referred to in the third paragraph of Article 189.

2. Directive No 76/207/EEC does not require discrimination on grounds of sex regarding access to employment to be made the subject of a sanction by way of an obligation imposed on the employer who is the author of the discrimination to conclude a contract of employment with the candidate discriminated against.

As regards sanctions for any discrimination which may occur, the directive does not include any unconditional and sufficiently precise obligation which, in the absence of implementing measures adopted within the prescribed time-limits, may be relied on by an individual in order to obtain specific compensation under the directive, where that is not provided for or permitted under national law.

Although Directive No 76/207/EEC, for the purpose of imposing a sanction for the breach of the prohibition of discrimination, leaves the Member States free to choose between the different solutions suitable for achieving its objective, it nevertheless requires that if a Member State chooses to penalize breaches of that prohibition by the award of compensation, then in order to ensure that it is effective and that it has a deterrent effect, that compensation must in any event be adequate in relation to the damage sustained and must therefore amount to more than purely nominal compensation such as, for example, the reimbursement only of the expenses incurred in connexion with the application. It is for the national court to interpret and apply the legislation adopted for the implementation of the directive in conformity with the requirements of Community law, in so far as it is given discretion to do so under national law.

In Case 14/83

REFERENCE to the Court under Article 177 of the EEC Treaty by the Arbeitsgericht [Labour Court] Hamm for a preliminary ruling in the action pending before that court between

SABINE VON COLSON AND ELISABETH KAMANN

and

LAND NORDRHEIN-WESTFALEN [North-Rhine Westphalia],

on the interpretation of Council Directive No 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regard access to employment, vocational training and promotion, and working conditions (Official Journal 1976, L 39, p. 40).

THE COURT

composed of: J. Mertens de Wilmars, President, T. Koopmans, K. Bahlmann and Y. Galmot, Presidents of Chambers, P. Pescatore, Lord Mackenzie Stuart, A. O'Keeffe, G. Bosco, O. Due, U. Everling and C. Kakouris, Judges,

Advocate General: S. Rozès
Registrar: H. A. Rühl, Principal Administrator

gives the following

JUDGMENT

Facts and Issues

I — Facts and procedure

In 1982 two vacancies for social workers arose at Werl prison. The two plaintiffs in the main proceedings applied for those posts. Two male candidates were eventually appointed.

The plaintiffs brought an action before the Arbeitsgericht Hamm against the Land Nordrhein-Westfalen, which administers Werl prison. The action sought a declaration that it was solely because of their sex that the plaintiffs had not been appointed. Consequently, they claimed that the defendant Land should be ordered to offer them a contract of employment in the abovementioned prison or, in the alternative, to pay them damages amounting to six months' salary. In a second claim in the alternative, the plaintiff von Colson claimed the reimbursement of travelling expenses amounting to DM 7.20 incurred by her in pursuing her application for the post.

The Arbeitsgericht held that the plaintiffs were rejected for the posts in question because of their sex.

Nevertheless, it considered that under German law it was not able to allow their claims with the exception of the alternative claim submitted by the plaintiff von Colson for her travelling expenses (DM 7.20).

Paragraph 611a of the Bürgerliches Gesetzbuch [Civil Code], which purports to implement Council Directive No 76/207/EEC, provides that:

"1. An employer must not discriminate against a worker on grounds of sex, in connection with an agreement or a measure, in particular in the course of the establishment of an employment relationship . . .

2. If an employment relationship has not been established because of a breach of the prohibition of discrimination in subparagraph (1) attributable to the employer, he is liable to pay damages in respect of the loss incurred by the worker as a result of his reliance on the expectation that the establishment of the employment relationship would not be precluded by such a breach . . .".

Therefore, according to the national court, the only sanction applicable for discrimination in respect of access to employment is compensation for "Vertrauensschaden", that is, for expenses actually incurred by the employee as a result of his reliance on the fact that he would not be refused a post as a result of a breach of the prohibition of discrimination.

Thus the German legislature expressly does not allow for the so-called "positive interest", namely a right to be offered a post following a breach of the principle of equal treatment for the two sexes.

In order to determine the rules applicable in Community law in the event of discrimination in relation to access to employment, the national court held that it had to ask the Court of Justice to interpret certain provisions of Council Directive No 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 (Official Journal 1976, L 39, p. 40).

The Arbeitsgericht Hamm therefore asked the Court for a preliminary ruling on the following questions:

"1. Does Council Directive No 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 imply that discrimination on grounds of sex in relation to access to employment (failure to conclude a contract of employment on account of the candidate's sex; preference given to another candidate on account of his sex) must be sanctioned by requiring the employer in question to conclude a contract of employment with the candidate who was discriminated against?

2. If Question 1 is answered in the affirmative, in principle:

(a) Is the employer required to conclude a contract of employment only if, in addition to the finding that he made a subjective decision on the basis of criteria relating to sex, it can be established that the candidate discriminated against is objectively — according to acceptable selection criteria — better qualified for the post than the candidate with whom a contract of employment was concluded?

(b) Or, is the employer also required to engage the candidate discriminated against if, although it can be established that the employer made a subjective decision on the basis of criteria relating to sex, the candidate discriminated against and the successful can-

didate are objectively equally well qualified?

(c) Finally, does the candidate discriminated against have the right to be engaged even if objectively he is less well qualified than the successful candidate, but it is established that from the outset the employer, on account of the sex of the candidate discriminated against, disregarded that candidate in making his decision on the basis of acceptable criteria?

3. If the essential issue is the objective assessment of the candidate's qualifications within the meaning of Question 2 (a), (b) and (c):

   Is that issue to be decided wholly by the court and what criteria and procedural rules relating to evidence and burden of proof are applicable in that regard?

4. If Question 1 is answered in the affirmative, in principle:

   Where there are more than two candidates for a post and from the outset more than one person is on the ground of sex disregarded for the purposes of the decision made on the basis of acceptable criteria, is each of those persons entitled to be offered a contract of employment?

   Is the court in such a case obliged to make its own choice between the candidates discriminated against?

   If the question contained in the first paragraph is answered in the negative, what other sanction of substantive law is available?

5. If Question 1 is answered in the negative, in principle:

   Under the provisions of Directive No 76/207/EEC what sanction applies where there is an established case of discrimination in relation to access to employment?

   In that regard must a distinction be drawn between the situations described in Question 2 (a), (b) and (c)?

6. Does Directive No 76/207/EEC as interpreted by the Court of Justice in its answers to the questions set out above constitute directly applicable law in the Federal Republic of Germany?"

According to the national court, it is clear from the provisions of the directive and from the preamble thereto that that directive requires Member States to adopt legal provisions together with effective sanctions. In its view only compensation in kind is effective.

The directive in question essentially lays down the principle of equal treatment for men and women as regards access to employment, which entails the obligation to abolish provisions which are incompatible with that principle. Article 6 of the directive, in addition, guarantees the protection by the courts of the rights which may result therefrom. Finally, Member States must bring into force the "laws, regulations and administrative provisions necessary" in order to apply the directive.

The order making the reference was lodged at the Court Registry on 24 January 1983.

In accordance with Article 20 of the Protocol on the Statute of the Court of Justice of the EEC, written observations have been submitted by the plaintiffs in the main proceedings, represented by Clemens Franzen, Rechtssekretär, Deutscher Gewerkschaftsbund [German Federation of Trade Unions]; by the Federal Republic of Germany, represented by Martin Seidel, Ministerialrat at the Federal Ministry of Economic Affairs and Manfred Zuleeg, acting as Agent; by the Danish Govern-

ment, represented by Laurids Mikaelsen, a Legal Adviser at the Danish Ministry of Foreign Affairs, acting as Agent; by the United Kingdom, represented by J. D. Howes, of the Treasury Solicitor's Department, acting as Agent, assisted by Ian Glick, Barrister, of the Inner Temple, London; and by the Commission of the European Communities, represented by Manfred Beschel, a member of its Legal Department, acting as Agent, assisted by Meinhard Hilf.

II — Written observations submitted to the Court

The *plaintiffs in the main proceedings* maintain that to allow compensation for the damage resulting from the refusal to recruit solely in respect of the "negative interest" ("Vertrauensschaden") is unacceptable. Under the terms of the Community directive, the Federal Republic of Germany is required to take action with a view to the implementation of Community rules and compliance therewith. That includes equally the adoption of appropriate measures intended to avoid discrimination in the future.

It is precisely because Paragraph 611a (2) of the Bürgerliches Gesetzbuch has expressly limited the right to compensation for discrimination established in relation to recruitment to what is known as the negative interest, that the German court considered itself prevented from applying the general rules of law (for example, the general right to compensation conferred by Paragraph 823 (2) of the Bürgerliches Gesetzbuch, the principle of *culpa in contrahendo* and so on).

In that respect, the Arbeitsgericht stated, to the point, that in practice the right to compensation is meaningless if it is limited to the negative interest. Such compensation can only cover the reimbursement, where appropriate, of costs incurred by the candidate in presenting himself at the premises of the employer (in this instance, DM 7.20 for the plaintiff von Colson).

That discrepancy provoked vigorous criticism in the Federal Republic of Germany. In an official report, the German Government itself expressly conceded that the view that Paragraph 611a (2) of the Bürgerliches Gesetzbuch provides an inadequate system of compensation is widely held and that actions are only rarely brought.

It must therefore be concluded that Article 611a (2) must be disregarded at least in so far as the right to compensation, in the event of established discrimination in relation to a recruitment procedure, is limited solely to "negative interests" based on frustration of expectation. The employer must therefore be required to conclude a contract of employment with the candidate who was discriminated against.

In the light of the rules of German law concerning evidence and the burden of proof (which, to a certain extent, place the burden of proof on the defendant), it is not essential to reply to Questions 2 and 3 in the order making the reference.

As regards Question 4, the plaintiffs consider that it would be consonant with national civil procedure for two plaintiffs to be appointed to the same post by way of reparation, in certain circumstances. If an employer is not able to show that he has not been guilty of discrimination, he exposes himself to the risk of being confronted with multiple claims. It is therefore equally not essential to reply to that question, owing to the operation of the rules of German law.

Finally, the plaintiffs take the view that even if, contrary to all expectations, the directive does not entail, in the light of national law, any right to be engaged, the sense and purpose of that directive

require at least that the employer be compelled to pay financial compensation in the event of established discrimination.

As regards the direct applicability of the directive, the plaintiffs express the hope that the Court will reply in accordance with the existing case-law.

The *Federal Republic of Germany* emphasizes that the draft law was notified to the Commission prior to the adoption of the law and that the Commission did not raise any objection in connexion with the provision which is made therein regarding the consequences of discrimination in relation to access to employment. Moreover, in its reasoned opinion of 29 October 1982 the Commission does not suggest that the law constitutes an infringement against Directive No 76/207/EEC in that respect. In addition, the new legislation goes further than previous laws, in particular inasmuch as it is now established that all potential and actual employers are bound by it.

Whilst it is aware of the need for effective implementation of the directive, the German Government stresses the fact that each Member State has a margin of discretion as regards the legal consequences which must result from a breach of the principle of equal treatment (third paragraph of Article 189 of the EEC Treaty).

The exclusion of the right to be engaged falls within the bounds of the margin of discretion allowed by the directive to each Member State as to form and methods. Community law does not require that the interests of the candidate discriminated against override all other considerations, since otherwise it would not have been necessary to include the provision in Article 2 (4) of Directive No 76/207/EEC, which authorizes Member States to take measures to promote equal opportunity for men and women.

The appointment of the person preferred by the employer cannot be annulled since that would entail the frustration of that person's legitimate expectations. Moreover, the creation of a new post or even of several posts goes beyond the scope of the prohibition of discriminatory treatment and represents a positive measure which cannot be imposed on the potential employer. Finally, even if the discrimination is revealed before the post is occupied, an employer cannot be compelled to engage someone.

In consequence the German Government proposes that the first question submitted by the national court be answered in the negative. Thus it is no longer useful to reply to Questions 2, 3 and 4.

As regards Question 5, the German Government maintains that if the Court should consider that more serious legal consequences are necessary in order to impose the principle of equal treatment effectively, the national courts must first be asked to exhaust the possibilities provided by the national legal system. In its view, it is possible for the German courts to elaborate from the general context of private law adequate solutions which satisfy both the principle of equal treatment and the interests of all parties.

Among the measures which would be effective with a view to enforcing the principle of equal treatment, the Bürgerliches Gesetzbuch provides for the right to damages.

Furthermore, the legal consequence of discrimination should be proportionate. Thus an appreciable legal consequence is sufficient to enforce the principle of equal treatment. Moreover, a right to damages should exist only if the candidate discriminated against was

better qualified than the others to carry out the duties in question; it should not exist where the candidates' qualifications were equal.

As regards Question 6, the German Government considers that, in the national sphere, the scope of the legal effects of Directive No 76/207/EEC is to be determined by reference to the existing case-law of the Court.

The *Danish Government* takes the view that the directive contains no provision which requires Member States to implement specific sanctions. Comparison with Council Directive No 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 shows that the latter provides expressly for penalties in the event of a breach of the principle of equal pay. The Community legislature therefore deliberately left that question open as regards the directive concerning equal treatment.

The Danish Government notes, in addition, that even in the directive on equal pay, the Council left to Member States the choice of appropriate measures, "in accordance with their national circumstances and legal systems", which provides additional support for the proposition that it is impossible to infer from the directive on equal treatment rules regarding an obligation to fix specific sanctions.

Accordingly, it is for the Member States to choose the appropriate sanctions, subject to the restrictions derived from Articles 5 and 189 of the Treaty. Moreover, Member States should impose the same penalties in respect of infringements of such rules as they impose in accordance with their legal system in respect of similar infringements of national rules in related spheres not governed by Community law.

A comparison with Convention No 158 of the International Labour Organization, concerning termination of employment at the initiative of the employer, adopted in 1982, shows that at an international level it is accepted that, even in cases of dismissal, the time is not yet ripe for the introduction of an obligation, to be imposed on the employer, to (re)-employ a dismissed employee.

The *United Kingdom* likewise takes the view that it is for Member States to choose and introduce the measures they consider appropriate to ensure the fulfilment of their obligations under the directive and that the Federal Republic of Germany has done so.

Article 6 of the directive is silent as to the measures Member States should adopt. The United Kingdom therefore finds the suggestion that there is some implied and exclusive requirement startling.

The questions submitted by the Arbeitsgericht and the commentaries upon them themselves demonstrate clearly the considerable difficulty the Court would face if it tried to legislate for Member States in those matters.

As regards the applicability of the directive, the United Kingdom emphasizes that a directive which has not been implemented cannot impose obligations on individuals to whom it is not addressed.

Even if the Land were to be regarded in this case as being the Federal Republic, direct effect may operate only against a Member State *qua* State. It should not operate against a Member State *qua* employer. In that respect, its position is analagous to that of an individual. Persons who are or seek to be employed by a Member State should not be in a better position than those who are or seek to be employed by another individual (judgment of 12. 12. 1974, Case 36/74 *Walrave and Koch* [1974] ECR 1405, paragraphs 19 to 25 of the decision).

It states, in addition, that if the directive impliedly requires national courts to order employers to engage candidates who have been discriminated against, such an implied requirement does not have direct effect inasmuch as it is neither clear nor unambiguous, and its operation is dependent upon further action taken by national authorities. Similarly, Article 6 cannot have direct effect since it expressly requires Member States to introduce unspecified measures.

The *Commission* first examines at some length the relevant provisions of Community law and German law. However, it states that it does not wish to deal with the question of the extent to which German law may help the plaintiffs in this instance in their action, if it is not necessary to do so.

The Commission takes the view that it is not possible to infer from Directive No 76/207/EEC a right to engagement. That follows, in the first place, from the wording of the directive, which does not provide for such a sanction. In particular, Article 6 merely provides for a purely formal remedy, without establishing any substantive right.

Nor is the background of the directive any more conclusive. Neither in the statement of the grounds of the proposal for a directive nor in the deliberations of the European Parliament, or those of the Economic and Social Committee, were the possible sanctions considered in any detail.

Moreover, the reactions of the Member States evinced in their implementing laws reveal a wide variety of sanctions. Only in Italian law has it been found that the courts are "entitled to order the termination or the rescission of a discrimination in respect of an appointment". That approach is attributable to the existence of the conflicting principle of the contractual freedom of the employer.

Finally, it is in keeping with the purpose of Directive No 76/207/EEC for it to leave to Member States the choice and the determination of the sanctions (third paragraph of Article 189 of the EEC Treaty). However, that principle applies only in conjunction with the general principle which underlies any directive, that the implementation must produce effective results.

Inasmuch as the first question must clearly be answered in the negative, it is not necessary, even in the alternative, to express a view on Questions 2, 3 and 4.

Question 5 is based on recognition of the fact that the German rule according to which compensation is awarded only in respect of "Vertrauensschaden" is ineffective. The question is intended to encourage the Court to acknowledge the possible existence of an implied right to financial compensation in respect of a positive material interest.

In that regard, the Commission concedes that neither the wording nor the background of the directive provides precise support for any argument in that context

and that not all the Member States have provided for a civil penalty in the form of a right to compensation.

Thus, Article 3 (1) of the directive contains a substantive obligation which is extremely clear. In relation to access to employment no discrimination whatsoever on grounds of sex is permitted. According to Article 6 of the directive, moreover, the person seeking employment must have, to that extent, a right corresponding to the above-mentioned obligation, when he is the "victim" of a breach of that obligation by the employer. In those circumstances, Article 6 implies the existence of "rights" which the person concerned may rely on before the courts. It is true that neither Article 6 nor any other provision of the directive specifies the form that those "rights" must take in order to comply with the requirements of Community law. Nevertheless, the rights accorded to candidates who have been discriminated against must be of such a nature as to evince an effective implementation of the objectives of the directive. That means that the legal consequences of a breach of the principle of equal treatment must not, in any event, be so derisory that an employer may ignore them in deciding whether to accept or reject an application.

The principle according to which the implementation of the directive must be effective requires that those rights must be such as to represent for the candidate, whose rights have been infringed, appropriate compensation and for the employer, a means of pressure to be taken seriously, which encourages him to respect the principle of equal treatment. A national provision which, where that candidate's right to equal treatment has been infringed, restricts a candidate's entitlement to compensation to reimbursement of the costs which he has incurred in making his application does not comply with the requirements of Community law, which are intended to ensure the effective implementation of the aims of the directive.

As regards Question 6, the question of the "direct applicability" of Directive No 76/207/EEC does not arise, in view of the fact that no clear sanction may be inferred from that directive. If, nevertheless, the Court were to consider that the inapplicability of the restriction on compensation contained in Paragraph 611a (2) of the Bürgerliches Gesetzbuch opened the way to a right to a wider, more general compensation for the plaintiffs, other problems regarding the direct applicability of the directive would arise.

Whilst in certain circumstances a directive might have a vertical effect in respect of a Member State or its institutions and its authorities, it is impossible, otherwise than in exceptional circumstances, to attribute to it such an effect in horizontal relationships between persons in private law.

However, in this instance, the plaintiffs have brought an action against the Land of Nordrhein-Westfalen which is part of the public authority. Community law recognizes the principle of the unity of public authority. Within certain limits each Member State may determine how and through what bodies it intends to fulfil the obligations which Community law imposes on it.

It is clear, according to that view, that the directive treats employment relationships of private law between individuals differently to those existing between the Land and the plaintiffs in their capacities as private persons. The discrimination which results therefrom is nevertheless explained, in the context of

these proceedings, by the fact that the public authorities are specifically required to respect fundamental rights. The particular requirement imposed on the public law employer is therefore objectively justified. In national law, that distinction is expressed in a general refusal to recognize the principle of "the effects of fundamental rights in relation to third parties" (Drittwirkung) in relationships between individuals.

III — Question put to the German Government

The German Government was requested to reply in writing to a question on the extent to which the adoption of Paragraph 611a of the Bürgerliches Gesetzbuch may be regarded as having reduced the right to compensation for women who have been victims of discrimination in relation to access to employment inasmuch as it excludes the application of the general provisions of civil law governing compensation and limits their right to compensation solely to the amount payable in respect of Vertrauensschaden.

The German Government replied that that paragraph did not limit the right to compensation and did not exclude the application of the general provisions governing compensation. On the contrary, it established, on its own and in conjunction with Paragraph 823 (2) of the Bürgerliches Gesetzbuch, specific grounds for obtaining compensation.

IV — Oral Procedure

The plaintiffs in the main proceedings, represented by Clemens Franzen, acting as Agent, the defendant in the main proceedings, represented by Mr Siefke, Regierungsdirektor, acting as Agent, the Government of the Federal Republic of Germany, represented by Martin Seidel and Manfred Zuleeg, acting as Agents, and the Commission, represented by Manfred Beschel, acting as Agent, assisted by Meinhard Hilf, presented oral argument and replied to the questions put by the Court at the sitting on 13 December 1983.

The Advocate General delivered her opinion at the sitting on 31 January 1984.

Decision

1 By order of 6 December 1982, which was received at the Court on 24 January 1983, the Arbeitsgericht [Labour Court] Hamm referred to the Court for a preliminary ruling pursuant to Article 177 of the EEC Treaty several questions on the interpretation of Council Directive No 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 (Official Journal 1976, L 39, p. 40).

2 Those questions were raised in the course of proceedings between two qualified social workers, Sabine von Colson and Elisabeth Kamann, and the Land Nordrhein-Westfalen. It appears from the grounds of the order for reference that Werl prison, which caters exclusively for male prisoners and which is administered by the Land Nordrhein-Westfalen, refused to engage the plaintiffs in the main proceedings for reasons relating to their sex. The officials responsible for recruitment justified their refusal to engage the plaintiffs by citing the problems and risks connected with the appointement of female candidates and for those reasons appointed instead male candidates who were however less well-qualified.

3 The Arbeitsgericht Hamm held that there had been discrimination and took the view that under German law the only sanction for discrimination in recruitment is compensation for "Vertrauensschaden", namely the loss incurred by candidates who are victims of discrimination as a result of their belief that their would be no discrimination in the establishment of the employment relationship. Such compensation is provided for under Paragraph 611a (2) of the Bürgerliches Gesetzbuch.

4 Under that provision, in the event of discrimination regarding access to employment, the employer is liable for "damages in respect of the loss incurred by the worker as a result of his reliance on the expectation that the establishment of the employment relationship would not be precluded by such a breach [of the principle of equal treatment]". That provision purports to implement Council Directive No 76/207.

5 Consequently the Arbeitsgericht found that, under German law, it could order the reimbursement only of the travel expenses incurred by the plaintiff von Colson in pursuing her application for the post (DM 7.20) and that it could not allow the plaintiffs' other claims.

6 However, in order to determine the rules of Community law applicable in the event of discrimination regarding access to employment, the Arbeitsgericht referred the following questions to the Court of Justice:

"1. Does Council Directive No 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 imply that discrimination on grounds of sex in relation to access to employment (failure to conclude a contract of employment on account of the candidate's sex; preference given to another candidate on account of his sex) must be sanctioned by requiring the employer in question to conclude a contract of employment with the candidate who was discriminated against?

2. If Question 1 is answered in the affirmative, in principle:

   (a) Is the employer required to conclude a contract of employment only if, in addition to the finding that he made a subjective decision on the basis of criteria relating to sex, it can be established that the candidate discriminated against is objectively — according to acceptable selection criteria — better qualified for the post than the candidate with whom a contract of employment was concluded?

   (b) Or, is the employer also required to engage the candidate discriminated against if, although it can be established that the employer made a subjective decision on the basis of criteria relating to sex, the candidate discriminated against and the successful candidate are objectively equally well qualified?

   (c) Finally, does the candidate discriminated against have the right to be engaged even if objectively he is less well qualified than the successful candidate, but it is established that from the outset the employer, on account of the sex of the candidate discriminated against, disregarded that candidate in making his decision on the basis of acceptable criteria?

3. If the essential issue is the objective assessment of the candidate's qualifications within the meaning of Questions 2 (a), (b) and (c):

   Is that issue to be decided wholly by the court and what criteria and procedural rules relating to evidence and burden of proof are applicable in that regard?

4. If Question 1 is answered in the affirmative, in principle:

   Where there are more than two candidates for a post and from the outset more than one person is on the ground of sex disregarded for the purposes of the decision made on the basis of acceptable criteria, is each of those persons entitled to be offered a contract of employment?

   Is the court in such a case obliged to make its own choice between the candidates discriminated against?

   If the question contained in the first paragraph is answered in the negative, what other sanction of substantive law is available?

5. If Question 1 is answered in the negative, in principle:

   Under the provisions of Directive No 76/207/EEC what sanction applies where there is an established case of discrimination in relation to access to employment?

   In that regard must a distinction be drawn between the situations described in Question 2 (a), (b) and (c)?

6. Does Directive No 76/207/EEC as interpreted by the Court of Justice in its answers to the questions set out above constitute directly applicable law in the Federal Republic of Germany?"

7 Those questions are intended primarily to establish whether Directive No 76/207 requires Member States to lay down legal consequences or specific sanctions in the event of discrimination regarding access to employment (Questions 1 to 5) and whether individuals may, where appropriate, rely on the provisions of the directive before the national courts where the directive has not been transposed into the national legal order within the periods prescribed (Question 6).

(a) Question 1

8 In its first question the Arbeitsgericht asks essentially whether Directive No 76/207 requires discrimination on grounds of sex in the matter of access to employment to be penalized by an obligation, imposed on an employer who is guilty of discrimination to conclude a contract of employment with the candidate who was the victim of discrimination.

9 According to the Arbeitsgericht, it is clear from the recitals in the preamble to and from the actual provisions of the directive that the directive requires Member States to adopt legal provisions which provide effective sanctions. In its view only compensation in kind, entailing the appointment of the persons who were the victims of discrimination, is effective.

10 According to the plaintiffs in the main action, by restricting the right to compensation solely to "Vertrauensschaden", Paragraph 611a (2) of the Bürgerliches Gesetzbuch excluded the possibilities of compensation afforded by the general rules of law. Directive No 76/207 requires Member States to introduce appropriate measures with a view to avoiding discrimination in the future. It should, therefore, be accepted that Paragraph 611a (2) must be left out of account. The result of that would be that the employer would be required to conclude a contract of employment with the candidate discriminated against.

11 The Government of the Federal Republic of Germany is aware of the need for an effective transposition of the directive but stresses the fact that, under the third paragraph of Article 189 of the EEC Treaty, each Member State has a margin of discretion as regards the legal consequences which must result from a breach of the principle of equal treatment. The German Government submits, moreover, that it is possible for the German courts to work out, on the basis of private national law and in conformity with the substance of the directive, adequate solutions which satisfy both the principle of equal treatment and the interests of all the parties. Finally an appreciable legal consequence is in its view sufficient to ensure compliance with the principle of equal treatment and that consequence should follow only if the victim of discrimination was better qualified for the post than the other candidates; it should not apply where the candidates' qualifications were equal.

12 The Danish Government considers that the directive deliberately left to Member States the choice of sanctions, in accordance with their national circumstances and legal systems. Member States should penalize breaches of the principle of equal treatment in the same way as they penalize similar breaches of national rules in related areas not governed by Community law.

13 The United Kingdom is also of the opinion that it is for Member States to choose the measures which they consider appropriate to ensure the fulfilment

of their obligations under the directive. The directive gives no indication as to the measures which Member States should adopt and the questions referred to the Court themselves clearly illustrate the difficulties encountered in laying down appropriate measures.

14 The Commission considers that although the directive is intended to leave to Member States the choice and the determination of the sanctions, the transposition of the directive must nevertheless produce effective results. The principle of the effective transposition of the directive requires that the sanctions must be of such a nature as to constitute appropriate compensation for the candidate discriminated against and for the employer a means of pressure which it would be unwise to disregard and which would prompt him to respect the principle of equal treatment. A national measure which provides for compensation only for losses actually incurred through reliance on a expectation ("Vertrauensschaden") is not sufficient to ensure compliance with that principle.

15 According to the third paragraph of Article 189: "A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods". Although that provision leaves Member States to choose the ways and means of ensuring that the directive is implemented, that freedom does not affect the obligation imposed on all the Member States to which the directive is addressed, to adopt, in their national legal systems, all the measures necessary to ensure that the directive is fully effective, in accordance with the objective which it pursues.

16 It is therefore necessary to examine Directive No 76/207 in order to determine whether it requires Member States to provide for specific legal consequences or sanctions in respect of a breach of the principle of equal treatment regarding access to employment.

17 The object of that directive is to implement in the Member States the principle of equal treatment for men and women, in particular by giving male and female real equality of opportunity as regards access to employment. With that end in view, Article 2 defines the principle of equal treatment and its limits, while Article 3 (1) sets out the scope of the principle specifically as regards access to employment. Article 3 (2) (a) provides that Member States

are to take the measures necessary to ensure that any laws, regulations and administrative provisions contrary to the principle of equal treatment are abolished.

18 Article 6 requires Member States to introduce into their national legal systems such measures as are necessary to enable all persons who consider themselves wronged by discrimination "to pursue their claims by judicial process". It follows from the provision that Member States are required to adopt measures which are sufficiently effective to achieve the objective of the directive and to ensure that those measures may in fact be relied on before the national courts by the persons concerned. Such measures may include, for example, provisions requiring the employer to offer a post to the candidate discriminated against or giving the candidate adequate financial compensation, backed up where necessary by a system of fines. However the directive does not prescribe a specific sanction; it leaves Member States free to choose between the different solutions suitable for achieving its objective.

19 The reply to the first question should therefore be that Directive No 76/207 does not require discrimination on grounds of sex regarding access to employment to be made the subject of a sanction by way of an obligation imposed upon the employer who is the author of the discrimination to conclude a contract of employment with the candidate discriminated against.

(b) Questions 2, 3 and 4

20 It is not necessary to answer the second, third and fourth questions since they are put only on the supposition that an employer is required to offer a post to the candidate discriminated against.

(c) Questions 5 and 6

21 In its fifth question the Arbeitsgericht essentially asks whether it is possible to infer from the directive any sanction in the event of discrimination other than the right to the conclusion of a contract of employment. Question 6 asks

whether the directive, as properly interpreted, may be relied on before national courts by persons who have suffered injury.

22 It is impossible to establish real equality of opportunity without an appropriate system of sanctions. That follows not only from the actual purpose of the directive but more specifically from Article 6 thereof which, by granting applicants for a post who have been discriminated against recourse to the courts, acknowledges that those candidates have rights of which they may avail themselves before the courts.

23 Although, as has been stated in the reply to Question 1, full implementation of the directive does not require any specific form of sanction for unlawful discrimination, it does entail that that sanction be such as to guarantee real and effective judicial protection. Moreover it must also have a real deterrent effect on the employer. It follows that where a Member State chooses to penalize the breach of the prohibition of discrimination by the award of compensation, that compensation must in any event be adequate in relation to the damage sustained.

24 In consequence it appears that national provisions limiting the right to compensation of persons who have been discriminated against as regards access to employment to a purely nominal amount, such as, for example, the reimbursement of expenses incurred by them in submitting their application, would not satisfy the requirements of an effective transposition of the directive.

25 The nature of the sanctions provided for in the Federal Republic of Germany in respect of discrimination regarding access to employment and in particular the question whether the rule in Paragraph 611a (2) of the Bürgerliches Gesetzbuch excludes the possibility of compensation on the basis of the general rules of law were the subject of lengthy discussion before the Court. The German Government maintained in the oral procedure that that provision did not necessarily exclude the application of the general rules of law regarding compensation. It is for the national court alone to rule on that question concerning the interpretation of its national law.

26 However, the Member States' obligation arising from a directive to achieve the result envisaged by the directive and their duty under Article 5 of the Treaty to take all appropriate measures, whether general or particular, to ensure the fulfilment of that obligation, is binding on all the authorities of Member States including, for matters within their jurisdiction, the courts. It follows that, in applying the national law and in particular the provisions of a national law specifically introduced in order to implement Directive No 76/207, national courts are required to interpret their national law in the light of the wording and the purpose of the directive in order to achieve the result referred to in the third paragraph of Article 189.

27 On the other hand, as the above considerations show, the directive does not include any unconditional and sufficiently precise obligation as regards sanctions for discrimination which, in the absence of implementing measures adopted in good time may be relied on by individuals in order to obtain specific compensation under the directive, where that is not provided for or permitted under national law.

28 It should, however, be pointed out to the national court that although Directive No 75/207/EEC, for the purpose of imposing a sanction for the breach of the prohibition of discrimination, leaves the Member States free to choose between the different solutions suitable for achieving its objective, it nevertheless requires that if a Member States chooses to penalize breaches of that prohibition by the award of compensation, then in order to ensure that it is effective and that it has a deterrent effect, that compensation must in any event be adequate in relation to the damage sustained and must therefore amount to more than purely nominal compensation such as, for example, the reimbursement only of the expenses incurred in connection with the application. It is for the national court to interpret and apply the legislation adopted for the implementation of the directive in conformity with the requirements of Community law, in so far as it is given discretion to do so under national law.

Costs

29 The costs incurred by the Governments of Denmark and the Federal Republic of Germany, by the United Kingdom and by the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. As the proceedings are, in so far as the parties to the main action are concerned, in the nature of a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT

in answer to the questions referred to it by the Arbeitsgericht Hamm by order of 6 December 1982, hereby rules:

1. **Directive No 76/207/EEC does not require discrimination on grounds of sex regarding access to employment to be made the subject of a sanction by way of an obligation imposed on the employer who is the author of the discrimination to conclude a contract of employment with the candidate discriminated against.**

2. **As regards sanctions for any discrimination which may occur, the directive does not include any unconditional and sufficiently precise obligation which, in the absence of implementing measures adopted within the prescribed time-limits, may be relied on by an individual in order to obtain specific compensation under the directive, where that is not provided for or permitted under national law.**

3. **Although Directive No 76/207/EEC, for the purpose of imposing a sanction for the breach of the prohibition of discrimination, leaves the Member States free to choose between the different solutions suitable for achieving its objective, it nevertheless requires that if a Member State chooses to penalize breaches of that prohibition by the award of compensation, then in order to ensure that it is effective and that it has a deterrent effect, that compensation must in any event be adequate in relation to the damage sustained and must therefore amount to more than purely nominal compensation such as, for example, the reimbursement only of the expenses incurred in connection with the application. It is for the national court to**

interpret and apply the legislation adopted for the implementation of the directive in conformity with the requirements of Community law, in so far as it is given discretion to do so under national law.

	Mertens de Wilmars	Koopmans	Bahlmann
Galmot	Pescatore	Mackenzie Stuart	O'Keeffe
Bosco	Due	Everling	Kakouris

Delivered in open court in Luxembourg on 10 April 1984.

P. Heim
Registrar

J. Mertens de Wilmars
President

OPINION OF MRS ADVOCATE GENERAL ROZÈS DELIVERED ON 31 JANUARY 1984 [1]

Mr President,
Members of the Court,

The questions which have been referred to the Court by the Arbeitsgericht [Labour Court] Hamm (Case 14/83) and the Arbeitsgericht Hamburg (Case 79/83) raise the problem of the legal consequences which must be laid down under national law for breach of the principle of equal treatment for men and women, in particular regarding access to employment, as implemented by Council Directive No 76/207/EEC of 9 February 1976 [2]. As the two courts were in no doubt that the plaintiffs had indeed been victims of discrimination on grounds of sex, a short summary of the facts in the two cases will suffice.

In Case 14/83, Sabine von Colson and Elisabeth Kamann applied for two vacant posts for social workers in a prison in North Rhine Westphalia. Although they were placed at the top of the list of candidates by the social worker's committee, they were moved down the list by the recruiting authority which finally selected two male candidats instead. According to the Arbeitsgericht Hamm, it was quite clear from the attitude of the appointing authority that the two candidates had been discriminated against because of their sex.

1 — Translated from the French.
2 — Offical Journal L 39 of 14. 2. 1976, p. 40.