OPINION OF ADVOCATE GENERAL
RUIZ-JARABO COLOMER
delivered on 24 January 2008 [1](1)

Joined Cases C−55/07 and C−56/07

Othmar Michaeler
Subito GmbH
v
Arbeitsinspektorat der Autonomen Provinz Bozen (now Amt für sozialen Arbeitsschutz)
Autonome Provinz Bozen
and
Ruth Volgger
Othmar Michaeler
Subito GmbH
v
Arbeitsinspektorat der Autonomen Provinz Bozen (now Amt für sozialen Arbeitsschutz)
Autonome Provinz Bozen

(References for a preliminary ruling from the Landesgericht Bozen (Italy))

(Equal treatment – General principles of law – Part-time and full-time workers – Discrimination – Limitation of the opportunities for part-time work)

I – Introduction

1. The Landesgericht Bozen (Regional Court, Bolzano) has referred to the Court for a preliminary ruling under Article 234 EC a question asking whether Italian administrative provisions are compatible with Community employment law. Specifically, the referring court raises the question of the validity of national legislation which requires employers to submit, within 30 days of their conclusion, a copy of all the part-time employment contracts they enter into. That obligation, which is accompanied by stringent administrative penalties for cases of non-compliance, should be consistent with Council Directive 97/81/EC of 15 December 1997 concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC. (2)

2. Although the Court has previously interpreted Directive 97/81, this is the first time it has been asked to rule on discrimination which is not the result of the substantive provisions of the contract but rather of the administrative obligations imposed on employers in relation to part-time employment contracts. Consequently, this case provides the Court with the opportunity to determine the scope of the protection afforded by Directive 97/81 and to define its relationship with the general principle of non-discrimination and with Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions. (3)

II – The legal framework

A – *The Community legislation*

3. In 1997, the European Community adopted Directive 97/81 for the purpose of implementing the Framework Agreement on part-time work concluded between the European social partners. The directive sought, on the one hand, to abolish discrimination against part-time workers and, on the other, to encourage the development of that type of employment contract. Clauses 4 and 5 of the Framework Agreement are of particular note:

'Clause 4: Principle of non-discrimination

1. In respect of employment conditions, part-time workers shall not be treated in a less favourable manner than comparable full-time workers solely because they work part time unless different treatment is justified on objective grounds.

2. Where appropriate, the principle of *pro rata temporis* shall apply.

3. The arrangements for the application of this clause shall be defined by the Member States and/or social partners, having regard to European legislation, national law, collective agreements and practice.

4. Where justified by objective reasons, Member States after consultation of the social partners in accordance with national law, collective agreements or practice and/or social partners may, where appropriate, make access to particular conditions of employment subject to a period of service, time worked or earnings qualification. Qualifications relating to access by part-time workers to particular conditions of employment should be reviewed periodically having regard to the principle of non-discrimination as expressed in Clause 4.1.

Clause 5: Opportunities for part-time work

1. In the context of Clause 1 of this Agreement and of the principle of non-discrimination between part-time and full-time workers:

(a) Member States, following consultations with the social partners in accordance with national law or practice, should identify and review obstacles of a legal or administrative nature which may limit the opportunities for part-time work and, where appropriate, eliminate them;

(b) the social partners, acting within their sphere of competence and through the procedures set out in collective agreements, should identify and review obstacles which may limit opportunities for part-time work and, where appropriate, eliminate them.

…'

4. As I have stated, the purpose of Directive 97/81 is to combat the unequal treatment of different types of employment contract. However, the directive is also concerned, as a secondary but equally important aim, with discrimination on grounds of sex. Indeed, recital 5 in the preamble to the directive states that 'the conclusions of the Essen European Council stressed the need to take measures to promote employment and equal opportunities for women and men.' Similarly, Clause 6(4) of the Framework Agreement establishes that the provisions on part-time work and the provisions on non-discrimination on grounds of sex are interdependent:

'This Agreement shall be without prejudice to any more specific Community provisions, and in particular Community provisions concerning equal treatment or opportunities for men and women.'

5. The provisions concerning equal treatment to which the Framework Agreement refers are, principally, 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 principle of equal pay for men and women, (4) and Council Directive 76/207 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and

promotion, and working conditions. (5) Article 3 of Directive 76/207 is particularly relevant to these proceedings:

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

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

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

(b) any provisions contrary to the principle of equal treatment which are included in collective agreements, individual contracts of employment, internal rules of undertakings or in rules governing the independent occupations and professions shall be, or may be declared, null and void or may be amended;

(c) those laws, regulations and administrative provisions contrary to the principle of equal treatment when the concern for protection which originally inspired them is no longer well founded shall be revised; and that where similar provisions are included in collective agreements labour and management shall be requested to undertake the desired revision.’

B – *The Italian legislation*

6. Article 2 of Legislative Decree 61/2000 of 25 February 2000 (6) imposes on employers the obligation to send, no later than 30 days after the conclusion of a part-time contract, a copy of that contract to the competent provincial employment and social security inspectorate.

7. In accordance with Article 8 of the Legislative Decree, failure to comply with that requirement attracts an administrative penalty of EUR 15 for each employee concerned and for each day of delay. No provision is made for any quantitative limit on the penalty or for any grounds for mitigation or aggravation based on the degree of culpability of the infringer.

8. In 2003, three years after the entry into force of Legislative Decree 61/2000, Article 2 was repealed. (7) Nevertheless, since the principle of *tempus regit actum* governs this field in Italy, the provisions abolishing the infringements and the administrative penalties cannot have favourable retroactive effect.

III – The facts

9. The Landesgericht Bozen explains in the order for reference that Ruth Volgger, Othmar Michaeler and Subito GmbH infringed Article 2 of Legislative Decree 61/2000. Despite the brief account of the facts, it is clear from the order that the Arbeitsinspektorat der Autonomen Provinz Bozen (Employment and Social Security Inspectorate of the Autonomous Province of Bolzano) imposed on Mr Michaeler and Subito GmbH a penalty in the form of a fine of EUR 216 750. The reference for a preliminary ruling in Case C−55/07 was made in the action contesting the decision to impose the penalty. At the same time, Ms Volgger, Mr Michaeler and Subito GMBH received a penalty in the amount of EUR 16 800 which they contested before the Landesgericht Bozen, giving rise to the reference in Case C−56/07.

10. The order for reference does not provide any more factual information but, as I will explain below, the uncertainty which has arisen necessitates an essentially abstract analysis of the applicable provisions. Accordingly, there is no reason why the Court should not give a preliminary ruling in the present proceedings.

IV – The question referred for a preliminary ruling and the procedure before the Court of Justice

11. The Landesgericht Bozen, which is fully aware of the Community and national legal

frameworks, has referred the following question to the Court:

'Are national provisions (Articles 2 and 8 of Decree-Law No 61/2000) which impose an obligation on employers to send a copy of part-time employment contracts within 30 days of their conclusion to the competent provincial department of the Labour Inspectorate, which imposes a fine of EUR 15 per employee concerned and per day of delay for failure to do so, and which do not set an upper limit for the administrative fine, compatible with Community law provisions and Directive 97/81/EC of 15 December 1997?'

12. By order of 18 April 2007, the President of the Court joined the two cases in the light of their objective connection.

13. During the written stage, observations were lodged by the Italian Government and the Commission. Since a hearing was not requested, after the general meeting of 27 November 2007, the case became ready for the preparation of this opinion.

V – Legal analysis

A – *A preliminary consideration: the relationship between the general principles of law and Directives 97/81 and 76/207*

14. Before dealing with the substance of the case, it is necessary to identify the applicable legal framework. In the order for reference, the Landesgericht Bozen asks whether the disputed Italian measures are compatible with Directive 97/81 and 'with Community law'. That final part of the question, together with the reasoning set out in the order, suggest to me that the referring court harbours uncertainty about whether the Italian legislation conforms to *other* Community provisions as well.

15. In my view, that reference to Community law concerns the principle of non-discrimination on grounds of sex. As the Italian Court points out, the unequal treatment of part-time and full-time contracts is liable to give rise to indirect discrimination, since women are a group particularly likely to be recruited under the former type of contract.

16. The ambiguity with which the applicable legal framework is described necessitates an explanation of the role of the principle of non-discrimination on grounds of sex in the Directives on equal treatment. In order to provide a useful reply, it is appropriate to consider briefly certain general aspects of the system of sources of Community law.

17. The impact of the general principles of law on Community directives has not always been straightforward. The emergence of open, indeterminate rules like the principles, together with the teleological nature of directives, is liable to confuse courts when it comes to applying clear criteria in order to resolve a dispute. The interwoven, complex influence which the two sources of law have on one another calls for clarification.

18. The general principles of law perform a heterogeneous function in the Community legal system. On the one hand, they are legal rules comparable to rules of primary law which have their own autonomy and may be used to determine whether an act of secondary law is valid or whether a provision of national law is applicable; (8) on the other hand, they supplement the interpretation of other provisions of primary or secondary law, including provisions of national law, and, while they do not have full autonomy, they have a strong influence on the interpretation in each individual case. (9)

19. That function of the principles becomes more straightforward where they are set down in written law, as has occurred with the principle of non-discrimination on grounds of nationality (Article 12 EC), since they then acquire a democratic character which they lack when they are created by case-law. However, in both cases, the principles act as parameters in accordance with other rules and as criteria for interpretation.

20. That clear duality becomes rather more complex where directives are concerned. In *Mangold*, (10) the Court held that it was possible for a general principle of law to apply where a directive could not be relied on in the case owing to its subject-matter, its lack of effectiveness

in horizontal relationships, and the fact that the period for its transposition had not yet expired. The legislation in issue in *Mangold* was Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation. (11) However, the Court resolved the difficulty in applying the directive by acknowledging the autonomy of the general principle of non-discrimination on grounds of age. (12) Where the Community legislature had not ensured protection by means of a directive, the Court of Justice found a solution by relying on a general principle of law.

21. In his opinion in *Palacios de la Villa*, (13) Advocate General Mázak is harshly critical of the *Mangold* case-law, which he regards as harmful to the Community legal order as a whole. (14) I share the view of the advocate general, since the subsidiary applicability of the principles not only gives rise to a lack of legal certainty but also distorts the nature of the system of sources, converting typical Community acts into merely decorative rules which may be easily replaced by the general principles. (15)

22. I believe that the Court should be very cautious when applying directives and general principles of law simultaneously. Indeed, their coexistence would be of more use to the Court if it were argued that directives, once they have become part of the legal system, must be interpreted in such a way that they complement the general principles but the two are not placed on an equal footing, because if, following the adoption of a directive, the principles were to govern matters which fall within the scope of that directive, it would seriously detract from the latter's function and nature. It would be preferable, where they are invoked in cases concerning directives, if the general principles of law acted as criteria for interpretation. In that way, the relationship between the principles and directives would create a climate more likely to guarantee legal certainty and more in keeping with the institutional equilibrium underlying a system of sources such as the Community one. (16)

23. In those circumstances, the question referred by the Landesgericht Bozen calls for an assessment of whether the uncertainties raised may be resolved using Community legislation, in which case the general principles would be used exclusively as tools for interpreting the directives. However, if there are no applicable directives, the general principles of Community law would come into play as autonomous rules of law.

24. In my opinion, the uncertainties raised by the Italian court are governed by two directives: Directive 97/81, to which that court has expressly referred and which governs part-time work, and Directive 76/207, which concerns the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions. Although the referring court cites Article 137 EC, its questions pertain to Directive 76/207.

25. Accordingly, in the present case it will be appropriate to interpret those directives in accordance with the general principles, while ensuring that those principles are not applied as autonomous rules which would have the effect of widening the scope of the directives by the back door and bypassing democratic decision-making processes.

26. Finally, it will be necessary to examine in detail the relationship between Directive 97/81 and Directive 76/207.

27. In *Steinicke*, Advocate General Tizzano saw no reason not to apply the two directives to a part-time employment scheme with a view to retirement that was open only to employees who had worked full-time for a total of at least three of the last five years. (17) However, the Court held that the disputed scheme concerned working conditions, thereby excluding Directive 97/81 and avoiding the need to consider the question which has arisen in the present case. (18)

28. One year later, the question of the relationship between the two directives arose again in *Wippel*, in which the Court finally agreed that they could apply simultaneously in an individual case. (19) I feel it would be appropriate to recall at this juncture the opinion of Advocate General Kokott in that case. (20) The advocate general took the view, which I fully support, that the two directives pursue different objectives. In the absence of any material similarity, it is not possible to assume a relationship of general rule to special rule between the provisions. (21)

29. Now that the nature of the application of the directives has been identified, in terms of their relationship with the principles and with each other, it is necessary to examine the substance of the question submitted by the Landesgericht Bozen. First, I will analyse whether the disputed Italian measures are compatible with Directive 97/81 and I will then determine whether they conform to Directive 76/207.

B – *The administrative obligations imposed by Legislative Decree 61/2000 in the light of Directive 97/81*

1. Purpose of the question

30. The Landesgericht Bozen requests an interpretation of Directive 97/81 in order to assess the compatibility with that Community act of two provisions of Legislative Decree 61/2000 (Articles 2 and 8). In accordance with those provisions, employers must send a copy of part-time employment contracts, within 30 days of their conclusion, to the competent employment authority, with infringement being punished by severe administrative penalties under which a fine of EUR 15 is imposed for each employee concerned and for each day of delay; there is no ceiling on the amount payable.

31. With a view to promoting employment, Directive 97/81 abolished all discrimination between part-time and full-time employment contracts. That aim is enshrined in Clause 1(a) of the Framework Agreement annexed to the directive, which states that its purpose is 'to provide for the removal of discrimination against part-time workers and to improve the quality of part-time work'. (22)

32. The equal treatment required by the directive is aimed principally at the substantive conditions of the employment relationship. The directive seeks to abolish all discrimination between the two types of contract which disadvantages part-time workers. The case-law of the Court in this field confirms that view. (23)

33. However, the present case does not concern the subject-matter of the employment contract; instead, the Italian legislation introduces bureaucratic measures into the administrative obligations of employers. Accordingly, this case relates to a vertical relationship between the State (the employment authority) and an individual (the employer).

34. Despite the fact that in the context of these proceedings the complaint does not concern the type of discrimination which constitutes the main objective of Directive 97/81, it is still important to examine the measures adopted in Italy. Clause 5(1)(a) of the Framework Agreement calls on the Member States to identify obstacles of a legal or administrative nature which may limit the opportunities for part-time work and, where appropriate, eliminate them. It is clear, therefore, that the bureaucratic restrictions imposed on the conclusion of part-time contracts are liable to infringe Directive 97/81.

35. Accordingly, my reply will focus on whether Legislative Decree 61/2000 is compatible with Clause (5)(1)(a) of the Framework Agreement annexed to Directive 97/81. It is appropriate to assess the lawfulness of the notification obligation first of all, followed by the lawfulness of the punitive measures. The provisions concerned are both contrary to the principle of non-discrimination between employment contracts laid down in Directive 97/81. For reasons of conceptual and expositional clarity, the failings of the two provisions must be dealt with separately.

2. The administrative notification obligation

36. The Landesgericht Bozen asks whether the obligation to notify all part-time employment contracts to the employment authority constitutes an infringement of Community law. Consequently, it is necessary to identify whether there is an objective, reasonable justification for the different treatment.

37. The principle of proportionality has been accorded a prominent position in the assessment of the Community principle of non-discrimination by the case-law of the Court and the judicial practice of a number of Member States. It has been treated in the same way by

academic writers. (24) The threefold proportionality test provides a useful tool for resolving the problem, requiring that the discrimination must be appropriate, necessary and proportionate in the strict sense. (25) Using that threefold evaluation, which is carried out in stages rather than cumulatively, the assessment of equality becomes more transparent and generates greater legal certainty.

38. The assessment of the principle of proportionality also confirms the points put forward in paragraphs 17 to 22 of this Opinion. In the case of a directive which harmonises a specific sector, the general principles perform an interpretative function. In the present case, the principle of proportionality helps to determine the meaning of Clause 5(1)(a) of the Framework Agreement annexed to Directive 97/81.

39. Case-law provides many examples of national provisions which impede the attainment of Community objectives. (26) The most prolific area is the freedoms of movement. In that field, the Court reserves particularly harsh criticism for directly discriminatory measures, because they lead to open inequality which it is for the Member States, to justify. However, in the case of indirectly discriminatory measures, the standard of review is always more measured and cautious in view of the difficulties which this type of assessment creates for the court performing it. (27)

40. It is my view that the case-law on freedom of movement must become the point of reference for answering the question referred for a preliminary ruling in the present case. Notwithstanding the obvious differences between the fundamental freedoms and a harmonised sector like employment, the methods of review employed by the Court are useful when it comes to drawing up rules for the interpretation of Directive 97/81.

41. The freedom to provide services and the freedom of establishment have provided the Court with the opportunity to rule on the compatibility with Community law of a number of national administrative procedures aimed solely at professionals exercising the right to freedom of movement. In *Vander Elst*, (28) the Court held that 'national legislation which makes the provision of certain services on national territory … subject to the issue of an administrative licence constitutes a restriction on the freedom to provide services'. (29) That finding, which has become settled case-law and been endorsed as a test of proportionality, is founded on the appropriateness and necessity of the administrative measures concerned. First of all, the Court determines whether there is a logical relationship between the national obligation and the aim it pursues. (30) Second, the Court evaluates whether there are less restrictive alternatives which would enable the State to achieve the same objectives using less onerous means. (31) That second stage of the test frequently culminates in a finding that there has been an infringement of Community law.

42. The *Vander Elst* judgment ruled that an obligation incumbent on undertakings established in another Member State to obtain for their employees work permits issued by a national immigration authority, with the imposition of an administrative fine as the penalty for infringement, is incompatible with the freedom to provide services. A few years later, in *Commission* v *Belgium*, (32) the Court went even further and extended that reasoning to national measures applicable to all individuals without exception, specifically an obligation incumbent on security firms to acquire an administrative authorisation. (33)

43. For the purposes of determining whether an administrative obligation is justified, particularly when carrying out the necessity test, the Court has used consistent reasoning in its case-law. In *Schnitzer*, (34) which concerned the obligation to register in a trades register undertakings established in other Member States which provided services in Germany, is most illuminating. The Federal Republic of Germany argued that that obligation was necessary to guarantee the quality of skilled work, but the Court held that that justification was not decisive and that it was necessary to take a different approach, linked to the *effectiveness* of the administrative provisions in issue. The Court went on to state in *Schnitzer* that 'the authorisation procedure set up by the host Member State must neither delay nor complicate exercise of the right of persons established in another Member State to provide their services on the territory of the first State where examination of the conditions governing access to the activities concerned has been carried out and it has been established that those conditions are satisfied'. (35)

44. It may be inferred from all of the foregoing that the Court attaches particular importance to the effectiveness of national administrative obligations which entail, *a priori*, discrimination prohibited under Community law. Justifications linked to such important matters as security or consumer protection are not persuasive where one of the objectives of the Community is at stake. Although the statement of the law set out was developed in the context of the fundamental freedoms, I believe that its theoretical structure may be extrapolated to the present case.

45. In its written observations, the Italian Government contends that the contested measures play an important role in combating fraud and employment black markets. The Italian Government maintains that the gathering of information about all part-time contracts represents a source of data which may be used to draw up and implement public policies. However, the Commission argues that the obligations entail an obstacle which is incompatible with Directive 97/81 and with its objective of promoting a type of contract which, in the present case, has been obstructed without any justification.

46. The severity that the Court displays towards national discriminatory acts, which are expressly prohibited under Community law, indicates that the argument put forward by the Italian Government is unlikely to be successful. There is no doubt that the disputed measures are appropriate to attain the objectives pursued, but, in line with the necessity test, an assessment of whether there are other less onerous solutions demonstrates that the Italian legislation does not comply with the directive. The obligation to submit a copy of all part-time contracts may be easily replaced by other procedures which are equally effective but less costly for employers, who must comply with a requirement which, in principle, is already fulfilled by the employment authority within its remit of supervision, inspection and enforcement.

47. The creation of administrative duties for the purposes of reducing or lightening the responsibilities of the public administration is not always a sign of good public management. Pointless procedures, the raising of private funds to carry out tasks of doubtful use, and the supervisory zeal of the administrative authorities are symptoms which become even more contentious if they are employed in a discriminatory manner and aimed only at a particular group. I feel moved to recall the civil servant Ramón Villamil, the tragic hero of *Miau*, a novel in which Benito Pérez Galdós portrays those who struggle against the forces of bureaucracy without success or reward, engulfed by an administrative system which feeds on its own unnecessary procedures. (36)

48. The notification obligation in dispute in the present proceedings is not compatible with the importance which Directive 97/81 attaches to part-time work or with the prohibition of discrimination it contains. Since there are other less onerous measures which the Italian Government could use to achieve the same aims, the obligation laid down in Article 2 of Legislative Decree 61/2000 is disproportionate and, accordingly, contrary to Clause 5(1)(a) of the Framework Agreement set out in Directive 97/81.

49. That conclusion is bolstered further when account is taken of the penalties resulting from an infringement of the contested obligation.

3. The administrative penalties

50. It is settled case-law that the administrative measures or penalties adopted by the Member States to implement Community law must not go beyond what is strictly necessary for the objectives pursued. In that regard, a penalty must not be so disproportionate to the gravity of the infringement that it becomes an obstacle to the freedoms enshrined in the Treaty. (37) The Court has also confirmed that, where a national administrative measure is ruled incompatible with Community law, the penalty provided for to guarantee compliance with that measure similarly becomes contrary to Community law. (38)

51. Should the Court take the view that the obligation to notify part-time contracts infringes Directive 97/81, it will not be necessary to analyse the penalty in any more detail. I have already pointed out that, were the administrative measure to be declared unlawful, that declaration would apply equally to the penalty. However, in case the Court does not share my view with regard to the notification obligation, I will now go on to examine the lawfulness of the penalties laid down in Article 8 of Legislative Decree 61/2000.

52. The Member States enjoy a wide discretion when it comes to the adoption of measures to safeguard Community law. In both the harmonised sectors and sectors where Member States may choose not to harmonise their legislation, provisions designed to combat breaches of obligations, in particular those of a punitive nature, are drawn up and enforced by the Member States as they see fit. However, that rule is subject to the aforementioned obligation, incumbent on the Member States, to respect the Community principles of effectiveness, equivalence and proportionality.

53. A system of penalties, be it criminal or administrative, aimed at enforcing Community law, must incorporate certain safeguards relating to *procedure* and *substance*. (39) The procedural guarantees are protected by means of the principles of effectiveness and equivalence, (40) while the substantive guarantees are protected by the principle of proportionality.

54. In the case before the Court, there is no reason to call into question the procedure followed before the Italian administrative authorities and courts, but there is reason to question the substantive provisions of the contested measures. It is therefore necessary to carry out a proportionality test.

55. I have already explained that, under Legislative Decree 61/2000, employers are punished with a fine of EUR 15 for each employee concerned and for each day of delay in notifying the contracts they have concluded. Moreover, there is no ceiling at all on the fine; since it is a continuing infringement, the unlawful act may carry on for a long period of time, which increases the amount payable without limit.

56. That type of system causes serious difficulties with regard to culpability. Although administrative penalties are not as severe as penalties in criminal law, the same general principles are applied in both systems. In my opinion in *Commission* v *Council*, I argued that that parallel between criminal and administrative penalties may also be found in the case-law of the Court. (41) The rigour with which the principles are applied varies, but it is clear that principles such as the presumption of innocence, the *ne bis in idem* rule, lawfulness and culpability are legislative constructs which are applicable to both criminal law and the penalties implemented by the administrative authorities. (42)

57. On that basis, it is my view that the penalties laid down in Decree 61/2000 are unlawful in the light of the principle of culpability, which requires that the penalty must reflect the intent of the infringer. To safeguard that principle, legal systems include corrective criteria which find expression in grounds for mitigation or aggravation. Following the same approach, the conduct is typically classified as either fraudulent or negligent. The penalty is therefore adjusted by reference to the degree of intent shown by the perpetrator, which in turn indicates his liability for the infringement. In case-law, that operation is treated as an aspect of the principle of proportionality. (43)

58. In *Louloudakis*, (44) the Court held that a national penalty imposed automatically and on the basis of a single criterion as the reference point, namely the cubic capacity of a vehicle, without taking into account the age of the vehicle or other requirements and rules with which the owner had complied, was incompatible with Community law. (45) Although the Court left the final assessment of the measure to the national court, the considerations put forward in the judgment on the question of culpability are relevant to the present case.

59. To my mind, penalties imposed without limit on the basis of the length of time and the number of employees involved, without being subject to corrective criteria which adjust the punishment according to the culpability of the infringer, contravene the Community principle of proportionality. The administrative obligation consisting of submitting a copy of each part-time contract concluded is supplemented by a punitive element which, once employers are aware of it, serves to discourage that type of employment contract. The possibility of being penalised without limit, simply on the basis of the amount of time that has passed, leads employers to choose other types of contract. The incentive to conclude different forms of contract is greater still when full-time employment contracts are not subject to the same penalties.

60. However, I propose that the Court should leave the decision on that matter to the

Landesgericht Bozen. The automatic nature of the penalty concerned must be analysed in the context of the Italian system of administrative penalties as a whole. Only if it is established that no corrective criteria are taken into account when determining the degree of culpability of the infringer will there be a contravention of Community law. The referring court is in a better position than the Court of Justice to conduct a systematic appraisal of a specific field of Italian law. The solution which I suggest be provided to the Landesgericht Bozen is simple: if, under national law, there is no provision for any adjustment of the penalties set out in Legislative Decree 61/2000, there is an infringement of the Community principle of proportionality.

C – *The administrative obligations under Legislative Decree 61/2000 in the light of Directive 76/207*

61. Finally, it is necessary to ascertain whether there has been an infringement of Directive 76/207. I have already pointed out that there is no relationship of general rule to special rule between that directive and Directive 97/81, which means that the two provisions may be interpreted jointly. Having established that the contested measures are incompatible with Directive 97/81, in my view, it is unnecessary to analyse the difficulties posed by Legislative Decree 61/2000 with regard to discrimination on grounds of sex. However, I feel that some guidance in that connection will help the national court to adopt the correct decision.

62. Although the Italian Government does not refer in its written observations to the conflict between Directive 76/207 and national law, the Commission has made assertions in that connection, to the effect that the provisions of that directive are not applicable to the present proceedings.

63. I do not share the Commission's view.

64. Since *Jenkins*, (46) it has been clear that in the sphere of social policy, and more particularly in the fight against different treatment on grounds of sex, Community law also precludes indirect discrimination. That case concerned a part-time female worker whose pay was substantially lower than that of her male colleagues. The defendant claimed that the difference in pay was not aimed at creating a distinct regime for men and women but rather at adjusting the wages to the specific characteristics of full-time employees on the one hand and part-time employees on the other. The Court held that such a difference in treatment was compatible with the principle of non-discrimination on grounds of sex with regard to pay (Article 141 EC) provided that it was objectively justified, (47) but pointed out that if the number of women who carried on full-time work was significantly lower than the number of men, there would be unlawful discrimination. (48)

65. The equality test introduced in *Jenkins* calls for a factual analysis which the Court is not always able to carry out. Accordingly, the Court stated that it is for the national court to evaluate the facts in order to determine whether there is discrimination between men and women, having regard to a number of factors, such as statistics drawn up by the national employment authority or other equivalent data. (49)

66. The *Jenkins* judgment has become settled case-law, (50) albeit mainly in the context of Article 141 EC, whose provisions on equal pay have their own special characteristics. In short, indirect discrimination on grounds of sex is currently prohibited to the same extent as direct discrimination. A particularly revealing example is Article 2(2) of Council Directive 97/80/EC of 15 December 1997 on the burden of proof in cases of discrimination based on sex, (51) which contains an expression of the *Jenkins* case-law:

'For purposes of the principle of equal treatment … indirect discrimination shall exist where an apparently neutral provision, criterion or practice disadvantages a substantially higher proportion of the members of one sex unless that provision, criterion or practice is appropriate and necessary and can be justified by objective factors unrelated to sex.' (52)

67. Since Article 2(2) of Directive 97/80 governs discriminatory situations prohibited by Directive 76/207, the *Jenkins* case-law must apply to the present case.

68. In those circumstances, it is merely necessary to refer to the analysis of the Italian

provisions I carried out above. Following that assessment, I suggest that the Court should hold that the introduction of measures which impede the promotion of part-time work are liable to restrict access to employment. For the reasons set out in paragraphs 36 to 60 of this Opinion, the disputed national measures discourage the recruitment of part-time workers. Having made that statement of the law, it is for the Landesgericht Bozen to determine whether the facts constitute evidence of discrimination on grounds of sex. If the result of that assessment shows that the measure affects a significantly higher percentage of women than men, the national court must find that there is an infringement of Directive 76/207, specifically Article 3 thereof.

VI – Conclusion

69. In the light of the foregoing considerations, I propose that the Court should reply to the question referred by the Landesgericht Bozen, declaring that:

Clauses 4 and 5 of the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC, annexed to Council Directive 97/81/EC of 15 December 1997, must be interpreted as meaning that they preclude national legislation requiring that a copy of all part-time contracts be sent to the administrative authorities within 30 days of their conclusion.

Article 3 of Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions must be interpreted as meaning that it precludes national legislation requiring that a copy of all part-time contracts be sent to the administrative authorities within 30 days of their conclusion, where it is demonstrated that the measure affects a significantly higher percentage of women than men. It is for the national court to determine whether the facts constitute evidence of discrimination on grounds of sex.

---

1 – Original language: Spanish.

---

2 – OJ 1998 L 14, p. 9.

---

3 – OJ 1976 L 39, p. 40.

---

4 – OJ 1975 L 45, p. 19.

---

5 – The two directives were recently recast in Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (OJ 2006 L 204, p. 23). However, the facts of the present case occurred before the adoption of Directive 2006/54, and therefore it is not applicable.

---

6 – *Gazzetta Ufficiale* of 20 March 2000, No 66.

---

7 – Legislative Decree 276/2003 of 10 September 2003 (*Gazzetta Ufficiale* of 9 October 2003, No 235).

---

8 – Although national courts have a duty to refrain from applying national provisions which conflict with Community law (judgment in Case 106/77 *Simmenthal* [1978] ECR 629, paragraphs 21 to 24), on occasion they must set such provisions aside (judgment in Case 167/73 *Commission* v *France* [1974] ECR 359, paragraph 35). That is the case where there is incompatibility between Community provisions and national administrative provisions, the assessment and subsequent annulment of which may be performed by the courts of a number of Member States. That situation confirms that there is not a clear relationship of ‘primacy’ (based on applicability) between Community law and national

law, as opposed to a relationship of 'supremacy' (founded on validity), since, in some cases, that distinction is distorted. Ferreres Comella, V., 'La Constitución española ante la cláusula de primacía del Derecho de la Unión Europea', in Closa Montero, C. (ed.), *Constitución española y Constitución europea. Análisis de la Declaración del Tribunal Constitucional*, Centro de Estudios Políticos y Constitucionales, Madrid, 2005, p. 92.

---

9 – In that connection, see Alonso García, R., *Derecho Comunitario. Sistema Constitucional y Administrativo de la Comunidad Europea*, CEURA, Madrid, 1994, pp. 238 to 244. In addition, Groussot, X., *Creation, Development and Impact of the General Principles of Community Law: towards a jus commune europaeum?*, Lund University, Lund, 2005, pp. 16 to 27, classifies the principles as supplementary (or subsidiary), regulatory or operational. The first group deal with lacunae in Community law, the second have a more legislative purpose (freedoms, subsidiarity or institutional fairness), while the third essentially act as criteria for assessing individual acts (proportionality, equality, legal certainty, etc.).

---

10 – Case C-144/04 *Mangold* [2005] ECR I-9981.

---

11 – OJ 2000 L 303, p. 16.

---

12 – Judgment in *Mangold*, cited in footnote 10, paragraph 75.

---

13 – Case C-411/05 *Palacios de la Villa* [2007] ECR I-0000.

---

14 – The opinion of Advocate General Mázak in *Palacios de la Villa* is most illuminating both for its grounds and for the clarity with which the advocate general expresses his disagreement with the *Mangold* case-law. Perhaps the most revealing section is contained in his closing points when he states that '… as a rule … where a directive has been adopted, such an act of secondary Community law may be interpreted in the light of the general principles underlying it and measured against those principles. Thus general principles of law – referred to by the Court on the basis of Article 220 EC as part of primary Community law – are given expression and effect through specific Community legislation …

A problematic situation could arise, however, if this concept were to be turned practically upside down by allowing a general principle of Community law which, as in the present case, may be considered to be expressed in specific Community legislation, a degree of emancipation such that it can be invoked instead or independently of that legislation.

Not only would such an approach raise serious concerns in relation to legal certainty, it would also call into question the distribution of competence between the Community and the Member States, and the attribution of powers under the Treaty in general …' (paragraphs 136 to 138).

---

15 – The *Common Market Law Review*, No 1, Vol. 43, 2006, dedicates a perceptive editorial to the *Mangold* judgment, which is critical in tone and draws attention to the extreme level of complexity the judgment brings to the Community legal framework. See, in particular, pp. 7 and 8.

---

16 – A different situation arises where a directive requires the Member States to transpose it in the light of the fundamental rights of the European Union. In the judgment in Joined Cases C-20/00 and C-64/00 *Booker Aquaculture and Hydro Seafood* [2003] ECR I-7411, the Court, in line with the opinion of Advocate General Mischo, declared that, in so far as they are general principles of

Community law, the fundamental rights must be observed by States when transposing directives into their national legal systems. Indeed, the fundamental rights of the European Union are useful not only for interpretation but also for reviewing acts of the public authorities. That function is derived from the essentially constitutional nature of the fundamental rights, in that, as well as conferring areas of freedom on individuals, they also legitimise the acts of the Union.

---

17 – Opinion of Advocate General Tizzano in Case C-77/02 *Steinicke* [2003] ECR I-9027.

---

18 – Judgment in *Steinicke*, cited in footnote 17, paragraph 52.

---

19 – Judgment in Case C-313/02 *Wippel* [2004] ECR I-9483

---

20 – Opinion of Advocate General Kokott in *Wippel*, cited in footnote 19, paragraphs 64 to 67.

---

21 – As the Advocate General states in paragraph 67 of her Opinion in *Wippel*, 'the prohibition on discrimination in Directive 76/207 is also applicable alongside the prohibition on discrimination against part-time workers under the Framework Agreement on part-time work because the two provisions relate to different facts and pursue different objectives. Their particular prohibitions on discrimination are based on different circumstances. There is no relationship between them of general rule to special rule.'

---

22 – The directive is examined in the works of Ellis, E., *EU Anti-Discrimination Law*, Oxford University Press, Oxford, 2005, pp. 266 and 267, and Barnard, C., *EC Employment Law*, 3rd edition, Oxford University Press, Oxford, 2006, pp. 429 to 432.

---

23 – *Wippel*, cited in footnote 19. I examined certain aspects of part-time work in my opinion in Case C-300/06 *Voß* [2007] ECR I-0000, paragraphs 28 to 31.

---

24 – Craig, P., *EU Administrative Law*, Oxford University Press, Oxford, 2006, pp. 695 to 700. See also Ellis, E., 'The Concept of Proportionality in European Community Sex Discrimination Law', in Ellis, E. (ed.), *The Principle of Proportionality in the Laws of Europe*, Hart Publishers, Oxford, 1999, pp. 170 to 171.

---

25 – The Court carries out this threefold evaluation on a regular basis. On the three steps for establishing proportionality in Community law, see Schwarze, J., *European Administrative Law*, Sweet & Maxwell, London, 2006; de Búrca, G., 'The Principle of Proportionality and its Application in EC Law', *Yearbook of European Law*, vol. 13, 1993; Emiliou, N., *The Principle of Proportionality in European Law*, Kluwer, 1996; and Ellis, E. (ed.), *The Principle of Proportionality in the Law of Europe*, op. cit. On the theoretical structure of the principle of proportionality, using a methodological perspective and with the emphasis on the constitutional nature of the principle, see Bernal Pulido, C., *El principio de proporcionalidad y los derechos fundamentales*, 2nd edition., Centro de Estudios Políticos y Constitucionales, Madrid, 2006.

---

26 – Tridimas, T., *The General Principles of EU Law*, 2nd edition, Oxford University Press, Oxford, 2006, Chapter 5.

---

27 – The principle of proportionality requires the prior determination of a level of protection, which must be adopted by the court carrying out the assessment on the basis of the factual, institutional and

legislative context of each individual case. That occurs in all the legal systems of the Member States which have recognised the principle. According to Craig, P., op. cit., p. 657, 'In any system of administrative law the courts will have to decide not only which tests to apply to determine the legality of administrative action, but also the rigour or intensity with which to apply them. In some legal systems this is worked out to a high degree, but the issue is pertinent for all systems. The relative intensity of judicial review is just as much a live question in relation to proportionality in the EU'.

---

28 – Case C-43/93 [1994] ECR I-3803.

---

29 – Judgment in *Vander Elst*, cited in footnote 28, paragraph 15.

---

30 – Judgment in *Vander Elst*, paragraphs 18 to 22.

---

31 – Judgment in *Vander Elst*, paragraphs 23 to 26.

---

32 – Case C-355/98 [2000] ECR I-1221.

---

33 – Judgment in *Commission* v *Belgium*, cited in footnote 32, paragraphs 35 to 40.

---

34 – Case C-215/01 [2003] ECR I-14847.

---

35 – Judgment in *Schnitzer*, cited in footnote 34, paragraph 36.

---

36 – In a conversation between Villamil, a character who supports the simplification of administrative practices, and Buenaventura Pantoja, the satirical archetype of the 19th century civil servant, Benito Pérez Galdós recounts with mastery and humour that 'what irritated Pantoja was that his friend [Villamil] advocated income tax, completely ignoring the territorial, industrial and consumer taxes. Income tax, which was based on a tax return and whose assistants were self-esteem and good faith, was madness in a country where it is almost necessary to put taxpayers in front of the gallows to make them pay up. In general, simplification was contrary to the spirit of the upright civil servant who liked a lot of staff, a lot of muddle, and an enormous amount of putting away and taking out of paperwork. Lastly, Pantoja felt an element of personal suspicion, for that obsession with abolishing taxes was rather like wanting to abolish him.' Pérez Galdós, B., *Miau*, col. Austral, No 470, Espasa Calpe, Madrid, 2007, p. 193.

---

37 – Judgments in Case C-210/91 *Commission* v *Greece* [1992] ECR I-6735, paragraph 19; Case C-36/94 *Siesse* [1995] I-3573, paragraph 21; and Case C-213/99 *De Andrade* [2000] ECR I-11083, paragraph 20.

---

38 – Judgments in Case 8/77 *Sagulo and Others* [1977] ECR 1495, paragraph 12; Case 157/79 *Pieck* [1980] ECR 2171, paragraph 19; and Case C-265/88 *Messner* [1989] ECR 4209, paragraph 14.

---

39 – Lenaerts, K./Arts, D./Maselis, I., *Procedural Law of the European Union*, 2nd edition, London, 2006, p. 83, section 3-001.

---

40 – Principles laid down by the Court in the judgments in Case 33/76 *Rewe* [1976] ECR 1989, paragraph 5, and Case 45/76 *Comet* [1976] ECR 2043, paragraph 13.

---

41 – I explain it as follows in point 47 of my opinion in Case C−176/03 *Commission* v *Council* [2005] ECR I−7879: 'Depending on the extent of the response, there are criminal penalties - those of greater severity – and administrative penalties. Both categories are manifestations of the penalising authority of the State and obey the same ontological principles. However, the less stringent nature of the second type entails a relaxation of the safeguards which must accompany their imposition, without prejudice to the fact that, as I stated in my Opinion in *Greece* v *Commission*, in both situations similar principles must be observed.'

---

42 – On the development of those principles in Community law, see Alonso García, R., *Derecho Comunitario, Derechos Nacionales y Derecho Común Europeo*, Civitas, Madrid, 1989, pp. 297 to 301.

---

43 – National legal systems also base the determination of the level of culpability on the principle of proportionality. In France, for example, since the judgment in Lebon (Section, 9 June 1978, p. 245), the Council of State has been applying the principle when reviewing the classification of administrative penalties. The Spanish legislature sanctioned that practice in Article 131 of Law 30/1992 of 26 November 1992 on the Legal Provisions applicable to the Public Administrations and the Common Administrative Procedure, in which the grounds for adjusting punitive liability are set out under the heading 'Principle of Proportionality'. On the development of the culpability test, see Peers, S., *EU Justice and Home Affair[s] Law*, 2nd edition, Oxford University Press, Oxford, 2006, pp. 417 and 418.

---

44 – Case C−262/99 [2001] ECR I−5547.

45– Paragraph 69 of the *Louloudakis* judgment, cited in footnote 44, states: '… although overriding requirements of enforcement and prevention may justify national legislation setting penalties at a certain level of severity, it is nevertheless possible that penalties determined in accordance with rules such as those applicable in the main proceedings may prove to be disproportionate and constitute an obstacle to the said freedom, inasmuch as they include flat-rate penalties fixed solely on the basis of the vehicle's cubic capacity, without account being taken of the vehicle's age, and increased duty which may be as much as 10 times the charges at issue. A penalty based on the sole criterion of cubic capacity could be disproportionate to the gravity of the infringement, in particular where it is associated with another heavy penalty, imposed in respect of the same infringement. The same could be true of a penalty amounting to a multiple of the charges at issue, for example 10 times such charges.' It must be recalled that the Court has only very rarely allowed any form of strict liability in the field of penalties. In those cases, the Court stipulated that national law must respect the principles of effectiveness, equivalence and proportionality. See also the judgments in Case 68/88 *Commission* v *Greece* [1989] ECR 2965, paragraph 24; Case C−326/88 *Hansen* [1990] ECR I−2911, paragraph 17; and Case C−177/95 *Ebony Maritime and Loten Navigation* [1997] ECR I−1111, paragraph 35.

---

46 – Case 96/80 *Jenkins* [1981] ECR 911.

---

47 – Judgment in *Jenkins*, cited in footnote 46, paragraphs 11 and 12. In the opinion in *Voß*, paragraphs 32 to 38, I discussed in detail the development in case-law of the principle of indirect discrimination based on sex. See also Craig, P. & de Búrca, G., *EU Law*, 4th edition, Oxford University Press, Oxford, 2007, pp. 886 to 896.

---

48 – Judgment in *Jenkins*, paragraphs 13 and 14.

49 – On the use of statistical criteria in the case-law of the Court, see Nielsen, R., *European Labour Law*, DJØF Publishing, Copenhagen, 2000, pp. 217 to 220.

50 – The Court upheld the *Jenkins* case-law shortly afterwards in the judgment in Case 170/84 *Bilka* [1986] ECR 1607, paragraph 29. In the same context, see the judgments in Case 171/88 *Rinner-Kühn* [1989] ECR 2743, paragraph 11; Case C-184/89 *Nimz* [1991] ECR I-297, paragraph 14; Case C-33/89 *Kowalska* [1990] ECR I-2591, paragraph 13; Case C-360/90 *Bötel* [1992] ECR I-3589, paragraph 30; Case C-100/95 *Kording* [1997] ECR I-5289, paragraph 16; and Case C-236/98 *JämO* [2000] ECR I-2189, paragraph 52.

51 – OJ 1998 L 14, p. 6.

52 – That concept was refined in Directive 2006/54, which defines indirect discrimination as occurring 'where an apparently neutral provision, criterion or practice would put persons of one sex at a particular disadvantage compared with persons of the other sex, unless that provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary'. It is clear from the wording of the new provision that the quantitative factor – that is, that the discrimination must affect a greater number of women than men – is no longer decisive and must be taken in conjunction with other criteria.