groups from the provisions intended to guarantee equal treatment for men and women in working life as a whole.

2. The categorical affirmation by the constitution of a Member State of the equality of men and women before the law and the express exclusion of all discrimination on grounds of sex and the guarantee of equal access to employment in the public service for all nationals of that Member State in provisions that are intended to be directly applicable constitute, in conjunction with the existing system of judicial remedies, including the possibility of instituting proceeedings before a constitutional court, an adequate guarantee of the implementation in the field of the public administration of the principle of equal treatment laid down in Directive No 76/207.

   The same is true with regard to freedom to take up the independent professions once a similar combination of constitutional provisions and judicial remedies that gives effect to such freedom is established.

3. Article 2 (2) of Directive No 76/207, by permitting the Member States to exclude certain occupational activities from the field of application of the directive, does not have as its object or as its effect to require the Member States to exercise that power of derogation in a particular manner.

   However, Article 9 (2) requires the Member States to compile a complete and verifiable list, in whatever form, of the occupations and activities excluded from the application of the principle of equal treatment and to notify the results to the Commission, which must verify the application of that provision.

4. A provision in the law of a Member State prohibiting employers from publishing offers of employment which are not neutral as regards the sex of the workers does not implement an obligation imposed by Directive No 76/207 but is an independent legislative measure designed to give effect to the principle of equal treatment. The fact that it was enacted as a non-binding rule cannot therefore constitute a breach of the Member States' obligations under the directive.

# OPINION OF MR ADVOCATE GENERAL MANCINI
delivered on 26 February 1985 *

*Mr President,*
*Members of the Court,*

1. In Case 248/83, initiated by an application lodged at the Court Registry on 9 November 1983, the Commission of the European Communities is carrying forward its battle for the clarification and correct implementation by the Member States of Directives (EEC) Nos 75/117 and 76/207.

* Translated from the Italian.

As the Court will be aware, those measures provide for the approximation of the national laws relating to the application of the principle of equal pay for men and women (Official Journal 1975, L 45, p. 19) and the implementation of the principle of equal treatment of men and women as regards access to employment, vocational training and promotion, and working conditions (Official Journal 1976, L 39, p. 40).

The Commission's policy, initiated some three years ago with proceedings against the Italian Republic which were dismissed by the Court, and continued with partial success against the United Kingdom, is now directed against the Federal Republic of Germany. On the basis of Article 169 of the EEC Treaty, the Federal Republic is alleged to have failed to fulfil its obligations by:

(1) not adopting appropriate national provisions to implement Directive No 76/207 with regard to employment relationships in the public sector;

(2) not adopting appropriate national measures to implement Directive No 75/117 with regard to equal pay for employees in the public sector;

(3) not adopting appropriate national measures to implement Directive No 76/207 with regard to self-employed persons;

(4) not defining in national legislation the scope of the derogations provided for in Article 2 (2) of Directive No 76/207;

(5) not making the provisions of paragraph 611 b of the Civil Code binding with regard to the impartiality of offers of employment. [1]

In order to clarify the factual and legal context of this dispute, it is necessary to go back a step. According to Article 8 of Directive No 75/117 and Article 9 of Directive No 76/207, the Federal Republic is obliged, as are the other Member States, to bring into force the laws, regulations and administrative provisions necessary in order to comply with the Community rules before February 1976 and August 1978 respectively. In September 1980, the German Government informed the Commission that on 13 August 1980 the Bundestag had adopted a law on equal treatment in the work place (referred to as the law aligning labour legislation with Community law).

In practical terms, that law inserted several new provisions in the Civil Code and amended others already in force. I would mention in particular that paragraph 611 a of the Civil Code provides that 'an employer shall not place an employee at a disadvantage by reason of that person's sex by entering into an agreement or taking a measure to that effect, in particular on the occasion of the conclusion of a contract of employment .... However, different treatment on grounds of sex shall be lawful in so far as the agreement or measure specifies the nature of the activity to be carried on and, for the pursuit of that activity, the sex of the employee is an indispensable prerequisite. Where, in case of dispute, the employee relies on facts which raise a presumption of discrimination on grounds of sex, the onus of rebutting the presumption by proving that different treatment is justified on objective grounds not related to sex or that, for the pursuit of the activity in question, the sex of the employee is an indispensable prerequisite rests with the employer.' On the other hand,

1 — In its application, the Commission contended that the Mutterschutzgesetz [German Law on Protection for Mothers] was also incompatible with Directive No 76/207, but it withdrew that contention following the judgment of the Court of 12 July 1984 in Case 184/83 *Hofmann* v *Barmer Ersatzkasse* [1984] ECR 3047.

paragraph 611 b provides that 'an employer may not advertise posts, whether publicly or within the undertaking, as being solely for men or women, except in the circumstances set out in the second sentence of paragraph 611 a (1)'. Finally, paragraph 612 (3) lays down that 'a contract of employment may not provide, in the case of the same work or work of equal value, for the payment to an employee of a remuneration that is lower, on grounds of sex, than that paid to an employee of the opposite sex. An agreement for a lower remuneration shall not be justified by the existence of special safeguards adopted on grounds of the employee's sex'.

At least in appearance, those rules are clear. On the whole, however, the Commission considers them insufficient for the attainment of the Community's objectives. Therefore, after a fruitless exchange of letters with the German Government, it delivered a reasoned opinion on 29 October 1982 in which it contended that the Federal Republic had not taken all the measures needed to implement the two directives. By a note of 3 January 1983, the German Government replied that, by supplementing the Civil Code in the manner set out above, the Federal Republic had taken all the measures necessary to fulfil its obligations. No change was required in relation to the public service and the liberal professions because the relevant rules were already of such a nature as to satisfy the Council's requirements of clarity and certainty.

2. That is the background to the present action, the essential purpose of which, according to the Commission, is to obtain a declaration that the Federal Republic has implemented the measures in question in a manner that is both fragmentary and inadequate. In other words, according to the applicant, this is a classic example of the failure of a Member State to fulfil its obligations under a directive. The defendant disagrees. It contends that since in the areas indicated by the Commission the German legislation adequately meets, in constitutional terms and in view of its direct applicability, the objectives pursued by the Community, this is a case which calls for *dispensation from the obligation to implement the directive.* The German Government's opinion is essentially that this case is a clear example of the situation which authoritative legal writers have defined as 'pre-existing conformity' (at Community level).

Is that argument tenable? Let me begin with the following remark: According to Article 189 of the EEC 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'. According to the legal writers to whom I have referred, a directive is thus characterized by two factors that must be taken into account *simultaneously* with regard to its interpretation. The first, which is the 'legislative model' conceived and proposed to the Member States by the Community, is unchanging and at the same time obligatory, inasmuch as it is *absolutely binding* on all the Member States in a uniform manner. The second, which is the implementation of that model in the national legal system, is, so to speak, variable, since each Member State is *free, within a limited range of possibilities,* to choose the forms and the methods for its implementation.

The Court's case-law has defined the scope of those two factors on many occasions.

Thus, the Court stated with regard to the first of them that 'it is . . . essential . . . that each Member State should implement the directives in question in a way which fully meets the requirements of clarity and certainty in legal situations which directives seek to achieve' (judgment of 6 May 1980 in Case 102/79 *Commission* v *Belgium* [1980] ECR 1473). With regard to the variable factor, the Court has held that the possibility of choosing the ways and means of implementing a directive does not affect 'the obligation . . . to adopt . . . all the measures necessary to ensure that the directive is fully effective, in accordance with the objective which it pursues' (judgment of 10 April 1984 in Case 14/83 *von Colson and Kamann* v *Land Nordrhein-Westfalen* [1984] ECR 1891, paragraph 15 of the decision; see also the Opinion of Mrs Advocate General Rozès, Part I, paragraph 1). That 'does not however release [the Member States] from the obligation to give effect to the provisions of the directive by means of national provisions of a binding nature' (judgment of 25 May 1982 in Case 96/81 *Commission* v *Netherlands* [1982] ECR 1791).

I now propose to consider the scope and the objectives of the directive at issue by reference to the criterion of simultaneous assessment in order to verify whether the 'pre-existing conformity' of the German system actually meets Community requirements precisely and in full. As I said earlier, the primary objective of Directive No 76/207 is the implementation of the principle of equal treatment for men and women. According to the *von Colson* judgment, the directive seeks in particular to ensure real equality of opportunity for men and women as regards access to employment. The application of that principle entails two mutually complementary obligations for the Member States:

(a) to remove all discrimination on grounds of sex in the various areas provided for in the directive by abolishing all laws, regulations and administrative provisions that are contrary to the principle of equal treatment (Articles 3 (2), 4 (a) and 5 (2) (a) of the directive); and

(b) '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'. Those measures must be 'sufficiently effective to achieve the objective of the directive' and such that they may 'in fact' be relied upon before the national courts by the persons concerned *(von Colson* judgment regarding Article 6).

If those are the obligations which Directive No 76/207 imposes on the Member States and the limits to which the Member States are subject in their choice of means for giving effect to the prohibition of discrimination, are Article 3 ('No one may be prejudiced or favoured because of his sex'), Article 12 ('All Germans shall have the right freely to choose their trade, occupation or profession') and Article 33 ('Every German shall be equally eligible for any public office according to his aptitude, qualifications and professional achievements') capable, as provisions of the German Constitution, of guaranteeing by themselves *effective equality of treatment* as regards access to the public service and the liberal professions, as well as the *certainty and effectiveness* in legal situations which the directive seeks to achieve?

I now turn to Directive No 75/117. That directive, which was adopted under Article 100 of the EEC Treaty, has as its purpose the approximation of the laws by which the Member States apply the principle of equal

pay for men and women. To that end, it requires the Member States:

(a) to abolish all discrimination between men and women arising from statutory provisions that are contrary to the principle of equal pay (Article 3); and

(b) to introduce into their legal systems such measures as are necessary to enable all employees who consider themselves wronged by discrimination to pursue their claims by judicial process (Article 2).

Moreover, in order to *guarantee* the application of that principle, Article 6 requires the Member States to take the measures that are essential for its application, in accordance with their 'national circumstances' and 'legal systems'. In that connection, the Court stated in its judgment of 30 January 1985 in Case 143/83 (*Commission* v *Denmark*) that 'it is true that Member States may leave the implementation of the principle of equal pay in the first instance to representatives of management and labour. That possibility does not, however, discharge them from the obligation of ensuring, by appropriate legislative . . . provisions, that all workers in the Community are afforded the full protection provided for in the directive. *That State guarantee must cover all cases where effective protection is not ensured...*'.

If those are the obligations imposed on the Member States by Directive No 75/117 and the limits to which the Member States are subject in their choice of means for implementing the principle of equal pay for men and women, is Article 3 of the German Constitution ('No one may be prejudiced or favoured because of his sex') really capable of guaranteeing by itself *effective equality* of pay, as well as the *certainty and effectiveness* in legal situations which the directive seeks to achieve?

In my view, both of those questions must be answered in the negative.

3. To begin with, I would point out that, contrary to the view expressed by the German Government, the Court has never recognized, not even by implication, that a directly applicable constitutional principle is sufficient to transpose a directive into national law. In its judgment of 26 October 1983 in Case 163/82 (*Commission* v *Italy* [1983] ECR 3273), the Court merely quoted the explanations given by the Italian Government and stated that the Commission had not been able to contest them. That government, moreover, explained on the same occasion the operation of Article 24 of the Italian Constitution (which provides that 'any person may have recourse to the courts in order to safeguard his rights'). It contended that 'once the existence of a basic rule protecting an individual interest is established (as a general rule) no specific legislative measure is needed' to protect that interest since such protection is universally and unconditionally afforded by a superior rule of law. In other words, Article 24 was relied upon as a *final provision* in a system already containing a large number of substantive and procedural provisions (namely those which the Italian Government took care to indicate first).

However, the German Government's argument proceeds from a premise diametrically opposed to that of the Italian Government. It states that Articles 3, 12 and 33 of the Constitution are not only in themselves sufficient to bring into operation the principle of equal treatment, but they even make it impossible to adopt ordinary rules giving effect to that principle. In other words, those articles are *of necessity* the only rules capable of implementing the directives

in question. However, and this is the point, are they also capable of guaranteeing such implementation *in reality*? There is no doubt that they *may* be able to do so. No provision of the Treaty or of secondary legislation expressly excludes implementation of a directive through constitutional rules. It is clear, however, that such rules must fulfil the requirements and conditions imposed by the Community measure with the same degree of effectiveness, certainty and clarity as would be possible with ordinary rules adopted *ad hoc*. That is precisely where the problems arise.

Let me begin with the observation that the articles in dispute, and above all Article 3, are binding on the legislature, influence the approach by the courts and are directly binding on the public authorities. On the other hand, they do not confer on private individuals and, in particular, on workers and nationals seeking employment, subjective rights which may be asserted in the courts. The German Government recognizes that those articles 'constitute solely the expression of general value judgments'. Moreover, it is for that reason that the Bundestag considered that it was under an obligation to implement Directive No 76/207 by inserting in the Civil Code the paragraph to which I have referred. The German Government contends that no such action was necessary as regards access to the public service. Since the authorities are directly bound by constitutional rules, the principle of equality laid down in Article 3 is sufficient to exclude the possibility of discrimination against an applicant on grounds of sex.

This then is the first source of doubt. The same rule produces effects which are *horizontally* different, that is, it operates in different ways according to the circumstances in which it is relied upon. If a scale of 0 to 10 is applied to a person who is about to enter into a contract of employment, the effectiveness of the protection provided by Article 3 is equal to zero, or, if account is taken of the fact that Article 3 expresses a 'general value judgment', at most equal to one. In the case of an applicant for a post in the public service, however, that effectiveness (although it is otherwise in practice) corresponds to 10.

That situation is in itself rather disturbing. It becomes very disturbing if it is borne in mind that, as was stated at the hearing, only a few employees of the public authorities are recruited by an instrument constituting a public service contract. The other applicants are recruited on the basis of a contract of employment and are consequently afforded protection by the provisions recently inserted in the Civil Code. In the judgment of 30 January 1985 which I referred to earlier, the Court stated that 'the principles of legal certainty and the protection of individuals . . . require an unequivocal wording which would give the persons concerned a clear and precise understanding of their rights and obligations'. The scale of values to which I have referred thus makes it impossible for Article 3 to satisfy those strict requirements of certainty with regard to the two means of access to the public service. That article must instead be regarded as an inadequate and ambiguous provision, at least as regards its capacity to provide an impartial guarantee of equal treatment as far as access to employment in the public service is concerned.

Moreover, *in view of its very nature* (or, possibly, its status or function), it is not totally impossible, though it is certainly highly improbable, that Article 3 really constitutes, as the German Government contends, a situation of 'pre-existing

conformity'. With the Court's permission, I would like to enlarge on that concept, which seems to me to be of great theoretical and practical importance.

Directive No 75/117 merely provided for the 'approximation' of national laws relating to equal pay because the Council took account of the fact that the principle of equal pay was already to be found in the legal weaponry of the Member States, albeit in different forms and with differing degrees of effectiveness. It is therefore understandable that, taking the view that their legislation was in conformity with the requirements prescribed by the Community, certain States considered that they were exempt from the obligation to transpose the measure in question into national law. The case of Directive No 76/207 is quite different. Its *direct* purpose is the implementation of the principle of equality between men and women, whether or not there are any rules to that effect in the various national legal systems. Furthermore, it requires the abolition not only of rules that are contrary to that principle but also of those which are ambiguous or out of date. In other words, there is no doubt that Directive No 76/207 is the more incisive, the more forceful of the two measures. I believe that this explains why the great majority of the Member States have transposed it into national law by means of *specific* provisions.

I would add that many national legal systems have been brought into line with the Community requirements as regards all forms of work, and therefore including employment in the public service, even though in certain Member States this area was already sufficiently regulated by legislation. France, for example, adopted two laws, in 1982 (dealing exclusively with the public sector) and in 1983 respectively. Similar action was taken by the Netherlands, Belgium, Denmark and Greece. The case of Italy, however, is more significant than all the others. That State could claim to possess constitutional rules concerning the public sector which were even more explicit than those in the German Constitution (Article 51 provides that 'all citizens of either sex may enter the public service . . . on equal terms'), as well as specific provisions for the implementation of such rules (Article 1 of Law No 66 of 9 February 1963 which provides that 'women shall have access to all offices, professions and posts in the public service . . . without any limit as to the duties which they may perform or as to the course of their careers'). None the less, Italy accepted the need for clarity and certainty which the Community rules were designed to achieve and, as the Court has been able to see for itself, implemented the principle of equal treatment so as to exclude, in so far as is humanly possible, any discrimination between its citizens.

Does this mean that the Federal Republic was obliged to adopt such legislation solely because other Member States had done so? Certainly not. That is not the point I wish to emphasize. The fact that the directive takes no account of pre-existing national rules to the same effect, the rigorous nature of its provisions, its unusually incisive language and the manner in which the majority of the Member States considered themselves obliged to transpose it into national law demonstrate that its central purpose is to *preclude any discretion* (or, as the Court would put it, any lack of certainty or clarity) in the application of the principle which prohibits the unequal treatment of men and women. Moreover, no provisions are less suited to ensuring that such a result is achieved than constitutional provisions.

An illustration is provided by Article 3 of the German Constitution. The effects of that provision are well known. It is clear however that it is addressed primarily to the legislature, whose principal task is to prevent discrimination from being introduced through legislation and to remove existing discrimination. What of unequal treatment deriving from factual circumstances which cannot in any event be imputed to an ordinary statutory provision? It is clearly impossible for a victim of discrimination to obtain, by challenging unequal treatment on grounds of unconstitutionality, a judgment having effect *erga omnes* which can be relied upon by anyone who falls victim to a similar practice. Unequal treatment can be removed, where possible, only by recourse to an ordinary court. Redress is therefore available on a case-to-case basis only and is granted as a matter of absolute discretion.

The argument advanced by the German Government (to the effect that there can be pre-existing conformity even where the only rules in the matter are constitutional rules) is thus extremely tenuous. Moreover, my impression is that this argument does not reflect an authentic theoretical conviction but is merely an expedient, a *deus ex machina*, as it were, brought on to the stage of the dispute in order to act as a bulwark against the Commission's accusations. I now propose to consider whether the other counter-arguments put forward by the German Government are more tenable.

4. I would remind the Court that the first complaint against the Federal Republic is that it failed to incorporate the provisions of Directive No 76/207 into national law with regard to employment relationships in the public sector. The Commission contends that paragraph 611 a, which has recently been inserted into the Civil Code, applies only to employment relationships in the private sector. Consequently, there are no specific rules which genuinely ensure equal access to employment in the public service for men and women. The German Government replies in the first place that in view of the restriction contained in Article 48 (4) of the Treaty, the directive does not apply to the public service. However, that objection, which in any event was only raised intermittently during the proceedings, is clearly a delaying tactic. Accordingly no purpose is served by considering its merits.

I now turn to the substance of the case. After developing the 'constitutional' argument which I have just criticized, the German Government deprives it of the greater part of its significance by stating that discriminatory treatment with regard to access to the public service is *also prohibited primarily* by two rigorous statutory provisions. Thus, paragraph 7 of the Beamtenrechtsrahmengesetz [Framework Law on the Public Administration] of 1 July 1957 provides that 'appointments shall be made on the basis of professional aptitude, achievements and qualifications without any distinction on grounds of sex', while paragraph 8 of the Bundesbeamtengesetz [Federal Law on Public Servants] of 14 July 1953 provides that 'applications for vacant posts shall be invited by means of advertisements. Selection shall be on the basis of professional aptitude, qualifications and achievement, without any distinction on grounds of sex'. Moreover, the judicial system protects applicants or public servants who are victims of discrimination by providing for numerous means of redress which may lead to the imposition of appropriate and highly deterrent penalties.

The Commission does not contest those facts. However, it denies that the provisions which have been cited are sufficiently effective. That gave rise to a dispute which persisted confusedly throughout the proceedings. The Commission contended, for example, that the criterion based on

'aptitude' was effective in appearance but weak or even counter-productive upon verification of the facts, an argument which the German Government described as unsupported by any evidence. For my own part, I have no information that would tip the scales either way. However, I consider it useful to draw the Court's attention to the reply, whatever its merits, that the German Ministry of the Interior gave three months ago to a question put to it by a number of Members of Parliament concerning the employment of women in the public service. It stated that 'the Government will continue to monitor developments . . . with regard to access for women to the public service in the Federal Republic. If the present positive trend continues, a decision will have to be adopted on the supplementary measures to be taken to ensure that the equality for legal purposes which has already been established between men and women in the public service *is fully guaranteed in actual practice*' (*Deutscher Bundestag*, 10. Wahlperiode, Drucksache 10/2461, 26 November 1984).

Although it is difficult to challenge the validity of the German Government's defence in view of the lack of reliable documentation, the weak point of that defence is to be found on the less slippery terrain of judicial protection, and it is surprising that the Commission failed to perceive it. I am referring to the defendant's contention that the rules which I have just cited and the new paragraph 611 a of the German Civil Code are equivalent. In its view, it was necessary to grant special protection to employees in the private sector but not to public servants who, by virtue of the Basic Law and of the measures adopted in the 1950s, already enjoyed a degree of protection which was at least as effective if not more so.

However, that equivalence does not exist. As the Court will recall, paragraph 611 a provides that 'where, in case of dispute, the employee relies on facts which raise a presumption of discrimination . . . the onus of rebutting the presumption by proving that different treatment is justified on objective grounds not related to sex or that, for the pursuit of the activity in question, the sex of the employee is an indispensable prerequisite rests with the employer'. That right to bring an action on the basis of a mere presumption and the consequent reversal of the burden of proof do not exist in the case of an applicant for a post in the public service. An applicant may avail himself of a wide variety of means of redress in order to have the administrative procedure declared unlawful, but he must in all cases be able to prove to the court that a statutory provision, or possibly a constitutional provision, has actually been infringed. It must be added that, in the Federal Republic, public servants are not recruited by competition since vacancies are as a rule filled at the discretion of the department concerned. If therefore an applicant feels that he has been discriminated against, it is far from easy for him to furnish the necessary proof.

Thus, the position of a public servant with regard to legal proceedings is much weaker than that of a worker employed in private industry or occupying a post in the public service under a contract of employment. In its pleadings and in reply to questions put to it by the Court, the German Government devoted much time and effort to a description of the means of redress available to public servants and of the penalties which may be imposed on the authorities for adopting a discriminatory measure. However, it made no mention of the rights and duties of the parties to such proceedings. Nor, in my view, was that silence

accidental, because it is precisely on the rock of judicial protection that the argument to the effect that the Federal Republic is exempt from the obligation to adopt implementing measures within the periods laid down in the directive founders.

5. Essentially similar broad considerations can be put forward with regard to the Commission's second complaint against the Federal Republic, namely that it failed to transpose into national law Directive No 75/117 with regard to equal pay for men and women in the public sector. In that respect too, the German Government relies in its defence chiefly on the direct effect and binding nature of Article 3 of the Constitution. Moreover, it puts forward a subsidiary argument to the effect that the classification of employees' salaries according to function and grade is sufficient to preclude discriminatory treatment.

In reality, Article 3 makes no mention of 'equal pay ... for the same work or for work to which equal value is attributed' (see Article 1 of the directive and paragraph 612 (3) of the German Civil Code). The same holds true for the legislation on salaries which merely lays down rules for calculating the amount to be paid but does not prohibit the payment of different amounts on grounds of sex. In other words, German law lacks a rule of general validity which clearly imposes an obligation not to discriminate between men and women with regard to remuneration.

6. The third complaint against the Federal Republic is that it failed to transpose into national law Directive No 76/207 with regard to self-employed persons. The German Government rejects that charge by referring to Article 12 of the Constitution which guarantees that 'all Germans shall have the right freely to choose their trade, occupation or profession' and consequently excludes, in conjunction with Article 3, any possibility of discrimination on grounds of sex. Moreover, it adds in its defence that where access to a liberal profession is subject to administrative authorization, the courts can require the authorities to allow a citizen who has been discriminated against to take up and pursue the activity in question (paragraph 42 of the Verwaltungsgerichtordnung [Code of Administrative Procedure]).

I would point out that Article 12 does not prohibit discrimination on grounds of sex. It is therefore even less capable than Article 3 of guaranteeing, by itself and with sufficient clarity and certainty, the equality of treatment which the directive seeks to achieve. Nor, as it is clear, can it fulfil that function 'in conjunction with' the provision which establishes the principle of equality. With regard to the guarantee of legal redress, to which reference has already been made, it seems to me that it is too limited in scope — if for no other reason than because the courts are not obliged to enforce it — to affect the privileged position of the authorities. In that case too, therefore, German law lacks a provision which is capable of achieving the objectives of the Community legislature.

7. The fourth complaint is concerned with Article 2 (2) of Directive No 76/207, which requires the Member States to define precisely the occupational activities which they wish to exclude from the scope of the principle of equal treatment. In the Commission's view, the States to which that provision is addressed have largely complied with it by compiling lists which, though they are not always entirely satisfactory, set out the activities which are excluded. Since the Federal Republic has not done so, the Commission cannot verify whether that State has complied with the Community rules in accordance wth Article 9 (2).

The German Government denies in the first place that the directive imposes an obligation to enumerate the occupational activities to which the principle of equality is not to apply. In its view, the directive requires, instead, a guarantee that a person's sex really is a *sine qua non* for carrying on such activities. That being so, paragraph 611 a of the German Civil Code, which provides that 'different treatment on grounds of sex shall be lawful in so far as the agreement or measure specifies the nature of the activity to be carried on and, for the pursuit of that activity, the sex of the employee is an indispensable prerequisite', satisfies in full the requirements of the Community model. Moreover, the fact that certain Member States compiled such lists is immaterial since the choice of means for implementing the directive was left to the national authorities. Finally, periodic assessment of the activities excluded from the scope of the principle of equal treatment does not necessarily presuppose the existence of a specific list. An assessment can easily be made by examining the laws which, from time to time, derogate from that principle.

That argument cannot be accepted. Article 2 (2) provides that 'this directive shall be without prejudice to (in German: 'steht nicht entgegen'; in French 'ne fait pas d'obstacle à') the right of the Member States to exclude from its field of application those occupational activities . . . for which, by reason of their nature or the context in which they are carried out, the sex of the worker constitutes a determining factor'. If that provision is viewed in the light of Article 2 (1), according to which the principle of equal treatment means that 'there shall be no discrimination whatsoever on grounds of sex', it becomes apparent that the purpose of Article 2 (2) is not to authorize Member States to permit discriminatory treatment whenever it proves necessary to do so, since a power of that kind already exists in the nature of things and is not conferred but 'found to exist' by the directive. Its purpose is to prevent the prohibition of discrimination from *making it difficult or impossible* to carry on those *and only those* activities for which a person's sex is an indispensable prerequisite. From that point of view, a precise indication of the activities that are excluded is not only useful but necessary in order to prevent the rule that there is to be 'no discrimination whatsoever' from being circumvented by an unrestricted power to derogate from it. Moreover, that is the only explanation for Article 9 (2) which provides that those activities must be assessed periodically.

The provision in paragraph 611 a of the German Civil Code to the effect that different treatment is lawful in so far as a person's sex constitutes an 'indispensable prerequisite' for carrying on the activity in question is superfluous inasmuch as it confirms almost *verbatim* the power of the Member States to set limits to the scope of the directive. On the other hand, that provision does not fulfil its purpose, that is, it does not specify the activities in respect of which the Federal Republic intends to exercise that power. Finally, contrary to the German Government's contention, the rule in Article 2 (2) does not come within the 'variable' factor in Directive No 76/207 (with regard to which the Member States have a certain discretion). That rule constitutes an essential aspect of the constant factor in the directive, which, as is well known, is absolutely binding on the national legislature. Moreover, that is how it was construed by the Member States which drew up the lists to which I referred earlier.

8. The fifth complaint against the Federal Republic is that it transposed Directive No 76/207 into national law to an insufficient extent as regards offers of employment. The Commission contends that, for the purposes of Article 3 ('application of the principle of equal treatment means that there shall be no discrimination whatsoever on grounds of sex in the conditions . . . for access to all jobs or posts'), national rules governing offers of employment fall within the concept of 'conditions . . . for access' and are therefore subject to Community legislation. It follows that the Member States are also obliged to prohibit any discrimination in that regard. In providing that 'an employer may not advertise posts as being solely for men or women' (paragraph 611 b of the German Civil Code), the Federal Republic adopted a rule which is not mandatory and, for that reason, cannot satisfy the requirements of certainty laid down by the Community legislature.

The defendant denies that charge. It points out that an offer of employment precedes recruitment and does not therefore fall within the concept of 'conditions . . . for access' or, consequently, within the scope of the directive. However, even if the argument to the contrary were adopted, paragraph 611 b cannot be said to conflict with the aims of the Community measure. Although it is not mandatory, that provision imposes a 'legal obligation' on the employer, breach of which may be penalized by the initiation of proceedings under paragraph 611 a.

Once again I disagree. I consider it unreasonable to argue that an offer of employment is not part of the recruitment procedure. It constitutes the first step in that procedure or, to put it another way, the act which sets it in motion. In any event — although the argument is *ad hominem* it carries considerable weight — the Bundestag itself, by making offers of employment the subject of a provision forming part of the Law of 13 August 1980, showed that it considered such offers to be at the very least closely linked to the rules governing access to employment on equal terms.

The second argument put forward by the German Government in its defence, though more substantial, cannot be accepted either. The defendant has not produced convincing evidence that proceedings concerning the impartiality of offers of employment come within the concept of a dispute as defined in paragraph 611 a (that is to say, a dispute concerning discrimination on the grounds of sex). In my view, that provision permits an action to be brought by persons who have suffered discrimination as a result of an offer which is not impartial. However, the tenacity with which the German Government defended its first argument to the effect that offers of employment are not covered by the rules governing conditions of access leads me to suspect that the possibility of instituting proceedings under paragraph 611 a is at the very least disputed by legal writers and in the case-law (see in this connection *K. Molitor*, 'Die Stellung der Frau im Recht der Arbeit und der sozialen Sicherheit', Recht der Arbeit, 1984, No 1, p. 16). However, on the assumption that proceedings can be instituted, the fact remains that, as German writers themselves acknowledge, the action would not be for a declaration of non-compliance with a mandatory obligation. In view of the fact that paragraph 611 a does not apply to cases in which a person's sex is an indispensable prerequisite for carrying on the activities in

question and that such cases are not specifically identified, it is easy for employers to argue before the courts that any discrimination in their offers of employment is justified.

Having said that, I am convinced that, in the light of the criterion whereby the effects of directives are to be assessed simultaneously, the problem raised by offers of employment can be solved by reference to the basic purpose of the Community rules. As I have shown (*supra*, Part 3), that purpose is to prevent the principle of equal treatment from being applied in a discretionary manner. Paragraph 611 b, which leaves the employer a wide discretion with regard to the wording of offers, is therefore, by virtue of that fact alone, contrary to the provisions of Directive No 76/207.

9. Mr President, Members of the Court, I should like to make a final observation: As I said earlier, the application now before the Court seeks to guarantee to all those concerned, and in particular to nationals seeking employment, the clarity and certainty which are essential if Community rules on equal pay and equal treatment as regards access to employment are to be effectively complied with. The Commission has sought to demonstrate that two important sectors in the Federal Republic, namely the public service and the liberal professions, do not benefit from the protection provided by the Council. In denying that this was the case, the German Government relied essentially on the highest-ranking provisions in the State, those which by their status in the hierarchy of norms exert an influence on the legislature, the courts and the administration. By now the Court is aware of my views in that regard. Perhaps, therefore, I may be allowed to examine what might be the consequences of accepting that argument.

The first consequence is that if the Court recognizes that the primary sources of law in a Member State can by themselves fulfil the obligations imposed by the Community legislature, those sources — which in the national legal system place the seal of constitutional legality of inferior rules of law — will themselves bear the seal of 'Community legality' and will necessarily pass it on to all national rules which give effect to them and which are at the same time regarded as adopted in implementation of a directive.

The second consequence is that a German or Italian court and, following enlargement, a Spanish or Portuguese court which is asked, in a labour dispute, to refrain from applying a national rule on the ground that it is incompatible with a directive, will no longer have any reason to seek a preliminary ruling on interpretation from the Court of Justice. It will be sufficient for those national courts to have recourse to the internal criteria governing the application of the primary rules or, failing such criteria, to refer the problem to their own constitutional court. Is that result in accordance with the principles which this Court has laid down over many years in its case-law on the question of the relationship between Community law and national law? That is a matter for the Court to decide.

10. For all the foregoing reasons, I propose that the Court should declare that, by failing to adopt all the measures necessary to comply with Directive No 76/207

on the implementation of the principle of equal treatment of men and women as regards access to employment, and with Directive No 75/117 on the approximation of the national laws relating to the application of the principle of equal pay, the Federal Republic of Germany has failed to fulfil its obligations under Article 189 of the EEC Treaty.

Since the defendant has failed in its submissions, it should be ordered to pay the costs.