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.

The Arbeitsgericht Hamburg reached a similar conclusion in the proceedings brought by Dorit Harz: Deutsche Tradax GmbH rejected her application precisely on the grounds that she was a woman, because of the particular nature of the post in question.

It therefore seems clear that there was a breach of the principle of equal treatment for men and women as regards access to employment. The German court's uncertainty concerns the *nature of the redress available to victims under Paragraph 611a (2)* of the Bürgerliches Gesetzbuch [Civil Code]. That provision was inserted in the Civil Code by the Law of 13 August 1980 implementing the European Community labour legislation (Bundesgesetzblatt 1980 — I, p. 1308). Paragraph 611a (1) lays down the principle of the prohibition of all sex discrimination, in particular in the course of the establishment of an employment relationship. Paragraph 611a (2) provides that:

"If an employment relationship has not been established because of a breach of the prohibition of discrimination in sub-paragraph (1) that is 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 obstructed by such a breach."

Under German law, therefore, an applicant for a post who is rejected on grounds of sex is entitled to compensation for the loss sustained as a result of the fact that his expectation that the employer would comply with the prohibition of sex discrimination has been frustrated — "Vertrauensschaden". He is not given an express right to be offered a post. The damages to which he is entitled as compensation for "Vertrauensschaden" cover only his outlay in connection with the application (the cost of the stamp and envelope, travel expenses, and the cost of compiling a curriculum vitae), which are generally small. The courts making the references are in some doubt as to whether such slight compensation is in conformity with Council Directive No 76/207. The question which they have submitted for a preliminary ruling are framed in similar terms, and may be summarized as follows:

1. Does a breach of the principle of equal treatment of male and female workers regarding access to employment as laid down in Directive No 76/207:

   (a) confer on the candidate discriminated against a right to the conclusion of an employment contract as a sanction imposed on the offending employer (Case 14/83, Question 1; Case 79/83, Question 1)?

   (b) If the answer to Question (a) is in the negative, does that breach require the imposition of a financially appreciable sanction such as compensation of up to six months' salary for example or, where appropriate, the imposition of penal sanctions or other penalties (Case 79/83, Question 3; Case 14/83 Question 5)?

   (c) In any event, in what way and to what extent must the national court take into account the qualifications of the candidate discriminated against in comparison with those of the successful candidate and, where appropriate, those of the other unsuccessful candidates (Case 14/83, Questions 2, 3 and 4; Case 79/83, Questions 2 and 4)?

2. Is Directive No 76/207 and in particular Articles 1, 2 and 3 thereof, directly applicable (Case 14/83, Question 6; Case 79/83, Question 5)?

It appears from those questions that the essential problem is first to ascertain whether Directive No 76/207 requires Member States to adopt specific sanctions. If that analysis proves unhelpful, it is then necessary to consider whether Community law imposes on Member States specific duties with regard to ensuring that directives are complied with.

I — Does Directive No 76/207 require Member States to adopt sanctions of a specific nature?

In replying to this question, which is fundamental to both orders for reference, it must first be stated that, under Article 189 of the Treaty: "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".

1. The exact extent of the States' powers with regard to the implementation of the directive therefore depends on the result to be attained. That is the principle laid down by the Court in the *Lee* case in which it was necessary to determine whether Council Directive No 72/159/EEC on the modernization of farms [1] required the Member States to make judicial remedies available against administrative decisions concerning the advantages contemplated by the directive. [2] Generally it is necessary to examine the framework laid down by the directive in order to define the exact nature of the Member States' obligations as to the result to be attained and thus what margin of discretion they have in the implementation of that obligation.

2. That process may be applied to Directive No 76/207. Its purpose is "the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions". That purpose is repeated in Article 1, whilst Article 2 defines the principle of equal treatment and its limits. Articles 3 to 8 delineate the scope of that principle, as so defined. It has a dual significance:

(a) In the first place, there must be no sex discrimination whatsoever in any of the spheres in respect of which the directive is adopted, [3] in particular "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". [4]

1 — Official Journal, English Special Edition 1972 (II), p. 324.

2 — Judgment of 6. 5. 1980, Case 152/79 [1980] ECR 1495, paragraph 12 of the decision; see also judgment of 23. 11. 1977, Case 38/77 *ENKA-BV* [1977] ECR 2203, paragraph 11 of the decision.

3 — Article 3 (1); the first part of Article 4; Article 5 (1).

4 — Directive No 76/207, Article 3 (1).

(b) Secondly, the Member States are required to take the measures necessary *inter alia:*

To ensure that any laws, regulations and administrative provisions or provisions included in collective agreements and the internal rules of undertakings which are contrary to the principle are abolished; [1]

To enable "all persons who consider themselves wronged by failure to apply to them the principle of equal treatment within the meaning of Articles 3, 4 and 5 to pursue their claims by judicial process after possible recourse to other competent authorities". [2] Article 7 complements that provision. It requires the Member States to protect workers who avail themselves of that right of action against any retaliation by dismissal. Article 8 provides that Member States are under an obligation to ensure that the provisions are brought to the attention of employees. Article 9 lays down the period within which the directive must be implemented and Article 10 states that Member States are required to communicate to the Commission all the necessary information to enable it to draw up the report which it is to present to the Council of Ministers on the application of the directive.

Therefore none of the provisions of the directive expressly requires the Member States to lay down a sanction of any kind whatsoever, still less a specific form of sanction, for failure to comply with the principle of equal treatment. Only Articles 6 and 7 suggest that such a breach will not remain unpunished by national sanctions. However the availability of a judicial remedy and the requirement that protection be afforded to the plaintiff do not predetermine the final choice of the kind of sanction to be adopted.

3. That analysis leads to a twofold conclusion.

A — Member States enjoy a margin of discretion in choosing the type of sanction to apply to a breach of the principle laid down in the directive. That proposition is not contested in the observations submitted in the two cases. Moreover, a comparative study carried out by the Commission of the different national measures reveals the diversity of the solutions adopted. Italy alone provides for the right to be offered a post, whilst all the other Member States apart from the Federal Republic of Germany and the Netherlands have introduced at least two forms of sanctions, which may be civil, criminal or administrative. [3] Directive No 76/207 does not therefore require Member States to provide for sanctions such as a right to the conclusion of a contract or compensation amounting to six months', one year's or two years' salary or any other form of sanction.

Thus since answers were required to Questions 2, 3 and 4 (Case 14/83) and to Questions 2 and 4 (Case 79/83) only in the event of the answer to Question 1 in both cases being in the affirmative, those questions have become devoid of purpose. The only point to be made is

1 — Article 3 (2); Article 4 (a) (b) and (c); Article 5 (2).

2 — Article 6 (cf. on that point, judgment of the Court of 26. 10. 1983, Case 163/82 *Commission* v *Italy* [1983] ECR 3273, paragraphs 18 to 21 of the decision and my Opinion, paragraph 2 (II).

3 — Commission report of 9. 2. 1981, p. 201, COM(80) 832 final.

that, as the Court has consistently held, it is exclusively for the national court to assess the facts and the procedural rules applicable to proceedings pending before it. [1]

B — The question of the direct effect of the directive or of certain of its provisions is no longer relevant. As has been emphasized, the directive does not lay down any unconditional and sufficiently precise obligation as to require the Member States to adopt a specific course of action, in this instance to choose sanctions of a particular kind. [2] That is not disputed by the parties.

I must therefore reply that Directive No 76/207 does not require Member States to lay down sanctions of a specific kind for unlawful discrimination between male and female workers. That does not, however, mean that Member States have an unfettered discretion as to the kind of sanction they impose. There is no contradiction in that: it is necessary at this point to restate the obligations which the implementation of a Community measure entails for all the Member States.

II — Does Community law impose on the member States specific obligations in the implementation of directives?

We have see that the Member States' obligation as regards the result to be achieved is to implement the principle of equal treatment in the spheres covered by Directive No 76/207. That obligation requires in practice the abolition of existing discrimination. It is complemented by the introduction of a judicial remedy, with protection afforded by national legislation.

In order to comply with the obligation thus incorporated in national law it is not however sufficient merely to adopt those procedural measures. The actual effectiveness of the principle implemented by the Member States also depends on there being sanctions for any breaches thereof. Although the directive is silent on that point and leaves it to the national authorities to take the necessary measures, [3] it does not follow that in this case it is possible to disregard the nature of the general obligations incumbent on those authorities in implementing all Community measures. Article 5 of the EEC Treaty provides that:

"Member States shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty or resulting from the action taken by the institutions of the Community."

That general requirement has been defined in more precise terms in the decisions of the Court.

1. With regard to equal treatment for men and women, the Court held in the judgment in Case 61/81 that the purpose of Council Directive No 75/117/EEC of 10 February 1975 was to implement the principle, laid down in Article 119 of the Treaty, [4] that men and women should receive equal pay, and concluded therefrom that "it is primarily the

1 — See for example judgment of 28. 3. 1979, Case 222/78 *ICAP* [1979] ECR 1163, paragraphs 10 and 11 of the decision.

2 — Judgment of 19. 1. 1982, Case 8/81 *Becker* [1982] ECR 53, paragraph 25.

3 — See, in respect of national sanctions for infringement of a regulation, judgment in Case 50/76 *Amsterdam Bulb* [1977] ECR 137, paragraphs 32 and 33 of the decision.

4 — Official Journal L 45 of 10. 2. 1975, p. 19, on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women.

responsibility of the Member States to ensure the application of this principle by means of appropriate laws, regulations and administrative provisions in such a way that all employees in the Community can be protected in these matters". [1]

In the same case the Court referred [2] to Article 6 of Directive No 75/117 which provides that Member States

"shall, in accordance with their national circumstances and legal systems, take the measures necessary to ensure that the principle of equal pay is applied. They shall see that effective means are available to take care that this principle is observed".

The Court found that United Kingdom legislation, which allowed employers to refuse any system of job classification and thereby prevented employees from establishing the equivalent value of work carried out for the purpose of applying the principle of equal pay, did not conform to the objectives of the directive. In that case, the United Kingdom's failure compromised the very efectiveness of the principle of equal pay for men and women.

It is true that Directive No 76/207 does not include a provision comparable to Article 6 of Directive No 75/117; nevertheless, it does require the Member States to adopt all the "measures necessary" to implement the directive. National measures intended to implement a directive must actually serve to bring about the results that the Member States are required to achieve. [3] It is clear in that respect that the effectiveness of the principle of equal treatment itself, as laid down in Article 119, depends on the fulfilment of that obligation. I consider that it is possible to define more precisely the extent of the obligation thus imposed on Member States.

2. In more general terms, leaving aside for the moment the implementation of Article 119 of the EEC Treaty, certain limits are imposed on the reference to national law.

On the question of the recovery of sums wrongly paid, the Court held in *Fromme* that:

"the application of national law must not adversely affect the scope or impair the effectiveness of Community law by making the recovery of sums wrongly paid impossible in practice".

Nor must it make that recovery subject

"to conditions or detailed rules less favourable than those which apply to similar procedures governed by national law alone. In such matters the national authorities must proceed with the same care as they exercise in implementing corresponding national laws so as not to impair, in any way, the effectiveness of Community law".

1 — Jugdment of 6. 7. 1982, Case 61/81 *Commission* v *United Kingdom* [1982] ECR 2601, paragraph 7 of the decision; Opinion of Mr Advocate General VerLoren van Themaat, in particular at p. 2624.

2 — Case 61/81, cited above, paragraph 10 of the decision.

3 — Cf, in relation to an ECSC Recommendation, the importance attached to penalties imposed for breach of its objectives, judgment in Case 9/61 *Netherlands* [1962] ECR 213; Opinion of Mr Advocate General Roemer, in particular p. 250.

Finally, in placing such limits on the reference to national law, the Court stated that:

"with regard to the relationship to procedures for determining similar, but purely national, disputes ... the application of national law on the basis of that reference must be effected in a non-discriminatory manner as compared with those procedures". [1]

It emerges from that decision, which combines the different elements of the Court's previous decisions, that there is a threefold requirement, as was pointed out by Mr Advocate General VerLoren van Themaat: [2]

(a) The national measures to which reference is made must in no circumstances undermine the effectiveness of Community law;

(b) Consequently they may not be less effective than the "method of applying comparable national rules", to adopt Mr VerLoren van Themaat's words; [3]

(c) Therefore they cannot, without being discriminatory, treat individuals less favourably than is the case where national provisions are applied.

To sum up, the measures in question must be neutral with regard to Community law, as effective as national implementing rules, and not discriminatory for the nationals of Member States. Those overlapping conditions determine the scope of the obligations imposed on Member States whenever Community law leaves them a margin of discretion in the implementation of Community provisions. It is not therefore surprising that the Court has applied those principles with particular clarity to sanctions which a Member State may impose for infringement of administrative formalities for the control of aliens.

3. In the matter of the free movement of persons, Member States have retained their power to control the presence on their territory of foreign nationals. [4] Thus they may *inter alia* require those persons to comply with the administrative formalities laid down in Council Directive No 68/360/EEC on the abolition of restrictions on movement and residence within the Community for workers of Member States and their families [5] such as the possession of certain documents establishing identity or the right to residence, [6] or the obligation to report to the authorities, provided for in Article 8 (2). [7] Although the Member States may consequently lay down sanctions for the breach of national provisions adopted in conformity with the directive, there are limits on the sanctions which they may impose. The sanctions must be "comparable to those attaching to

1 — Judgment of 6. 5. 1982, Case 54/81 *Fromme* [1982] ECR 1449, paragraphs 6 and 7 of the decision; see also Mr Advocate General VerLoren van Themaat's outline of the case-law in the same case, at p. 1469.

2 — Ibid., p. 1470.

3 — Ibid., p. 1471.

4 — Judgment of 8. 4. 1976, Case 48/75 *Royer* [1976] ECR 497, paragraph 42 of the decision; judgment of 7 July 1976, Case 118/75 *Watson* [1976] ECR 1185, paragraph 17 of the decision.

5 — Official Journal, English Special Edition 1968 (II), p. 485.

6 — Articles 3, 4 and 7.

7 — Judgment in Case 118/75, cited above, paragraphs 18 *et seq.* of the decision; judgment of 14. 7. 1977, Case 8/77 *Sagulo* [1977] ECR 1495, paragraphs 4 and 5 of the decision; judgment of 3 July 1980, Case 157/79 *Pieck* [1980] ECR 2171, paragraph 17 of the decision.

infringements of provisions of equal importance by nationals" and they must be proportionate to the nature of the infringement committed so as not to obstruct the principle of the free movement of persons. [1]

Such national sanctions imposed by the Member States are intended to ensure compliance with administrative provisions for the control of the lawful presence, movement and establishment on the territory of the Member States of nationals of other Member States. If the threefold condition referred to above is applied to such measures, it may be said that two limits are placed on the effectiveness of the sanctions:

(i) the sanctions must be equivalent to those which apply to comparable offences under national law;

(ii) such sanctions must not be disproportionate to the gravity of the offence in such a way as to be liable to affect the scope of the principles of free movement and equal treatment.

That interpretation — an effective sanction but proportionate to the offence and equivalent to a national sanction — is explained by the following consideration. The formalities which Directive No 68/360 imposed on migrant workers represent a necessary adjustment to the fundamental principle of their freedom of movement. The Member States' power of control thus recognized must therefore be interpreted particularly strictly, so as to prevent such provisions from depriving the rights conferred on the Community nationals by the Treaty itself (Articles 7 and 48) [2] of any practical effect.

4. On the other hand, the same interpretation indicates that priority should be given to the requirement of effectiveness where national sanctions are intended to *ensure compliance with a fundamental principle of the Treaty,* such as the principle of equal treatment for male and female workers. [3] In order to be capable of ensuring fulfilment of the obligation imposed by the Treaty and repeated in Article 2 of Directive No 76/207, in accordance with the general requirement laid down in the first paragraph of Article 5 of the Treaty, those sanctions must be *effective, or, in other words, they must have a deterent effect.* Any other solution would undermine both the economic and social [4] objectives of Article 119; undertakings would be able to disregard the Community provisions with impunity and female workers would be deprived of the protection which they are entitled to expect under the Treaty itself. Those sanctions must, in my view, satisfy the two conditions which the Court has laid down with regard to the restrictive effect of sanctions imposed for the infringement of administrative formalities in the matter of freedom of movement. The requirement that they must be equivalent and proportionate still applies, since they are sanctions, but

1 — Case 118/75 cited above, paragraph 21 of the decision; Case 8/77 cited above, paragraph 13 of the decision; Case 157/79 cited above, paragraph 19 of the decision.

2 — Opinion of Mr Advocate General Mayras in Case 48/75, *Royer,* cited above, at p. 525; Case 118/75 cited above, paragraph 18 of the decision.

3 — Cf. third recital in the preamble to Directive No 68/360, cited above; judgment of 8. 4. 1976 in Case 43/75 *Defrenne* [1976] ECR 473, paragraph 12 of the decision.

4 — Case 43/75 cited above, at p. 473, paragraphs 8 to 12 of the decision.

in this context it is *subject* to the requirement that they be effective, as they are sanctions intended to ensure compliance with a fundamental principle of the Community. In consequence, in order to be appropriate, the national sanctions which a Member State imposes in respect of non-compliance with the principle of equal treatment for male and female workers must be:

Comparable to sanctions applied to offences of the same gravity;

Proportionate to the seriousness of the offence, which is a breach of a fundamental principle of the Treaty.

The deterrent effect of the sanctions provided for by a particular national law or regulation must be assessed on the basis of those requirements.

5. In the light of those considerations we may now examine Paragraph 611a (2) of the Bürgerliches Gesetzbuch, the provision at issue in these proceedings. In their arguments before the Court on this point, the applicants and the Federal German Government's agent expressed differing views on the discretionary power of the national courts with regard to that provision, in particular whether they may derogate from it in order to apply general legal provisions on compensation. The Commission questioned the effectiveness of allowing the courts to develop the law in that way. In addition the parties discussed at length the kind of alternative sanctions capable of replacing the compensation provided for under Paragraph 611a (2). They cited the right to the conclusion of a contract and, if that were not possible, the right to financial compensation of an economically appreciable amount, on the basis of various national provisions governing the matter.

In proceedings under Article 177 it is not for me to express a view on questions which fall exclusively within the jurisdiction of the national courts inasmuch as they concern the application of national law. However, in relation to sanctions applicable to the failure to comply with measures for the control of aliens, the Court has recognized that when a national court is confronted with national law that has been inadequately adjusted in the matter of sanctions, it is to "use its judicial discretion to impose a punishment appropriate to the character and objective of the provisions of Community law the observance of which the penalty is intended to safeguard." [1] I consider that the same obligation applies to a national court which, having regard to the criteria established by the Court, finds that the sanctions attaching to a breach of the principle of equal treatment for men and women laid down in Article 119 of the Treaty and defined in Directive No 76/207 are inappropriate.

In the light of those comments and all the cases cited, what reply can be given to the national courts?

The first point is that in their observations the parties to the main action acknowledged that the compensation deriving from Paragraph 611a (2) of the Bürgerliches Gesetzbuch did *not* have a *deterrent* effect, in so far as heavier sanctions, involving reparation in kind or financial penalties, may be imposed.

1 — Case 8/77, *Sagulo*, cited above, paragraph 12 of the decision.

Secondly, compensation for reliance on a proper expectation ("Vertrauensschaden") is even less appropriate because it seems to involve an *element of chance:* Dorit Harz pointed out, without being contradicted, that in the light of the purpose of the national provision in question — to compensate the candidates' frustrated legitimate expectation — a candidate might not be entitled to any compensation where the employer had openly declared his intention not to recruit female candidates.

Finally, if the requirements set out above are applied to Paragraph 611a (2), it is clear that compensation for "Vertrauensschaden" alone is not *sufficiently effective.* At the hearing, the Agent of the Federal German Government had to acknowledge that offences comparable to sex discrimination, committed with regard to access to employment, such as racial or religious discrimination in particular, or again fraud or corruption in connection with recruitment, are subject to both penal and civil sanctions, the latter entailing reparation in kind or, where that is not possible, the payment of substantial damages. Compensation limited to the expenses incurred by the candidate discriminated against is therefore not capable of ensuring compliance with a principle of such fundamental importance as the equal treatment of male and female workers, which is moreover provided for in the Grundgesetz [Basic Law of the Federal Republic of Germany], since comparable offences carry penalties which have more deterrent effect and are proportionate to the seriousness of the offence comitted.

In conclusion I propose that the Court should hold, in reply to the questions referred to it for a preliminary ruling by the Arbeitsgericht Hamm and the Arbeitsgericht Hamburg, that:

The reimbursement of the costs incurred by a candidate in applying for a particular post does not constitute appropriate compensation in order to ensure compliance with the principle of equal treatment for male and female workers laid down by Article 119 of the Treaty and Directive No 76/207, since the provisions of national laws and regulations impose, for comparable offences, sanctions which are more proportionate to the seriousness of the offence committed.