a directive, the national court is required to interpret its 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.

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 79/83

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

DORIT HARZ

and

DEUTSCHE TRADAX GMBH,

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),

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

The facts of the case, the course of the procedure and the observations submitted in accordance with Article 20 of the Protocol on the Statute of the Court of Justice of the EEC may be summarized as follows:

1 — Facts and procedure

In October 1980 the plaintiff in the main proceedings, Dorit Harz (hereinafter referred to as "the plaintiff"), completed her studies in business administration and qualified as a Diplomierte Kauffrau [graduate in business studies]. On 24 January 1981 the defendant in the main proceedings, Deutsche Tradax GmbH (hereinafter referred to as "the defendant") inserted in the newspaper "Die Welt" an advertisement for a vacant post in which it offered to economics graduates willing to work hard "a springboard for a career in management".

The plaintiff applied for that post by letter dated 28 January 1981. By letter dated 3 February 1981 the manager of Deutsche Tradax GmbH returned her application papers and informed her that only male applicants would be considered for the position. It appears from the defendant's letter that the applicant's qualifications, which were generally good, were not in doubt.

At the instigation of the plaintiff, the Leistelle "Gleichstellung der Frau", (Regional department promoting equality for women) in Hamburg requested an explanation from the defendant. The latter replied that it had rejected the plaintiff for the position advertised solely because she was a woman.

In her application brought before the Arbeitsgericht Hamburg on 26 February 1981 the plaintiff sought, primarily, an order requiring the defendant to appoint her, in the alternative, damages in the sum of DM 12 000, and, in the last alternative, damages in the sum of DM 2.31.

By letter dated 7 April 1981 the defendant offered to interview the plaintiff at the defendant's premises to discuss the possibility of her employment with the defendant. That interview took place on 12 May 1981. At the defendant's invitation, the plaintiff was interviewed for a post by Deutsche Tradax GmbH at the latter's European headquarters on 25 May 1981. Finally, by letter of 3 June 1981, the defendant informed the plaintiff that following the interviews which had been conducted in Hamburg on 12 May and in Geneva on 25 May 1981, it had decided not to recruit her for its trainee programme.

Before the Arbeitsgericht the plaintiff claimed that the defendant had committed a breach of the principle of nondiscrimination, and had infringed Articles 2 and 3 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, as well as Paragraph 611a of the Bürgerliches Gesetzbuch (German Civil Code).

The defendant maintains that the advertised post had to be filled by a male applicant. Only men are employed in the buying and selling of agricultural raw materials. The defendant supplies large quantities of cereals to Saudi Arabia, in particular. The social and religious structures prevailing there preclude a woman from establishing business contracts and maintaining existing business relationships in that country.

Moreover, the reason why the plaintiff was not appointed was solely that she did not meet the requirements which the defendant regarded as essential for the position. That was clear from study of the job interviews conducted with the plaintiff in Hamburg on 12 May and in Geneva on 25 May 1981.

Finally, the defendant referred to Paragraph 611a (2) of the Bürgerliches Gesetzbuch and contended that at the most the plaintiff was entitled to claim damages in the sum of DM 2.31.

The Arbeitsgericht Hamburg took the view that, in this instance, there had been discrimination in the selection procedure inasmuch as the discussions between the defendant and the plaintiff as to the possibility of recruitment took place under pressure of the proceedings which has been initiated before that court. For the purpose of enforcing equal teatment for men and women as regards access to employment, the possible sanctions are a right to engagement or a right to damages. Damages, if awarded, should represent a financially appreciable sanction in order to ensure that the employers conduct themselves in conformity with the law.

In the view of the Arbeitsgericht, Directive No 76/207/EEC has not yet been implemented in German law and the equality of treatment referred to in that directive can only be achieved if the mandatory legal consequence of discrimination in the selection of candidates for a post is restitution in respect of a positive interest, that is to say, a right to be engaged or, alternatively, as a sanction, to receive substantial damages. The court also stated, however, that the Gesetz über die Gleichbehandlung von Männern und Frauen am Arbeitsplatz und über die Erhaltung von Ansprüchen bei Betriebsübergang [Law on Equal Treatment for Men and Women at Work and the Maintenance of Rights on Transfers of Businesses], which amended the German labour legislation to comply with the Community provisions, provides in Paragraph 611a (2) of the Bürgerliches Gesetzbuch, as the sole penalty for discrimination in recruitment, compensation for "Vertrauensschaden" [abuse of confidence], that is for expenses actually incurred in reliance on the expectation that there would be no discrimination in connection with the employment relationship. Such minimal compensation, in the present case DM 2.31, is not sufficient to ensure compliance with the Community directive, since it will not make employers conduct themselves in conformity with the law.

Consequently, the Arbeitsgericht Hamburg stayed the proceedings and referred the following questions to the Court for a preliminary ruling:

1. In an established case of discrimination, does the principle of equal treatment for men and women as regards access to employment contained in Articles 1 (2), 2 (1) and 2 (3) 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) confer on a female applicant a right to a contract of employment against an employer who has refused to engage her on account of her sex?

2. In the case of an affirmative reply to Question 1 does that answer apply only

   (a) where the female applicant discriminated against is the best qualified of all the applicants, whether male or female, or

   (b) also where, although there was discrimination in the selection procedure, in the result a better qualified male applicant was appointed?

3. If Questions 1, 2 (a) and 2 (b) are answered in the negative, does it follow, as a legal consequence, from the principle of equal treatment for men and women as laid down by the provisions of Directive No 76/207/EEC that a financially appreciable sanction is necessary, for example a right in favour of the female worker discriminated against to damages to be assessed, according to the position in the particular case, in a sum not exceeding the earnings which she could properly have expected to receive for the period of six months, the period in which under the law of the Federal Republic of Germany workers may not plead socially unjustified dismissal, and/or that the State must impose penalties or administrative fines?

4. If Question 3 is answered in the affirmative, does that answer apply only

   (a) where the female applicant discriminated against is the best qualified of all the candidates, whether male or female, or

   (b) also where, even though there was discrimination in the selection

procedure, in the result a better qualified male candidate was appointed?

5. If Questions 1, 2, 3 or 4 are answered in the affirmative, are Articles 1, 2 and 3 of Directive No 76/207/EEC directly applicable in the Member States?

The order making the reference was lodged at the Court Registry on 3 May 1983.

In accordance with Article 20 of the Protocol on the Statute of the Court of Justice of the EEC, written observations were submitted by the plaintiff, represented by Klaus Bertelsmann and Heide M. Pfaar, of the Hamburg Bar; by the Federal Republic of Germany, represented by Martin Seidel, Ministerialrat at the Federal Ministry of Economic Affairs and by Manfred Zuleeg, Professor of Public Law (including European Law and International Law) at the Johann Wolfgang Goethe University of Frankfurt am Main, acting as Agents; by the United Kingdom, represented by J. D. Howes of the Treasury Solicitor's Department, Queen Anne's Chambers, acting as Agent, assisted by Ian Glick, Barrister, of the Inner Temple, London; by the Kingdom of the Netherlands, represented by E. F. Jacobs, Secretary-General of the Netherlands Ministry of Foreign Affairs, acting as Agent; and by the Commission, represented by Manfred Beschel, a member of its Legal Department, acting as Agent, assisted by Meinhard Hilf of the University of Bielefeld.

Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court decided to open the oral procedure without any preparatory inquiry.

II — Relevant provisions

The following provisions of Directive No 76/207/EEC are relevant:

"Article 1

1. The purpose of this directive is to put into effect in the Member States the principle of equal treatment for men and women as regards access to employment, including promotion, and to vocational training and as regards working conditions and ... social security. This principle is hereinafter referred to as 'the principle of equal treatment'.

...

Article 2

1. For the purposes of the following provisions, the principle of equal treatment shall mean that there shall be no discrimination whatsoever on grounds of sex either directly or indirectly by reference in particular to marital or family status.

...

Article 3

1. Application of the principle of equal treatment means that there shall be no discrimination whatsoever on grounds of sex in the conditions, including selection criteria, for access to all jobs or posts ...

...

Article 6

Member States shall introduce into their national legal systems such measures as are necessary to enable all persons who consider themselves wronged by failure

to apply to them the principle of equal treatment . . . to pursue their claims by judicial process . . .

. . .

Article 9

1. Member States whall put into force the laws, regulations and administrative provisions necessary in order to comply with this directive . . ."

Paragraph 611a of the Bürgerliches Gesetzbuch, which purports to implement Directive No 76/207/EEC in German law, stipulates 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) 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 precluded by such a breach . . .".

III — Written observations submitted to the Court

The *plaintiff* maintains that Directive No 76/207/EEC has not been or has been insufficiently adopted in the national law of the Federal Republic of Germany as far as discrimination in recruitment is concerned.

She considers that it is clear from the wording of Paragraph 611a (2) of the Bürgerliches Gesetzbuch that that provision does not comply with Article 3 (1) taken together with Articles 1 (1) and 2 (1) of Directive No 76/207/EEC. The directive requires that compliance with the prohibition of any discrimination on grounds of sex be enforced by legal sanctions. German law, on the other hand, provides that workers may receive (nominal) damages for the frustration of their expectation that they will not be discriminated against.

In German law the legal consequences of the prohibition against discrimination do not, therefore, depend on the breach of that prohibition but on the loss caused to the worker in question, if he has sustained any loss, on the ground that his expectation has been frustrated. The legislature adopted that approach because it balanced the objectives of the prohibition against discrimination against the conflicting ones of the "contractual freedom" of the employer, a procedure which it was not entitled to adopt.

In several areas of the employment relationship, for example in the matter of dismissal and in respect of other measures which may be taken in the course of recruitment, the legislature gave precedence to the prohibition against discrimination. However, on the question of access to employment, the legislature opted in favour of the contractual freedom of the employer, which includes the "freedom" to discriminate.

Moreover, the prevailing academic view is that when an employer states at the outset his intention to discriminate, for example not to engage a woman, there is not even any recognized right to damages in respect of the frustrated

expectation. In adding subparagraph (2) to Paragraph 611a of the Bürgerliches Gesetzbuch, the legislature diminished the force of the prohibition of discrimination contained in subparagraph (1) of the same paragraph. Its action in so doing represents a considerable departure from the "normal" legal consequences provided for by German civil law. Those "normal" rules — with the exception of Paragraph 611a (2) of the Bürgerliches Gesetzbuch — go further in fact, and even allow for a more flexible approach in individual cases.

Paragraph 611a (2) implies that a victim of discrimination is entitled to compensation only in respect of his so-called negative interest, with the result that in almost every case it is possible to claim, in that respect, only the reimbursement of the cost of submitting an application, in other words the costs of preparing documents, of the writing paper, the postage and so on. In this instance, in the view of the Arbeitsgericht Hamburg, the plaintiff is entitled to claim damages of DM 2.31, and that compensation constitutes the sole legal consequence incurred. Moreover, the victims of the discrimination are required to satisfy certain conditions in order to be entitled to that nominal compensation and those conditions are not always satisfied. The prohibition against discrimination which appears in Paragraph 611a is therefore purely formal.

It is conceded that Directive No 76/207/EEC, on the one hand, does not provide expressly for specific legal sanctions or consequences in the event of discrimination in recruitment, but on the other hand, (as, moreover, the Court of Justice has observed) Community law requires that effective means be made available to implement the binding objectives of directives.

The plaintiff lists the different methods which she considers might be used in applying the directive in question, and points out that in any event it is inconceivable for the legal consequences of discrimination against a woman to be limited to the right to reimbursement of postage costs.

The plaintiff then endeavours to explain why it follows from the directive, taken together with German civil law, that a right to engagement exists or alternatively, if the victim of discrimination does not exercise that right, the entitlement to damages in a sum not exceeding 12 monthly salary payments. As regards discrimination in recruitment, recognition that the worker who has been rejected as a result of discrimination has a right to be engaged certainly corresponds to the tenor of the directive in question. Such a right, together with the consequences which follow from it, is in conformity with the German legal system. The general principle regarding compensation, laid down by the Civil Code — with the exception of Paragraph 611a (2) — allows any person who has suffered damage the right to compensation corresponding to his positive interest or, in other words, compensation in kind (Naturalrestitution). Paragraph 611a (2) therefore represents a departure from that principle.

Moreover, recognition of a right to engagement already exists in German law in fact where the rejected candidate is the best of the candidates of both sexes.

A right to engagement may arise where discrimination occurs in recruitment for a post in the civil service (see Article 33 (2) and (3) of the Grundgesetz [Basic Law]). There is some dispute as to the exact circumstances in which a candidate male or female, may assert his or her right to be engaged in the civil service, but it is agreed that the right to

engagement exists where the engagement of that person is the only possible lawful decision for the public authority in question.

In any event, the right exists in so far as the post in question has not yet been filled. If the post is already occupied, it is generally thought that the victim of the discrimination is entitled, if the post concerned is that of a civil servant, either to be recruited for the next vacant post, or to be paid financial compensaiton. As regards the post of a manual worker or a clerical employee in the civil service, a person who has been discriminated against in the selection procedure may bring an action before the labour courts with a view to obtaining an appointment in the civil service, even if the post has already been filled. In any event, the administration may be ordered to include the person who has been unlawfully rejected in the next selection procedure for a similar post.

In the private sector, the right to engagement was recognized before the implementing law came into force for undertakings which hold a monopoly. That state of affairs is based on the prohibition against abuse of a monopoly.

For other undertakings in the same sector, Paragraph 78 of the Betriebsverfassungsgesetz [Law on the Representation of Employees within Undertakings] also provides for a right to engagement.

It cannot be claimed that a right to engagement is not feasible because it would compel the employer to create and to fill a considerable number of useless posts. The employer is not required to engage a rejected candidate on the basis of the latter's right to engagement and, at the same time, to continue to employ the candidate who has already been engaged. According to the Kündigungsschutzgesetz [Law on Protection against Dismissal] an employer may dismiss an employee during the first six months of employment. Even after that period, he is entitled to dismiss if that proves necessary to meet imperative requirements of management.

In certain cases the engagement of the person may be impossible or out of the question, as for example when a post has been abolished in the meantime and when there is no comparable post. According to the "normal" rules, the victim of discrimination may be given financial compensation in that case. Thus Paragraph 10 of the abovementioned Law provides for the payment of a lump sum not exceeding twelve monthly salary payments, and that provision could serve as a legal model to be applied in the cases mentioned above.

The victims of discrimination who are not recognized as having a right to engagement because a better qualified candidate obtained the post in question are entitled not only to reimbursement of the cost of submitting an application, but also to compensation for the non-material damage caused by the infringement of the rights of the individual [Persönlichkeitsrecht — a concept embracing the right to privacy and the right to the free development of the person]. That right is protected under Article 2 (1) of the Grundgesetz and may also be implied from Paragraph 847 of the Bürgerliches Gesetzbuch. The right to compensation for non-material loss is especially important where a female candidate is not regarded as the best qualified because in the majority of cases recognition of a woman's right to be engaged is the exception rather than the rule, not because women are less well qualified, but because the procedure

which requires a woman to establish that she is better qualified entails an extremely heavy burden of proof.

The plaintiff claims that the legislature in the Federal Republic of Germany has failed to take the necessary measures to ensure that any laws, regulations and administrative provisions contrary to the principle of equal treatment are abolished. The provision in question, namely Paragraph 611a (2) of the Bürgerliches Gesetzbuch, does not allow national courts to develop an interpretation of the law which is in conformity with the Community directive, inasmuch as the clear wording of the provision in question prevents them from so doing. The only possible solution is therefore to declare the provisions of law in question contrary to the directive and not applicable within the Member State. Since the Federal Republic of Germany has not adequately implemented Directive No 76/207/EEC concerning discrimination in recruitment, that directive becomes directly applicable. The possibility that there might be some discretion as to the implementation of the directive does not prevent its having direct application provided that it is clear that the implementing law is such as to prevent an adequate implementation in the national law. Article 3 (2) of the directive clearly states that Member States are required to take the measures necessary to ensure that national provisions contrary to the principle of equal treatment are abolished, and therefore allows individuals to rely on it. The consequence of the direct effect of that provision of the directive is therefore that Paragraph 611a (2) of the Bürgerliches Gesetzbuch loses its effect and the effective sanctions normally imposed under German civil law, described above, are applicable until the German legislature exercises its wide discretion in a manner which conforms to the directive.

In conclusion, the plaintiff proposes that the questions submitted by the Arbeitsgericht Hamburg should be answered as follows:

First question

Pursuant to Directive No 76/207/EEC, Member States must take the measures necessary to ensure that any laws, regulations and administrative proposions contrary to the principle of equal treatment are abolished.

If a Member State fails to abolish a law which is incompatible with that principle, although its removal would bring the national law into conformity with the directive, the provision of national law is abolished in application of the directive.

Paragraph 611a (2) of the Bürgerliches Gesetzbuch constitutes an obstacle to the application of the directive and must no longer be applied. Therefore the rules which would have been applicable if that paragraph had not been adopted apply.

There is a right to conclude an employment contract provided that it is possible for the victim of the discrimination to be engaged.

Second question

Only a candidate who has not been engaged on the ground of her sex may claim a right to be engaged.

Third question

If it is impossible to engage a candidate who has been discriminated against or if she is not the best qualified, the sanction to be imposed must be an appreciable one in order to render the prohibition against discrimination effective.

Fourth question

A candidate who has been discriminated against and who satisfies the necessary conditions, but who cannot claim a right to be engaged, may, in application of the German legislation, claim damages not exceeding twelve monthly salary payments.

The candidates who do not satisfy the necessary conditions for engagement are entitled to the reimbursement of the cost of submitting an application and compensation for the non-material damage which has been caused to their rights as an individual.

Fifth question

The directive is directly applicable inasmuch as the German national provision, which is contrary to it and which excludes the application of the normal legal consequences obtaining in civil law, is void.

The *Federal Republic of Germany* refers to the observations which it submitted in Case 14/83, *von Colson and Kamann* v *Land Nordrhein-Westfalen,* in which it 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 connection 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 discrimated 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 addition, 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 the problem of the effects of Directive No 76/207/EEC, the German Government considers that, in the national sphere, the scope of the directive's legal effects is to be determined by reference to the existing case-law of the Court.

The *United Kingdom* likewise refers to its observations in Case 14/83, in which it observes 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 posed in the abovementioned case 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.

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 *Kingdom of the Netherlands* considers that in cases of discrimination the victim has no right to be engaged. On the other hand, it takes the view that various solutions are possible. Thus, in certain circumstances the employer might be ordered to pay damages. The Netherlands Government considers, in any event, that an order to pay a purely nominal sum cannot satisfy the requirement that the person discriminated against must be able to rely on his rights under the directive.

Moreover, the Netherlands Government emphasizes, with reference to the fourth question, that it is not possible to suggest that the candidate has a right to be recruited if she is "the best qualified" as subparagraph (a) of that question presupposes. The choice of the "best qualified" candidate depends on a certain number of factors which cannot be assessed from an objective point of view. According to the Netherlands Government, subparagraph (a) of the fourth question must therefore be answered in the negative and subparagraph (b) in the affirmative. A victim of discrimination in the course of a selection procedure must have a remedy

against that discrimination, but that remedy must not prejudge the final outcome of the procedure.

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 plaintiff in this instance in her 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 be offered a post. 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 are the courts "entitled to order the termination or the rescission of a discrimination in respect of an appointment". The caution of the Member States 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.

As the first question must clearly be answered in the negative, it is not necessary, even in the alternative, to express a view on the second question.

The third question 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 compensaton 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.

Nevertheless, the Commission considers that the national legislature must take into account certain general principles.

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 abovementioned 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 the reimbursement of the costs which he had 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 the Commission takes the view that the third question should be answered in the negative, it considers that it is unnecessary to reply to the fourth.

As regards the fifth question, 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 plaintiff, other problems regarding the direct applicability of the directive would arise.

Indeed, whilst the Court recognizes that directives may be relied upon as against a Member State or its institutions and authorities it has never, as yet, acknowledged the existence of an effect in respect of third parties (except as regards the possible effect of certain provisions of the Treaty, such as Article 119). The Commission emphasizes that since publication of directives is not mandatory there can be no question, in a State upholding the rule of law, of recognizing the existence of obligations for individuals derived from directives. Although Directive No 76/207/EEC concerns the same basic principle of equal treatment as that contained in Article 119 of the Treaty, the fact remains that the directive is based on Article 235 of the Treaty, which is less specific in that respect.

In the Commission's view, in reply to the questions submitted by the Arbeitsgericht the Court should state as follows:

1. 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 does not require that discrimination on grounds of sex in access to employment be sanctioned by obligating the employer responsible for the discrimination to conclude a contract of employment with the candidate who has been discriminated against.

2. Directive No 76/207/EEC requires Member States to adopt within the prescribed periods legislation which, in the event of a breach of the principle of equal treatment enshrined in the directive, accords the candidate discriminated against rights which he may rely on before the courts and

which, by their nature and by their scope, are sufficient to ensure that the principle is respected by employers.

3. National legislation which restricts the rights of a candidate discriminated against to reimbursement of the costs incurred by him in relation to the submission of his application does not satisfy the requirements of Community law, according to which the aims set out in the abovementioned directive must be effectively implemented in the national legislation.

IV — Questions put to the Government of the Federal Republic of Germany

In Case 14/83, *von Colson and Kamann* v *Land Nordrhein-Westfalen*, the Court requested the German Government 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.

V — Oral procedure

The plaintiff in the main action represented by K. Bertelsmann, assisted by H. M. Pfarr, the Government of the Federal Republic of Germany, represented by M. Seidel and the Commission, represented by M. Beschel, assisted by M. Hilf, presented oral argument 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 5 July 1982, which was received at the Court on 3 May 1983, the Arbeitsgericht [Labour Court] Hamburg 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 Dorit Harz, a graduate in business studies, and Deutsche Tradax GmbH. It appears from the grounds of the order for reference that the Arbeitsgericht considers that the defendant undertaking practised sex discrimination in the recruitment procedure commenced by it in which Mrs Harz was a candidate.

3 In the Arbeitsgericht's view, under German law, the only sanction for discrimination in a recruitment procedure is compensation for "Vertrauensschaden", namely the loss incurred by candidates who are victims of discrimination as a result of their belief that there would be no discrimination in the establishment of the employment relationship. Such compensation is provided for in 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 payment only of minimal compensation, of DM 2.31 in the case in point, in respect of expenses incurred by Mrs Harz in relation to her application. It considered that such compensation was not sufficient to ensure compliance with the Community directive, since it would not serve to ensure that employers conduct themselves in conformity with the law.

6 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. In an established case of discrimination, does the principle of equal treatment for men and women as regards access to employment contained in Articles 1 (2), 2 (1) and 2 (3) 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) confer on a female applicant a right to a contract of employment against an employer who has refused to engage her on account of her sex?

2. In the case of an affirmative reply to Question 1 does that answer apply only

   (a) where the female applicant discriminated against is the best qualified of all the appalicants, whether male or female, or

   (b) also where, although there was discrimination in the selection procedure, in the result a better qualified male applicant was appointed?

3. If Questions 1, 2 (a) and 2 (b) are answered in the negative, does it follow, as a legal consequence, from the principle of equal treatment for men and women as laid down by the provisions of Directive No 76/207/EEC that a financially appreciable sanction is necessary, for example a right in favour of the female worker discriminated against to damages to be assessed, according to the position in the particular case, in a sum not exceeding the earnings which she could properly have expected to receive for the period of six months, the period in which under the law of the Federal Republic of Germany workers may not plead socially unjustified dismissal, and/or that the State must impose penalties or administrative fines?

4. If Question 3 is answered in the affirmative, does that answer apply only

   (a) where the female applicant discriminated against is the best qualified of all the candidates, whether male or female, or

   (b) also where, even though there was discrimination in the selction procedure, in the result a better qualified male candidate was appointed?

5. if Questions 1, 2, 3 or 4 are answered in the affirmative, are Articles 1, 2 and 3 of Directive No 76/207/EEC directly applicable in the Member States?

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 4) 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 5).

(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 the sanctions which may be envisaged in order to enforce the principle of equal treatment for men and women regarding access to employment are an automatic right to be given a post or a right to damages, which in German law are classified as compensation for a "positive interest" [Ersatz des positiven Interesses]. The Arbeitsgericht considers that Directive No 76/207 has not yet been transposed into German law inasmuch as the sanction provided for in Paragraph 611a (2) of the Bürgerliches Gesetzbuch is not, in its view, sufficent in that respect.

10 According to the plaintiff 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, at least 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 or, if that proves impossible or out of the question in the particular case, at least to pay him appreciable damages.

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 Netherlands Government takes the view that the directive does not require a specific sanction, for example by giving victims of discrimination the automatic right to be offered a post. On the other hand, an order requiring the employer to pay a purely nominal sum does not satisfy the requirement that the person discriminated against must be able to rely on his rights under the directive.

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, nevertheless the transposition of the directive must 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, for the candidate discriminated against, appropriate compensation 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 an 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 free 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, within the framework of 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 workers 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 that 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, reinforced 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) Question 2

20 It is not necessary to answer the second question, since it is put only on the supposition that an employer is required to offer a post to the candidate discriminated against.

(c) Questions 3, 4 and 5

21 In its third and fourth questions the Arbeitsgericht essentially asks whether it is possible to infer from the directive that a financially appreciable sanction is necessary. The fifth question asks whether the directive, as properly interpreted, may be relied on before national courts by persons who have suffered injury.

22 In that respect it must be remarked that 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 the first question, full implementation of the directive does not require a specific form of sanction for breach of the prohibition of 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 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 rembursement of expenses incurred in connexion with 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 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 national law and in particular the provisions of a national law specifically introduced in order to implement Directive No 76/207, the national court is required to interpret its 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 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.

Costs

29 The costs incurred by the Governments of the Federal Republic of Germany and the Netherlands, 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 Hamburg by order of 5 July 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

(see Case 14/83, p. 1911)