articles 2 and 3 of Directive 76/207 is to be resolved. The principles of specificity and priority, rooted as they are in European legal tradition, could apply. Alternatively, the prohibition on discrimination on grounds of sex may have attained the status of a basic right in Community law and may consequently render the third indent of Article 34(1) of Directive 93/16 ineffective.

B – The questions submitted for a preliminary ruling

20. In the light of the foregoing, the Bundesverwaltungsgericht submitted the following questions to the Court of Justice for a preliminary ruling by an order of 8 November 2001, received at the registry of the Court on 31 January 2002.

1. Does the requirement laid down in Directives 86/457/EEC and 93/16/EEC, to the effect that certain components of the specific training in general medical practice – completion of which confers the right to use the title general medical practitioner – must be undertaken full-time, constitute indirect discrimination on grounds of sex within the meaning of Directive 76/207/EEC?

2. If the answer to Question 1 is yes:

(a) How is the incompatibility of Directive 76/207/EEC on the one hand with Directives 86/457/EEC and 93/16/EEC on the other to be resolved?

(b) Does the prohibition of indirect discrimination on grounds of sex constitute a basic unwritten right under Community law that overrides any conflicting rule in secondary legislation?

C – Procedure before the Court

21. In the procedure before the Court written observations were submitted by Mrs Rinke, the Swedish Government, the Council and the Commission. At the hearing on 12 November 2002 Mrs Rinke, the Council and the Commission presented more detailed argument.

IV – Appraisal

A – The first question submitted for a preliminary ruling

22. By the first question the national court wishes to ascertain whether the requirement to the effect that certain components of part-time training in general medical practice must be undertaken full-time constitutes indirect discrimination.

23. According to the Court's case-law relating to pay or social security benefits, access to employment and working conditions, there is indirect discrimination where, although worded in neutral terms, (national) provisions or rules work to the disadvantage of a much higher percentage of women than men, unless that difference in treatment is justified by objective factors unrelated to any discrimination on grounds of sex. (7) This case-law has now been codified in various directives. (8) Below I will first consider whether the provision at issue in this case works to the disadvantage of a higher percentage of women than men. I will then consider the arguments put forward to justify this provision.

24. The Court has ruled that where it is established that a measure adversely affects a much higher percentage of women than men, or vice versa, there will be a presumption of indirect discrimination and it will be for the employer or the person who drafted that measure to demonstrate the contrary. Furthermore, the statistics on which indirect discrimination is based must be valid. This is understood as meaning that these statistics must cover enough individuals, must not illustrate purely fortuitous or short-term phenomena, and appear, in general, to be significant. (9) – Indirect discrimination: working to the disadvantage of women?

25. Mrs Rinke and the Swedish Government have argued that the requirement affects a considerably higher percentage of women than men and that there is therefore indirect discrimination. They note that experience shows that a higher percentage of women than men take advantage of the possibility of undertaking part-time training. They point to the fact that the average age upon completion of basic medical training is approximately 28. For women this coincides with the age at which they have to give serious consideration as to whether or not to have children. Further training lasts three to five years. This is the period during which most women have their first child (or children). Since the necessary practical experience cannot be acquired in full on a part-time basis, this group is essentially denied access to this profession. That is because the part-time training which has been completed is not recognised and therefore they are unable to establish themselves in practice as general medical practitioners.

26. The Council contends that the directive merely lays down a number of detailed rules governing part-time training in general medical practice. The obligation to complete a particular period thereof on a full-time basis cannot be compared with a total impossibility of undertaking part-time training. In the view of the Council, the latter would indeed have an adverse effect on women. However, the Council also considers that doctors undergoing part-time training are not discriminated against as compared with doctors undergoing full-time training. For both groups the conditions for access to the profession are the same and both practical training and a period of full-time training are required. The Council considers it unlikely that this provision will adversely affect a higher percentage of women than men even though, as the national court found, it is primarily women who undertake part-time training.

27. The Commission notes that it is only on the basis of solid statistics that it is possible to examine whether or not the rule does in fact have an adverse effect on women. According to the Commission, the national court did not assess such statistics in the present case. In its order for reference it merely observed that there is no

question that the impossibility of completing the entirety of such training part-time affects women more than men since it is clear from past experience that women take advantage of the possibility of part-time work in significantly greater numbers than men. In the view of the Commission, this general finding is insufficient to prove that there is indirect discrimination. In the light of the developments in the role of men and women on the labour market and within the family the Commission considers that it is not possible, without further investigation, to conclude that women take advantage of the possibility of undertaking part-time training in considerably greater numbers.

28. In the view of the Commission, the national court must therefore consider whether or not the specific rule does in fact affect a higher percentage of women than men. This can be done on the basis of statistics which provide information on the number of men and women who complete at least part of their training in general medical practice part-time. Only if it is evident that a considerably larger number of women do so can it be asserted that the exclusion from entirely part-time training is unfavourable to women.

29. However, Mrs Rinke points out that no such statistics are available precisely because entirely part-time training is not recognised and therefore no such group exists. She considers that all women and men within the category of general medical practitioner must be compared. In that regard a further distinction should be drawn between male general medical practitioners who gained their qualifications on the basis of specialist training and general medical practitioners who acquired their right to practise solely on the basis of practical experience before special training in general medical practice was introduced in 1995. No such distinction is drawn in the statistics. Consequently, it is not possible to examine figures based thereon.

30. Nevertheless, Mrs Rinke points to the under-representation of women in this profession. According to the statistics, the percentage of female holders of a diploma in medicine in Germany in the period 1993-1999 was 35%. In 2000 it was 37%. In the other countries of Europe the percentage was, on average, about the same. The fact that there are subsequent problems as regards continued training is also evident from the statistics. Of that 37% only 62% have the status of specialist, including that of specialist general medical practitioner, whereas the figure is 76% in the case of men. In addition, she points out that entirely part-time training is possible in respect of specialisations other than general medical practice. Furthermore, it is well-known that more women than men work part-time. This is certainly true of the category of women aged between 28 and 35. Mrs Rinke considers that she has adduced sufficient evidence to indicate that there is indirect discrimination.

– Appraisal of indirect discrimination

31. The first question to be answered in the present case is whether or not there is indirect discrimination. In that respect I should note that this problem, which also raises the question whether and to what extent obstacles to and the consequences of part-time work can constitute indirect discrimination, is not unknown to the Court. Furthermore, in its case-law the Court has stated on several occasions, either implicitly or explicitly, that it is aware of the difficulties which women can encounter in respect of full-time work and the adverse effects thereof as regards, for example, pay, working conditions and social security. [\(10\)](#)

32. It should also be noted that this case relates to training which, as such, affects access to a profession and consequently falls within the scope of Directive 76/207 which presupposes that training can also be indirectly discriminatory. The present case relates to specific training in general medical practice which can be undertaken following the successful completion of basic medical training at university. [\(11\)](#)

33. It is also established that the third indent of Article 34(1) of Directive 93/16 requires that a component of this training be conducted on a full-time basis. Furthermore, I should note that this directive has now been amended by Directive 2000/19. [\(12\)](#) However, the provision on the periods of full-time training as part of part-time training in general medical practice, which is at issue in this case, has been retained. [\(13\)](#)

34. The question now arises as to whether this requirement to undertake full-time work during a particular component of the training poses a greater obstacle to women than to men.

35. The figures which Mrs Rinke cites in support of this argument and which relate primarily to the total number of women among all the general medical practitioners in Germany lack any real conviction in this regard because they are unable to establish a causal link between the alleged barrier and the result. There could be other historical reasons why participation in this profession, which requires postgraduate training, can be comparatively low.

36. On the other hand, the statistics showing that part-time exercise of a profession is generally more appealing to women than to men are convincing. Statistics show that generally women are over-represented in professions which are exercised part-time. This also appears to be true of professions which require graduate or postgraduate education. [\(14\)](#) The ability to work part-time appears indisputably to improve the opportunities for a large group of women to participate in work. This also applies to the exercise of a profession per se.

37. Eurostat statistics [\(15\)](#) show that part-time work is performed mainly by women. The statistics from 2001 show that one third of working women work part-time whereas 6% [\(16\)](#) of working men do so. They also show that in countries in which the percentage of part-time working women is low, this fact reflects an obstacle to access to the labour market. The average age at which women in the EU have children is 28. Moreover, in all the Member States of the EU women spend considerably more time than men looking after children. Women aged between 20 and 49 spend an average of 45 hours or more a week looking after children whilst men spend well under 30 hours a week doing so (the EU average is 22 hours). Not only do women devote more time to childcare, it also has a bearing on whether or not they go out to work and whether they work full or part-time. The combination of childcare and work usually means that women work part-time whereas men at most work a few hours less in a full-time job. Around 37% of women aged between 20 and 49 who look after children and work part-time work less than 30 hours a week. That is twice as many as women in the same age group who have no children or at least no childcare responsibilities.

38. It may consequently be concluded that, where a training requirement cannot be satisfied on a part-time basis, the lowering of barriers in terms of access to that profession which part-time work offers, and which is appealing to women, does not exist. In other words, part-time work has the effect of lowering barriers precisely for women.

39. In this case there is a requirement that postgraduate training be undertaken full-time. Therefore, the effect of lowering barriers specific to women disappears. Consequently, this requirement affects women in relatively larger numbers than men.

40. The fact that this case concerns a training requirement makes the effects of the indirect discrimination on the disadvantaged group more serious than if it concerned a requirement to exercise a function or profession full-time. The training requirement means that a barrier may arise to entry to the profession concerned. The disadvantaged group is affected not only as regards the pursuit of a chosen career but also as regards the opportunities to embark upon a particular career.

41. Neither the Council nor the Commission has been able to show that no such indirectly discriminatory effect occurs.

42. In the light of the unequivocal statistics on the relative participation of men and women in part-time functions I consider untenable the Commission's argument that the developments in the role of men and women on the labour market do not automatically permit the conclusion that women take advantage of the possibility of undertaking part-time training in considerably greater numbers.

43. The developments to which the Commission refers may bring about significant changes in this relative participation in future, but they do not alter the validity of these statistics.

44. Furthermore, the Council and the Commission are not particularly coherent in their arguments since they contend, in order to justify the requirement to complete training in general medical practice in part on a full-time basis, that only a limited period is involved. They clearly intend thus to play down the inhibiting effect. However, the very fact that such an argument is put forward indicates that the Council and the Commission are aware of such an effect.

45. It is not possible to concur with the argument of the Council and the Commission that the applicant in the main proceedings should have shown to the national court that the relevant national implementing regulation has indirectly discriminatory effects which the national authorities must, in turn, disprove. If the national implementing regulation relating to the requirement of full-time training at issue here is based undeniably and directly on the third indent of Article 34(1) of Directive 93/16, the possible indirectly discriminatory effect of this provision must be examined in this case.

46. In established and extensive case-law the Court has ruled that in cases in which the suspicion of indirect discrimination is credible, it is for the employer or the national authorities to disprove that suspicion. (17) The Community legislature codified this case-law in Directive 97/80. (18) Although the case-law and the abovementioned directive are directed at the Member States and individuals, the principle laid down therein is, in my view, entirely applicable in cases such as the present where secondary Community law must be examined in the light of the fundamental principle of equal treatment.

47. In their written and oral arguments reproduced above neither the Council nor the Commission even begin to disprove, on the basis of unequivocal qualitative data, the suspicion, which is substantiated by statistics, that the provision at issue in this case indirectly discriminates against women who wish to undertake postgraduate training in general medical practice.

– Objective justifications

48. Even if a particular measure affects a higher percentage of women than men, or vice versa, there is no indirect discrimination where that measure pursues a legitimate aim, provided the means of achieving it are necessary and proportionate.

– Submissions of the parties

49. Mrs Rinke notes that there is no objective justification for the requirement to complete periods of full-time training as part of part-time training in general medical practice. The Swedish Government shares this view. It considers that although this requirement undoubtedly pursues an objective aim, this aim could also be attained in a manner other than that laid down in the directive, for example by stipulating that entirely part-time training be of the same total duration as full-time training. In that connection it should be noted that training in other specialities, including practical training, can be undertaken on an entirely part-time basis. This demonstrates that it is possible to organise training in another, non-discriminatory manner.

50. The Council and the Commission consider that, although the rule affects a higher percentage of women than men, it is in any event objectively justified. They point out that the aim of the directive is to facilitate freedom of movement of doctors and at the same time to ensure a high level of training. Under the directive, the Member States are required to recognise diplomas, certificates and other evidence of formal qualifications. This requires harmonisation of the minimum requirement relating to the duration and content of their training. As regards training in general medical practice, they point out that the specific aim of Article 34 of Directive 93/16 is to ensure that part-time training in general medical practice is of a level of quality equivalent to full-time training. In addition, they note that it is also necessary to safeguard a high level of care for patients. They point out that (1) the directive in principle permits part-time training, (2) provided that the general condition laid down in Article 34(2) thereof is satisfied which (3) is defined in detail in Article 34(1), the third indent of which relates to the requirement that part-time training include a certain number of full-time training periods. Finally, they note (4) that the Community legislature must ensure that this requirement does not go beyond what is strictly necessary.

51. As regards the last point, the Council and the Commission observe that the duration and number of full-time periods is not laid down by the Community legislature but left to the national legislature. It is merely stipulated that the full-time periods to be completed as part of part-time training must provide adequate preparation for the effective exercise of general medical practice.

52. They further contend that, although the national measure is not at issue in this case, the Member States are also bound by the principles of Community law. Therefore, they must take account of the principles of non-discrimination and proportionality. Consequently, in connection with part-time training in general medical

practice they must keep the length of the full-time periods as short as possible but long enough to attain the aim pursued by the directive.

53. The Council observes that the requirement to complete a number of full-time training periods as part of part-time training does not go beyond what is necessary. The need for part-time training is thus reconciled with the quality requirements concerning training in general medical practice. The Commission and the Council point to the central role of the general medical practitioner in the health care system and the specific requirements placed on him. He is increasingly becoming the patients' first point of contact and occupies a central position in terms of diagnosis and final treatment. A trainee general medical practitioner must be prepared for this task.

54. The Commission doubts that entirely part-time training can meet this need because in this context part-time activity cannot be regarded as equivalent to full-time activity. The Council also points to problems which would arise if training were undertaken on an entirely part-time basis. The Commission and the Council point in particular to the fact that if training is part-time the progress of a patient's illness cannot be followed completely and that the acquisition of experience of particular situations, such as emergencies and terminal and intensive care, is not the same in part-time training and workload and availability also differ. By way of illustration, they point to the case of a trainee general medical practitioner who is available in the morning but not in the afternoon. If a patient who paid a visit in the morning had an adverse reaction to a prescribed medicine in the afternoon, he would be unable to see the doctor who was treating him.

55. They contend that high-quality training requires full participation in all medical activities in all possible situations in order to follow the progress of patients and to gain a complete picture of their state of health. However, the problems which could arise if training in general medical practice were undertaken on a completely part-time basis are averted by requiring a number of full-time periods, albeit of short duration, as part of part-time training. In that way a trainee general medical practitioner is still able to acquire the knowledge and experience which he needs as a practising doctor.

56. The Council further observes that a distinction must be drawn between a part-time activity and part-time training. The latter is of only a limited duration within which the necessary experience must be acquired. The Commission also considers that, in view of the objective, it is reasonable to require that a certain, limited period of training be undertaken full-time. As regards such a limited period, it is also easier to find a solution to childcare problems, for example, than is the case with entirely full-time training. In addition, the Commission observes that the case-law of the Court allows the Member States a certain margin of discretion as regards the need to achieve the aim of their social and employment policy, even if such measures affect a greater percentage of women than men. (19) Therefore, the criteria applicable to the Community legislature cannot be stricter. Consequently, the Council was empowered, within its margin of discretion, to lay down the requirements governing training in general medical practice. In the view of the Commission, an infringement of the principle of equal treatment can be assumed only if the rule in the directive is manifestly unjustified.

57. The fact that the directive lays down different rules for the part-time training of specialists, in particular by not stipulating that a component thereof must be full-time, does not, in their view, justify the conclusion that this should also apply to the training of general medical practitioners. They point to the difference in their roles and to the duration of the training. They consider that a specialist does not have the same central role as a general medical practitioner. He does not have, as part of his specialisation, to provide the same extensive and continuous care as a general medical practitioner. Therefore, the training requirements differ. The training of a general medical practitioner is predominantly practical in nature, whereas that of a specialist is both theoretical and practical. Furthermore, training as a specialist lasts three to five years, depending on the specialisation. Therefore, such training is considerably longer and consequently the possibility of undertaking the training entirely on a part-time basis is also justified in that case.

– Appraisal: objective justification

58. As stated at paragraph 23 above, according to the Court's case-law there is no indirect discrimination where there is objective justification for it, that is to say where the measure concerned pursues a legitimate aim and the means of achieving it are necessary and proportionate.

59. Three preliminary remarks should be made as regards the assessment of whether or not there is objective justification for the requirement to undertake a component of the training in general medical practice full-time which is laid down in the third indent of Article 34(1) of Directive 93/16.

60. Firstly, high-quality training and thorough preparation for the future profession are obvious and justified requirements in the light of the increasingly important function which so-called frontline medical care is performing within the medical chain. They form the basis of Directives 86/457 and 93/16 which also provide for separate postgraduate specialist training for general medical practitioners which, when undertaken full-time, currently lasts three years.

61. Secondly, I refer to my observation above (paragraph 40) that the requirement at issue in this case, namely that a component of part-time training be undertaken on a full-time basis, may have the effect of making access to the profession more difficult, or even impossible, for certain groups. Such an effect has structural repercussions on the further prospects on the labour market of those affected by it. This places stringent requirements on the objective justifications in terms of necessity and proportionality.

62. Thirdly, it should be noted that no grounds for the requirement to undertake training on a full-time basis are to be found either in the preamble or the enacting terms of the directive. However, the preamble does contain a general explanation of the desirability of specific, additional training in general medical practice. This explanation follows the same lines as the first preliminary remark above (paragraph 60).

63. It is clear from the history of the directive that the Commission's original proposal provided for the possibility of entirely part-time training where full-time training was not possible for sound individual reasons. This proposal was consistent with the rules applicable to specialists in a particular field of medicine. However, this proposal was not adopted by the Council. Certain Member States considered that the latter requirement was superfluous, whereas others considered that precisely full-time training was necessary. That is why Directive 86/457 and later

Directive 93/16 provide for the possibility of part-time training provided that a component thereof is completed full-time. In Directive 93/16, as now amended by Directive 2001/19, this requirement is retained, whilst the preamble states that [i]n its Report on specific training in general medical practice provided for by Title IV of Directive 93/16/EEC, the Commission recommended that the requirements applying to part-time training in general medical practice should be brought into line with those applying to other medical specialists. There has been no complete alignment. However, some experts in the sector itself saw no objection to entirely part-time training in general medical practice, and neither the Council nor the Commission disputed this fact at the hearing.

64. In view of this history, it must be concluded that the need to include a full-time component in part-time training in general medical practice is not generally recognised. The preamble to Directive 93/16 states no grounds for this need, whilst the preamble to Directive 2001/19 contains a recital which points instead to the absence of such a need. No criteria for assessing the proportionality of such a requirement are to be found anywhere in either directive. Moreover, in the light of the available information on the history of the contested provision, there have to be serious doubts as to whether there was any awareness that such a provision could have an indirectly discriminatory effect.

65. It is in this context that it is necessary to consider the factual arguments which the Council and the Commission have now put forward in their written and oral submissions in support of the objective justification of the provision. These arguments cover, in brief, three aspects:

- gaining the necessary experience of following patients' illnesses as they may develop over time;
- gaining the necessary experience of following patients' illnesses as they may develop over time;
- acquiring sufficient experience of the various situations which may occur in particular in general medical practice;

- acquiring sufficient experience of the various situations which may occur in particular in general medical practice;
- and the differences between the profession of general medical practitioner and that of other medical specialists and the associated different training requirements.

and the differences between the profession of general medical practitioner and that of other medical specialists and the associated different training requirements.

66. The first argument is not substantively incorrect but the need for doctors to acquire experience of the development of illnesses in their patients and the complications which may arise in that respect applies no less to specialists in other fields of medicine, such as internal medicine, cardiology and psychiatry. In those fields too illnesses can change rapidly and require adaptation of the original diagnosis and method of treatment.

67. The same is essentially true of the second argument. It is a fact that in the practice of every doctor it is necessary to ensure the requisite continuity of patient care. To that end, the necessary care must be learned and exercised where duties are temporarily transferred even in the case of full-time training and practice.

68. Therefore, as regards both arguments it is difficult to see why they necessitate partial full-time training in respect of general medical practitioners but expressly do not do so in respect of specialists in a particular field. It should be noted incidentally that other requirements which are less restrictive than the unqualified full-time requirement could be sufficient to gain the necessary experience, such as the provision that, in the case of part-time training, the timetable must be such that adequate experience is acquired of assessing and monitoring patients over a long period. In brief, in so far as both arguments seek to demonstrate a particular need, they fail to substantiate the proportionality of the full-time requirement.

69. The third argument is substantively incorrect in so far as it is put forward to substantiate the need for partial full-time training in respect of general medical practitioners alone. Since the period of (full-time) training for general medical practitioners is extended to three years in the amended directive, and is thus made the same as that for a number of specialists, the – shorter – duration invoked can no longer be advanced as a ground for retaining a partial full-time requirement in respect of training in general medical practice alone.

70. In a number of judgments concerning various aspects of part-time work the Court has not been satisfied with generalisations such as the presumed lesser involvement of part-time workers or the lesser ability of such workers to acquire skills and experience. [\(20\)](#) I should note that the arguments of the Council and the Commission examined above do not go beyond generalisations. They do not demonstrate the need, let alone the proportionality, of the third indent of Article 34(1) of Directive 93/16 with any pertinence or precision.

71. The Commission has also contended that the case-law of the Court allows the Member States a certain margin of discretion as regards the need to pursue the aim of their social and employment policy. It claims that the Community legislature has, by analogy, the same margin of discretion. In the present case this argument is irrelevant since, as was explained at paragraph 62 above, neither the preamble nor the enacting terms of Directive 93/16 state any grounds for the need and proportionality of the requirement to complete a number of periods of full-time training as part of part-time training in general medical practice. According to the established case-law of the Court, the enjoyment of a margin of discretion brings with it the obligation to state grounds for its use. [\(21\)](#)

72. In the light of the foregoing, I conclude that the Council and the Commission are unable to put forward a convincing, objective justification for the third indent of Article 34(1) of Directive 93/16. Therefore, this provision must be regarded as indirectly discriminatory to women in respect of their access to the labour market.

73. For the sake of completeness, I will also examine the argument of the Council and the Commission that the provision at issue is flexible because it does not lay down the duration and number of full-time periods and that the Member States themselves must take account of the basic principle of equal treatment and the principle of proportionality when implementing that provision.

74. This argument is untenable since I found above that the Community provision per se is contrary to the fundamental principle of equal treatment. The margin of discretion which it allows the Member States to apply it more or less restrictively does not change this finding in any way. On the contrary, since in the present case the Community legislature is required to weigh up carefully the objectives of the directive and the limitation it might impose on the scope of the fundamental principle of equality, the matter cannot be left to the discretion of the

Member States. Precisely if the Community legislature considered that a minimum amount of full-time experience was so essential as to justify a limitation on the scope of the principle of equality, it should have stipulated this in the directive and stated sound reasons therefor.

B – The second question submitted for a preliminary ruling

75. The second question is made up of two limbs, namely as to how the incompatibility of Directive 76/207 on the one hand with Directive 93/16 on the other is to be resolved, and whether the prohibition of indirect discrimination constitutes a basic unwritten right under Community law that overrides any conflicting rule in secondary legislation.

– Observations of the parties

76. All the parties point out that the right to equal treatment forms part of fundamental human rights and that these fundamental rights are general principles of Community law which must be observed. Furthermore, this principle has also acquired a basis in treaty law through the Treaty of Amsterdam, in particular in Articles 2 and 3(2) EC, and, moreover, Article 141(3) EC provides an explicit basis for the adoption of Community measures. The Commission and the Council also point to the Charter of fundamental rights of the European Union adopted in Nice on 7 December 2000. [\(22\)](#)

77. Mrs Rinke considers that the requirement relating to a full-time training period is contrary to primary law and therefore partially void. Consequently, the question of incompatibility between Directives 93/16 and 76/207 does not arise. If it does arise, the incompatibility must be resolved in the light of the interests to be protected by the directives. In that respect, Directive 93/16 does not exclude Directive 76/207 and it would be contrary to the aim of the latter directive to abandon the interest to be protected by that directive simply because the provision falls within the scope of Directive 93/16.

78. The Swedish Government observes that the provisions of Directive 76/207 are an expression of the principle of equal treatment for men and women and that the provision at issue is contrary to that principle.

79. The Commission acknowledges that Directive 76/207 can, as secondary law, be regarded as an expression of the basic principle of the prohibition of discrimination on grounds of sex. However, the Commission considers that the directive is directed at the Member States and not at the Community institutions in connection with their legislative activities. Therefore, it is necessary to consider whether the provisions concerned are contrary to the fundamental provisions of Community law.

– Appraisal

80. The principle of equal treatment for men and women on the labour market laid down and developed in Article 141 EC and the secondary law based thereon, including Directive 76/207, [\(23\)](#) constitutes a specific case of the fundamental principle of the equality of men and women on the labour market. In its established case-law the Court has regarded this principle as a fundamental right. [\(24\)](#) Therefore, it follows that in drafting and developing its secondary law the Community legislature must at all times consider whether that law is consistent with this fundamental legal principle.

81. The third indent of Article 34(1) of Directive 93/16 must also be assessed in the light of this requirement of diligence. As stated above in the answer to the first question, this provision, and consequently also the way in which it is implemented in national legal systems, results in indirect discrimination against women as regards access to the labour market, discrimination the need for which has not been proven convincingly and which is, in any case, disproportionate.

82. Furthermore, the Court has repeatedly found that a fundamental legal principle overrides secondary legislation and that where a provision of secondary legislation appears to be contrary to a superior rule of law, that provision must not be applied.

83. On those grounds, the third indent of Article 34(1) of Directive 93/16 must be declared invalid. Therefore, national rules which, in order to implement this provision, provide for a full-time period as part of training in general medical practice must not be applied.

V – Conclusion

84. Having regard to the foregoing, I propose that the Court should answer the questions referred by the Bundesverwaltungsgericht as follows:

(1) The requirement, laid down in the third indent of Article 34(1) of Council Directive 93/16/EEC of 5 April 1993 to facilitate the free movement of doctors and the mutual recognition of their diplomas, certificates and other evidence of formal qualifications, to the effect that specific training in general medical practice must include a number of full-time training periods constitutes indirect discrimination on grounds of sex within the meaning of Directive 76/207/EEC.

(2) The third indent of Article 34(1) of Directive 93/16 is invalid. The provisions of national law adopted to implement it must therefore not be applied in so far as they lay down a full-time period as part of specific training in general medical practice.

[1](#) – Original language: Dutch.

[2](#) – OJ 1993 L 165, p. 1.

[3](#) – OJ 1976 L 39, p. 40.

4 – Under Directive 2002/73/EC of the European Parliament and of the Council of 23 September 2002 amending Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions (OJ 2002 L 269, p. 15), there is 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 and 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.

5 – Articles 3 and 4 of Directive 76/207 and Article 3 thereof as amended by Directive 2002/73.

6 – OJ 1986 L 267, p. 26.

7 – For example, Case 96/80 *Jenkins v Kingsgate* [1981] ECR 911; Case 170/84 *Bilka – Kaufhaus v Weber von Hartz* [1986] ECR 1607; Case 171/88 *Rinner-Kühn v FWW Spezial-Gebäudereinigung* [1989] ECR 2743; Case C-167/97 *Regina v Secretary of State for Employment; ex parte Nicole Seymour-Smith and Laura Perez* [1999] ECR I-623; Case C-281/97 *Krüger v Kreiskrankenhaus Ebersberg* [1999] ECR I-5127; and Case C-226/98 *Jørgensen v Foreningen af Speciallæger og Sygesikringens Forhandlingsudvalg* [2000] ECR I-2447.

8 – 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), Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (OJ 2000 L 303, p. 16), and finally Directive 2002/73/EC of the European Parliament and of the Council of 23 September 2002 amending Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions (OJ 2002 L 269, p. 15).

9 – See Case C-127/92 *Enderby v Frenchay Health Authority and Secretary of State for Health* [1993] ECR I-5535 and Case C-226/98 *Jørgensen v Foreningen af Speciallæger og Sygesikringens Forhandlingsudvalg* [2000] ECR I-2447.

10 – See, for example, *Jenkins*, cited in footnote 7; Case C-158/97 *Badeck and Others* [2000] ECR I-1875; and order in Case 76/88 R *La Terza v Court of Justice* [1988] ECR 1741.

11 – The history of this provision goes back to Council Directive 75/362/EEC of 16 June 1975 concerning the mutual recognition of diplomas, certificates and other evidence of formal qualifications in medicine, including measures to facilitate the effective exercise of the right of establishment and freedom to provide services (OJ 1975 L 167, p. 1) and Council Directive 75/363/EEC of 16 June 1975 concerning the coordination of provisions laid down by law, regulation or administrative action in respect of activities of doctors (OJ 1975 L 167, p. 14). The directives contain no provisions on the mutual recognition of the diplomas certifying completion of specific training in general medical practice or the criteria which such training must satisfy. The last-mentioned directive did lay down a provision that medical training at university must comprise at least a six-year course or 5 500 hours and provisions on the minimum requirement for specialist training. In the light of the development in the role of the general medical practitioner in most Member States the need for specific training in general medical practice has steadily increased. It was considered that the most important aspects of general medical practice could no longer be taught satisfactorily as part of the basic medical training which existed in the Member States. Specific training in general medical practice was introduced by Directive 86/457. Under this directive, specific part-time training in general medical practice could be undertaken provided that particular conditions were met. However, specialisation as a general medical practitioner differs from other specialisations in that this part-time training must comprise a number of full-time periods. The abovementioned directives have been amended on a number of occasions. Therefore, they have been codified in a new directive into which Directive 86/457 has also been incorporated.

12 – Directive 2001/19/EC of the European Parliament and of the Council of 14 May 2001 amending Council Directives 89/48/EEC and 92/51/EEC on the general system for the recognition of professional qualifications and Council Directives 77/452/EEC, 77/453/EEC, 78/686/EEC, 78/687/EEC, 78/1026/EEC, 78/1027/EEC, 80/154/EEC, 80/155/EEC, 85/384/EEC, 85/432/EEC, 85/433/EEC and 93/16/EEC concerning the professions of nurse responsible for general care, dental practitioner, veterinary surgeon, midwife, architect, pharmacist and doctor (Text with EEA relevance.) – Statements (OJ 2001 L 206, p. 1).

13 – The amendments relate to the reduction in the weekly duration of part-time training. Whereas under the second indent of Article 34(1) of Directive 93/16 the weekly duration of part-time training was not to be less than 60% of weekly full-time training, that percentage was reduced to 50% by Directive 2001/19. A second amendment relates to the minimum period of training in general medical practice which is changed from two to three years in the case of full-time training.

14 – Eurostat statistics. See footnote 15.

15 – . *Inter alia*, Labour Force Survey 1998, 1999, 2000, New Cronos database, the Eurostat publication *The life of Women and Men in Europe – a Statistical Portrait* and *Employment in Europe 2002* and *Employment in Europe 2001*, publication of the European Commission, Directorate-General for Employment and Social Affairs.

16 – In relation to men in the age group 25-49 the figure is only 3.8%.

17 – See, for example, Case 109/88 *Danfoss* [1989] ECR 3199 and *Enderby*, cited in footnote 9.

18 – 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).

19 – In this respect the Commission refers to Case C-444/93 *Megner and Scheffel v Innungskrankenkasse Vorderpfalz, now Innungskrankenkasse Rheinhessen-Pfalz* [1995] ECR I-4741. It also refers to the Court's case-law in which the Council is allowed a broad margin of discretion in particular fields, which affects the scope of the judicial review. In that respect it refers to Case C-280/93 *Germany v Council* [1994] ECR I-4973, and Case C-84/94 *United Kingdom v Council* [1996] ECR I-5755.

20 – See, for example, Case 171/88 *Rinner-Kühn v FWW Spezial-Gebäudereinigung* [1989] ECR 2743; Case C-184/89 *Nimz v Freie und Hansestadt Hamburg* [1991] ECR I-297; Case C-1/95 *Gerster v Freistaat Bayern* [1997] ECR I-5253; and Case C-243/95 *Hill and Stapleton v The Revenue Commissioners and Department of Finance* [1998] ECR I-3759.

[21](#) – See, for example, the recent judgment in Case C-228/99 *Silos e Mangimi Martini v Ministero delle Finanze* [2001] ECR I-8401.

[22](#) – OJ 2000 C 364, p. 1. See Articles 20, 21(1) and the third paragraph of Article 23 of the Charter.

[23](#) – Directive 76/207 was based at the time on Article 235 of the EC Treaty (now Article 308 EC). Article 141(3) EC now provides the legal basis therefor.

[24](#) – See Case 149/77 *Defrenne v Sabena* [1978] ECR 1365, and Joined Cases 75/82 and 117/82 *Razzouk and Beydoun v Commission* [1984] ECR 1509.