

## **Avis juridique important**

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**Judgment of the Court of 11 January 2000. - Tanja Kreil v Bundesrepublik Deutschland. - Reference for a preliminary ruling: Verwaltungsgericht Hannover - Germany. - Equal treatment for men and women - Limitation of access by women to military posts in the Bundeswehr. - Case C-285/98.**

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### **Keywords**

*Social policy - Men and women - Access to employment and working conditions - Equal treatment - Derogations on grounds of public security - Subject to the rules of Community law - Option available under Article 2(2) of Directive 76/207 - Scope - Total exclusion of women from armed units of the German Bundeswehr - Not permissible - Breach of the principle of proportionality - Derogation provided for under Article 2(3) of the Directive - Not applicable*

*(Council Directive 76/207, Art. 2(2) and (3))*

### **Summary**

*§§Although it is for the Member States, which have to adopt appropriate measures to ensure their internal and external security, to take decisions on the organisation of their armed forces, it does not follow that such decisions must fall entirely outside the scope of Community law. It is not possible, without impairing the binding nature of Community law and its uniform application, to recognise that there is inherent in the Treaty a general exception covering all measures taken by a Member State for reasons of public security, above and beyond the specific cases contemplated in certain provisions. Accordingly, such measures are subject to Directive 76/207 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.*

*When, in the case of the organisation of the armed forces in the Federal Republic of Germany, the competent national authorities avail themselves of the option open to them under Article 2(2) of the Directive - that is to say, of excluding from the scope of the Directive occupational activities for which, by reason of their nature or the context in which they are carried out, sex constitutes a determining factor - they cannot, without contravening the principle of proportionality, adopt the general position that the composition of all armed units in the Bundeswehr must remain exclusively male. Since the derogations provided for in Article 2(2) can apply only to specific activities, such an exclusion, which applies to almost all military posts in the Bundeswehr, cannot be regarded as a derogating measure justified by the specific nature of the posts in question or by the particular context in which the activities in question are carried out.*

*As regards the possible application of Article 2(3) of the Directive, under which differences of treatment are allowed out of a concern to protect women, the total exclusion of women from all military posts involving the use of arms is not one of the differences of treatment permissible.*

*It follows that Directive 76/207 precludes the application of provisions of national law, such as those of German law, which impose a general exclusion of women from military posts involving the use of arms and which allow them access only to the medical and military-music services.*

*(see paras 15-16, 19-20, 27, 29-32 and operative part)*

### **Parties**

*In Case C-285/98,*

*REFERENCE to the Court under Article 177 of the EC Treaty (now Article 234 EC) by the Verwaltungsgericht Hannover, Germany, for a preliminary ruling in the proceedings pending before that court between*

*Tanja Kreil*

*and*

*Bundesrepublik Deutschland*

*on the interpretation 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 particular Article 2 thereof,*

*THE COURT,*

*composed of: G.C. Rodríguez Iglesias, President, J.C. Moitinho de Almeida, L. Sevón (Presidents of Chambers), P.J.G. Kapteyn, C. Gulmann, J.-P. Puissochet (Rapporteur), G. Hirsch, H. Ragnemalm and M. Wathelet, Judges,*

*Advocate General: A. La Pergola,*

*Registrar: L. Hewlett, Administrator,*

*after considering the written observations submitted on behalf of:*

*- Tanja Kreil, by J. Rothardt, Rechtsanwalt, Soltau,*

*- the German Government, by W.-D. Plessing, Ministerialrat at the Federal Ministry of the Economy, and C.-D. Quassowski, Regierungsdirektor at the same ministry, acting as Agents,*

*- the Commission of the European Communities, by J. Grunwald, Legal Adviser, acting as Agent,*

*having regard to the Report for the Hearing,*

*after hearing the oral observations of Tanja Kreil, represented by J. Rothardt; of the German Government, represented by C.-D. Quassowski; of the Italian Government, represented by D. Del Gaizo, Avvocato dello Stato; of the United Kingdom Government, represented by J.E. Collins, Assistant Treasury Solicitor, acting as Agent, and by N. Fleming QC; and of the Commission, represented by J. Grunwald, at the hearing on 29 June 1999,*

*after hearing the Opinion of the Advocate General at the sitting on 26 October 1999,*

*gives the following*

*Judgment*

### **Grounds**

*1 By order of 13 July 1998, received at the Court on 24 July 1998, the Verwaltungsgericht (Administrative Court), Hanover, referred to the Court for a preliminary ruling under Article 177 of the EC Treaty (now Article 234 EC) a question on the interpretation 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, hereinafter 'the Directive'), in particular Article 2 thereof.*

2 The question has been raised in proceedings between Tanja Kreil and the Bundesrepublik Deutschland concerning the refusal to engage her in the maintenance (weapon electronics) branch of the Bundeswehr.

*The law applicable*

3 Article 2(1), (2) and (3) of the Directive 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.'

4 Article 9(2) of the Directive provides: 'Member States shall periodically assess the occupational activities referred to in Article 2(2) in order to decide, in the light of social developments, whether there is justification for maintaining the exclusions concerned. They shall notify the Commission of the results of this assessment.'

5 Article 12a of the Grundgesetz für die Bundesrepublik Deutschland (Basic law for the Federal Republic of Germany) provides:

'(1) Men who have attained the age of eighteen years may be required to serve in the Armed Forces, in the Federal Border Guard, or in a Civil Defence organisation.

...

(4) If, while a state of defence exists, civilian service requirements in the civilian public health and medical system or in the stationary military hospital organisation cannot be met on a voluntary basis, women between eighteen and fifty-five years of age may be assigned to such services by or pursuant to a law. They may on no account render service involving the use of arms.'

6 Access for women to military posts in the Bundeswehr are governed in particular by Article 1(2) of the Soldatengesetz (Law on Soldiers, hereinafter 'the SG') and by Article 3a of the Soldatenlaufbahnverordnung (Regulation on Soldiers' Careers, hereinafter 'the SLV'), according to which women may enlist only as volunteers and only in the medical and military-music services.

*The main proceedings*

7 In 1996, Tanja Kreil, who has been trained in electronics, applied for voluntary service in the Bundeswehr, requesting duties in weapon electronics maintenance. Her application was rejected by the Bundeswehr's recruitment centre and then by its head staff office on the ground that women are barred by law from serving in military positions involving the use of arms.

8 Tanja Kreil then brought an action in the Verwaltungsgericht (Administrative Court) Hannover claiming in particular that the rejection of her application on grounds based solely on her sex was contrary to Community law.

9 Considering that the case required an interpretation of the Directive, the Verwaltungsgericht Hannover decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

'Is Council Directive 76/207/EEC of 9 February 1976, in particular Article 2(2) of that directive, infringed by the third sentence of Article 1(2) of the Soldatengesetz (Law on Soldiers) in the version of 15 December 1995 (Bundesgesetzblatt I, p. 1737), as last amended by the Law of 4 December 1997 (Bundesgesetzblatt I, p. 2846), and Article 3a of the Soldatenlaufbahnverordnung (Regulations on Soldiers' Careers), in the version published

on 28 January 1998 (*Bundesgesetzblatt I*, p. 326), under which women who enlist as volunteers may be engaged only in the medical and military-music services and are excluded in any event from armed service?'

*The question referred for a preliminary ruling*

10 By its question the national court is asking essentially whether the Directive precludes the application of national provisions, such as those of German law, which bar women from military posts involving the use of arms and which allow them access only to the medical and military-music services.

11 The applicant argues that this bar constitutes direct discrimination contrary to the Directive. She considers that, under Community law, a law or a regulation may not prohibit a woman from access to the occupation which she wishes to pursue.

12 The German Government, on the other hand, considers that Community law does not preclude the provisions of the SG and SLV in question, which are in accordance with the German constitutional rule prohibiting women from performing armed service. According to it, Community law does not in principle govern matters of defence, which form part of the field of common foreign and security policy and which remain within the Member States' sphere of sovereignty. Secondly, even if the Directive could apply to the armed forces, the national provisions in question, which limit access for women to certain posts in the Bundeswehr, are justifiable under Article 2(2) and (3) of the Directive.

13 The Italian and United Kingdom Governments, which presented oral argument, argue basically that decisions concerning the organisation and combat capacity of the armed forces do not fall within the scope of the Treaty. Alternatively, they submit that in certain circumstances Article 2(2) of the Directive allows women to be excluded from service in combat units.

14 The Commission considers that the Directive, which is applicable to employment in the public service, applies to employment in the armed forces. It considers that Article 2(3) of the Directive cannot justify greater protection for women against risks to which men and women are equally exposed. As regards the question whether the employment sought by Tanja Kreil forms part of activities whose nature or the context in which they are carried out require, as a determining factor within the meaning of Article 2(2) of the Directive, that they be carried out by men and not by women, it is for the referring court to answer that question having due regard for the principle of proportionality and taking account both of the discretion which each Member State retains according to its own particular circumstances and of the progressive nature of the implementation of the principle of equal treatment for men and women.

15 The Court observes first of all that, as it held in paragraph 15 of its judgment of 26 October 1999 in Case C-273/97 *Sirdar* [1999] ECR I-0000, it is for the Member States, which have to adopt appropriate measures to ensure their internal and external security, to take decisions on the organisation of their armed forces. It does not follow, however, that such decisions are bound to fall entirely outside the scope of Community law.

16 As the Court has already held, the only articles in which the Treaty provides for derogations applicable in situations which may affect public security are Articles 36, 48, 56, 223 (now, after amendment, Articles 30 EC, 39 EC, 46 EC and 296 EC) and 224 (now Article 297 EC), which deal with exceptional and clearly defined cases. It is not possible to infer from those articles that there is inherent in the Treaty a general exception excluding from the scope of Community law all measures taken for reasons of public security. To recognise the existence of such an exception, regardless of the specific requirements laid down by the Treaty, might impair the binding nature of Community law and its uniform application (see, to that effect, Case 222/84 *Johnston v Chief Constable of the Royal Ulster Constabulary* [1986] ECR 1651, paragraph 26, and Case C-273/97 *Sirdar*, cited above, paragraph 16).

17 The concept of public security, within the meaning of the Treaty articles cited in the preceding paragraph, covers both a Member State's internal security, as in the *Johnston* case, and its external security, as in the *Sirdar* case (see, to this effect, Case C-367/89 *Richardt and 'Les Accessoires Scientifiques'* [1991] ECR I-4621, paragraph 22, Case C-83/94 *Leifer and Others* [1995] ECR I-3231, paragraph 26, and *Sirdar*, cited above, paragraph 17).

18 Furthermore, some of the derogations provided for by the Treaty concern only the rules relating to the free movement of goods, persons and services, and not the social provisions of the Treaty, of which the principle of

*equal treatment for men and women relied on by Tanja Kreil forms part. In accordance with settled case-law, this principle is of general application and the Directive applies to employment in the public service (Case 248/83 Commission v Germany [1985] ECR 1459, paragraph 16, Case C-1/95 Gerster v Freistaat Bayern [1997] ECR I-5253, paragraph 18, and Sirdar, cited above, paragraph 18).*

*19 It follows that the Directive is applicable in a situation such as that in question in the main proceedings.*

*20 Under Article 2(2) of the Directive, Member States may exclude from the scope of the Directive occupational activities for which, by reason of their nature or the context in which they are carried out, sex constitutes a determining factor; it must be noted, however, that, as a derogation from an individual right laid down in the Directive, that provision must be interpreted strictly (Johnston, paragraph 36, and Sirdar, paragraph 23).*

*21 The Court has thus recognised, for example, that sex may be a determining factor for posts such as those of prison warders and head prison warders (Case 318/86 Commission v France [1988] ECR 3559, paragraphs 11 to 18), for certain activities such as policing activities performed in situations where there are serious internal disturbances (Johnston, paragraphs 36 and 37) or for service in certain special combat units (Sirdar, paragraphs 29 to 31).*

*22 A Member State may restrict such activities and the relevant professional training to men or to women, as appropriate. In such a case, as is clear from Article 9(2) of the Directive, Member States have a duty to assess periodically the activities concerned in order to decide whether, in the light of social developments, the derogation from the general scheme of the Directive may still be maintained (Johnston, paragraph 37, and Sirdar, paragraph 25).*

*23 In determining the scope of any derogation from a fundamental right such as the equal treatment of men and women, the principle of proportionality, one of the general principles of Community law, must also be observed, as the Court pointed out in paragraph 38 of Johnston and paragraph 26 of Sirdar. That principle requires that derogations remain within the limits of what is appropriate and necessary in order to achieve the aim in view and requires the principle of equal treatment to be reconciled as far as possible with the requirements of public security which determine the context in which the activities in question are to be performed.*

*24 However, depending on the circumstances, national authorities have a certain degree of discretion when adopting measures which they consider to be necessary in order to guarantee public security in a Member State (Leifer, paragraph 35, and Sirdar, paragraph 27).*

*25 As the Court emphasised in paragraph 28 of its judgment in Sirdar, the question is therefore whether, in the circumstances of the present case, the measures taken by the national authorities, in the exercise of the discretion which they are recognised to enjoy, do in fact have the purpose of guaranteeing public security and whether they are appropriate and necessary to achieve that aim.*

*26 As was explained in paragraphs 5, 6 and 7 above, the refusal to engage the applicant in the main proceedings in the service of the Bundeswehr in which she wished to be employed was based on provisions of German law which bar women outright from military posts involving the use of arms and which allow women access only to the medical and military-music services.*

*27 In view of its scope, such an exclusion, which applies to almost all military posts in the Bundeswehr, cannot be regarded as a derogating measure justified by the specific nature of the posts in question or by the particular context in which the activities in question are carried out. The derogations provided for in Article 2(2) of the Directive can apply only to specific activities (see, to this effect, Commission v France, cited above, paragraph 25).*

*28 Moreover, having regard to the very nature of armed forces, the fact that persons serving in those forces may be called on to use arms cannot in itself justify the exclusion of women from access to military posts. As the German Government explained, in the services of the Bundeswehr that are accessible to women, basic training in the use of arms, to enable personnel in those services to defend themselves and to assist others, is provided.*

*29 In those circumstances, even taking account of the discretion which they have as regards the possibility of maintaining the exclusion in question, the national authorities could not, without contravening the principle of*

*proportionality, adopt the general position that the composition of all armed units in the Bundeswehr had to remain exclusively male.*

*30 Finally, as regards the possible application of Article 2(3) of the Directive, upon which the German Government also relies, this provision, as the Court held in paragraph 44 of its judgment in Johnston, is intended to protect a woman's biological condition and the special relationship which exists between a woman and her child. It does not therefore allow women to be excluded from a certain type of employment on the ground that they should be given greater protection than men against risks which are distinct from women's specific needs of protection, such as those expressly mentioned.*

*31 It follows that the total exclusion of women from all military posts involving the use of arms is not one of the differences of treatment allowed by Article 2(3) of the Directive out of concern to protect women.*

*32 The answer to be given to the question must therefore be that the Directive precludes the application of national provisions, such as those of German law, which impose a general exclusion of women from military posts involving the use of arms and which allow them access only to the medical and military-music services.*

### **Decision on costs**

#### *Costs*

*33 The costs incurred by the German, Italian and United Kingdom Governments and by the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court.*

### **Operative part**

*On those grounds,*

*THE COURT,*

*in answer to the question referred to it by the Verwaltungsgericht Hannover by order of 13 July 1998, hereby rules:*

*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 precludes the application of national provisions, such as those of German law, which impose a general exclusion of women from military posts involving the use of arms and which allow them access only to the medical and military-music services.*