**Opinion of Advocate General Jacobs delivered on 6 July 2000**

**Julia Schnorbus v Land Hessen**

**Reference for a preliminary ruling: Verwaltungsgericht Frankfurt am Main – Germany**

**Equal treatment for men and women - Rules on access to practical legal training in Land Hesse - Priority for applicants who have completed military or civilian service**

**Case C-79/99**

*European Court reports 2000 Page I-10997*

## Opinion of the Advocate-General

**1.** Do the Community rules on equal treatment preclude a national provision under which, where the number of qualified applicants for a practical course for trainee lawyers exceeds the number of places available for a particular intake, priority is to be given within certain temporal limits to those meeting generally-defined hardship criteria, one specified example of which that of having completed military service can in fact be fulfilled only by men? That is the essential issue raised in this reference for a preliminary ruling from the Verwaltungsgericht (Administrative Court), Frankfurt am Main.

### The Equal Treatment Directive

**2.** Council Directive 76/207 was adopted to put into effect in the Member States the principle of equal treatment for men and women as regards, inter alia, access to vocational training (Article 1). According to Article 2(1), the principle of equal treatment means that there may be no discrimination whatsoever on grounds of sex either directly or indirectly. Among other exceptions, however, Article 2(4) provides that the Directive is to be without prejudice to measures to promote equal opportunity for men and women, in particular by removing existing inequalities which affect women's opportunities in the areas to which it relates.

**3.** Article 4 provides:

Application of the principle of equal treatment with regard to access to all types and to all levels, of vocational guidance, vocational training, advanced vocational training and retraining, means that Member States shall take all necessary measures to ensure that:

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

...

(c) ... vocational guidance, vocational training, advanced vocational training and retraining shall be accessible on the basis of the same criteria and at the same levels without any discrimination on grounds of sex.

**4.** Under Article 6:

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.

### National provisions and their context

**5.** In Germany, training for the legal professions is thorough and lengthy. Although details may vary from one Land to another, the general pattern is as follows.

**6.** After completion of secondary schooling, four years of university study in law are required, followed by the First State Examination in law, which generally takes up a further semester. Although a limited number of minor career opportunities may be available at that stage, most would-be lawyers must then go on to follow, generally for two years, a course of practical training/work experience in various capacities under the supervision of the judiciary. During this period, trainees are paid and acquire pension entitlement as temporary civil servants. At the end of it, they sit the Second State Examination in law, success in which qualifies them fully for entry into any of the legal professions.

**7.** The present case concerns admission to the practical legal training course in the Land of Hessen. This was governed at the material time (March 1998) by Paragraphs 23 and 24 of the (Hessen) Juristenausbildungsgesetz (Law on Legal Training, hereinafter JAG) and Paragraph 14a of the Juristische Ausbildungsordnung (JAO), an implementing regulation.

**8.** Under Paragraph 23(1) of the JAG, admission to practical legal training is guaranteed to any person having passed the First State Examination. Paragraph 24(1) provides for two-monthly intakes, beginning on the first working day of January, March, May, July, September and November in each year. The number of places available for each intake is limited, under separate budgetary provisions, to 140. Situations in which there are more applicants than available places are dealt with in Paragraph 24(2) of the JAG, which provided, at the material time:

If the number of applications for admission to practical legal training on a particular commencement date received before expiry of the deadline exceeds the number of available training places, appointment may be deferred by up to 12 months. This shall not apply if deferment would result in particular hardship. Lots will be drawn to select the candidates whose admission will be deferred.

**9.** Cases of particular hardship were defined in Paragraph 14a of the JAO:

1. A case of particular hardship for the purposes of Paragraph 24(2) of the [JAO] exists where deferment would result in detriment to the applicant which, judged by exacting standards, goes significantly beyond the detriment usually associated with a refusal.

2. The following, in particular, may be regarded as cases of particular hardship:

(1) proven severe disability,

(2) special social or family circumstances attested by certificates from the relevant authorities,

(3) delays in commencing and completing studies through no fault of the applicant including, in particular, delays arising out of the pursuit of education as a mature student or owing to membership of university-based or other self-governing student organisations,

(4) completion of compulsory service pursuant to Article 12a(1) or (2) of the Grundgesetz [German Basic Law], or a period of at least two years spent as development-aid volunteer within the meaning of the Entwicklungshelfer-Gesetz [Law on development-aid volunteers] ... or completion of a voluntary community service year within the meaning of the Gesetz zur Förderung eines freiwilligen sozialen Jahres [Law on the promotion of a voluntary community service year] ...

**10.** The reference to compulsory service concerns compulsory military service (Article 12a(1) of the Grundgesetz), which lasts 10 months, and compulsory civilian service (Article 12a(2)), which lasts 13 months. Both are applicable only to men. I shall refer to them jointly as compulsory national service.

**11.** The statutory provisions in Hessen were subsequently amended, in May 1998. Since then, essentially, 50% of the places for each intake are to be filled on the basis of the applicants' qualifications and results, 15% on the basis of hardship and 35% on the basis of the length of time since the initial application. The definition of hardship remained basically the same, although the order of examples (3) and (4) was reversed, and it was specified that if the number of persons claiming hardship exceeded 15% of available places, cases falling within example (1) were to be given priority, followed by those in example (2), with lots being drawn among the remainder for any remaining places.

### The main proceedings and the order for reference

**12.** Ms Julia Schnorbus passed the First State Examination in law in October 1997 and applied to be admitted to practical legal training in the January 1998 intake. She was one of 360 applicants on that occasion, so that Paragraph 24(2) of the JAG came into play, in order to decide on the filling of the 140 available places. Once the hardship rule had been applied, lots were drawn for the remaining places and Ms Schnorbus was unsuccessful. She applied again for the March 1998 intake but was again unsuccessful, finding herself in 250th place on the list drawn up after drawing of lots. Finally, she was allocated a place in the May 1998 intake, again after drawing of lots.

**13.** In the meantime, however, Ms Schnorbus had commenced legal and administrative proceedings challenging the refusal of 11 February 1998 to allocate her a place in the March intake.

**14.** On the one hand, she applied to the Verwaltungsgericht Frankfurt am Main for an interlocutory order that she be employed as a trainee from the first working day in March 1998. That order was granted on 23 February 1998, but set aside on appeal four days later by the Hessische Verwaltungsgerichtshof (Administrative Court of Appeal for Hessen).

**15.** On the other hand, she lodged an administrative objection to the refusal, which was rejected on 2 April 1998 in a reply stating that the procedure did not constitute unlawful direct discrimination against women and the rule referring to those who had completed compulsory national service related to an objective distinguishing factor.

**16**. She then brought further legal proceedings before the Verwaltungsgericht seeking a declaration that the rejection of her objection was unlawful and constituted a breach of her rights. (An application for an order that she be awarded a place in the May 1998 intake was withdrawn when a place was awarded to her.) It is in the context of those proceedings that the Verwaltungsgericht has sought a preliminary ruling by the Court on eight questions, which may be summarised as follows:

Does the preference granted to men who have completed compulsory national service (a condition which women cannot fulfil) fall within the scope of Directive 76/207/EEC? (Question 1) If so, does it constitute, either directly or indirectly, discrimination on grounds of sex within the meaning of Article 2(1) thereof? (Questions 2 and 3)

Is justification under Article 2(4) of the Directive precluded either because the preference operates automatically in favour of men, without reference to individual circumstances or other relevant factors, thus going beyond a

measure to promote equal opportunity, (Question 4) or because that provision allows only measures which serve to promote equal opportunity in favour of women? (Question 5)

If not, is the fact that only men are subject to compulsory national service a sufficient existing inequality to the disadvantage of men within the meaning of Article 2(4), or must the disadvantages which women are likely to face in employment because of their sex also be taken into account? (Question 6) Alternatively, can the preference be justified under Article 2(4) simply on the ground that it offsets disadvantages which women do not face because they are not subject to compulsory national service? (Question 7)

Finally, can Article 6 of the Directive found a right of access to training where refusal of access is based on discrimination and there is no right to compensation? (Question 8)

**17.** Written observations have been submitted by the Land Hessen (the defendant in the main proceedings) and by the Commission. Ms Schnorbus has not submitted any observations, although her arguments are amply set out in the order for reference made by the Verwaltungsgericht, which seems inclined to view them in a favourable light. There was no oral hearing.

## Analysis

### Admissibility

**18.** The Land Hessen questions whether the reference for a preliminary ruling is admissible. Since the legislation has been amended, it argues, any ruling as to its compatibility with Community law would be irrelevant in future cases. Such a ruling would also be irrelevant to the outcome of the main proceedings: since Ms Schnorbus came in 250th place after drawing of lots, she could not have been allocated a place even if there had been no priority candidates; in addition, her action for declaratory relief is inadmissible since she has no interest in bringing it.

**19.** It is true that nothing much of substance seems to turn on the interpretation of Community law in the present case. It is also true that the Verwaltungsgericht explicitly states in its order for reference that one of its considerations in making a reference was that the questions to be answered will be relevant in future cases concerning other legislative provisions, regardless of the outcome of the present proceedings, which implies that its interest is to a certain extent hypothetical.

**20.** However, I do not think there is any real objection to the admissibility of the reference.

**21.** The amendment to the legislation is irrelevant in that regard. The Court held in Pierrel that Article 177 of the EC Treaty (now Article 234 EC) confers jurisdiction on the Court to interpret Community law and ... therefore changes in national legislation after the order making the reference cannot influence that interpretation. The present situation is no different in essence (even though the change in the legislation occurred before the order for reference), in that the national court has to apply domestic law as it stood before the change and has sought an interpretation of Community law in that context. Indeed, since the questions relate specifically to the criterion of completion of compulsory national service and since that criterion remains in the amended legislation, albeit with more limited repercussions, the amendment does not remove the original relevance.

**22.** For the rest, the Verwaltungsgericht has made it clear that Ms Schnorbus's only outstanding claim is for a declaration that the reply to her objection was unlawful and injured her in her rights. It is not for this Court to judge the admissibility of that claim which she must be able to make under Article 6 of the Directive and most of the questions posed do not appear irrelevant to the decision to be reached on it. Even the national court's eighth question, although it might not seem immediately relevant to the outstanding issue, may be necessary for procedural reasons connected with a possible subsequent claim for compensation in the civil courts.

### The Kreil judgment

**23.** On 11 January 2000, after the close of the written procedure in the present case, the Court delivered its judgment in Kreil, a case which might appear to have some relevance here. Any such appearance quickly dissipates, however, on closer examination.

**24.** The question in Kreil was whether Directive 76/207 precludes the application of national provisions, such as those of German law, which bar women from military posts involving the use of arms, allowing them access only to the medical and military-music services, and the Court's answer was in the affirmative.

**25.** However, that judgment had no bearing on the obligation imposed exclusively on men to perform military or civilian service, which is relevant to the present case, but concerned the blanket denial to women of any right to serve voluntarily in military posts involving the use of arms. The discrimination which was found to exist was thus wholly distinct from any discrimination which might be germane to the present case.

### The issues in the present case

Do the disputed provisions fall within the scope of Directive 76/207?

**26.** The national court expresses the view that Directive 76/207 applies to the system of priorities laid down in the disputed legislation, since they affect the timing of access to vocational training even if they do not affect the right of access itself. The Land Hessen considers that it does not: the rules in question do not affect any person's right of access to vocational training but merely regulate the length of the possible waiting period. The Commission, however, considers that equal treatment with regard to access relates to the question not just whether but also when; any delay imposed upon a person in gaining access to vocational training, and thus to the subsequent professional activity, may constitute a discriminatory disadvantage compared with those who

have not suffered it and may even, if excessive, amount to a refusal of access. It is important to ensure that the provisions of the Directive are not circumvented.

**27.** I agree with the national court and the Commission. It is self-evident that a candidate for paid vocational training who is admitted immediately is treated more favourably than one who has to wait, even if for no more than 12 months. The difference in treatment at this stage will not only entail a degree of temporary financial hardship but will also have repercussions on career progress for some time. In addition, any delay at this stage of legal study may be significantly disruptive, interfering with the continuing acquisition and active retention of knowledge, particularly if it lasts for a full 12 months. Where an insufficiency of resources means that rules must be laid down to determine which candidates are admitted immediately and which must wait, then Directive 76/207 in particular Article 4 applies fairly and squarely to those rules, which must therefore avoid any discrimination, direct or indirect, on grounds of sex.

**The rule in issue**

**28.** Certain of the observations submitted to the Court by both the Land Hessen and the Commission stress the fact that the disputed provisions of the JAG and the JAO accord priority in cases of hardship in general and that completion of compulsory national service is merely one of several instances included in a non-exhaustive list of such cases. They point out that other cases, whether specifically mentioned in the legislation or not, may apply equally to women, and draw from that fact certain conclusions as to the discriminatory nature or otherwise of those provisions.

**29.** I consider that approach to be erroneous. The national court's questions specifically and explicitly concern the legality, in the light of the Directive, of the priority accorded to those who have completed compulsory national service. What has to be considered is whether any unequal treatment involved in according priority in such circumstances constitutes unlawful discrimination or whether it can be justified. It is irrelevant to those questions that priority may be accorded in other circumstances without giving rise to unlawful discrimination. It would on the other hand be relevant if, say, an obligation of a comparable nature were imposed upon women without their being accorded the same priority. However, Ms Schnorbus does not base her claim on any such allegation, nor is there any indication of such a situation in the national court's order for reference. I shall therefore confine my analysis to the specific rule in issue, which accords priority to those who have completed compulsory national service.

Direct and indirect discrimination on grounds of sex: general considerations and possible justifications

**30.** It is not always necessary to distinguish between direct and indirect discrimination on grounds of sex. No distinction is drawn, for example, in Article 119 of the EC Treaty (now, after amendment, Article 141 EC) or in the Equal Pay Directive. Indeed, the form of words used in Directive 76/207 (no discrimination whatsoever on grounds of sex either directly or indirectly) seems designed rather to be all-encompassing than to establish two different categories of discrimination.

**31.** However, as will appear, the distinction may be relevant to the question of what justification is possible.

**32.** A legislative definition of indirect discrimination, which encapsulates much of the development in the case-law since the distinction was first drawn by the Court, is to be found in Article 2(2) of Directive 97/80: indirect discrimination shall exist where an apparently neutral provision, criterion or practice disadvantages a substantially higher proportion of the members of one sex unless that provision, criterion or practice is appropriate and necessary and can be justified by objective factors unrelated to sex.

**33.** To state matters simply, it may be said that discrimination on grounds of sex arises where members of one sex are treated more favourably than the other. The discrimination is direct where the difference in treatment is based on a criterion which is either explicitly that of sex or necessarily linked to a characteristic indissociable from sex. It is indirect where some other criterion is applied but a substantially higher proportion of one sex than of the other is in fact affected.

**34.** There are two ways in which a difference in treatment may be justified. On the one hand, according to the Court's case-law, a difference in treatment justified by objective factors unrelated to any discrimination based on sex does not constitute unlawful discrimination. On the other hand, a number of provisions prohibiting discrimination state that they are to be without prejudice to certain measures considered to be necessary or in the general interest. In particular, there is the saving clause in Article 2(4) of Directive 76/207, with which the national court is concerned in its questions 4 to 7, namely the exception for measures to promote equal opportunity for men and women, in particular by removing existing inequalities which affect women's opportunities in other words, affirmative or positive action.

**35.** The two types of justification are different in nature. The former relates to the definition of unlawful discrimination itself; if it is present, there is no such discrimination and no need to look any further. The latter is a possible defence to be examined once the existence of such discrimination has been established. In addition, the former appears capable of relating only to indirect discrimination, since where there is direct discrimination the criterion is by definition necessarily linked to sex, whereas the latter seems capable of relating to either form.

Does the rule in issue entail direct discrimination on grounds of sex?

**36.** The Verwaltungsgericht is of the opinion that there is direct discrimination on grounds of sex because the rule in issue favours a category which can only comprise men. Both the Land Hessen and the Commission consider that there is not, stressing essentially the various categories mentioned in Paragraph 14a(2) of the JAO which may comprise women.

**37.** I take the view that there is no discrimination directly on grounds of sex though not, as I have explained above, for the reasons given by the Land Hessen and the Commission, since it is only the specific priority accorded to those who have completed compulsory national service which is in issue.

**38.** It is true that under German law as it stands women cannot be accorded priority under the rule in issue whereas the overwhelming majority of men can, as a direct result of the fact that the criterion used completion of compulsory national service relates to an obligation imposed by law on all men and on men alone.

**39.** This might be compared to the situation as regards pregnancy. The Court has held, in a series of cases starting with Dekker, that since only women can be refused employment on grounds of pregnancy, such a refusal constitutes direct discrimination on grounds of sex.

**40.** However, there is a distinction to be drawn between a criterion based on an obligation imposed by law on one sex alone and a criterion based on a physical characteristic inherent in one sex alone. No amount of legislation can render men capable of bearing children, whereas legislation might readily remove any discrimination between men and women in relation to compulsory national service.

**41.** In the present case, therefore, there is no direct discrimination because the rule in issue differentiates between those who have and those who have not completed compulsory national service as a result of a statutory obligation, and not between men and women as such.

Does the rule in issue entail indirect discrimination on grounds of sex?

**42.** The national court considers that there is in any event indirect discrimination, a view which it reaches on the basis of figures provided by the Land Hessen: of the 394 applicants for admission to training in March 1998, 157 were men and 237 women; of the 140 successful applicants, there were 94 men and 46 women; and 107 of the 140 were admitted under the hardship rule 84 men (67 of whom had completed compulsory national service) and 23 women. Thus a considerably higher proportion of women were disadvantaged than of men, without that difference being due to any objective criteria unrelated to sex. The Land Hessen itself does not specifically address this question in its observations to the Court, but disputes the relevance of a single set of figures; in contrast with the March 1998 situation, for example, the percentage of women given a place was 51.2% for the July 1997 intake and 50.9% for September 1997. The Commission agrees here with the Verwaltungsgericht, on the basis of the figures cited in the order for reference, but points out that the national court must make the necessary findings of fact. It refers to the Court's case-law to the effect that indirect discrimination exists when a rule affects a considerably smaller percentage, a much lower proportion, or a much higher proportion of one sex than of the other.

**43.** Again, I consider that it is not the correct approach to look at the overall figures. The figure we must look at is that of the number of applicants allocated a training place in accordance with the rule in issue that is to say, on the ground of completion of compulsory national service.

**44.** In that connection, the Court's case-law stresses that there must be a considerable difference in percentage for indirect discrimination to be established. As regards the criterion of completion of compulsory national service, the difference is clearly considerable; 100% of those who meet it are necessarily men, 0% are women.

**45.** From that viewpoint, I have no difficulty whatever in concluding that the rule in issue entails prima facie indirect discrimination on grounds of sex.

**46.** However, if one were to take the course of examining the overall statistics implying an evaluation of the hardship rules as a whole, rather than of the single rule in issue it would be unwise to base any conclusion simply on the gross figures for March 1998. As the Commission suggests, the national court would have to investigate the situation further before it could reach any sound conclusion; other intakes would have to be examined. I do not, though, consider that the other figures produced by the Land Hessen prove any particular point either. If as I gather is the case the principal sessions of the First State Examination are held once or twice a year, but there are intakes for the practical training every two months, and if the discrimination is as alleged, one would expect to find a higher percentage of men in the intakes immediately following one such session and a higher percentage of women in the intakes preceding the next. But if we disregard the number of men given priority in accordance with the single criterion of completion of compulsory national service, in March 1998 27 men were allocated places (17 under the hardship rules) compared to 46 women (23 of them under the hardship rules). Those figures thus do not appear to disclose any discrimination other than in relation to the rule in issue, where the conclusion is inescapable.

Is the rule in issue justified by objective factors unrelated to any discrimination based on sex?

**47.** The Court's usual formulation may seem circular. To say that there is no discrimination based on sex when a difference in treatment is justified by factors unrelated to discrimination based on sex appears self-evident. In line with the definition in Directive 97/80, however, I take it to mean that (indirect) discrimination is not unlawful when the difference in treatment is justified by objective factors not in themselves (that is to say, not directly) related to sex.

**48.** It may be helpful here to point out that the hardship rules in general do not have the effect of imposing a difference in treatment on a population all of whose members could otherwise be subject to identical conditions. The difference in treatment is imposed by the need to limit the number of candidates allocated a training post in each intake. Where the number of qualified applicants does not exceed the number of available places, all applicants are treated equally. Where there are insufficient places for the number of qualified applicants, some must be treated less favourably than others. The hardship rules lay down a series of priorities whose underlying principle is clearly an intention to spread the inevitable disadvantages as fairly as possible by treating more

favourably at this particular juncture those who have already suffered some form of disadvantage and less favourably those who have not. It is also worth recalling that the priority accorded affects no more than the timing of the allocation of a training place, and then only within defined temporal limits.

**49.** For the criterion of completion of compulsory military service, there is justification based on objective factors which like the criterion itself are not directly related to sex. The rule in issue is designed to compensate for (or perhaps rather to avoid exacerbating) a delay of approximately one year in the commencement of legal studies. That disadvantage is defined objectively and applies to members of one sex only because the law (for the time being) imposes it on members of one sex only. Thus steps taken to mitigate its effects do not fall within the definition of unlawful discrimination unless either there is some other comparable disadvantage suffered by members of the other sex in respect of which no equivalent steps are taken (and, as I have indicated above, there is no such issue in the present case) or they go beyond what is necessary to compensate for the disadvantage (and the rule in issue is incapable of conferring an advantage of more than 12 months, which is the delay suffered as a result of completion of compulsory national service).

**50.** I am aware that underlying the national court's sixth and seventh questions is the concern that the delay to men's careers as a result of compulsory national service should not be compensated for at the expense of women since women will later incur even greater delays connected with motherhood. However, the rule in issue is concerned with objectively ascertainable disadvantages already suffered and not with statistically probable, yet uncertain, future disadvantages.

**51.** That is not to say that appropriate steps taken to compensate for delays incurred as a result of motherhood would constitute unlawful discrimination. Clearly they would not they would be authorised under Article 2(4) of Directive 76/207 and, now, under Article 141(4) EC. However, the fact that such steps would be lawful and commendable if taken does not mean that their absence can render unlawful other steps taken to mitigate the effects of other, objectively defined, delays.

Can the rule in issue be justified under Article 2(4) of the Directive (positive action)?

**52.** I take the view that the rule in issue entails no unlawful discrimination because the difference in treatment is justified by objective factors not directly related to sex. I thus consider that there is no need to look at Article 2(4). However, any examination of possible justification under that provision would have to take account, to a large extent, of the same considerations as I have set out above with regard to objective justification.

**53.** In any event, it seems clear that the national court is misguided in its suggestion that Article 2(4) applies only to measures in favour of women. The Commission is right to point out that the Directive applies to equal treatment for both men and women and that the reference to existing inequalities which affect women's opportunities is merely an example. The fact that only women are cited in that example is no doubt due to the fact that, as is common knowledge, most existing discrimination on grounds of sex, whether direct or indirect, is to their disadvantage.

Can Article 6 of the Directive found a right of access to training if there is no right to compensation?

**54.** In the light of the conclusion I have reached on the issue of discrimination, I consider that the national court's last question does not require an answer.

**55.** If the Court were to give an answer, however, it would seem right to stress the firmly-worded case-law to the effect that all persons have a right to obtain an effective remedy against breaches of the principle of equal treatment. In accordance with the Court's explanation of the meaning and scope of Article 6 of the Directive in Marshall II, measures must be available to restore equality where it has not been observed; in the present case such measures would have to involve either ensuring non-discriminatory access to training or, if that is not possible, granting adequate financial compensation such as to enable the loss and damage actually sustained as a result of the unlawful discrimination to be made good in full in accordance with the applicable national rules.

**Conclusion**

**56.** I am therefore of the opinion that the Court should answer the questions raised by the Verwaltungsgericht Frankfurt am Main as follows:

Laws, regulations or administrative provisions of a Member State which regulate the order of priority for access to vocational training fall within the scope of Council Directive 76/207/EEC and must comply with the principle of equal treatment laid down therein.

A rule which accords priority in order of access to vocational training to all persons who have fulfilled an obligation imposed by law on members of one sex alone does not constitute discrimination directly on grounds of sex but is capable of constituting discrimination indirectly on grounds of sex.

Such a rule is none the less justified by objective factors unrelated to sex where it goes no further than to compensate for a delay already suffered as a result of compliance with the statutory obligation in question and where members of the other sex are not subject to any comparable delay for which there is no equivalent compensation; in such circumstances, the difference in treatment does not constitute unlawful discrimination.