

Sisters in arms: female soldiers and the evolution EC law

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1. Introduction

Every year several thousand women enlist in the armed forces of the Member States of the European Union (EU)¹. Women have been working in many of these forces for decades as nurses, musicians, and cooks. More recently they also started working as tank drivers, bomber pilots, and submarine commanders. Generally there is a Community-wide tendency to open more and more military occupations to females. Nevertheless, women remain excluded from several areas of frontline activity. Moreover, they are not subject to conscription. The degree of exclusion varies considerably from Member State to Member State². Choices on access of women to the defence sector affect the composition of the armed forces and are therefore perceived as an important aspect of national defence policy. Member States try to justify the total or partial exclusion of women with the argument that their presence in the forces compromised the combat

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¹ According to 2001 figures 3,190 women (7.7 per cent) serve in the Belgian armed forces, 862 (5 per cent) in the Danish armed forces, 6,300 (3.4 per cent) in the German armed forces, 6,155 (3.75 per cent) in the Greek armed forces, 438 (0.1 per cent!) in the Italian armed forces, 22 in the Luxembourg armed forces (overall strength 770), 4,170 (8 per cent) in the Dutch armed forces, 2,875 (6.6 per cent) in the Portuguese armed forces and 9,983 (8.2 per cent) in the Spanish armed forces. 8.55 per cent of the French armed forces are women. These figures fall short of the United States where 200,000 (14 per cent) serve in the armed forces and 90 per cent of carrier fields are open to them. Source: web site of the Committee on women in NATO forces: <http://www.nato.int/ims/2001/win/>.

² The percentage can be as high as 8.55 per cent as in France and as low as 0.1 per cent as in neighbouring Italy, *ibid*.

effectiveness of their forces. Safeguarding the combat effectiveness is a core question of national security, which is within the exclusive competence of the Member States.

The EC Treaty was created after an unsuccessful attempt to establish a supranational European Defence Community. Reasons for this failure included Member State concerns about their sovereignty³. The Community was widely understood as a commercial enterprise excluding any notion of a common defence. The Member States are the guardians of their national security. The Common Foreign and Security Policy (CFSP) and the European Defence and Security Policy (EDSP) were introduced as a second, intergovernmental pillar of the Treaty on European Union (TEU). Here the principles of supremacy of Community law and direct effect do not apply.

EU defence law can be understood as a narrow concept comprising of the second pillar and second pillar based instruments. The basic assumption of this article, however, understands EU defence law as a wider concept comprising of all common rules that relate to defence. This includes the second pillar. In addition it includes all rules that govern the commercial aspects of defence, such as the production, procurement and trade in arms and dual use goods⁴. Many of these aspects are regulated within the first,

³ France, Italy, Germany, Belgium the Netherlands and Luxembourg has signed the European Defence Community Treaty (EDC) by 1954. All by France and Italy had also ratified the Treaty when a coalition of communists and Gaullist prevented ratification in the the French parliament in August 1954. Strictly speaking the Assembly did not reject the ratification of the Treaty. It voted on a motion under Article 46 of the Assembly's procedure, a *motion préalable*, that the occasion of the debate was not suitable for deliberation and that the matter under discussion be definitely rejected without being brought forward for proper deliberation. Article 1 EDC established the supranational character of the Community comprising common institutions, common armed forces and a common budget. The supranational character of the EDC was the most controversial aspect of the project and ultimately the reason for the rejection in the *Assemblée Nationale*. Another controversial point was the executive organ of the EDC, the Board of Commissioners. On a more detailed account of the reasons for the rejection by the Assembly see: R. Aron and D. Lerner, *La querelle de la CED* (Paris: Librairie Armand Colin, 1956), the English edition is: *France Defeats EDC* (New York: Frederick A. Praeger Inc., 1957). See also E. Fursdon, *The European Defence Community: A History* (London and Basingstoke: The Macmillan Press, 1980) chapter 7: "Prelude to failure", at 227-265 and chapter 8: "La ronde est complète", at 266-299.

⁴ Material that can be used for both military and civil purposes, for example transport aircraft or tents.

supranational pillar of the TEU that is characterised by the principles of supremacy and direct effect. Finally it covers all those social rules created by the institutions of the Community that have a direct impact on the armed forces. This includes EC legislation on the equal treatment of men and women.

The regulation of defence aspects through Community legislation raises a constitutional problem: the demarcation between the competencies of the Community and that of the Member States for defence ⁵. On the one hand defence matters are generally outside the EC Treaty. On the other hand the achievement of the internal market is the main purpose of the EC Treaty. Moreover, the Community has a considerable social agenda and a substantial body of labour law.

Recent case law of the European Court of Justice sheds a new light on the limits of Community competence in areas concerned with the equal treatment of men and women in the armed forces. The judgments and advisory opinions in *Sirdar*, *Kreil* and *Dory* deal with access to employment in the forces and conscription. This paper discusses the new case law with regards to two important issues. First it analyses the effect of Community law on the equality of women in the armed forces of the Member States. Second, the paper deals with the impact of these decisions on the constitutional order of the European Union. It will be argued that some of these judgments came close to ruling on the compatibility of a national constitutional provision on defence with the EC-Treaty. The cases illustrate that Community law has an impact on an important aspect of defence: the composition of the armed forces of the Member States with regards to sex.

⁵ See the Tobacco Advertising Case: C-376/98 *Germany v European Parliament* [2000] E.C.R. I-8419, [2000] 3 C.M.L.R. 1175; T. Hervey, "Up in smoke? Community (Anti) Tobacco Law and Policy", 26 (2001) *European Law Review* 101-125; S. Crosby, "The new Tobacco Control Directive: An illiberal and illegal disdain for the law", (2002) 27 *European Law Review* 177-193; P. Syrpis, "Smoke Without Fire:

2. Equal treatment of men and women in Community law

Article 2 EC lists the objectives of the Community⁶. The list implies a commercial emphasis. However, the objectives include a high level of employment and of social protection and equality between men and women. It could be argued that, because of this commercial emphasis, the equality of men and women has to be seen in an economic context. Sex equality at the workplace has economic effects on production and service provision and national differences in regulation can be barriers to trade. If sex equality as an objective of the Community is limited to those areas where it has economic effects, it could be argued that equality between men and women in the armed forces has no economic effects and is therefore not covered by the EC objective. There are three arguments against this interpretation. First the wording of Article 2 EC does not limit the objective of sex equality and there are strong indications that equality between men and women has a constitutional dimension in the EC Treaty that goes beyond commercial limits⁷. Second the EC Treaty has objectives that go beyond economic integration.

The Social Policy Agenda and the Internal Market" (2001) 30 *Industrial Law Journal* 271-288; C. Hillion, "Tobacco Advertising: If you must, you may" (2001) 60 *Cambridge Law Journal* 486-489.

⁶ Article 2 EC reads: "The Community shall have as its task, by establishing a common market and an economic and monetary union and by implementing common policies or activities referred to in Articles 3 and 4, to promote throughout the Community a harmonious, balanced and sustainable development of economic activities, a high level of employment and of social protection, equality between men and women, sustainable and non-inflationary growth, a high degree of competitiveness and convergence of economic performance, a high level of protection and improvement of the quality of the environment, the raising of the standard of living and quality of life, and economic and social cohesion and solidarity among Member States."

⁷ In Case C-43/75 *Defrenne v SABENA (No. 2)* [1976] ECR 455, [1976] CMLR 98 the Court described the then Article 119 EC as one of the 'foundations of the Community' to achieve a 'double objective', economic and social. Nevertheless EC sex discrimination law is confined strictly within the economic context, see for example: Case C-184/83 *Hofmann v Barmer Ersatzkasse* [1984] ECR 3042, [1986] 1 CMLR 242. J. Langer, annotations in (200) 37 *Common Market Law Review* 1433, at 1443 says that the "principle gradually has been constitutionalised" and that it has some "autonomous value" in Community law. See also G. More, "The principle of equal treatment: from market unifier to fundamental right?" in P. Craig and G. de Búrca (eds.), *The Evolution of EU Law*, (OUP: Oxford, 1999) 517 at 544 and 548; H. Fenwick and T. Hervey, "Sex equality in the Single Market: new directions for the European Court of Justice", (1995) 32 *Common Market Law Review* 443; P. Craig and G. de Búrca, *EU Law* (OUP: Oxford, 2002), at 885.

Economic integration is at the core of the Community but the Treaty has objectives in the social, environmental, and other fields that go beyond its commercial emphasis. Third sex equality in the armed forces has at least indirect economic effects. If, for example, women are generally excluded from the armed forces, these women will seek employment in other parts of the economy or be a burden to the social security system.

On the basis of these considerations this paper is based on the understanding that sex equality is an objective of the EC Treaty and that the Community has the competence to legislate this area⁸. The question addressed is to what extent the competence of the Member States to regulate their armed forces is limited by the Community competence to legislate on sex equality. Thus EC legislation may have an effect on access to the armed forces. Moreover, it may have an effect on other related areas including conscription.

Community law on sex discrimination comprises of Article 141 EC on the general principle of equal pay for equal work for men and women, the Equal Pay Directive⁹, the Equal Social Security Directive¹⁰, the Equal Occupational Schemes Directive¹¹, the Equal Self - Employment Directive¹² and the Equal Treatment Directive¹³. Most provisions have at least vertical direct effect¹⁴. As a provision of the EC Treaty, Article 141 EC has

⁸ Article 141 EC is now the legal basis for secondary legislation on the equal treatment of men and women.

⁹ Council-Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principles of equal pay for men and women [1975] OJ L-45/19.

¹⁰ Council-Directive 79/7/EEC of 19 December 1979 on the progressive implementation of the principle of equal treatment for men and women in matters of social security [1979] OJ L-6/24.

¹¹ Council-Directive 86/378/EEC of 24 July 1986 on the implementation of the principle of equal treatment for men and women in occupational social security schemes [1986] OJ 1986 L-225/40.

¹² Council-Directive 86/613/EEC of 11 December 1986 on the application of the principle of equal treatment between men and woman engaged in an activity, including agriculture, in a self-employed capacity, and on the protection of self-employed women during pregnancy and motherhood [1986] OJ L-359/56.

¹³ Directive 76/207/EEC on the implementation of the principle of equal treatment of men and women regards access to employment, vocational training and promotion, and working conditions [1976] OJ L-39/40.

¹⁴ Case C-91/92 *Faccini Dori* [1994] E.C.R. I-3325; [1995] 1 C.M.L.R. 665; Case C-152/84 *Marshall v. Southampton and South-West Hampshire Area Health Authority* [1986] E.C.R. 723; [1986] 1 C.M.L.R.

also horizontal direct effect¹⁵. The employer of soldiers is the national ministry of defence as an organ of the respective Member State. They will therefore always be able to bring cases against their employer on the basis of vertically directly effective provisions of the sex equality directives¹⁶. The cases discussed in this paper are all concerned with the Equal Treatment Directive. Article 2 (1) of the Equal Treatment Directive provides:

“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.”
[emphasis added]

This wide prohibition is not absolute but subject to several exemptions. These will be discussed below.

3. Defence and national security in Community law

The EC Treaty is not directly concerned with defence integration. Founding and acceding Member States intended to retain their sovereignty over defence and national security. Defence, however, has commercial, social and even environmental implications.

688, at paragraph 48; Case C-106/89 *Marleasing SA v La Comercial Internacional de Alimentacion SA*. [1990] E.C.R. I-4135; Case C-443/98 *Unilever Italia SpA v Central Food SpA* [2000] E.C.R. I-7535.

¹⁵ Case C-43/75, *Defrenne v Sabena II* [1976] E.C.R. 455, at paragraph 39; Case C-143/83 *Commission v. Denmark* [1985] E.C.R. 427.

¹⁶ Case C-152/84 *Marshall v Southampton and South West Hampshire Area Health Authority (Teaching)* [1986] ECR 723, [1986] 1 CMLR 888, [1986] 2 WLR 780, [1986] 2 All ER 584.

Competition in the defence sector¹⁷, exports and intra-community transfers of weapons¹⁸, defence procurement¹⁹, and State aids to the defence industries²⁰, show that defence has not only a political but also a market dimension. The very issue of this paper, equal treatment of men and women in the armed forces shows that defence has a social dimension. Finally the armed forces can violate environmental requirements. Therefore the EC Treaty requires a mechanism to balance the internal market and other interests of the Community with the defence and national security interests of the Member States. This mechanism is provided in Articles 296 (ex223), 297 (ex224), 30 (ex36), 39 (3) (ex48), 46 (3) (ex56) and 58 (1) (b) (ex73d) EC, representing exemptions from the Treaty for reasons of public and national security²¹. The exemptions in Articles 30, 39 (3), 46 (3) and 58 (1) (b) EC are limited to their specific regimes on goods, workers, establishment or services²². They have to be invoked, justified, proven and are subject to strict judicial

¹⁷ On competition law and merger control in the defence sector see: M. Trybus, "European Defence Procurement: Towards a Comprehensive Approach", (1998) 4 *European Public Law* 111, at 117-126.

¹⁸ On defence exports see: P. Koutrakos, Trade, Foreign Policy & Defence in EU Constitutional Law (Hart Publishing: Oxford, 2001), at 93-130; "Exports of Dual-Use Goods under the Law of the European Union" (1998) 23 *European Law Review* 235; K. Eikenberg, "Article 296 (ex 223) E.C. and external trade in strategic goods" (2000) 25 *European Law Review* 117; A. Collert, "L'Europe des armes, un double démarche", (1992) *R.T.D.E.* 105; N. Emiliou, "Strategic Export Controls, National Security and the Common Commercial Policy" (1996) *European Foreign Affairs Review* 55; "Restrictions on Strategic Exports, Dual Use Goods and the Common Commercial Policy" (1997) 22 *European Law Review* 68; O. Lhoest "La production et la commerce des armes, et l'article 223 du traité constituant la Communauté européenne" (1993) 1 *Revue Belge de droit international* 176; J. Govaere and P. Eeckhout, "On dual use goods and dualist case law: the Aimé Richardt judgement on export controls", (1992) 29 *Common Market Law Review* 956; .

¹⁹ On defence procurement see: M. Trybus, "Procurement for the armed forces: balancing security and the internal market", (2002) 27 *European Law Review* 692-713; *European Defence Procurement Law: International and National Procurement Systems as Models for a Liberalised Defence Equipment Market* (Kluwer Law International: The Hague/London/Boston, 1999); "National Models for the Regulation of the Acquisition of Armaments: Towards a European Defence Procurement Code" in S. Arrowsmith and A. Davies (eds.), *Public Procurement: Global Revolution*, (Kluwer Law International: London, 1998) 71-93.

²⁰ On State aids to the defence industries see: M. Trybus, "European Defence Procurement: Towards a Comprehensive Approach", *supra* note 17, at 128-131.

²¹ See on these provisions in detail: M. Trybus, "The EC Treaty as an instrument of European defence integration: judicial scrutiny of security and defence exclusions", (2002) 39 *Common Market Law Review* 1347-1372.

²² Articles 12 (ex6), 14 (ex7a), 18 (ex8a), 150 (ex127) and 294 (ex221) EC can also be connected to national security, see S. Peers, "National Security and European Law", (1996) 15 *Yearbook of European*

scrutiny of the Court, including a detailed proportionality test²³. The exemptions in Article 296 and 297 EC deal specifically with national security and leave a wider margin of discretion to the Member States. Nevertheless they also have to be invoked, justified, proven and are subject to scrutiny²⁴. Article 298 (2) EC provides a special review procedure for the use of these articles. All exemptions have to be narrowly construed, as a wide interpretation would be detrimental to the functioning of the internal market as a whole²⁵. The concept of public security in the sense of these provisions covers both the Member State's internal²⁶ as it's external²⁷ security. There are also security type exemption in the other Treaties²⁸ and secondary Community law²⁹. To summarise: the national security interests of the Member States are accommodated by a wide margin of

Law 363, at 366-367. Articles 64 (ex73i) and 68 (ex73p) EC and 2 (3) sentence 2 of the Protocol Integrating the Schengen *Acquis* into the Framework of the European Union, OJ [1997] C-340/96 are relevant.

²³ See for example in relation to Article 30 EC: Case C-72/83 *Campus Oil Limited v Minister for Industry and Energy*, [1984] ECR 2727, at 2764, [1984] 3 CMLR 544, at 558.

²⁴ See for example in relation to Article 296 (1) (b) EC: Case C-414/97 *Commission v Spain* [1999] ECR I-5585, [2000] 2 CMLR 4, discussed by: M. Trybus "On the Application of the E.C.-Treaty to Armaments", (2000) 25 *European Law Review* 633 and "The Recent Judgment in *Commission v. Spain and the Procurement of Hard Defence Material*" (2000) 9 *Public Procurement Law Review* NA99. On Article 297 EC see Advisory Opinion of AG Jacobs in C-120/94R *Commission v Greece*, [1996] ECR I-1513 ('FYROM' or 'Macedonia' case). See also P. Koutrakos, "Is Article 297 a "Reserve of Sovereignty"?", (2000) 37 *Common Market Law Review* 1339-1362.

²⁵ Case C-222/84 *Marguerite Johnston v Chief Constable of the Royal Ulster Constabulary*, [1986] ECR 1651, [1986] 3 CMLR 240, at paragraph 26. See also Case C-13/68 *SpA Salgoil v. Italian Ministry of Foreign Trade* [1968] ECR. 453, at 463, [1969] CMLR 181, at 192.

²⁶ *Johnston*, *ibid.*

²⁷ Case C-367/89 *Richardt and 'Les Accessoires Scientifiques'* [1991] ECR I-4621, at paragraph 22: Case C-83/94 *Leifer and Others* [1995] ECR I-3231, at paragraph 26.

²⁸ See Articles 69 (1) ECSC-Treaty and 96, 194 and 195 EAC-Treaty.

²⁹ For example: Article 2 and 3 Directive 93/36/EEC OJ [1993] L-199/1, Article 4 (1) and (2) Directive 92/50/EEC [1992] OJ L-209/1, Article 4 (b) Directive 93/37/EEC [1993] OJ L-199/54, and Article 10 Directive 93/38/EEC OJ [1993] L-199/84 (on public procurement), Articles 6 and 9 Directive 64/221/EEC OJ Sp Ed 1963-4,117 (on the free movement of persons), Article 21 (3) Regulation 4064/89/EEC OJ [1989] L-395/1 (on merger control), and Article 11 Regulation 2603/69/EEC [1969] OJ L-324/25, [1991] OJ L-372/31 (on exports). There are also security provisions in the EC trade agreements, see Peers, *supra* note 22, at 374-378.

appreciation; the internal market interests of the Community are accommodated by a narrow interpretation and judicial scrutiny to varying degrees of intensity³⁰.

Articles 39 and 297 EC are the exemptions most relevant to the organisation of the armed forces. Article 39 EC provides for the free movement of workers through the prohibition of discrimination on grounds of nationality in Article 39 (2) EC and the free movement in Article 39 (3) EC. The armed forces of the Member States are exempt from this regime as they are covered by the public service exclusion in Article 39 (4) EC³¹. Measures limiting free movement can be justified for public security reasons on the basis of Article 39 (3) EC³². These exemptions only apply to the free movement of workers regime of the Treaty: they can justify discrimination on grounds of nationality but not discrimination on grounds of sex.

Article 297 EC provides for a special consultation procedure between Member States taking together the steps needed to prevent the functioning of the common market being affected by measures, which a Member State may be called upon to take in a number of situations involving national security. These situations apply: [1] “in the event of serious internal disturbances affecting the maintenance of law and order, [2] in the event of war, [3] serious international tension constituting a threat to war; or [4] in order to carry out obligations it [the Member State] has accepted for the purpose of maintaining peace and international security“. Member States have used this provision to argue against the penetration of Community law into the organisation of their armed forces, including in

³⁰ See M. Trybus, “The EC Treaty as an instrument of European defence integration: judicial scrutiny over defence and security exemptions”, *supra* note 21.

³¹ See for example: Case C-307/84 *Commission v France* [1986] ECR 1725, 1733; [1987] 3 CMLR 555.

³² Case C-355/98 *Commission v Belgium* [2000] E.C.R. I-1221; Case C-114/97 *Commission v Spain* [1998] ECR I-6717.

the cases discussed in this paper³³. However, this provision has a very narrow field of application³⁴ and cannot justify permanent measures³⁵, such as the exclusion of women from serving in arms. The provision will be discussed in the context of the judgments analysed below.

4. Equal treatment of men and women in the armed forces

The Equal Treatment Directive (hereafter the Directive) applies to employment in the public service³⁶ including the armed forces³⁷. It does not contain a security or defence specific exemption or an exemption for the armed forces. As pointed out above, it is part of the social provisions of Community law and not part of the free movement of workers regime of the EC Treaty to which the public service exemption in Article 39 (4) EC applies. However, the Directive contains an exemption that could potentially be interpreted as justifying discrimination of women in relation to certain dangerous professions, although not on a literal interpretation. Member States have argued that the entirety or parts of their armed forces were one of these dangerous professions³⁸. Article 2 (2) of the Directive reads:

³³ Case C-15/69 *Württembergische Milchverwertungs-Südmilch AG v Ugliola*, [1969] ECR 363, [1970] CMLR 194; Case C-273/97 *Angela Maria Sirdar v The Army Board ex parte Secretary of State for Defence*, [1999] ECR I-7403, [1999] 3 CMLR 559; Case C-285/98 *Kreil v Germany*, [2000] ECR I-69. See also *Johnston*, *supra* note 25, at paragraph 36.

³⁴ AG Jacobs in Case C-120/94 *FYROM*, *supra* note 24.

³⁵ Verhoeven, in *Commentaire du Traité instituant la CEE*, Constantinesco, Jacqué, Kovar and Simon (eds.), (Economica: Paris, 1992), entry dealing with Article 224 EC (now 297), at point 2. One commentator even refers to unilateral measures of “strictly necessary duration” designed to deal with “exceptional and particularly serious circumstances”: see Quadri, Monaco, Trabucchi, *Commentario al Trattato istitutivo della Comunità economica europea*, (Giuffrè: Milan, 1965), Vol. III, entry dealing with Article 224, at 1633 -1634 (as cited by AG La Pergola in Case C-273/97 *Sirdar*, *supra* note 33, at paragraph 21). AG Cosmas in Case C-423/98 *Alfredo Albore* [2000] ECR I-5965, at paragraph 31.

³⁶ Case C-248/83 *Commission v Germany* [1985] ECR 1459, at paragraph 16; Case C-1/95 *Gerster v Freistaat Bayern* [1997] ECR I-5253, at paragraph 18.

³⁷ Case C-273/97 *Sirdar*, *supra* note 33; Case C-285/98 *Kreil*, *supra* note 33.

³⁸ Case C-273/97 *Sirdar*, *supra* note 33; Case C-285/98 *Kreil*, *supra* note 33.

“This Directive shall be without prejudice to the right of Member States to exclude from its field of application those occupational activities and, when 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.”

This is not an exemption intended to safeguard Member State sovereignty over national security and defence; there is no such safeguard in the Directive. The exclusion is intended to take differences between the sexes into account³⁹ as will be discussed in more detail below.

4.1. *Johnston*: women wearing firearms

The ‘mother’ of all cases on the armed forces discussed in this paper and on the derogation in Article 2 (2) Directive is *Johnston*⁴⁰, although this original ruling is not itself an armed forces case. A female officer of the Royal Ulster Constabulary (RUC), now the Police Service Northern Ireland (PSNI), brought an action against a decision of her employer refusing to renew her contract of employment. As women were neither trained in the use of firearms nor permitted to use them, the RUC had decided a new policy not to employ women as full time members of their reserve. The RUC argued by

³⁹ H. Fenwick, “Special Protections for Women in European Union Law” in T. Hervey, and D. O’Keeffe (eds.), *Sex Equality Law in the European Union* (Chichester: John Wiley and Sons, 1996), at 63-80.

⁴⁰ Case C-222/84 *Johnston*, *supra* note 25. See E. Ellis, “Can Public Safety Provide an Excuse for Sex Discrimination?” (1986) *The Law Quarterly Review* 496-500; V. Shrubbsall, “Protection Practices and the Equal Treatment Directive” (1987) 19 *Industrial Law Journal* 118-121; P. E. Morris, “Sex Discrimination, Public Order and the European Court” (1987) *Public Law* 334-344; A. Arnall, “The Beat Goes On”, (1987) 12 *European Law Review* 56-61; R. Wallace, “Free Movement for Workers and Social Security: Remedies for Foul Play” (1988) 13 *European Law Review* 267- 270.

analogy with Article 39 (3) EC (then 48 (3) EC) that because of the political situation in the province, derogation was justified on public safety or public security grounds. Moreover they considered it justified under Article 2 (2) Directive⁴¹. Allowing women to carry and use firearms increased their risk of becoming the target for assassinations. The Member States had the discretion to decide whether, “owing to the requirement of national security and public safety or public order, the context in which the occupational activity is carried out prevents that activity from being carried out by a policewoman⁴²”.

The Court clarified two important points. First it held that there is no general public safety exemption to the equal treatment principle available under the EC Treaty, thereby rejecting the RUC’s argument based on the analogy with Article 39 (3) EC.

Second they held that derogation could only be examined in the light of the Directive. The Directive provides an exemption in Article 2 (2) that, “being a derogation from an individual right” has to be interpreted strictly⁴³. In relation to Article 2 (2) of the Directive the Court provided the following three-limb test:

First, the derogation can only be applied to specific duties, not to activities in general. Nevertheless it is permissible to take the context in which the activity takes place into account⁴⁴. The context in which the activity is carried out can be a reason for the sex of the person carrying out the activity being a determining factor in the sense of Article 2 (2)

⁴¹ The RUC also sought to justify its action under Article 2 (3) Directive, as “concerning the protection of women, particularly as regards pregnancy and maternity”. The Court held that the risks to policewomen arising from the situation in the province were not within the scope of the derogation. Article 3 (3) Directive is intended to protect women’s biological condition.

⁴² Case C-222/84 *Johnston*, *supra* note 25, at paragraph 31.

⁴³ Case C-222/84 *Johnston*, *supra* note 25, at paragraph 36.

⁴⁴ In Case C-318/86 *Commission v France*, [1988] ECR 3559, [1989] 3 CMLR 663, a case on prison wardens, the Court made clear that derogation is possible only in relation to specific activities, and these exceptions must be sufficiently transparent to permit effective scrutiny. The fact that women cannot perform certain police functions does not justify discriminatory treatment in admission to the police force in general. The application of the derogation requires a specific assessment of the specific duties to be performed in individual cases.

of the Directive. The environment in which the activity is carried out determines this context. In *Johnston* an environment of serious internal disturbances that characterised the situation in Northern Ireland determined the context in which police activities were carried out. In other words, public security considerations determined the context in which police activities were carried out. In the situation of Northern Ireland, said the Court, the carrying of firearms by women can be contrary to public security requirements due to an additional risk of being assassinated⁴⁵. Because of this additional risk compromising public security, the gender of a police officer can constitute a determining factor⁴⁶. In such a situation, a restriction of particular tasks to men can be justified on the basis of Article 2 (2) of the Directive. Thus Article 2 (2) of the Directive can effectively be a public security exemption if the deployment of women causes additional risks. The questions are whether the deployment really does cause additional risks, who determines whether it does, and whether the Court has the authority to scrutinise this evaluation made by the Member States. In *Johnston* the Court assumed such an additional risk. The United Kingdom had argued an additional risk caused by “the difference in physical strength between the sexes, the probable reaction of the public to the appearance of armed policewomen and the risk of their being assassinated”⁴⁷. The United Kingdom had also argued that the decision about this additional risk was within the discretion of the Member States. The Court did not specifically rule on the discretion of Member States in this context but it assumed that such an additional risk might exist. The term “the possibility cannot be excluded” could be interpreted as indicating that the Court itself

⁴⁵ The Court, building on an argument of the United Kingdom, assumes that there is an additional risk for women wearing firearms to be assassinated.

⁴⁶ Case C-222/84 *Johnston*, *supra* note 25, at paragraph 37.

⁴⁷ See reference of the Court in Case C-222/84 *Johnston*, *supra* note 25, at paragraph 30.

made that evaluation and did not assume the discretion argued by the United Kingdom. However, it seems more appropriate to leave maximum discretion on whether there is an additional risk to the discretion of the Member States. Only when an additional risk is manifestly not given or the Member State does not argue such a situation in good faith should the Court rule against it. This is because the Member States are the only guardians of security and the Court lack the expertise to evaluate whether such an additional risk exists. It is the Member States who have the staff and the police forces that have the expertise to evaluate this additional risk. Their judgement, which is necessarily partly subjective, cannot easily be substituted by the judgement of the Court.

It is submitted, however, that *Johnston* represents a case where an additional risk was manifestly not given. The reasons put forward by the United Kingdom for an additional risk are not convincing. The “difference in physical strength between the sexes” is not an important factor when a woman wears a firearm, and the wearing of firearms was the issue in this case. Most women will have the physical strength to pull a trigger. It is not clear what kind of “probable reaction of the public to the appearance of armed policewomen” is anticipated. Did the United Kingdom expect riots in reaction to armed women? The additional “risk of their being assassinated” for armed women is also not persuasive.

Another question related to this additional risk test is the definition of the concept of public security that determines the context that can make gender a determining factor in the sense of Article 2 (2) of the Directive is not taken from Article 39 (3) or 297 EC. The Court made clear that the earlier exemption applies only to the free movement of workers regime of which the Directive is not a part. Moreover it considers Article 297 EC to

concern “a wholly exceptional situation” and the subject matter of another question put to the Court⁴⁸. However, public security in the context of Article 2 (2) of the Directive is not related to the concepts of security in the exemptions of the Treaty. In the Treaty security is like a national privilege, as such giving Member States the right to derogate from the Treaty. In the Directive security is one of several factors, biological differences being one of the others, which can determine a context in which gender is a determining factor to carry out a certain activity. Security does not justify derogation as such. Therefore the concept of security that can apply in the context of Article 2 (2) of the Directive is distinct from the concepts of security in the Treaty. It is an autonomous concept.

Second, the derogation is subject to the principle of proportionality. Hence derogation has to be suitable, necessary and proportional in the strict sense to accommodate the fact that sex is a determining factor for a specific duty⁴⁹. The derogation was later successfully used to justify limitations in relation to prison wardens and head prison wardens⁵⁰. However, in *Johnston* the Court referred the case back to the national court to decide on the proportionality⁵¹.

Third, where derogation is justified, the situation must be reviewed periodically to ensure that the justification still exists⁵². Soon after *Johnston* the PSNI changed its policy and allowed women into activities involving the carrying of arms⁵³.

Johnston is important because it shows the impact of security on the application of the Directive and made clear that all security exemptions from the Treaty have to be

⁴⁸ Case C-222/84 *Johnston*, *supra* note 25, at paragraph 27.

⁴⁹ Case C- 222/84 *Johnston*, *supra* note 25, at paragraph 38.

⁵⁰ Case C-318/86 *Commission v France*, *supra* note 44.

⁵¹ Case C-222/84 *Johnston*, *supra* note 25, at paragraph 39.

⁵² *Ibid.*

⁵³ According to Inspector Ken Cameron of the Emergency Planning Unit of the PSNI, today the PSNI does not have restrictions on female officers in any activity, e-mail dated 20 February 2003.

interpreted narrowly. However, the Court did not go as far as to rule against the discriminatory measure of the Member State.

4.2. *Sirdar*: who is cooking for the Royal Marines?

It was already clear from *Johnston* that the blanket exclusion of women from the armed forces as a whole would be difficult to justify on the basis of Article 2 (2) of the Directive. The derogation can only be applied to specific duties, not to activities in general. Moreover, it was clear that the fact that the exercise of a specific military duty involved the use of firearms as such would also not suffice to justify the exclusion of women on the basis of this derogation. However, it took another 15 years before the Court finally decided on the application of the exemption with regards to the armed forces in particular.

4.2.1. The facts

The *Sirdar* case⁵⁴ continued the line of judgements⁵⁵ started by *Johnston*. It concerned a female soldier who had been a chef in the British Army since 1983. Before she was made redundant for economic reasons, she received an offer from the Royal Marines who had a shortage of chefs. However, when the responsible authorities became aware of the fact that she was a woman, they informed her that she was ineligible because there was a general policy to exclude women from that regiment. This policy was adopted on the ground that their presence was incompatible with the requirement of 'interoperability'.

⁵⁴ Case C-273/97 *Sirdar*, *supra* note 33. See reactions: J. Langer, annotations in (2000) 37 *Common Market Law Review* 1433; P. Koutrakos, "Community law and equal treatment in the armed forces", (2000) 25 *European Law Review* 433; J. M. Kämmerer, "Gleichberechtigung am Gewehr", (2000) *Europarecht*

Every Royal Marine has to be capable of fighting in a commando unit⁵⁶. Sirdar brought the matter before an industrial tribunal who made a reference for a preliminary ruling under Article 234 EC.

4.2.2. *The judgement*

The Court based their judgment on the exemption in Article 2 (2) of the Directive and the principles developed in *Johnston*⁵⁷ which require a narrow interpretation of all exceptions. It ruled that within the context of Article 2 (2) of the Directive:

“That principle [of proportionality] requires that derogation 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.*”⁵⁸

Referring to the judgment in *Leifer*⁵⁹, a case on the export of strategic products, the Court said that Member States have a certain margin of discretion when “adopting measures

102, at 116; J. Rideau, “Overservation sur Sirdar”, (2000) No. 19 *Receuil Le Dalloz Sommaires Commentés* 191-192 and J.-L. Clergerie, in No. 22, *Commentaire Jursiprudence* at 487-489.

⁵⁵ Expression of P. Koutrakos, *ibid.*, at 436.

⁵⁶ Paragraph 2 (b) of the Revised Employment Policy for Women in the Army – Effect on the Royal Marines states: “In a small corps, in times of crisis and manpower shortage, all Royal Marines must be capable at any time of serving at their rank and skill level in a commando unit [...] Employment of women in the Royal Marines will not allow for interoperability”. Cited by the Court in *Sirdar*, *supra* note 33, at paragraph 7.

⁵⁷ Case 273/97 *Sirdar*, *supra* note 33, at paragraphs 23-26.

⁵⁸ Case 273/97 *Sirdar*, *supra* note 33, at paragraph 26.

⁵⁹ *Leifer*, *supra* note 27, at paragraph 35.

which they consider to be necessary in order to guarantee public security in a Member State”. The Court held:

“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 safety* and whether they are appropriate and necessary to achieve that aim.”⁶⁰

Hence the Member States have a margin of discretion but the Court will scrutinise the proportionality of the measure and whether it served the purpose of the narrowly construed exception that is invoked to justify it.

The Court went on to test whether the total exclusion of women from a particular unit could be justified by the objective of interoperability. It took into account that the organisation of the Royal Marines differs considerably from that of any other unit of the British armed forces, as they are the ‘point of the arrow head’, and that they are a small force and intended to be the first line of attack. All members including chefs have to serve as front-line commandos, are trained for the purpose, and there are no exceptions at time of recruitment⁶¹. On the basis of these considerations the Court ruled that:

“the competent authorities are entitled [...] to come to the view that the specific rules for deployment of the assault units of which the Royal Marines are

⁶⁰ *Sirdar*, *supra* note 33, at paragraph 28.

⁶¹ *Sirdar*, *ibid.*, at paragraph 29.

composed, and in particular the rule on interoperability to which they are subject, justified their composition remaining exclusively male.”⁶²

Thus, according to the Court, the interoperability of a small combat unit on the first line of attack can justify the total exclusion of women. It is within the discretion of the Member State to consider the principles of interoperability and combat effectiveness being affected by the presence of women. The measure of total exclusion goes very far but it is justifiable in relation to a very particular kind of unit.

4.2.3. *Comment*

This line of argument is only partly convincing. The Court does not explain why the principle of interoperability is affected by the presence of women in a small combat unit⁶³. The advisory opinion of Advocate General La Pergola cites material provided by the United Kingdom government arguing that Royal Marines have to “maintain a high level of physical fitness”. This seems to indicate that the principle of interoperability is negatively affected by the presence of women in the corps because they do not have the required level of physical fitness. It is accepted that most women might not have the necessary level of physical fitness to be Royal Marines. However, some women do. Moreover, most men are not fit enough to be Royal Marines. Surely it is necessary to look at the individual applicant to decide on his or her physical fitness. If a female applicant has the required level of physical fitness her level of fitness cannot compromise

⁶² *Sirdar, ibid.*, at paragraph 30.

⁶³ P. Koutrakos, *supra* note 54, at 436, considers the answer to this question to be a part of the discretion enjoyed by the Member States. However, the answer to this question is crucial for determining whether the measure in question is aimed at ensuring the combat effectiveness and interoperability of the Royal

the principle of interoperability. Hence the total exclusion of a group of society because of their sex is manifestly unsuitable to achieve interoperability, if this is what interoperability means. Moreover, the exclusion of women from the Royal Marines is not appropriate when there is a measure less restrictive on the equal treatment of women but equally effective to achieve interoperability. The definition of objective access requirements would be such a less restrictive measure⁶⁴. Moreover in contrast to the total exclusion of women it would be a measure suitable to ensure interoperability.

Another possible argument against the presence of women might be that the average Royal Marine is a rather conservative character, finding it difficult to work with women, particularly in a combat situation. He would be too sexist to fight side by side with a female colleague, let alone to accept orders from a female superior⁶⁵. This traditionalist male opposition would compromise the interoperability and combat effectiveness of the corps. Moreover, the average Royal Marine is a gentleman. Rather than fighting side by side with a female Marine, he might feel the urge to protect her in a combat situation⁶⁶. From a legal point of view, this line of argument cannot easily be accepted. The question is, whether a government or a court should accept male chauvinism or protective instincts as an argument for the lawful exclusion of women from a particular activity⁶⁷.

Community law and the law of all Member States clearly prohibit the discrimination of

Marines. This determination it is necessitates the consideration of possible alternative motives and a discussion of the effect of women on combat effectiveness and interoperability.

⁶⁴ J. M. Kämmerer, *supra* note 54, at 116.

⁶⁵ See Alison Utley, "Army struggles to integrate women", *The Times Higher Education Supplement*, February 7, 2003, at 5: "Masculine culture still dominates the British army, whose top brass echoed tabloid stereotypes of female soldiers as gusty types who would never be good enough to be real soldiers". The article reflects on research done by Newcastle and Sunderland universities.

⁶⁶ Male soldiers tend to protect each other in combat situations to a certain extent. This comradeship rather than 'the love for King and country' keep most soldiers in the ranks during a war.

⁶⁷ These phenomena are very present in many other professions traditionally reserved to men. Examples include the fire and police services, the legal professions and even academia.

women⁶⁸. Moreover, keeping a number of commando units or the Royal Marines as a whole exclusively female could also ensure interoperability⁶⁹. Hence it is submitted that the total exclusion of women from the Royal Marines is neither suitable nor necessary and therefore not proportional.

The ruling in *Sirdar* is also objectionable because it facilitates abuse of Article 2 (2) of the Directive in the context of the armed forces⁷⁰. The ruling is not entirely clear on whether it considers the British rules to be proportional or just within the margin of appreciation or discretion of the United Kingdom. However, it is widely interpreted as a ruling on the proportionality of the exclusion of women from certain units⁷¹.

The argument that women are generally not suited to serve in arms is not proven. On the contrary the fact that many women are suitable is proven by their successful deployment in many units of many armed forces. Exclusion of women from certain activities in the armed forces may only be on the basis of Article 2 (2) of the Directive because sex is a determining factor. The public security considerations of interoperability and combat effectiveness determine the context in which the activity is to be carried out. As explained above, these considerations can only be promoted when the access to combat

⁶⁸ Austria: Article 7 (1) of the Constitution; Belgium: Article 10 (2) of the Constitution; Denmark: Section 83 of the Constitution; Finland: Section 6 (1) (2) of the Constitution of 2000; France: Article 1 Declaration de Droit de l' Hommes et de Citoyens; Germany: Article 3 (2) Basic Law; Greece: Art. 4 (1) (2) of the Constitution; Italy: Article 3 (1) of the Constitution; Luxembourg: Article 11(2) of the Constitution; Netherlands: Article 1 of the Constitution; Portugal: Article 13 of the Constitution; Spain: Article 14 of the Constitution; Sweden: Article 16, Chapter 2 of the Constitution; United Kingdom: Article 14 of the Human Rights Act 1998 (the United Kingdom is the only Member State of the European Union without a written constitution).

⁶⁹ J. M. Kämmerer, *supra* note 54, at 115-116.

⁷⁰ *Ibid.*

⁷¹ J. M. Kämmerer, *supra* note 54, at 115.

activities is based on objective qualification criteria that are themselves based on military requirements. Simply being a man is no such objective qualification⁷².

The decision whether interoperability and combat effectiveness of the armed forces are compromised is within the discretion of the Member States. The fact that the Court considered the United Kingdom measure to be proportional, although for the reasons outlined above there are doubts whether this is convincing, shows that this margin of appreciation is relatively wide. The extent of this margin of discretion is linked to the question of intensity of review exercised by the Court. The standard of review has to be different to that applied to measures which do not affect defence and security, an area generally outside Community competence. The military implications limit the intensity of control exercised by the Court⁷³. Only when the interoperability is clearly not affected or the measure to ensure it is manifestly disproportionate should the Court intervene. In the constitutional order of the European Union it is the Member States and not the Community who have the competence, expertise, and capabilities to safeguard defence. Moreover, national security issues are the responsibility of the executive arm of government and not of the judiciary. It is the government supported by its military staff that has the expertise to take decisions on defence. The judge cannot easily substitute the judgement of the executive with his or her own. In the context of the *Sirdar* case, the Court had to accept the discretion of the United Kingdom. There are good reasons to limit judicial control to manifestly disproportionate cases of abuse. However, for the

⁷² J. Langer, *supra* note 54, at 1444 supports the decision and considers it to be “not surprising” and “a follow-up” decision to *Johnston*. The Court had already accepted that gender could be a justified and proportional determining factor in the case of prison wardens or police units in Northern Ireland. However, as explained above, in *Johnston* the Court had not decided on the proportionality of the measure but had ruled that this was a question for the national Court to decide. Langer does not, however, discuss proportionality in detail. Neither did the Court.

⁷³ P. Koutrakos, “Community law and equal treatment in the armed forces”, *supra* note 54, at 438.

arguments regarding the lack of suitability and necessity argued above, it is submitted that the *Sirdar* case represented such a clearly disproportionate case of abuse. The fact that the Court still considered the disproportionate United Kingdom measure to be proportional shows that this margin of appreciation is relatively wide.

Prima facie the Court does not apply the 'additional risk' test established in *Johnston*. However, it is submitted that the notions of 'interoperability' and 'combat effectiveness' point essentially in the same direction. Negative effects on interoperability and combat effectiveness cause additional risks for public and national security. Hence the Court does not deviate from the additional risk requirement it only established a variation of it.

The part of *Sirdar* stipulated in paragraph 28 of the ruling mentioned above confirms a function of Article 2 (2) of the Directive already developed in *Johnston*. Article 2 (2) can be a public security exemption in the context of the activities carried out by the police or the armed forces. Moreover, in *Sirdar* the Court applied a proportionality test whereas in *Johnston* they had left the decision on the proportionality of the measure to the national court⁷⁴. However, *Sirdar* does not clarify what the precise standard of review is. The Court left open whether the intensity of scrutiny is that of the public security exemptions of the free movement regimes or whether another standard of review applies. When functioning as a security exemption in the context of the armed forces Article 2 (2) of the Directive has to balance the social interest of the Community to ensure equal treatment with the national security interest of the Member States. The basic tools to achieve this balance are judicial scrutiny to safeguard the Community interest and a margin of discretion to safeguard the Member State interest. In the context of the armed forces the margin of discretion will be wider than for civilian professions because the composition

of the armed forces is a question of defence which is within the competence of the Member States. The baseline for judicial scrutiny is the general rule that exemptions have to be narrowly construed. The main instrument of judicial scrutiny is the proportionality test. Within the proportionality test the suitability of a measure to promote national security is mainly determined by the additional risk test established in *Johnston*. The presence of women in a particular unit or activity poses an additional risk for security and makes (the male) sex a determining factor in the sense of Article 2 (2) of the Directive. *Sirdar* established that negative effects on interoperability and therefore on combat effectiveness can constitute an additional risk. However, this was not clearly spelt out. Moreover, for the reasons outlined above this is not considered to be convincing. Therefore the *Sirdar* is no contribution to clarity and coherence in the context of the crucial question of the standard of review.

It is submitted that the level of scrutiny possibly applied to Article 297 EC would not have been appropriate. Rules on the composition of the armed forces are permanent measures outside the narrowly defined emergency situations envisaged by Article 297 EC⁷⁵. The provision represents a “wholly exceptional clause”⁷⁶ and in *Sirdar* the Court

⁷⁴ Case C-222/84 *Johnston*, *supra* note 25, at paragraph 39.

⁷⁵ In Case C-273/97 *Sirdar* AG La Pergola pointed out “that the cases envisaged by Article 297 EC concern temporary and non-permanent situations” (paragraph 21) He gave an example in the adoption of unilateral measures under Article 297 EC by the United Kingdom in a temporary situation of serious crisis which arose in 1982 when Argentine troops occupied the British Falkland Islands. Thus, so the AG, in contrast to Article 296 (1) (b) EC, which refers to the general measures a Member State adopts in times of peace for the purpose of safeguarding its security, Article 297 EC refers to the special measures which prove necessary in an actual crisis situation which has already developed. In Case C-423/98, *Albore*, *supra* note 35, at paragraph 32 AG Cosmas argued that, because of the exceptional character of the situations described, Article 297 EC only applies to provisional and not permanent measures See also Verhoeven, in *Commentaire du Traité instituant la CEE*, Constantinesco, Jacqué, Kovar and Simon (eds.), (Economica: Paris, 1992), entry dealing with Article 224 EC (now 297), at point 2. One commentator even refers to unilateral measures of “strictly necessary duration” designed to deal with “exceptional and particularly serious circumstances”: see Quadri, Monaco, Trabucchi, *Commentario al Trattato istitutivo della Comunità economica europea*, (Giuffrè: Milan, 1965), Vol. III, entry dealing with Article 224, at 1633 - 1634 (as cited by AG La Pergola in Case C-273/97 *Sirdar*, *supra* note 33, at paragraph 21).

considered it not to apply to the case⁷⁷, a view shared by Advocate La Pergola in his advisory opinion⁷⁸. Hence the Court did not answer the questions put to it by the industrial tribunal regarding the interpretation of Article 297 EC⁷⁹.

From a constitutional point of view the *Sirdar* judgment is important because it clarifies that the Equal Treatment Directive in particular and the social provisions of the EC Treaty and related secondary law in general applies to the armed forces. This means that to a certain extent Community social law regulates the armed forces of the Member States. Thus questions relating to the composition and organisation of the armed forces are not outside the Treaty⁸⁰. This principle was later confirmed in *Kreil* and is likely to be confirmed again in *Dory*, as will be explained below. Defence issues are not automatically excluded from the regime of the Community. There is no easy answer to the question about the demarcation of competence between the Community and the Member States in the area of defence. It is submitted that the Court attempted to strike a balance in *Sirdar*: a wide margin of appreciation for the national security interests of the Member States⁸¹ balanced with a narrow interpretation and the principle of proportionality for the Community interest in equal treatment⁸². However, the balance cannot be achieved when the principle of proportionality is not properly applied as was the case in *Sirdar*.

⁷⁶ Case C-222/84 *Johnston*, *supra* note 25, at paragraph 27.

⁷⁷ Case C-273/97 *Sirdar*, *supra* note 33, at paragraph 19 citing paragraph 27 of Case C-222/84 *Johnston*, *ibid.*

⁷⁸ AG La Pergola in Case C-273/97 *Sirdar*, *supra* note 33, at paragraphs 19-29.

⁷⁹ Case C-273/97 *Sirdar*, *supra* note 33, at paragraph 33. P. Koutrakos, *supra* note 54, at 437-439 rightly laments the fact that the Court failed to clarify "the uncertainty that seems to surround the interpretation of Article 297". This adds to a line of judgments where the Court avoided the provision, see M. Trybus, "The Ec Treaty as an instrument of European defence integration: judicial scrutiny of defence and security exemptions", *supra* note 21.

⁸⁰ That is also the interpretation of: J. Langer, *supra* note 54, at 1433; J. M. Kämmerer, *supra* note 54, at 102; P. Koutrakos, *supra* note 54, at 432 and 441.

⁸¹ See J. Langer, *ibid.*, at 1441.

The judgment is also important because it clarifies that women can be excluded from certain units in the armed forces on the basis of Article 2 (2) of the Directive. As the Court considered the measure to be proportional the ruling did not have an effect in practice. Mrs Sirdar could be excluded from the Royal Marines.

4.3. *Kreil*: any tank girls?

Sirdar added to *Johnston* by clarifying that the Court itself would scrutinise a measure taken for public security reasons in the context of Article 2 (2) of the Directive. As the Court considered the measure lawful, the ruling fell short of a ‘scrutiny with teeth’ which requires a negative judgment on the legality of a Member State measure. However, this ‘scrutiny with teeth’ manifested itself a few months after *Sirdar* in the *Kreil* case.

The *Kreil* Case⁸³ concerned a woman trained in electronics that applied for voluntary service involving weapon electronic maintenance in the *Bundeswehr*, the German armed forces. Her application was rejected on the basis that according to German law women were barred from serving in military positions involving the use of arms. Ms Kreil brought an action in the Administrative Court Hanover who referred the case to the European Court of Justice for a preliminary ruling under Article 234 EC. The question concerned the interpretation of Article 2 (2) of the Directive in the light of Article 1 (1) of the Law of Soldiers⁸⁴ and Article 3 (a) of the Regulation on Soldier’s Careers⁸⁵.

⁸² J. M. Kämmerer, *supra* note 54, at 116.

⁸³ Case C-285/98 *Kreil v Germany*, [2000] ECR I-69.

⁸⁴ Article 1 (2) of the Law of Soldiers (German: *Soldatengesetz*) provided: “Any person who voluntarily undertakes to perform military service for life may be appointed to serve as a professional soldier. Any person who voluntarily undertakes to perform military service for a limited period may be appointed to serve as a soldier for a fixed term. Women may also be appointed to serve in the armed forces, in accordance with the first and second sentences above, in posts in the medical and military-music services.” As cited by the Court in *Kreil*, German original: In das Dienstverhältnis eines Berufssoldaten kann berufen werden, wer sich freiwillig verpflichtet, auf Lebenszeit Wehrdienst zu leisten. In das

According to these national provisions women may enlist only as volunteers and only in the medical and military music service. The German provisions are based on Article 12 a (4) of the Basic Law, the Federal German constitution, which at the time provided:

“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 services involving the use of arms.*” [emphasis added]

The reference question did not include Article 12 a (4) sentence 2 Basic Law itself but only the corresponding Law and the Regulation mentioned above. The motive of the referring Administrative Court Hanover behind this limitation of the reference was probably to avoid an unnecessary ruling on the constitutional provision. This might have been perceived as potentially raising constitutional questions the solution of which would have been of no help to their case but might have caused delays through long considerations or even rejection and resubmission. Another motive might have been to ‘protect’ the constitution from the European Court⁸⁶.

Dienstverhältnis eines Soldaten auf Zeit kann berufen werden, wer sich verpflichtet, für begrenzte Zeit Wehrdienst zu leisten. In ein Wehrdienstverhältnis nach Satz 1 und 2 können auch Frauen für Verwendungen im Sanitäts- und Militärmusikdienst berufen werden.“

⁸⁵ Article 3a of the Regulation of Soldiers’ Careers (*Soldatenlaufbahnverordnung*) provided: “Women may enlist only as volunteers and only in the medical and military-music services”, as cited by the court in Kreil, German original: „Frauen können nur aufgrund freiwilliger Verpflichtung und nur in Laufbahnen des Sanitäts- und des Militärmusikdienstes eingestellt werden.“

⁸⁶ There is extensive case law concerning German courts protecting parts of the constitution, especially the fundamental rights section: *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für*

4.3.1. The German situation before Kreil

Article 12 a (4) sentence 2 Basic Law had been subject to controversy since it was introduced as part of the ‘emergency constitution’⁸⁷ in 1968. The political and academic discussion concerned both the interpretation and, based on a wide interpretation, the usefulness of the resulting State practice to completely exclude women from service in arms in the armed forces. The old Article 12 (3) Basic Law, the predecessor of Article 12 a (4) sentence 2 Basic Law, had been politically controversial but there was no discussion on the interpretation of the provision.

The Federal Constitutional Court⁸⁸, the Federal Administrative Court⁸⁹ and the majority of academic writers⁹⁰ interpreted the provision as an outright ban for women to render

Futtermittel [1972] CMLR 177; *Bundesverfassungsgericht* in ‘Solange I’ [1974] CMLR 540; ‘Solange II’ [1987] 3 CMLR 225; *Brunner v The European Union Treaty* [1994] 1 CMLR 57.

⁸⁷ Translation of the author, German: *Notstandsverfassung*, inserted into the Basic Law through the 17. Gesetz zur Ergänzung des Grundgesetzes vom 24.5.1968, BGBl I S.709. This major constitutional reform adapted the Basic Law to the requirements of a national emergency, for example a war situation. The reform was very controversial and one of the reasons for the student protests of the late 1960s.

⁸⁸ BVerfGE 48, 127, at 165; BVerfG, 2nd Senate, 1st Chamber, decision of 30th April 1996 - 2 BvR 471/96 and decision of 5th September 1997 - BvL 8/97, on the reference of the *Truppendienstgericht Nord* (Military Tribunal North), Decision of the 20th June 1997 - N 7 Bla 1/97 published in (1997) 50 *Neue Juristische Wochenschrift* at 2834-2835. BVerfG is the official abbreviation for *Bundesverfassungsgericht*, the Federal Constitutional Court, which is the highest federal court. BVerfGE contains the official publication of the judgements of the Court.

⁸⁹ BVerwGE 72,241, at 246; BVerwGE 103, 301, (1996) 49 *Neue Juristische Wochenschrift* 2173, at 2174, (1996) 38 *Neue Zeitschrift für Wehrrecht* 122. BVerwG is the official abbreviation for *Bundesverwaltungsgericht*, the Federal Administrative Court. BVerwGE contains the official publication of the judgments of the Court.

⁹⁰ R. Scholz, in Th. Maunz, G. Dürig, R. Herzog, R., Scholz (eds.), *Grundgesetz-Kommentar, Band II- Art. 12 a-37 GG* (C.H. Beck-Verlag: Munich, 1989), “Artikel 12 a”, Rdnr. 198, at 67-68; M. Gubelt, in I. v. Münch, Ph. Kunig (eds.), *Grundgesetz-Kommentar, Band I (Präambel bis Art. 20 GG)* (C.H. Beck-Verlag: Munich, 4th ed. 1992) “Artikel 12 a Wehrdienst und andere Dienstverpflichtungen”, Rdnr. 20, at 785; W. Heun, H. Dreier (eds.), *Grundgesetz-Kommentar, Band I, Artikel 1-19 GG* (Mohr Siebeck: Tübingen, 1996), “Artikel 12 a”, Rdnr. 33, at 802-803; B. Schmidt-Bleibtreu, in B. Schmidt-Bleibtreu, F. Klein (eds.), *Kommentar zum Grundgesetz* (Luchterhand: Neuwied, Kriftel, 9th ed. 1999), “Artikel 12 a”, Rdnr. 10, at 354; G. Gornig, in Ch. Starck (ed.), v. Mangoldt/Klein, *Das Bonner Grundgesetz, Band 1, Präambel bis Art. 19 GG* (Verlag Franz Vahlen: Munich, 4th ed. 1999), “Artikel 12 a Abs. IV”, Rdnr. 158, at 1540; C. Grimm, “Freiwilliger Waffendienst für Frauen?”, (1987) *Zeitschrift für Rechtspolitik* 394, at 394-395, H. D. Jarras, in H. D. Jarras, B. Pieroth (eds.), *Grundgesetz für die Bundesrepublik Deutschland – Kommentar* (C.H. Beck-Verlag: Munich, 3rd ed. 1995), “Artikel 12a”, Rdnr. 13, at 308 (more critical at Rdnr. 3, at 305), K. Dau, “Ernstfall für die Gleichberechtigung?”, (1990) 32 *Neue Zeitschrift für Wehrrecht* 45; E.-D. Maar, “Frauen im Bundesgrenzschutz”, (1989) 42 *Der Öffentliche Dienst* 249; at 249-252; E. Barth, “10 Jahre Wehrverfassung im Grundgesetz”, (1966) 19 *Die Öffentliche Verwaltung* 153, at 156 (although he asks

services involving the use of arms. This ban was understood as an exemption from the freedom of profession in Article 12 Basic Law⁹¹, the equality rights in Article 3 (2) and (3) Basic Law⁹², and the free access of all Germans to public offices in Article 33 (2) Basic Law⁹³. The actual State practice in the Federal Republic of Germany was based on this wide interpretation: women were not allowed to serve in arms. Female applicants were rejected. The wording, “on no account”⁹⁴ and the history of the provision seem to support this interpretation⁹⁵. The reasons for the ban were less clear. The Federal Administrative Court said that the ban aimed to prevent women from participating in

whether “the Basic Law went to far in its ambition to protect women”); B. Walter, “Frauen im BGS – Präzedenzfall für die Bundeswehr ?”, (1992) 34 *Neue Zeitschrift für Wehrrecht* 89; C. Lutze, “Kein Verfassungsverbot für eine Verteidigungsministerin”, (1996) 38 *Neue Zeitschrift für Wehrrecht* 196; A. Steinkamm, “Der “Ernstfall für die “Gleichberechtigung” ist in Sicht”, (1994) 36 *Neue Zeitschrift für Wehrrecht* 133 (although he appreciates the arguments of the minority view, see below in footnote 98, at 136 and argues against a majority view on the prohibition of the voluntary service of women, at 138).

⁹¹ Article 12 Basic Law reads: “(1) All Germans have the right freely to choose their trade or profession their place of work and their place of training. The practice of trades and professions may be regulated by law. (2) No one may be compelled to perform a particular work except within the framework of a traditional compulsory public service which applies generally and equally to all. (3) Forced labour may be imposed only in the event that a person is deprived of his freedom by the sentence of a court.” German original: „(1) Alle Deutschen haben das Recht, Beruf, Arbeitsplatz und Ausbildungsstätte frei zu wählen. Die Berufsausübung kann durch Gesetz oder auf Grund eines Gesetzes geregelt werden. (2) Niemand darf zu einer bestimmten Arbeit gezwungen werden, außer im Rahmen einer herkömmlichen allgemeinen, für alle gleichen öffentlichen Dienstleistungspflicht. (3) Zwangsarbeit ist nur bei einer gerichtlich angeordneten Freiheitsentziehung zulässig.“

⁹² Article 3 (2) Basic Law reads: “Men and women are equal. The State supports the effective realisation of equality of women and men and works towards abolishing present disadvantages.” German original: Männer und Frauen sind gleichberechtigt. Der Staat fördert die tatsächliche Durchsetzung der Gleichberechtigung von Frauen und Männern und wirkt auf die Beseitigung bestehender Nachteile hin.“ Article 3 (3) Basic Law reads: “No one may be disadvantaged or favoured because of his sex, parentage, race, language, homeland and origin, his faith, or his religious or political opinions. No one may be disadvantaged because of his handicap.” German original: „Niemand darf wegen seines Geschlechtes, seiner Abstammung, seiner Rasse, seiner Sprache, seiner Heimat und Herkunft, seines Glaubens, seiner religiösen oder politischen Anschauungen benachteiligt oder bevorzugt werden. Niemand darf wegen seiner Behinderung benachteiligt werden.“

⁹³ Article 33 (2) Basic Law reads: “Any German is equally eligible for any public office, according to his aptitude, qualifications and professional achievements.” German original: „Jeder Deutsche hat nach seiner Eignung, Befähigung und fachlichen Leistung gleichen Zugang zu jedem öffentlichen Amte.“

⁹⁴ G. Gornig, *supra* note 90, at 1543 (Rdnr. 164).

⁹⁵ See the MP Dr. Schwarzhaupt, 132. Session of the Deutscher Bundestag of 6th March 1956, Stenographischer Bericht, Bd. 28 at 6819; Bundestags-Drucksache V/2873, at 7; Protokoll Nr. 106 des 16. Ausschusses, Deutscher Bundestag, 2. Wahlperiode, 1953, as cited by Gornig, *supra* note 90, at 1542, footnote 29; Bundestag-Drucksache 2/2150, at 6858-6859, as cited by M. Zuleeg, “Frauen in die Bundeswehr” (1997) 50 *Die Öffentliche Verwaltung* 1017, at 1018 footnote 11; Grimm, *supra* note 90.

hostilities⁹⁶. However, this is the effect of the provision rather than a reason for it. The Court also said that the ban aims at preventing that women as combatants are subject to the effects of enemy weapons, again without explaining why the constitution seeks to provide this protection and whether this protection would be effective⁹⁷.

A minority of academic writers⁹⁸ offered a narrow interpretation. According to this minority view, the ban in sentence 2 was limited to the emergency situations described in sentence 1 of Article 12 a (4) Basic Law: women could be forced to serve in the health system but not to serve in arms. This interpretation could be reconciled with the gender equality provisions in Article 3 (2) and (3) Basic Law and the free access to public office and employment in Article 33 (2) Basic Law⁹⁹. Moreover, as will be explained in more

⁹⁶ BVerwG, *supra* note 89.

⁹⁷ BVerwG, *supra* note 89.

⁹⁸ Very comprehensively on the basis of a Ph.D. thesis at the University of Trier: I. Seidner, Ingo, *Der freiwillige Dienst von Frauen in der Bundeswehr mit der Waffe als Gleichheitsproblem. Zum verfassungsrechtlichen Kontext von Art. 12a IV S. 2 GG* (Shaker Verlag: Aachen, 1997), at 80-110 and 114-118; Zuleeg, *supra* note 00, at 1018; R. Jahn, "Frauen zu den Waffen?", (1988) 30 *Neue Zeitschrift für Wehrrecht* 177; V. Slupik, "Bewaffneter Dienst von Frauen in der Bundeswehr", (1990) *Zeitschrift für Rechtspolitik* 305; J. Kokott, in M. Sachs (ed.) *Kommentar zum Grundgesetz* (1996), Artikel 12 a, Rdnr. 4; Jarras-Pieroth, (5th ed. 2000) Article 12 a RdNr. 3; H. G. Edelmann, "Freiwilliger Waffendienst für Frauen?", (1988) *Zeitschrift für Rechtspolitik* 144; L. Broker, "Frauen als Kombattanten", (1996) *Zeitschrift für Rechtspolitik* 127; A. Poretschkin, "Frauen in der Bundeswehr", (1990) *Zeitschrift für Rechtspolitik* 482; "Innere Führung, Recht und Frauen. Zufall oder Ironie?", (1990) 32 *Neue Zeitschrift für Wehrrecht* 195; very cautious for the narrow (minority) interpretation: H.J. Berg, "Zum grundgesetzlichen Verbot eines uneingeschränkten Dienstes von Frauen in den Streitkräften", (1979) 21 *Neue Zeitschrift für Wehrrecht* 81, also cautious: U. Repkewitz, "Verbietet Art. 12 a Abs. 4 Satz 2 GG Frauen den freiwilligen Dienst mit der Waffe?", (1990) 32 *Neue Zeitschrift für Wehrrecht* 177. Ingo v. Münch, an advocate of the majority view, *supra* note 00, argued in a report for the German liberal party FDP: "more reasons can be put forward for the constitutional legality of a voluntary service of women than against it", Gutachten zur Verfassungsmäßigkeit des Dienstes von Frauen in der Bundeswehr, printed in Beschluss des 38. Ordentlichen Bundesparteitages der F.D.P. in Kiel, 5th and 6th September 1987, "Frauen in der Bundeswehr". Many authors advocating the minority view published their thoughts in the *Neue Zeitschrift für Wehrrecht* (English: New Journal for Defence Law), a specialist law journal not available in most university law libraries in times of tight budgets. The author found the journal only in the State library of Westphalia in Münster. In contrast the authors advocating the wide (majority) view published their views in commentaries of the Basic law, a form of legal literature widely available in university, government, court and even private law libraries

⁹⁹ Zuleeg, *supra* note 95.

detail below, this interpretation could be reconciled with the requirements of Community law¹⁰⁰.

As Zuleeg¹⁰¹ pointed out, the fathers and mothers of the Constitution were free to introduce a special provision as an exemption to gender equality. However, when two different interpretations of a provision are possible, the government, the legislature and the Courts are required to choose the interpretation that can be reconciled with other relevant provisions of the Constitution and with the requirements of Community law.

The question whether the total ban suggested by the Courts and the majority of academic writers can be reconciled with other provisions of the Constitution, in particular Articles 3 (2) and (3) and 33 (2) Basic Law, depends on whether the ban can be justified by reasonable considerations. This depends on the purpose of the ban. Possible purposes of the ban were gallantry¹⁰², to protect women as 'reproductive elements of society'¹⁰³, to ensure security, as women are considered physically and psychologically incapable to serve in arms¹⁰⁴, to accommodate traditional role models and division of work¹⁰⁵ and to protect women from participation in armed conflicts¹⁰⁶.

These purposes, however, are not convincing reasonable considerations to justify discrimination. Discrimination is not gallant; it is rather offensive to women and contradicts their basic rights in Articles 3, 12 and 33 Basic Law¹⁰⁷. Women can not be

¹⁰⁰ An exhaustive record of the arguments for this interpretation would go beyond the aims of this paper.

¹⁰¹ Zuleeg, *supra* note 95, at 1019. In this article the former judge at the European Court of Justice anticipates the results and reasoning of the *Kreil* judgement, see pages 1021 – 1025. He also wrote a report on the question for the Law Committee of the *Bundestag*, the Lower House of the German Federal parliament, before Article 12 a (4) sentence 2 Basic Law was amended in October 2000, see below.

¹⁰² Zuleeg, *supra* note 95, at 1019.

¹⁰³ Zuleeg, *supra* note 95, at 1019.

¹⁰⁴ Zuleeg, *supra* note 95, at 1019.

¹⁰⁵ Zuleeg, *supra* note 95, at 1019-1020.

¹⁰⁶ Zuleeg, *supra* note 95, at 1020.

¹⁰⁷ Zuleeg, *supra* note 95, at 1019; G. Edelmann, *supra* note 90, at 144.

protected in war situations anyway, as modern warfare does not spare any part of the population¹⁰⁸. Moreover, an armed female soldier can protect herself better than an unarmed woman. The successful service of women in many other armies of the world¹⁰⁹, in the Federal German Police¹¹⁰, and the police forces of the German states, has shown that many women are physically and psychologically capable to serve in arms. On the other hand many men are not capable of being useful soldiers. The fostering of traditional role models is no legitimate purpose for an exemption in the Constitution, and in fact the amended Article 3 (3) Basic Law explicitly prohibits this¹¹¹. Finally protection against their will comes close to denying women their right to self-determination: the free will of women overrides rules for their protection¹¹². The Federal Constitutional Court ruled in the *Night Work Judgment*¹¹³ that women can decide themselves about advantages and disadvantages of their work. The motives of the majority view seem patronising and based on outdated notions of masculinity and femininity and male and female roles. Hence, as the total ban cannot be justified by a legitimate purpose, only the narrow interpretation of Article 12 a (4) sentence 2 Basic Law can be reconciled with the other provisions of the Constitution. Nevertheless, it was the wide interpretation, understanding Article 12 a (4) sentence 2 Basic Law as a total ban for women to serve in arms, that was applied in practice.

¹⁰⁸ Zugleeg, *supra* note 95, at 1019; K. Dau, *supra* note 90, at 45; A. Poretschkin, *supra* note 98, at 198; A. Steinkamm, *supra* note 90, at 140 also referring to the consideration of Parliament when discussing female soldiers: Protokoll der 106. Sitzung des Ausschusses für Rechtswesen und Verfassungsrecht v. 6.2.1956, Deutscher Bundestag, 2. Wahlperiode 1953, BT-Drs. 2154, v. 1.3.1956.

¹⁰⁹ Dau, *supra* note 90, at 45.

¹¹⁰ M. Hellenthal, *Frauen im Bundesgrenzschutz* (1988); E.-D. Maar, *supra* note 90, at 249-252; B. Walter, *supra* note 90, at 93-94

¹¹¹ Zugleeg, *supra* note 95, at 1020 citing BVerfGE 87, 234, at 258 (judgment of 1992).

¹¹² H. D. Jarras and B. Pieroth, *Grundgesetz für die Bundesrepublik Deutschland, Kommentar* (3rd ed. 1996), Art. 3 Rdnr. 58 as cited by Zugleeg, *supra* note 95, at 1020.

¹¹³ BVerfGE 85, 191, at 209-210 as cited by Zugleeg, *supra* note 95, at 1020 (footnote 39).

4.3.2. The judgment

Building on the established case law in *Johnston*¹¹⁴, *Richardt*¹¹⁵, *Leifer*¹¹⁶, *Commission v Germany*¹¹⁷, *Gerster*¹¹⁸, *Commission v France*¹¹⁹, and *Sirdar*¹²⁰, the European Court of Justice focussed on the fact that the German law in question represented an outright ban from military posts involving the use of arms. The ban applied to almost the entirety of military posts in the *Bundeswehr*. Thus the provisions could not be justified by the specific nature of the post in question as in *Sirdar* or by the particular context in which the activities in question are carried out as in *Johnston*. Article 2 (2) of the Directive did not apply. The nature of a post in the armed forces as at least potentially involving the use of arms cannot in itself justify the exclusion of women. Even for the posts that are accessible to women in the *Bundeswehr*, basic training in the use of arms for self-defence and assistance purposes is provided. On this basis the Court ruled:

“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 *Bundeswehr* had to remain exclusively male.”

Moreover, the Court ruled that the ban was not justified by Article 2 (3) Directive out of concern to protect women. The Court concluded that:

¹¹⁴ Case C-222/84 *Johnston*, *supra* note 25.

¹¹⁵ Case C-367/89 *Richardt and 'Les Accessoires Scientifiques'*, *supra* note 27.

¹¹⁶ Case C-83/94 *Leifer*, *supra* note 27.

¹¹⁷ Case C-248/83 *Commission v Germany*, *supra* note 36.

¹¹⁸ Case C-1/95 *Gerster v Freistaat Bayern*, *supra* note 36.

¹¹⁹ Case C-318/86 *Commission v France*, *supra* note 44.

¹²⁰ Case C-273/97 *Sirdar*, *supra* note 33.

“the [Equal Treatment] 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.”

The judgment is important for several reasons. First it is constitutionally important. It confirms *Sirdar*: Community law applies to the armed forces. Measures taken on the basis of Article 2 (2) Directive need to be proportional. Second it is important because it develops the tests developed in *Johnston* and *Sirdar* into a ‘scrutiny with teeth’. For the first time the Court declares incompatible with the Directive a rule relating to the armed forces. Politically that goes a step further than confirming a national rule, as the Court did in *Sirdar*. This means that the Court is prepared to rule against national provisions regulating the organisation of the armed forces. The sovereignty of the Member States over their defence is not absolute. Community social law has an impact on defence. Third this ruling on the incompatibility of the Law of Soldiers and the Regulation of Soldiers’ Careers with the Directive implies a ruling on the incompatibility of Article 12 a (4) sentence 4 Basic Law, a provision of the Constitution.

4.3.3. *The German situation after Kreil*

Reactions to the judgment in Germany were divided¹²¹. Negative reactions considered the judgement to be *ultra vires*: the Court failed to respect the reserved defence domain of the Member States by expanding Community competence¹²².

¹²¹ See the annotation by Langer, *supra* note 54, at 1433, citing mainly negative reactions at footnote 2. J. A. Kämmerer, *supra* note 54 speaks of mainly positive reactions.

In October 2000 the German parliament, decided by the necessary two-thirds majority to amend Article 12 a (4) sentence 2 Basic Law¹²³. The amended version of the provision reads:

“They may on no account be forced to render services involving the use of arms.”

Before the *Kreil* judgement a proposal of the parliamentary group of the liberal party FDP had suggested to delete the provision¹²⁴. However, as the protocol of the debate preceding the vote reveals¹²⁵, the amendment was a direct reaction to the judgment of the European Court of Justice in *Kreil*. The incompatibility of the provision with Community law was the strongest argument for the amendment releasing a decades old deadlock in the legislature.

Two points need to be made about this reaction of the German legislature. First, the story of *Kreil* could serve as a useful example to be followed when a provision in a constitution of a Member State is incompatible with Community law. The national Court refers only

¹²²See T. M. Spranger, “Die Entscheidungen “Sidar” und “Kreil” des EuGH – Diskriminierung oder Gleichberechtigung de luxe?”, (2000) 42 *Neue Zeitschrift für Wehrrecht* 117, also citations in footnote 4; K. Eichen, “Erosion der deutschen Wehrverfassung durch sekundäres Gemeinschaftsrecht?”, (2000) 42 *Neue Zeitschrift für Wehrrecht* 45.

¹²³ *Gesetz zur Änderung des Grundgesetzes (Artikel 12a) vom 19.12.2000*, BGBl. I-2000, 1755 [decision of the Federal Diet (lower house, directly elected representatives) in October of the Federal Council (upper house, members sent by the state governments) in November.

¹²⁴ Deutscher Bundestag, 14. Wahlperiode, Drucksache 14/1728 (neu), at 2. The FDP was, however, aware of the reference pending before the Court (see motives of the proposal, at 3). The motives for the proposal were also to take into account the change of the reality of society of the Federal Republic of Germany after five decades. The motives also cited the Annual Report of the Young Officers of the *Bundeswehr* 1997 according to which female young people are increasingly interested to serve in the armed forces and considered the old interpretation and State practice an “extreme violation of equal treatment”, a “violation of the law” or even “misogynist”.

¹²⁵ See the speeches of the MPs Anni Brandt-Elsweiler (SPD), Professor Rupert Scholz (CDU/CSU), Volker Beck (BÜNDNIS 90/DIE GRÜNEN), Jörg van Essen (FDP) Petra Bläss (PDS), Margot von Renesse (SPD) and Christina Schenk (PDS). Deutscher Bundestag, 14. Wahlperiode, Bundestagsprotokolle, 128. Sitzung, Berlin, Freitag, den 27. Oktober 2000, at 12338-12348. All refer to the judgment in their speeches.

acts of parliament and regulations based on the respective constitutional provision to the European Court of Justice, not the constitutional provision itself. This respects the importance of the founding document of each of the Member States and thereby their sovereignty. Moreover, it avoids a direct conflict between the Court and the Member States or their constitutional courts. The application of the constitutional provision in subsidiary national legislation, however, is scrutinised thereby ensuring the uniformity and supremacy of Community law. After a ruling of the Court declaring the incompatibility of the provisions in national acts and regulations, the legislature of the Member State takes the initiative to amend the respective constitutional provision.

Second, the amended Article 12 a (4) sentence 4 Basic Law stipulates that women can now serve in arms but are not subject to conscription. According to Article 12 a (1) Basic Law, men are subject to conscription¹²⁶. This means that, subject to the possibility of conscientious objection in Article 12 a (2) Basic Law, men can be forced to serve in arms. Having to serve in arms, in Germany conscripts serve for nine months, represents a considerable loss of time and earnings and is thoroughly unpleasant for those not cut to be warriors¹²⁷. *Prima facie* this situation, armed service as right for women but an obligation for men, represents discrimination against men on grounds of sex. It is this that is at issue in the final case considered in this paper.

¹²⁶ Article 12 a (1) of the Basic Law provides: "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." German original; „Männer können vom vollendeten achtzehnten Lebensjahr an zum Dienst in den Streitkräften, im Bundesgrenzschutz oder in einem Zivilschutzverband verpflichtet werden.“

¹²⁷ K. Meyer, "Der Rechtsschutz der Grundrechte im Wehrdienst", (1954) 8 *Die Öffentliche Verwaltung* 66, at 66 speaks of "particularly intrusive duties" and names "interruption of his professional career, separation from his family, limitation with regards to his residence, subordination under the special duty of obedience of the soldier". Conscription can interfere with the fundamental right in Articles 1(1): human dignity, 2: personal freedom, 3: equality, and 4 (3): conscientious objection, of the Basic Law. Moreover the right to

4.3. *Dory*: who wants to be a legionnaire?¹²⁸

The Equal Treatment Directive is sometimes misunderstood as an instrument to promote the access of women to posts previously exclusively male. However, it is not solely designed for that purpose. It can equally work as a tool against discrimination against men. The recent *Dory* case pending before the Court concerns the discrimination against men in the context of the armed forces.

The German national Mr Alexander Dory reached an age that makes him subject to conscription. He unsuccessfully applied for exemption from conscription to his local drafting authority arguing that the German Law of Conscription violated Community law. Section 1 (1) of that Law reads: "From the age of 18 all men who are Germans within the meaning of the Basic Law are subject to conscription"¹²⁹. After an unsuccessful objection he took his case to the Administrative Court of Stuttgart where he argued that after the *Kreil* judgment there were no reasonable reasons to justify the exemption of women from conscription on grounds of sex. Conscription only for men, as enshrined in Article 12 a (1) Basic Law, represented an unlawful discrimination against men: women now had a right but no duty to serve in arms. The Directive matter fell within the material scope of the Directive, as conscription has the effect of delaying the access of men to civil work. They have access only after their service. The Federal Republic of Germany, supported by the intervening French and Finnish Republics, argued that conscription for men is part of defence policy. There was no connection between the organisation of the armed forces and Community law. The Directive applied only to work. Hence it did not apply to

strike and the freedom to organise trade unions in Article 9 Basic Law "can not be reconciled with the nature of the armed force " (at 68). This article was published before German rearmament in 1955.

¹²⁸ Case C-186/01 *Alexander Dory v Germany*, not yet decided or reported.

conscription, as conscription was a citizen's duty to service and not work. The Administrative Court of Stuttgart doubted these views and referred the following question to the European Court of Justice under Article 234 EC: "Is German conscription only for men in conflict with European law?" Mr Dory applied to both the referring and the European Court for an injunction. Both applications were rejected¹³⁰ for procedural reasons that go beyond the aim of this paper.

4.3.1. *Advisory Opinion of Advocate General Stix-Hackl*

In her advisory opinion delivered on the 28 November 2002 AG Stix-Hackl¹³¹ rejected the argument of the German and other governments that questions relating to the organisation of their armed forces were entirely exempt from the application of Community law. Neither the principle of limited competence in Article 5 EC¹³² nor the security exemptions in Article 30, 39, 46, 296 and 297 EC¹³³ established a general and automatic exemption from the application of the Treaty¹³⁴. The organisation of the armed forces was within the competencies of the Member States. However, if related Member State measures had effects on issues regulated by Community law, if the field of application of Community law was affected, these effects had to comply with the supreme Community law¹³⁵. This confirms the pre-existing case law discussed above.

¹²⁹ Translation of the author, original German: "Wehrpflichtig sind alle Männer vom vollendeten achtzehnten Lebensjahr an, die deutsche im Sinne des Grundgesetzes sind".

¹³⁰ Ordonance du président de la cour, 24 octobre 2001, dans l'affaire C-186/01 R (not available in English).

¹³¹ Case C-186/01 *Dory*.

¹³² AG Stix-Hackl in Case C-186/01 *Dory*, *surpa* note 130, at paragraph 56.

¹³³ AG Stix-Hackl in Case C-186/01 *Dory*, *surpa* note 130, at paragraph 58.

¹³⁴ Referring to *Johnston, Richardt, Leifer, Johnston*, (footnote 15), *Albore, Werner*, Case C-283/99 *Commission v Italy* [2001] ECR I-4363, C-265/95 *Commission v France* [1997] ECR I-6959, footnote 20), and the advisory opinion of AG Jacobs in Case 120/94 *Commission v Greece* [1996] ECR I-1513.

¹³⁵ AG Stix-Hackl in Case C-186/01 *Dory*, *surpa* note 130, at paragraph 62.

The Advocate General went on to find that the Law on Conscription was not directed at a delayed access of men to civil work. The delayed access was only an effect of the Law, which was exclusively directed at safeguarding the external security of Germany¹³⁶. Community law did not cover the safeguarding of the external security of a Member State as such. Hence the Law of Conscription was outside the field of application of the Directive.

According to Advocate General Stix-Hackl three judgments indicate a narrow interpretation of the Directive. *Jackson and Cresswell*¹³⁷ concerned a social security scheme that, on certain conditions, provided persons with means below a legally defined limit with a special benefit designed to enable them to meet their needs. The conditions of entitlement for receipt of the benefits may be such as to affect the ability of a single parent to take up access to vocational training or part-time employment. Most single parents are women. These conditions were considered to be insufficient to bring that scheme within the scope of the Directive¹³⁸. This rule was confirmed in *Meyers*¹³⁹ but the Court finally considered the relevant scheme to be covered by the Directive. According to Article 1 (2) benefits based on social security schemes are expressly excluded from the application of the Directive¹⁴⁰. This exception was interpreted narrowly resulting in a wide interpretation of the scope of the Directive. A benefit based on a social security was “*nevertheless but only* then covered by the Directive” if it concerned one of the subject matters of the Directive: access, vocational training, promotion and working conditions. The result was a narrow interpretation of both the exception and the scope of the

¹³⁶ AG Stix-Hackl in Case C-186/01 *Dory*, *surpa* note 130, at paragraph 78.

¹³⁷ Cases C-63/91 and C-64/91 *Sonia Jackson and Patricia Cresswell v Chief Adjudication Officer* [1992] ECR I-4737.

¹³⁸ Cases C-63/91 and C-64/91, *ibid.*, at paragraph 30.

Directive¹⁴¹. Measures that are not directed at the regulation of one of the subject matters of the Directive but only have discriminatory effects were not mentioned in the Directive¹⁴² and were therefore outside its scope.

Moreover, the Advocate General based her findings on *Schnorbus*¹⁴³, a first judgment on conscription and sex discrimination, delivered briefly after *Kreil*. The case concerned the overcrowded and State-run vocational training courses for lawyers in Germany. In the German State of Hesse there is usually a waiting period of up to a twelve months between graduation and access to the course. Law graduates who had done their military or equivalent service could benefit from a reduced waiting time or even got admitted straight after their exams¹⁴⁴. The Court decided that such provisions fall within the scope of the Directive. They constitute indirect discrimination based on sex but the Directive does not preclude national provisions in so far as such provisions are justified by objective reasons and prompted solely by a desire to counterbalance the delay resulting from the completion of compulsory military or civilian service. Conscription itself was not a subject of the judgment. According to Advocate General Stix-Hackl in *Dory*, this implies that the Court considers national measures that have only a discriminatory *effect* on access to vocational training are outside the scope of the Directive¹⁴⁵. The Directive applies to access to a professional army. It applies to conscription only as far as access to

¹³⁹ Case C-116/94 *Meyers*, [1995] ECR I-2131.

¹⁴⁰ They are regulated by Council-Directive 79/7/EE C [1979] OJ L-6/24.

¹⁴¹ AG Stix-Hackl in Case C-186/01 *Dory*, *surpa* note 130, at paragraph 90.

¹⁴² *Ibid.*, at paragraph 93.

¹⁴³ Case C-79/99 *Julia Schnorbus v Hesse* [2000] ECR I-10997, decided 7 December 2000.

¹⁴⁴ Section 14 a of the (Hesse) Legal Education Order, 1994 Hess. GVBl. I, at 334.

¹⁴⁵ AG Stix-Hackl in Case C-186/01 *Dory*, *surpa* note 130, at paragraph 96.

the armed forces itself, and not access to the subsequent civil employment is concerned¹⁴⁶.

This line of argument is not convincing. First it is doubtful whether the law of conscription is directed at the defence of Germany. The country is currently not very concerned about her defence, as she does not feel threatened by any of her neighbours. An indication of this feeling is the very limited defence procurement activity¹⁴⁷. Large parts of the German defence equipment are not ready to use. It is submitted that today conscription serves other purposes. A professional army is considered to be more expensive¹⁴⁸ and it has been the German policy for over a decade to cut the defence budget¹⁴⁹. Conscripts are cheaper as they are not properly paid. However, a measure directed at cutting the defence costs is still directed at defence, as the defence budget is an important part of defence organisation¹⁵⁰. Moreover, many young Germans subject to conscription are conscientious objectors. They do civil service within the social security system instead. The social security system is not viable without the conscientious objectors working for it without being properly paid. Hence the national defence is to a large extent an excuse for a money saving exercise. Second, the Advocate General assumes a narrow scope of the Directive as a basis for her argument. The preamble¹⁵¹ of

¹⁴⁶ *Ibid.*, at paragraph 100.

¹⁴⁷ In 2000 the Western European N.A.T.O. States (excluding France) spent US\$ 22,273 million on equipment, the United Kingdom with US\$ 9,937 million almost half of that, Germany spent US\$ 4,723 million, see NATO, *Financial and Economic Data Relating to NATO Defence: Defence Expenditures of NATO Countries (1980-2000)*, Press Release M-DPC-2 (2000) 107, 5 December 2000, URL <http://www.nato.int/docu/pr2000/p00-107e.htm>.

¹⁴⁸ See for example: Interview with Federal Defence Secretary Struck, *Westdeutsche Allgemeine Zeitung*, 6 January 2003.

¹⁴⁹ For an overview see: E. Sönks, E. Loose-Weintraub, W. Omitoogun, P. Stålenheim, R. Weidacher, *SIPRI Yearbook 2001: Armaments, Disarmament and International Security* (O.U.P.: Oxford, 2001), chapter 4.

¹⁵⁰ Thanks to Sue Arrowsmith (Nottingham) for bringing this point to my attention.

¹⁵¹ Preamble: "Whereas Community action to achieve the principle of equal treatment for men and women in respect of access to employment and vocational training and promotion and in respect of other working

the Directive and the fact that it was based on Article 308 EC¹⁵², however, seem to indicate a wide interpretation¹⁵³. The Directive aims to regulate all aspects of equal treatment in employment, except equal pay¹⁵⁴ and social security¹⁵⁵. The wording of Article 1 (1) of the Directive is “notably far reaching”¹⁵⁶. In contrast to the more narrowly drafted principle of equal pay in Article 141 EC it prohibits discrimination “whatsoever” and “either directly or indirectly”. Moreover, the notion “by reference in particular to marital or family status” in the provision is intended as examples indicating a wide interpretation. The notion of “access” to employment in Article 3 (1) of the Directive also has a wide meaning¹⁵⁷. The very cases used by Advocate General Stix-Hackl as a basis for her narrow interpretation of the scope of the Directive, namely *Meyers* and *Jackson and Cresswell*, are generally used as authority for a wide interpretation¹⁵⁸. Therefore it is submitted that her exclusion of the effects of Member States measures is wrongly based on a narrow interpretation of the material scope of the Directive.

Third, the case law the Advocate General used does not carry her argument. Discrimination on grounds of sex arises where members of one sex are treated more favourably. The discrimination is direct where the difference in treatment is based on the criterion of sex¹⁵⁹. Only men are subject to conscription. Only men are prevented from

conditions also appears to be necessary; Whereas equal treatment for male and female workers constitutes one of the objectives of the Community, in so far as the harmonisation of living and working conditions while maintaining their improvement are inter alia to be furthered.”

¹⁵² Preamble: “Whereas the Treaty does not confer the necessary powers for this purpose.”

¹⁵³ E. Ellis, *EC Sex Equality Law* (OUP: Oxford, 1998 2nd ed.), at 190-191.

¹⁵⁴ Preamble: “Whereas with regard to pay, the Council adopted on 10 of February 1975 Directive 75/117/EEC on the approximation of the principle of equal pay for men and women;”

¹⁵⁵ Preamble: “Whereas the definition and progressive implementation of the principle of equal treatment in matters of social security should be ensured by means of subsequent instruments” and Article 1 (1) of the Directive: “on the conditions referred to in paragraph 2, social security”.

¹⁵⁶ Ellis, *supra* note 133, at 193.

¹⁵⁷ *Ibid.*, at 198.

¹⁵⁸ Ellis, *supra* note 00, at 198-199.

¹⁵⁹ AG Jacobs in Case C-79/99 *Julia Schnorbus v Hesse*, *supra* note 143, at paragraph 33.

access to civil employment during their service. The delayed access to civil employment is a necessary and unavoidable effect of conscription. The access of women to civil employment is unfettered by conscription. Hence conscription only for men represents direct discrimination. *Jackson and Cresswell*, *Meyers* and *Schnorbus* are cases of indirect discrimination. The concept of indirect discrimination involves that a measure that is not directly discriminatory but has a discriminatory effect is covered by such a prohibition¹⁶⁰. The principles of these judgements cannot be applied to a case of direct discrimination. Moreover *Jackson and Cresswell* and *Meyers* concern social benefits that are expressly excluded from the application of the Directive. This does not apply to conscription. The Advocate General admits that in *Schnorbus* the Court did not “expressly” consider measures that have only an effect on access to civil employment but are not directed at it to be outside the scope of the Directive¹⁶¹. Moreover she admits that her narrow interpretation of the scope of the Directive is “not necessarily implied” by the Court in *Jackson and Cresswell* and *Meyers*¹⁶².

4.3.2. *The judgment?*

Some commentators consider a success of Mr Dory possible¹⁶³. *Prima facie* service in arms as an obligation for men but a right for women represents a discrimination of men

¹⁶⁰ Article 2 (2) (a) Council-Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation [2000] OJ L-303/16 reads: “indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons having a particular religion or belief, a particular disability, a particular age or a particular sexual orientation at a particular disadvantage compared with other persons unless [...]”.

¹⁶¹ AG Stix-Hackl, C-186/01 *Dory*, *supra* note 130, at paragraph 96.

¹⁶² *Ibid.*, at paragraph 92.

¹⁶³ P. Dreist, “Das Gebot der Stunde: Streitkräfteöffnung für Frauen” (2000) 42 *Neue Zeitschrift für Wehrrecht* 65, at 77.

on grounds of sex in the sense of the Directive. It does not matter what the measure is directed at.

Moreover, the old Article 12 a (4) sentence 2 Basic Law was equally directed at external security. That did not prevent *Kreil*. Assuming the Directive applies, it is submitted that as a case of direct discrimination the German law on conscription can only be justified by the exception in Article 2 (2) of the Directive, similar to the laws considered in *Kreil*. Following the principles established in *Kreil* but also in *Sirdar*, sex can not be considered a determining factor for service in the armed forces as a whole. Article 2 (2) EC can only justify differences in treatment in relation to specific activities. Hence the provision of the German law on conscription subjecting only men to conscription and thus delaying only the access of men to civil employment represents a case of direct discrimination in violation of Article 2 (1) of the Directive. The German law cannot be justified by Article 2 (2) of the Directive.

However, it is submitted that it is not wholly unlikely that the Court will accept the defence objective put forward by Germany. The Court is very aware if not even concerned about their constitutional position both with regards to the division of powers and the allocation of competencies. The division of powers requires policy decisions in the area of defence in general and possibly with regards to conscription in particular to be taken by the executive. Judicial review is generally very delicate in this area¹⁶⁴. The allocation of competencies requires a legal base for Community action. In the constitutional framework of the European Union it is the Member States and not the Union who have the competence to regulate defence. Moreover the Court will be aware

¹⁶⁴ See: T. M. Franck, *Political Questions/Juridical Answers: Does the Rule of Law Apply to Foreign Affairs?* (Princeton University Press: Princeton, 1992),.

that this is a politically sensitive issue. If they rule that conscription only for men is contrary to the Directive the German legislator had only two very problematic options. The first option is to abolish conscription for men and introduce a professional army. This will make defence much more expensive and may lead to a breakdown of the social security system, as the substitutional civil service rendered by thousands of conscientious objectors would end with conscription. The second option is to introduce conscription for women. This would be very unpopular amongst female voters who would be losing a privilege and might well lead to the end of the careers of the politicians who dare to even moot it. However, Conscription for women combined with a free choice between the armed forces and social service previously reserved for conscientious objectors would serve the interests of defence, finance, social security and equal treatment of men and women. A free choice would be crucial for women. The working environment in most armed forces is male dominated, actually and potentially dangerous and there is an increased danger for women of being raped, and not only after being captured by the enemy. Women joining any army will have to face fierce male opposition. Male opposition and dominance as well as the danger of being raped apply considerably less or not at all to male recruits. It is these additional negative aspects that can be put forward as arguments for the legality of conscription for men in conjunction with only voluntary service for women under the Directive.

5. Conclusions

The EC legislation on the equal treatment of men and women applies to the armed forces of the Member States. There is no general exclusion of the armed forces from the regime

of the Treaty on sex equality or the Equal Treatment Directive. The question whether a particular discriminatory Member State measure is contrary to Community law depends on the application of one of the exemptions. The use of the exemptions is subject to different degrees of scrutiny exercised by the European Court of Justice. Compliance with the Equal Treatment Directive depends on whether one of the exceptions in the Directive applies. Compliance with the Treaty depends on whether the Member State in question can invoke one of the security exemptions.

According to the principle of limited competence enshrined in Article 5 (1) EC and emphasised in the *Tobacco Advertising Judgement* the Community can only regulate when there is a specifically stipulated legal base in the Treaty. There is no such legal base for defence. According to Articles 2, 3 (2) combined with 308 and 141 (3) EC, the Community has the competence to regulate the equal treatment of men and women. Whether the Community has the competence to regulate the equal treatment of men and women in the armed forces depends on the classification of the matter as an equal treatment (legal base) or a defence (no legal base) issue. The fact that equal treatment of men and women obviously has defence implications is not sufficient to classify it as a defence issue and take it outside the scope of Community law. Moreover the armed forces are not expressly excluded from this competence. The case law discussed in this paper shows, that the Court considers equal treatment in employment in the armed forces to be a matter of equal treatment legislation.

It is submitted that the classification as a defence issue depends on the question whether the employment of women in the armed forces compromises national security. Moreover it is submitted that this question can be answered with the help of the security exemptions

in the Treaty and the principles developed by the Court in relation to these provisions. The security exemptions do not contain legal bases for defence but can justify derogation from legislation for which there is a legal base. Although there is a legal base for the regulation of equal treatment of men and women in the armed forces, derogation from the legislation is possible if national security is affected.

Defence is one of the few fields where the Community has no competence but the Treaty nevertheless determines the limits. If the integration of women in the armed forces compromises national security the access of women to military posts is a question of national security and therefore outside the ambit of Community law. The majority view is that the integration of women in the armed forces does not compromise national security. The experiences of many armies of the world show that women can be excellent soldiers. Modern warfare is less dependent on physical strength than on technical ability and training. The Court considers this to be a question of proportionality, whereby the Member States have a wide margin of appreciation. According to *Sirdar* exclusion from a particular front line unit can be proportional. Therefore it is within the margin of appreciation. Moreover it is outside the competence of the Community as the employment and deployment of women in frontline forces is a question of defence and national security. According to *Kreil* the total exclusion of women from service in arms and therefore from the majority of positions in the armed forces is not proportional. Therefore it is outside the margin of appreciation. Moreover it is within the competence of the Community as a non-proportional ban is not a question of national security but concerns the Community competence for the equal treatment of men and women. Hence

it can be said that the Court carefully determines the limits of the Treaty with regard to defence.

Most women are not interested in serving in the armed forces. First, they are not interested for the same reasons most men are not interested. The work is hard, repetitive, dangerous, badly paid, and carries little prestige in most European countries. Second, they can do without the fierce opposition, abuse and chauvinism from male soldiers. Third they might fear, with some reason, the increased danger of being sexually abused, and not only after being captured by the enemy. Finally many women know that they do not have the necessary level of physical fitness and strength or that they are not cut out for being soldiers for other reasons. The point is that some or all of these reasons will prevent most *but not all* women from applying for the service in the armed forces. There is a group of women that have the physical strength and the ability and who are interested to serve in arms. It is one of the objectives of the Equal Treatment Directive to make sure that these women get their chance. Dory will show whether it is another objective to ensure that conscription is required or not required from men and women alike.