JUDGMENT OF THE COURT (Grand Chamber)
1 February 2005 (1)

(Failure of a Member State to fulfil its obligations – Articles 249 EC and 307 EC – Articles 2 and 3 of Directive 76/207/EEC – Equal treatment for men and women – Prohibition of the employment of women in underground work in mining or in a high-pressure atmosphere or in diving work)

In Case C-203/03,

ACTION under Article 226 EC for failure to fulfil obligations, brought on 12 May 2003

Commission of the European Communities, represented by N. Yerrell and H. Kreppel, acting as Agents, with an address for service in Luxembourg,

applicant,

v

Republic of Austria, represented by H. Dossi and E. Riedl, acting as Agents, with an address for service in Luxembourg,

defendant,

THE COURT (Grand Chamber),

composed of V. Skouris, President, P. Jann, C.W.A. Timmermans and A. Rosas, Presidents of Chambers, J.-P. Puissochet, R. Schintgen, N. Colneric (Rapporteur), J. Malenovský, J. Klučka, U. Lõhmus and E. Levits, Judges,

Advocate General: F.G. Jacobs,
Registrar: R. Grass,

having regard to the written procedure,

after hearing the Opinion of the Advocate General at the sitting on 8 July 2004,

gives the following

Judgment

1
By its application, the Commission of the European Communities requests the Court to declare that, by maintaining, contrary to the provisions of Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions (OJ 1976 L 39, p. 40):

– in Article 2 of the Verordnung des Bundesministers für Wirtschaft und Arbeit über Beschäftigungsverbote und -beschränkungen für Arbeitsnehmerinnen (Regulation of the Federal Minister for the Economy and Labour concerning prohibitions and restrictions on the employment of female workers) of 4 October 2001 (BGBl. II, 356/2001, 'the regulation of 2001'), a general prohibition of the employment of women, with a limited number of exceptions, in the sector of the underground mining industry and

– in Articles 8 and 31 of the Druckluft- und TaucherarbeitenVerordnung (Regulation on work in high-pressure atmosphere and diving work) of 25 July 1973 (BGBl. 501/1973, 'the regulation of 1973'), a general prohibition of the employment of women in that kind of work,

the Republic of Austria has failed to fulfil its obligations under Articles 2 and 3 of that directive and under Articles 10 EC and 249 EC, and to order the Republic of Austria to pay the costs.

2
The Republic of Austria contends that the Court should:

– dismiss the action as inadmissible in so far as it concerns the decree of 2001 and

– order the Commission to pay the costs,

and, in so far as the Court should consider the action admissible,

– dismiss the action and

– order the Commission to pay the costs.

Legal context

The relevant provisions of international law

3
Article 2 of Convention No 45 of the International Labour Organisation ('the I.L.O.') of 21 June 1935 concerning the employment of women on underground work in mines of all kinds, ratified by the Republic of Austria in 1937, stipulates that:

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

4
In accordance with Article 3 of that Convention:

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

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

(b) females employed in health and welfare services;

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

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

5
Article 7 of that Convention stipulates:

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

2. Each Member which has ratified this Convention and which does not, within the year following the expiration of the period of ten years mentioned in the preceding paragraph, exercise the right of denunciation provided for in this Article, will be bound for another period of ten years and, thereafter, may denounce this Convention at the expiration of each period of ten years under the terms provided for in this Article.’

6
Convention No 45 of the I.L.O. entered into force on 30 May 1937.

7
Convention No 176 of the I.L.O. of 22 June 1995 on safety and health in mines does not refer to men only but lays down rules on safety and health irrespective of the worker’s sex.

8
The Republic of Austria ratified that convention on 26 May 1999, but it has not denounced Convention No 45 of the I.L.O.

The relevant provisions of Community law

9
The first and second paragraphs of Article 307 EC provide:

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

To the extent that such agreements are not compatible with this Treaty, the Member State or States concerned shall take all appropriate steps to eliminate the incompatibilities established. Member States shall, where necessary, assist each other to this end and shall, where appropriate, adopt a common attitude.’

10
Article 2(1) to (3) of Directive 76/207 provides:

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

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

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

11
Under Article 3 of that directive:

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

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

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

…’

12
Article 2 of Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding (tenth individual Directive within the meaning of Article 16(1) of Directive 89/391/EEC) (OJ 1992 L 348, p. 1) provides

‘Definitions

For the purposes of this Directive:

(a)
“pregnant worker” shall mean a pregnant worker who informs her employer of her condition, in accordance with national legislation and/or national practice;

(b)
“worker who has recently given birth” shall mean a worker who has recently given birth within the meaning of national legislation and/or national practice and who informs her employer of her condition, in accordance with that legislation and/or practice;

(c)
“worker who is breastfeeding” shall mean a worker who is breastfeeding within the meaning of national legislation and/or national practice and who informs her employer of her condition, in accordance with that legislation and/or practice.’

13
Article 4 of that directive provides:

‘Assessment and information

1. For all activities liable to involve a specific risk of exposure to the agents, processes or working conditions of which a non-exhaustive list is given in Annex I, the employer shall assess the nature, degree and duration of exposure, in the undertaking and/or establishment concerned, of workers within the meaning of Article 2, either directly or by way of the protective and preventive services referred to in Article 7 of Directive 89/391/EEC, in order to:

–
assess any risks to the safety or health and any possible effect on the pregnancy or breastfeeding of workers within the meaning of Article 2,

–
decide what measures should be taken.

2. Without prejudice to Article 10 of Directive 89/391/EEC, workers within the meaning of Article 2 and workers likely to be in one of the situations referred to in Article 2 in the undertaking and/or establishment concerned and/or their representatives shall be informed of the results of the assessment referred to in paragraph 1 and of all measures to be taken concerning health and safety at work.’

14
Under Article 5 of Directive 92/85:

‘Action further to the results of the assessment

1. Without prejudice to Article 6 of Directive 89/391/EEC, if the results of the assessment referred to in Article 4(1) reveal a risk to the safety or health or an effect on the pregnancy or breastfeeding of a worker

within the meaning of Article 2, the employer shall take the necessary measures to ensure that, by temporarily adjusting the working conditions and/or the working hours of the worker concerned, the exposure of that worker to such risks is avoided.

2. If the adjustment of her working conditions and/or working hours is not technically and/or objectively feasible, or cannot reasonably be required on duly substantiated grounds, the employer shall take the necessary measures to move the worker concerned to another job.

3. If moving her to another job is not technically and/or objectively feasible or cannot reasonably be required on duly substantiated grounds, the worker concerned shall be granted leave in accordance with national legislation and/or national practice for the whole of the period necessary to protect her safety or health.

4. The provisions of this Article shall apply *mutatis mutandis* to the case where a worker pursuing an activity which is forbidden pursuant to Article 6 becomes pregnant or starts breastfeeding and informs her employer thereof.'

15
Article 6 of Directive 92/85 is worded as follows:

'Cases in which exposure is prohibited

In addition to the general provisions concerning the protection of workers, in particular those relating to the limit values for occupational exposure:

1. pregnant workers within the meaning of Article 2(a) may under no circumstances be obliged to perform duties for which the assessment has revealed a risk of exposure, which would jeopardise safety or health, to the agents and working conditions listed in Annex II, Section A;

2. workers who are breastfeeding, within the meaning of Article 2(c), may under no circumstances be obliged to perform duties for which the assessment has revealed a risk of exposure, which would jeopardise safety or health, to the agents and working conditions listed in Annex II, Section B.'

16
Annex I to that directive, entitled 'Non-exhaustive list of agents, processes and working conditions referred to in Article 4(1)', states:

'A.
Agents

1. *Physical agents*, where these are regarded as agents causing foetal lesions and/or likely to disrupt placental attachment, and in particular:

(a) shocks, vibrations or movement;

(b) handling of loads entailing risks, particularly of a dorsolumbar nature;

(c) noise;

…

f) extremes of cold or heat;

g) movements and postures, travelling – either inside or outside the establishment –, mental and physical fatigue and other physical burdens connected with the activity of the worker within the meaning of Article 2 of the directive.

2. *Biological agents*

…

3. *Chemical agents*

The following chemical agents in so far as it is known that they endanger the health of pregnant women and the unborn child and in so far as they do not appear in Annex II.

…

e) carbon monoxide;

…

B. Processes

– Industrial processes listed in Annex I to Directive 90/394/EEC.

C. Working conditions

– Underground mining work.'

17
Annex II to Directive 92/85, headed 'Non-exhaustive list of agents and working conditions referred to in Article 6', provides:

'A. Pregnant workers within the meaning of Article 2(a)

1. *Agents*

(a) Physical agents

– Work in hyperbaric atmosphere, e.g. pressurised enclosures and underwater diving.

…

2. *Working conditions*

– Underground mining work.

B. Workers who are breastfeeding within the meaning of Article 2(c)

…

2. *Working conditions*

– Underground mining work.'

The relevant provisions of national law

18
Article 16 of the Arbeitszeitordnung (rules on working time) of 30 April 1938 (Deutsches RGBl. I, p. 447; GBl.f.d.L.Ö 231/1939, 'the 1938 rules') provided:

'Prohibited employment

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

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

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

19
In 1972 that provision was repealed, except where applicable to underground mines.

20
With effect from 1 August 2001 the employment of women in the underground mining industry has been regulated by the Regulation of 2001.

21
Article 2 of that regulation, headed 'Employment in the underground mining industry', is worded as follows:

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

(2)
Paragraph 1 shall not apply to:

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

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

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

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

22
Article 4 of that regulation, headed 'Work entailing particular physical strain', provides:

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

(2)

In assessing the work mentioned in paragraph 1, the determining factors to be taken into consideration as regards strain and stress are above all the weight, type and form of the load, the means and speed of transport, the duration and frequency of the work and the fitness of the female workers.

(3)

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

23
Article 8 of the regulation of 1973 provides:

'(1)

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

(2)

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

24
Under Article 31 of the regulation of 1973:

'(1)

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

The pre-litigation procedure

25
Being of the view that both the prohibition laid down in the 1938 rules of the employment of women in the underground mining industry and the similar prohibition concerning work in a hyperbaric atmosphere and diving work were contrary to Community law, the Commission initiated the proceedings under Article 226 EC. Having given the Republic of Austria notice to submit its observations, the Commission issued a reasoned opinion on 7 February 2002 inviting that State to take the measures necessary to comply therewith within a period of two months from its notification. So far as employment in the underground mining industry was concerned, that opinion referred to the 1938 rules and not to the regulation of 2001 which forms the subject-matter of this action and which was cited for the first time in the Austrian Government's reply to the reasoned opinion.

26
Considering that the information imparted by the Austrian authorities showed that the failure to fulfil obligations invoked in the reasoned opinion still subsisted, the Commission decided to bring this action.

Concerning the action

With regard to admissibility

Arguments of the Austrian Government

27
The Austrian Government is of the view that the Commission's action is inadmissible in so far as it concerns the prohibition of the employment of women in the underground mining industry. It maintains that the Commission's reasoned opinion and the action must be based on the same grounds. Citing Case C-11/95 *Commission* v *Belgium* [1996] ECR I-4115, that government claims that it is only where the measures referred to during the pre-litigation procedure have been maintained in their entirety that amendments to the

national legislation adopted between those two procedural stages do not constitute an impediment to the admissibility of the action. The regulation of 2001 did in fact make considerable amendments to the pre-existing situation.

Findings of the Court

28
It is true that the subject-matter of proceedings brought under Article 226 EC is circumscribed by the pre-litigation procedure provided for by that provision and that, consequently, the reasoned opinion and the application must be based on the same objections (see, inter alia, Case C-227/01 *Commission* v *Spain* [2004] ECR I-0000, paragraph 26).

29
However, that requirement cannot go so far as to mean that in every case the operative part of the reasoned opinion and the form of order sought in the application must be exactly the same, provided that the subject-matter of the proceedings has not been extended or altered but simply limited (Case C-139/00 *Commission* v *Spain* [2002] ECR I-6407, paragraph 19). To that extent, where legislation is altered during the pre-litigation procedure, the action may relate to provisions of national law which are not the same as those referred to in the reasoned opinion.

30
The judgment in *Commission* v *Belgium* does not run counter to that interpretation. In paragraph 74 of that judgment, the Court held that it is sufficient that the system established by the legislation contested in the pre-litigation procedure has, on the whole, been maintained by the new measures which were adopted by the Member State after the issue of the reasoned opinion and have been challenged in the application. In so ruling, the Court did not exclude the possibility that it is also sufficient that the new measures should introduce some exceptions into the system forming the subject-matter of the reasoned opinion, thus redressing in part the ground for complaint. Not to accept that the action was admissible in such circumstances could enable a Member State to block proceedings under Article 226 EC by making a slight amendment to its legislation every time a reasoned opinion was notified, while in fact maintaining the legislation at issue.

31
In the present case, Article 2 of the regulation of 2001 prohibits, as did Article 16 of the 1938 rules, the employment of women in the underground mining industry. Unlike the earlier regulation, it introduces certain exceptions limiting the scope of the prohibition. To accept that the action is admissible in the circumstances of the case does not, however, prejudice the right to due process, inasmuch as it was possible to put forward all the arguments, particularly those of a medical or physical nature, during the pre-litigation procedure and as those arguments are, in essence, those which were pleaded in order to justify a prohibition coupled with exceptions.

32
In consequence, the objection of inadmissibility raised by the Austrian Government must be rejected.

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

Concerning Directive 76/207

– Arguments of the parties

33
The Commission maintains that Article 2 of the regulation of 2001, which authorises women to be employed in the underground mining industry only in respect of certain restricted activities, is contrary to Article 3(1) of Directive 76/207. In so far as the directive itself contains various restrictions of the prohibition of discrimination, the Commission submits that it cannot be prayed in aid in order to justify the prohibition of employment at issue.

34

According to the Commission, the activity carried on in the sector of the underground mining industry does not relate to an occupation of the kind referred to in Article 2(2) of that directive.

35
With regard to the derogation from the principle of equal treatment for men and women provided for by Article 2(3) of Directive 76/207, the Commission argues that the risks to which women are exposed in the underground mining industry are not, generally, different in kind from those to which men are equally exposed.

36
The Austrian Government, relying on that last provision, contends that Article 2 of the regulation of 2001 is in keeping with Directive 76/207.

37
According to that Government, working in the underground mining industry involves permanent stress on the locomotory system, in a strained position, linked to work often carried out with the arms raised, in an atmosphere heavy with, inter alia, quartz dust, nitrogen oxide and carbon monoxide with values for temperature and humidity which are most often above average. The consequence for the workers concerned is frequent diseases of the lungs, joints and spinal column (miners' knee, damage to the intervertebral discs, muscular rheumatism).

38
On average, mass and muscular strength, vital capacity, absorption of oxygen, blood volume and the number of red blood cells are less in women than they are in men. Women bearing strong physical stresses in their place of work would be exposed to higher risks of abortion and also of osteoporosis when menopausal and would suffer more migraines.

39
Since women have on average smaller vertebrae, they run more risks than men when carrying heavy loads. Moreover, when they have given birth several times there is an increased risk of injury to the lumbar vertebrae.

40
According to the Austrian Government, it is clear, therefore, that on account of the morphological differences to be found on average between men and women very strenuous physical labour in the underground mining industry exposes women to more risks, in contrast to the situation with respect, for example, to night work, which exposes women and men to the same stresses.

41
On this point, the Commission argues in particular that the Austrian Government itself declared during the pre-litigation procedure that 'the range of energy variables is wide, there are considerable areas of overlap with values for men and an individual assessment ought to be carried out'.

– Findings of the Court

42
In accordance with Article 3(1) of Directive 76/207, application of the principle of equal treatment means that there is to be no discrimination whatsoever on grounds of sex in the conditions for access to all jobs or posts. It is not disputed that Article 2(1) of the regulation of 2001 treats men and women differently so far as employment in the mining industry is concerned. Since the Austrian Government has pleaded the derogation provided for by Article 2(3) of that directive, it has to be considered whether such a difference in treatment is covered by that provision and is therefore authorised.

43
As the Court pointed out in Case C-394/96 *Brown* [1998] ECR I-4185, paragraph 17, by reserving to Member States the right to retain or introduce provisions which are intended to protect women in connection with 'pregnancy and maternity', Article 2(3) of Directive 76/207 recognises the legitimacy, in terms of the principle of equal treatment, first, of protecting a woman's biological condition during and after pregnancy

and, second, of protecting the special relationship between a woman and her child over the period which follows pregnancy and childbirth.

44
It is precisely because certain activities may present a specific risk of exposure to hazardous agents, processes or working conditions for a pregnant worker or for one who is breast-feeding or who has recently given birth that the Community legislature, by adopting Directive 92/85, introduced the requirement to evaluate and communicate risks, and a prohibition of the exercise of certain activities.

45
Nevertheless, Article 2(3) of Directive 76/207 does not allow women to be excluded from a certain type of employment solely on the ground that they ought to be given greater protection than men against risks which affect men and women in the same way and which are distinct from women's specific needs of protection, such as those expressly mentioned (see, to this effect, Case 222/84 *Johnston* [1986] ECR 1651, paragraph 44, and Case C-285/98 *Kreil* [2000] ECR I-69, paragraph 30).

46
Nor may women be excluded from a certain type of employment solely because they are on average smaller and less strong than average men, while men with similar physical features are accepted for that employment.

47
In this case, while it is true that the regulation of 2001 does not prohibit the employment of women in the underground mining industry without having provided exceptions to that prohibition, the fact nevertheless remains that the ambit of the general prohibition in Article 2(1) of that regulation is very wide, inasmuch as it excludes women even from work that is not physically strenuous and that does not, therefore, present any specific risk to the preservation of a woman’s biological capacity to become pregnant and to give birth, or to the safety or health of the pregnant worker or for one who is breast-feeding or who has recently given birth, or to the foetus.

48
The exception provided for by Article 2(2)(1) of that regulation in fact refers only to management posts and technical tasks undertaken by women with management responsibilities who are therefore situated at a high grade in the hierarchy. The exception contained in Article 2(2)(2) concerns only female workers employed in the social or health services, and Article 2(2)(3) and (4) deal only with specific situations limited in time.

49
Such legislation goes beyond what is necessary in order to ensure that women are protected within the meaning of Article 2(3) of Directive 76/207.

50
It follows that the general prohibition of the employment of women in the underground mining industry laid down in Article 2(1) of the regulation of 2001, even though read in conjunction with subparagraph 2 of that article, does not constitute a difference in treatment permissible under Article 2(3) of Directive 76/207.

Concerning Article 307 EC and Convention No 45 of the I.L.O.

– Arguments of the parties

51
The Austrian Government argues that, irrespective of the medical reasons relied on, restrictions on the employment of women in the underground mining industry, within the limits laid down by the new legislation, are also justified by the fact that the Republic of Austria is bound by Convention No 45 of the I.L.O., which it ratified in 1937.

52
According to that Government, having regard to Case C-158/91 *Levy* [1993] ECR I-4287, paragraph 17 et seq., and Case C-13/93 *Minne* [1994] ECR I-371, paragraph 19, it is in any case licit for the Member States to assert the rights conferred on them by such treaties. It follows that the Austrian Government, being bound

to transpose into domestic law the prohibition of employment laid down in Convention No 45 of the I.L.O., is not obliged to apply in this respect Articles 2 and 3 of Directive 76/207.

53
The Commission argues that the conclusion drawn by the Austrian Government from *Levy* and *Minne* is too general.

54
According to the Commission, the interpretation of Article 307 EC given by the Court in Case C-84/98 *Commission* v *Portugal* [2000] ECR I-5215, paragraphs 51 and 53, can be transposed direct to the present case. Article 7 of Convention No 45 of the I.L.O. contains a denunciation clause. It is unarguable that the Republic of Austria could have denounced that convention with effect from 30 May 1997, that is to say, a date after that on which the directive became binding on it by reason of the ratification of the Agreement on the European Economic Area of 2 May 1992 (OJ 1994 L 1, p. 3). The Republic of Austria was, in the Commission's view, required to denounce the convention pursuant to Article 3(2) of Directive 76/207.

55
The Austrian Government counters that it could not have known that the law applicable in that field in Austria was contrary to Community law, or that the Commission considered the provisions in question to be contrary to Community law. The Commission's first letter on the subject was dated 29 September 1998. It follows that Convention No 45 of the I.L.O. could be denounced on 30 May 2007 at the earliest.

56
Commission v *Portugal* does not, according to the Austrian Government, impose any general obligation on the Member States to denounce international agreements when they are contrary to Community law. That interpretation, it argues, follows also from Case C-475/98 *Commission* v *Austria* [2002] ECR I-9797, paragraph 49, in which the Court held, concerning 'open skies' agreements, that in the case of amendments to such an agreement concluded before accession, the Member States are prevented not only from contracting new international commitments but also from maintaining such commitments in force if they infringe Community law. If there existed a general obligation to denounce agreements contrary to Community law, it would not have been necessary to establish that the entire agreement was confirmed when certain parts of it were amended.

– Findings of the Court

57
It follows from the third paragraph of Article 307 EC that the obligations arising from agreements concluded, by acceding States before the date of their accession, between one or more Member States on the one hand, and one or more third countries on the other, are not affected by the provisions of the EC Treaty.

58
The Republic of Austria, which acceded to the European Community with effect from 1 January 1995, ratified Convention No 45 of the I.L.O. before that date. Article 2 of that convention contains a general prohibition of the employment of women in underground work in mines and Article 3 permits a few exceptions of the same kind as those provided for in the regulation of 2001. It is common ground that that regulation implements the obligations imposed by the convention without going beyond the restrictions on the employment of women laid down therein.

59
In those circumstances, while it is true that the Republic of Austria may, in principle, rely on the first paragraph of Article 307 EC to maintain in force the provisions of domestic law implementing the abovementioned obligations, the fact remains that the second paragraph of that article states that, to the extent that earlier agreements within the meaning of the first paragraph of the article are not compatible with the Treaty, the Member State or States concerned are to take all appropriate steps to eliminate the incompatibilities established.

60
In light of the conclusion reached by the Court in paragraph 50 above, the obligations imposed on the Republic of Austria by Convention No 45 of the I.L.O. are incompatible with Articles 2 and 3 of Directive

76/207.

61
As is apparent from paragraph 50 of Case C-62/98 *Commission* v *Portugal* [2000] ECR I-5171, the appropriate steps for the elimination of such incompatibility referred to in the second paragraph of Article 307 EC include, inter alia, denunciation of the agreements in question.

62
None the less, it must be noted that the only occasion on which the Republic of Austria could, following its accession to the European Community, have denounced Convention No 45 of the I.L.O. was, in accordance with the rules laid down in Article 7(2) of the convention, during the year following 30 May 1997. At that time, the incompatibility of the prohibition laid down by that convention with the provisions of Directive 76/207 had not been sufficiently clearly established for that Member State to be bound to denounce the convention.

63
It may appropriately be added that, as Article 7(2) of Convention No 45 of the I.L.O. makes clear, the next opportunity for the Republic of Austria to denounce the convention will occur on the expiry of another period of ten years running from 30 May 1997.

64
It follows that, by maintaining in force national provisions such as those contained in the regulation of 2001, the Republic of Austria has not failed to fulfil its obligations under Community law.

65
It follows from the foregoing considerations that the action must be dismissed in so far as it concerns the prohibition of the employment of women in the sector of the underground mining industry.

The prohibition of the employment of women in work in a high-pressure atmosphere and in diving work

Arguments of the parties

66
The Commission considers that its observations on the prohibition of the employment of women in the underground mining industry apply in the same way to the prohibition of the employment of women in work to be carried out in a high-pressure atmosphere and in diving work. A general prohibition of the employment of women laid down without any individual assessment cannot be justified by women’s alleged special needs of protection.

67
In the Austrian Government’s opinion, the restrictions on employment contained in Articles 8 and 31 of the regulation of 1973 are also justified on medical grounds relating specifically to women’s activity.

68
That Government argues that in most cases work to be carried out in a high-pressure atmosphere and diving work involve significant physical stress, for example, in the construction of underground railways in a high-pressure atmosphere or in the carrying out of under-water repairs to bridges. Prohibiting the employment of women in physically very demanding work in a high-pressure atmosphere and their employment in diving work is justified because their respiratory capacity is less than men’s and because they have a lower red blood cell count.

Findings of the Court

69
An absolute prohibition of the employment of women in diving work does not constitute a difference in treatment permitted under Article 2(3) of Directive 76/207.

70

The range of diving work is wide and includes, for instance, activity in the fields of biology, archaeology, tourism and police work.

71
The absolute prohibition laid down in Article 31 of the regulation of 1973 excludes women even from work that does not involve significant physical stress and thus clearly goes beyond what is necessary to ensure that women are protected.

72
With regard to employment in a high-pressure atmosphere, the regulation of 1973 excludes women from work that places excessive strain on their bodies.

73
In so far as the Austrian Government claims that women have lesser respiratory capacity and a lower red blood cell count in order to justify such exclusion, it relies on an argument based on measured average values for women to compare them with those for men. However, as that Government itself acknowledged during the pre-litigation procedure, as regards those variables there are significant areas of overlap of individual values for women and individual values for men.

74
In those circumstances legislation that precludes any individual assessment and prohibits women from entering the employment in question, when that employment is not forbidden to men whose vital capacity and red blood cell count are equal to or lower than the average values of those variables measured for women, is not authorised by virtue of Article 2(3) of Directive 76/207 and constitutes discrimination on grounds of sex.

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In light of the foregoing considerations, it must be declared that, by maintaining in Articles 8 and 31 of the regulation of 1973 a general prohibition of the employment of women in work in a high-pressure atmosphere and in diving work, providing a limited number of exceptions in the former case, the Republic of Austria has failed to fulfil its obligations under Articles 2 and 3 of Directive 76/207.

Costs

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Under the first subparagraph of Article 69(3) of the Rules of Procedure, the Court may order that the costs should be shared or decide that the parties are to bear their own costs, where each party succeeds on some and fails on other heads. Since the Commission has been successful only in part, the parties are to bear their own costs.

On those grounds, the Court (Grand Chamber) hereby:

1.

Declares that, by maintaining in Articles 8 and 31 of the Druckluft- und Taucherarbeiten-Verordnung (Regulation on work in a high-pressure atmosphere and diving work) of 25 July 1973 a general prohibition of the employment of women in work in a high-pressure atmosphere and in diving work, providing a limited number of exceptions in the former case, the Republic of Austria has failed to fulfil its obligations under Articles 2 and 3 of Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions;

2.

Dismisses the remainder of the action;

3.

Orders the parties to bear their own costs.

[Signatures]

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Language of the case: German.