JUDGMENT OF THE COURT
21 May 1985 *

In Case 248/83

Commission of the European Communities, represented by its Legal Adviser, Manfred Beschel, acting as Agent, assisted by Professor Jürgen Schwarze of the University of Hamburg, with an address for service in Luxembourg at the office of Georges Kremlis, a member of the Commission's Legal Department, Jean Monnet Building, Kirchberg,

applicant,

v

Federal Republic of Germany, represented by Martin Seidel, Ministerialrat im Bundesministerium für Wirtschaft (Ministerial Adviser at the Federal Ministry for Economic Affairs), acting as Agent, assisted by Jochim Sedemund of the Cologne Bar, with an address for service in Luxembourg at the Embassy of the Federal Republic of Germany,

defendant,

APPLICATION for a declaration that the Federal Republic of Germany has failed to fulfil its obligations under the EEC Treaty by not fully transposing into national law 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 and Council Directive No 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women,

THE COURT

composed of: Lord Mackenzie Stuart, President, G. Bosco, O. Due and C. Kakouris (Presidents of Chambers), P. Pescatore, T. Koopmans, U. Everling, K. Bahlmann and Y. Galmot, Judges,

Advocate General: G. F. Mancini

Registrar: P. Heim

after hearing the Opinion of the Advocate General delivered at the sitting on 26 February 1985,

gives the following

* Language of the Case: German.

JUDGMENT

(The account of the facts and issues which is contained in the complete text of the judgment is not reproduced)

Decision

1 By application lodged at the Court Registry on 9 November 1983, the Commission of the European Communities brought an action before the Court under Article 169 of the EEC Treaty for a declaration that the Federal Republic of Germany has failed to fulfil its obligations under the EEC Treaty by not fully transposing into national law Council Directive No 76/207/EEC of 9 February 1976 on 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) and Council Directive No 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women (Official Journal 1975, L 45, p. 19).

Purpose and legal context of the action

2 It is clear from the documents in the case, and particularly from the letter of 15 January 1982 inviting the submission of observations and the reasoned opinion of 29 October 1982, that the Commission initiated the procedure under Article 169 after the entry into force in the Federal Republic of the Law of 13 August 1980 on equal treatment of men and women in the work place, the Arbeitsrechtliches EG-Anpassungsgesetz [Law aligning labour legislation with Community law] (BGBl. 1980, I, p. 1308) The purpose of that law was, in particular, to insert a series of new paragraphs in Book 2, Title 6, of the German Civil Code which deals with contracts of service. Paragraph 611 a provides that an employer may not place an employee at a disadvantage by reason of that person's sex on the occasion of the conclusion of a contract of employment or in matters of promotion or dismissal. The same paragraph provides, however, that different treatment is lawful where, for a professional or trade activity, the sex of the employee is an indispensable prerequisite. Paragraph 611 b provides that an employer may not advertise posts restricted either to men or to women except where, for the activity in question, the sex of the employee is an indispensable prerequisite. A new provision was added to paragraph 612, according to which contracts 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.

3 It is apparent from the documents before the Court that the Commission charges the Federal Republic essentially with restricting the measures adopted for the implementation of the aforementioned directives to employment relationships governed by private law and, moreover, with failing to give adequate legal effect to a specific provision of the aforementioned law.

4 In those circumstances, the Commission has formulated five complaints against the Federal Republic which may be summarized as follows:

1. Failure to transpose Directive No 76/207 into national law as required, with regard to employment relationships in the public service;

2. Failure to transpose Directive No 76/207 into national law as required, with regard to the rules governing the independent professions;

3. Failure to define as required the scope of the exceptions referred to in Article 2 (2) of Directive No 76/207;

4. Failure to comply fully with Directive No 76/207 when adopting the provisions concerning offers of employment laid down in paragraph 611 b of the Civil Code;

5. Failure to transpose Directive No 75/117 into national law as required, with regard to remuneration in the public service.

It should be noted that a sixth complaint dealing with the maternity leave introduced by paragraph 8b of the Mutterschutzgesetz [German Law on Protection for Mothers] was withdrawn by the Commission following the judgment of the Court of 12 July 1984 in Case 184/83 *(Hofmann* v *Barmer Ersatzkasse* [1984] ECR 3047).

5 With a view to determining as accurately as possible the nature of the obligations which the Federal Republic has allegedly failed to fulfil, it is appropriate to recall the purpose and the general structure of the two directives on the basis of which the Commission has instituted proceedings, in so far as their provisions are relevant to the dispute.

6 Article 1 of Directive No 75/117, which defines the scope of the 'principle of equal pay', provides that that principle means, for the same work or for work to which equal value is attributed, the elimination of all discrimination on grounds of sex with regard to all aspects and conditions of remuneration. Article 2 requires

the Member States to introduce into their national legal systems 'such measures as are necessary to enable all employees who consider themselves wronged by failure to apply the principle of equal pay to pursue their claims by judicial process'. That provision is reinforced by Article 6 according to which the Member States are, in accordance with their national circumstances and legal systems, to take the measures necessary to ensure that the principle of equal pay is applied.

7 The structure of Directive No 76/207 is similar to that of Directive No 75/117. Article 1, together with Article 2 (1) of Directive No 76/207, defines the scope of the principle of equal treatment of men and women as meaning that 'there shall be no discrimination whatsoever on grounds of sex either directly or indirectly' as regards access to employment and working conditions. Article 2 (2) provides that the directive is without prejudice to 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'. Article 2 (3) provides that the directive is without prejudice to the provisions concerning the protection of women, particularly as regards pregnancy and maternity. It should be noted that the scope of the latter provision has in certain respects been defined more precisely by the Court in its aforementioned judgment of 12 July 1984.

8 For the purpose of implementing the principle of equal treatment, the directive imposes two kinds of obligations on the Member States. Articles 3, 4 and 5 require the Member States to abolish all forms of discrimination both in their national legislation and in their administrative practices and to establish the necessary legislative machinery to ensure observance of the principle of equal treatment in collective agreements, individual contracts of employment and the rules governing the independent professions.

9 Article 6 requires the Member States to 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.

10 In that regard, it must be borne in mind that in its judgment of 10 April 1984 in Case 14/83 (*von Colson and Kamann* v *Land Nordrhein-Westfalen* [1984] ECR

1891), the Court, in interpreting Directive No 76/207, emphasized 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. Although . . . full implementation of the directive does not require any specific form of sanction for unlawful discrimination, it does entail that that sanction be such as to guarantee real and effective judicial protection'.

11 The five complaints formulated by the Commission must be examined in the light of those considerations.

The complaint of failure to apply the principle of equal treatment to the public service

12 The Federal Republic initially denied that Directive No 76/207 was applicable to the public service (öffentlicher Dienst). Consequently, in its application the Commission dealt with that question first. In its view, Directive No 76/207 is of general application, as is clear in particular from Article 3 (1), which refers to 'all jobs or posts, whatever the sector or branch of activity'. Since employment relationships in the public service are thus within the scope of the directive, the Federal Republic has failed to adopt the legislative provisions needed to ensure the application of the principle of equal treatment in this area. The Commission recognizes that the principle is enshrined in the Basic Law of the Federal Republic of Germany but it considers that the provisions in question need to be given concrete form and to be implemented by ordinary legislation if they are to be effective in practice. In its view, only such legislation could have created the conditions of 'clarity and certainty in legal situations' which are necessary for the proper implementation of directives, as the Court stated in its judgment of 6 May 1980 in Case 102/79 (*Commission* v *Belgium* [1980] ECR 1473, paragraph 11 of the decision). Moreover, the Commission points out that the aforementioned constitutional provisions guarantee equal access and equal treatment of men and women as regards the public service but only subject to the 'aptitude' of the applicants, which makes it possible to re-introduce conditions relating to sex. The

same observations apply to the legislation concerning the public service. In its view, therefore, provisions similar to those of the Law of 13 August 1980 should also have been adopted in relation to the public service.

13 In its defence, the Federal Republic of Germany reaffirms its reservation as regards the applicability of Directive No 76/207 to the public service. It is clear, however, from the position which the Federal Republic subsequently took in its rejoinder and at the hearing, that the reservation has not in fact been maintained. As far as the substance of the problem is concerned, the Federal Republic contends that both the Basic Law and the legislation concerning the public service expressly guarantee equal access and equal treatment for men and women as regards the public service. Paragraphs (2) and (3) of Article 3 of the Basic Law accordingly provide that:

'(2) Men and women shall have equal rights.

(3) No one may be prejudiced or favoured because of his sex . . .'

Furthermore, with regard to the public service, Article 33 (2) of the Basic Law provides that:

'(2) Every German shall be equally eligible for any public office according to his aptitude, qualifications and professional achievements.'

According to Article 1 (3) of the Basic Law:

'(3) The following basic rights shall bind the legislature, the executive and the judiciary as directly enforceable law.'

14 Moreover, paragraph 7 of the Beamtenrechtsrahmengesetz [Framework Law on the Public Administration] of 1 July 1957 (BGBl. I, p. 667, in the version in force since 3 January 1977, BGBl. I, p. 21) provides that:

'Appointments shall be made on the basis of professional aptitude, achievements and qualifications, without any distinction on grounds of sex . . . '.

Paragraph 8 of the Bundesbeamtengesetz [Federal Law on Public Servants] of 14 July 1953 (BGBl. I, p. 551, in the version in force since 3 January 1977, BGBl. I, p. 1) reads as follows:

'Applicants shall be chosen by competition. Selection shall be on the basis of professional aptitude, qualifications and achievements, without any distinction on grounds of sex . . . '.

15 The defendant maintains that all those provisions define rights which are directly conferred on individuals and which give rise, where they are infringed, to a right of action before the administrative courts and, if necessary, before the Constitutional Court. Accordingly, to bring into force legislative provisions pursuant to Directive No 76/207 seemed to be devoid of purpose, particularly as such legislation would merely have restated the principles already embodied in the Constitution and in the legislation concerning the public service. From that point of view, employment in the public service differs from employment governed by private law since, as regards the latter, it was uncertain whether the constitutional provisions on equal treatment of men and women were of such a nature as to create direct rights between private individuals (Drittwirkung). In order to remove that uncertainty, the competent authorities considered it necessary to adopt the measures contained in the Law of 13 August 1980.

16 In view of the objection initially raised by the Federal Republic of Germany, it must be emphasized that both Directive No 76/207 and Directive No 75/117 apply to employment in the public service. Like Article 119 of the EEC Treaty, those directives are of general application, a factor which is inherent in the very nature of the principle which they lay down. New cases of discrimination may not be created by exempting certain groups from the provisions intended to guarantee equal treatment of men and women in working life as a whole.

17 With regard to the substance of the problem, it should be noted in the first place that the Commission has not established, or even attempted to establish, that discrimination on grounds of sex exists, either in law or in fact, in the public service of the Federal Republic of Germany. In raising the question whether the constitutional and legislative provisions relied upon by the Federal Republic of Germany constitute an adequate safeguard against possible discrimination and whether Directive No 76/207 required the adoption of further legislative provisions, the Commission considered the problem exclusively in terms of the principles involved.

18 It may be stated in that regard that the categorical affirmation by the Basic Law 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 German nationals, in provisions that are intended be directly applicable, constitute, in conjunction with the existing system of judicial remedies, including the possibility of instituting proceedings before the 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 guarantees are reiterated in the legislation concerning the public service, which expressly lays down that appointment to posts in the public service must be based on objective criteria, without any distinction on grounds of sex.

19 It follows that the object of Directive No 76/207 had already been achieved in the Federal Republic of Germany as regards employment in the public service at the time when the directive entered into force, with the result that no further legislative provisions were required for its implementation.

20 The Commission points out, however, that both Article 33 (2) of the Basic Law and the legislation on employment in the public service make access thereto subject to the 'aptitude' of the applicants, which makes it possible to re-introduce discrimination on grounds of sex. The Government of the Federal Republic of Germany contends in that regard that the reference to aptitude constitutes an objective criterion for the selection of applicants and that the principle that there must be no discrimination on grounds of sex also governs the application of that criterion.

21 In that connection, it must be pointed out in the first place that the criterion of aptitude for office in the public service, as used in the Basic Law and in the legislation of the Federal Republic of Germany, covers a wide variety of criteria of assessment which, having regard to the broad range of duties performed by the public administration, are entirely unconnected with the question of a person's sex. Accordingly, the use of that criterion in the Basic Law and the legislation of the Federal Republic of Germany cannot be contested in principle.

22 The question to be resolved is therefore exclusively concerned with whether the criterion of aptitude, which is in itself an objective criterion, has been applied in

practice in such a way as to lead to appointments to the public service based on sex discrimination. The onus was on the Commission to show that such a practice was followed in the German administration. However, it has not established that this was the case.

23 In the light of all the foregoing considerations, the first complaint must be rejected.

The complaint of failure to apply the principle of equal treatment to the independent professions

24 For the same reasons as those on which it relied with regard to employment in the public service, the Commission considers that the Federal Republic of Germany should, in the interests of clarity and certainty in legal situations, have adopted legislative measures to ensure the application of the principle of equal treatment laid down by Directive No 76/207 in relation to the right to take up the independent professions, particularly as the rules governing those professions are expressly referred to in Articles 3, 4 and 5 of the directive. According to the Commission, the application of the provisions of the Basic Law alone does not create a sufficient degree of legal certainty in the case of the professions at issue. In those circumstances, the Commission fails to understand why the legislation adopted to implement the directive was limited to employment relationships and was not extended to the activities carried on by self-employed persons. As an example of discrimination in this area, the Commission refers to the occupation of midwife, which, it maintains, is still not entirely open to men.

25 The Federal Republic of Germany denies that charge on the ground that the relevant provisions of the Basic Law constitute an adequate safeguard against sex discrimination also in the case of the independent professions. In addition to the general provisions already mentioned, which are concerned with the equality of men and women before the law and with the abolition of sex discrimination, the Government of the Federal Republic draws attention to Article 12 (1) of the Basic Law, which provides as follows:

'All Germans shall have the right freely to choose their trade, occupation or profession, their place of work and their place of training.'

26 According to the Government of the Federal Republic of Germany, the relevant constitutional provisions are directly applicable in this area in view of the fact that,

in so far as the right to take up an independent profession is subject to an admission procedure, admission is in the nature of an administrative measure adopted by a body governed by public law. Consequently, the principle laid down in Article 1 (3) of the Basic Law applies without exception to the rules governing the various independent professions, in accordance with the requirements of the directive. Examination of the rules governing each of the various professions concerned reveals the absence in the Federal Republic of any provisions which are contrary to the requirements of the directive. Admission to all the independent professions is therefore open to persons of either sex, provided that they possess the required professional qualifications.

27 With regard to the occupation of midwife, in particular, the Government of the Federal Republic of Germany states that access to the appropriate training was extended to men with effect from 1 January 1983 as a result of the adoption of the Ausbildungs- und Prüfungsordnung für Hebammen [Rules Governing the Training and Examination of Midwives] of 3 September 1981 (BGBl. I, p. 923). Consequently, the Hebammengesetz [Law on the Pursuit of the Occupation of Midwife] of 21 December 1938 (BGBl. I, p. 1893) is under review. Such action on the part of the authorities of the Federal Republic corresponds fully with action of the kind which the Court held to be compatible with the directive in its judgment of 8 November 1983 in Case 165/82 (*Commission* v *United Kingdom* [1983] ECR 3431).

28 It should be noted that during the proceedings, the Commission indicated that it did not attach much importance to the question of midwives, which it cited only by way of illustration and which was not in reality the subject of the application.

29 Having regard to that clarification, it must be stated, as with the first complaint, that the Commission has produced no evidence from which it may be inferred that the rules governing the independent professions in the Federal Republic of Germany actually give rise to discrimination. This charge was included in the application as a matter of principle, as was the preceding charge, since the Commission considered that the existing legal situation did not provide sufficient clarity and certainty for legal purposes to satisfy the requirements of the directive.

30 For the reasons already given in connection with the first complaint, this head of the application also appears to be unfounded. In view of the guarantees provided by the Basic Law and by the existing system of judicial remedies as regards the freedom for all German nationals to take up an independent profession, subject

only to the possession of qualifications that are objectively determined without any reference to sex, it must be held that, as far as the rules governing the independent professions are concerned, the object of Directive No 76/207 had already been achieved in the Federal Republic of Germany at the time when that directive came into force, with the result that no further legislative measures were required for its implementation.

31 Therefore this complaint must also be rejected.

The complaint of failure to define the scope of the exceptions provided for in Article 2 (2) of Directive No 76/207

32 In its third complaint, the Commission charges the Federal Republic of Germany with failing to implement the provisions of Article 2 (2) and Article 9 (2) of Directive No 76/207 regarding occupational activities which may be excluded from the scope of the principle of equal treatment by reason of their nature or the context in which they are carried on. It is not clear from the application whether the Commission requires those exceptions to be legally determined or whether a list or a catalogue of such exceptions is to be established by other means. In any event, the Commission considers that paragraph 611 a of the Civil Code, which makes it possible to derogate from the principle of equal treatment where a person's sex constitutes a condition for carrying on a given occupational activity, is inadequate since that provision does not contain a catalogue setting out precisely the exceptions permitted. Moreover, the Federal Republic is charged with failing to create an adequate basis for enabling the Commission to exercise the right of supervision which is conferred upon it by Article 9 (2) of Directive No 76/207. The Commission points out that a study of comparative law shows that most of the other Member States have embodied in legislation the exceptions which they consider justified under Article 2 (2) of the directive.

33 The Federal Republic of Germany denies that charge on the ground that Article 2 (2) of Directive No 76/207 does not contain any indication which suggests that the Member States are obliged to determine exhaustively by way of legislation the exceptions permitted by that provision. It considers that the relevant provision embodied in paragraph 611 a of the Civil Code fully satisfies the requirements of the directive. The existence of a list established by law is not essential for the exercise by the Commission of its right of supervision. Moreover, the requirement laid down by the Commission is impracticable since the occupational activities excluded from the scope of the principle of equal treatment by Article 2 (2) of the

directive are largely the result of specific prohibitions of access to certain posts, which are laid down for the purpose of providing protection related to the nature of the activity carried on, in accordance with the provisions of Article 2 (3). Finally, the Federal Republic casts doubt on the Commission's statements regarding the implementation of the directive by other Member States, particularly as it is uncertain whether the provisions enacted by those States were adopted in pursuance of a legal obligation or in the exercise of their discretion.

34 In order to clarify that aspect of the dispute, the Court requested the Commission to provide it with a summary of the results of its investigation as to the implementation of Article 2 (2) of Directive No 76/207 by the various Member States and to indicate whether, on the basis of that information, it had been able to draw up a list of the occupational activities exempted by the aforementioned provision which was valid for the whole Community. The Commission did not reply to that question. It is clear from the information which it supplied concerning the practice followed by the Member States that, although the laws and practices of the various States are similar with regard to certain clearly-defined occupations (such as singing, acting, dancing and artistic or fashion modelling), the Member States maintain a wide variety of other exceptions based on social, moral or, in certain cases, religious considerations, that a substantial number of those exceptions are based on considerations relating to the physical and moral protection of women and, finally, that certain important exemptions are bound up with the question of military service and the organization of the police and similar bodies. The basis for the exemptions is also variable, inasmuch as some owe their existence to voluntary and unwritten customs, others to provisions laid down by law or regulation, and others still to international conventions. Finally, it has become apparent that the provisions of certain Member States are limited to general clauses similar to Article 2 (2) of Directive No 76/207. The Commission has pointed out that it intends to take action against several Member States for failure to fulfil their obligations.

35 In order to determine the scope of the Commission's complaint and the grounds on which it is based, it is necessary to refer first of all to the relevant provisions of Directive No 76/207. Article 2 (2) provides that:

'This directive shall be without prejudice to the right of Member States to exclude from its field of application those occupational activities and, where appropriate,

the training leading thereto, 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.'

Article 2 (3) provides that:

'This directive shall be without prejudice to provisions concerning the protection of women, particularly as regards pregnancy and maternity.'

Article 9 (2) provides as follows:

'Member States shall periodically assess the occupational activities referred to in Article 2 (2) in order to decide, in the light of social developments, whether there is justification for maintaining the exclusions concerned. They shall notify the Commission of the results of this assessment.'

36 It must be pointed out in the first place that the purpose of Article 2 (2) is not to oblige but to permit the Member States to exclude certain occupational activities from the field of application of the directive. That provision 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, especially since, as is clear from the study of comparative law submitted by the Commission, the exceptions in question serve widely differing purposes and several of them are closely linked to the rules governing certain occupations or activities.

37 However, it is necessary to ascertain what obligations Article 9 (2) of the directive imposes on the Member States. That provision provides for supervision in two stages, namely a periodic assessment by the Member States themselves of the justification for maintaining exceptions to the principle of equal treatment, and supervision by the Commission based on the notification of the results of that assessment. That twofold supervision serves to eliminate progressively existing exceptions which no longer appear justified, having regard to the criteria laid down in Article 2 (2) and (3).

38 It follows from those provisions that it is primarily for 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. For its part, the Commission has the right and the duty, by virtue of the powers conferred on it by Article 155 of the EEC Treaty, to adopt the measures necessary to verify the application of that provision of the directive.

39 It became apparent during the proceedings that at no time since the entry into force of the directive has the Federal Republic of Germany adopted the necessary measures to create even a minimum of transparency with regard to the application of Article 2 (2) and (3) and Article 9 of Directive No 76/207. The Federal Republic has thus prevented the Commission from exercising effective supervision and has made it more difficult for any persons wronged by discriminatory measures to defend their rights.

40 It must therefore be held that, by failing to take the measures necessary to implement Article 9 (2) of Directive No 76/207, in relation to the occupational activities excluded from the scope of the principle of equal treatment by virtue of Article 2 (2) of that directive, the Federal Republic of Germany has failed to fulfil its obligations under the EEC Treaty.

The complaint of failure to give legal effect to the provisions concerning offers of employment

41 This complaint is concerned with paragraph 611 a of the Civil Code, according to which an employer may not advertise offers of employment which are not 'impartial' as regards the sex of the employees. The Commission considers that, since offers of employment precede access to employment, they come within the scope of Directive No 76/207. It charges the Federal Republic of Germany with failing to make paragraph 611 a a binding provision. It considers that the choice of the contested provision, which has no legal effect, does not satisfy the requirement laid down in Article 6 of the directive to the effect that persons who consider themselves wronged by failure to apply the principle of equal treatment to them must be able to pursue their claims by judicial process.

42 The Federal Republic of Germany refutes that charge on the ground that, since offers of employment merely precede access to employment, they do not come within the scope of the directive. It points out that none of the provisions of the directive refers to offers of employment. In its view, it is only at the stage of access to employment that the directive comes into operation, that obligations are imposed on the Member States and that persons seeking employment can assert their right to equal treatment. The Federal Republic cannot therefore be criticized for enacting paragraph 611 a of the Civil Code as a non-binding rule.

43 In response to that argument, it must be observed first of all that offers of employment cannot be excluded *a priori* from the scope of Directive No 76/207, inasmuch as they are closely connected with access to employment and can have a restrictive effect thereon. It must also be recognized, however, that the directive imposes no obligation on the Member States to enact general legislation concerning offers of employment, particularly as this question is in turn closely linked to that of the exceptions permitted by Article 2 (2) of the directive, given that the application of Article 9 (2) in full will have the effect of creating the necessary transparency also as regards offers of employment.

44 Consequently, paragraph 611 a of the German Civil Code cannot be regarded as implementing an obligation imposed by Directive No 76/207 but must be treated as an independent legislative measure adopted for the purpose of giving effect to the principle of equal treatment.

45 This complaint must therefore be rejected.

The complaint of failure to transpose Directive No 75/117 into national law with regard to remuneration in the public service

46 Finally, the Commission charges the Federal Republic of Germany with failing to transpose into national law the provisions of Directive No 75/117 concerning equal pay for male and female public servants. The Commission therefore considers that the legislation of the Federal Republic in this area also lacks the legal clarity which is essential for effective implementation of the directive.

47 The Government of the Federal Republic of Germany has linked its arguments on this point to those which it put forward in connection with the first complaint. It contends, in particular, that the remuneration of public servants and judges is determined according to post and grade, without reference to the sex of the officials concerned.

48 That argument must be upheld. The Commission has not been able to produce the slightest evidence of sex discrimination with regard to the remuneration of public servants in the Federal Republic of Germany; such remuneration is, as the defendant has correctly explained, based exclusively on post and grade, regardless of the sex of the officials concerned.

49 Thus it would appear that in that respect the object of Directive No 75/117 had already been achieved in the Federal Republic of Germany at the time when that directive entered into force, with the result that no specific measure was required for its implementation.

50 Therefore this complaint must also be rejected.

51 It follows from the foregoing considerations that the Commission's application must be dismissed as regards the first, second, fourth and fifth complaints, but with regard to the third complaint, it must be held that the Federal Republic has failed to fulfil its obligations under the Treaty.

Costs

52 Under Article 69 (2) of the Rules of Procedure the unsuccessful party is to be ordered to pay the costs. Since the Commission has largely failed in its submissions it must be ordered to pay the costs.

On those grounds,

THE COURT

hereby:

(1) Declares that, by failing to adopt the measures necessary to apply Article 9 (2) of Council Directive No 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment of men and women as regards access to employment, vocational training and promotion, and working conditions, in relation to the occupational activities excluded from the scope of that principle by virtue of Article 2 (2) of the same directive, the Federal Republic of Germany has failed to fulfil its obligations under the EEC Treaty;

(2) For the rest, dismisses the application;

(3) Orders the Commission to pay the costs.

Mackenzie Stuart Bosco Due Kakouris

Pescatore Koopmans Everling Bahlmann Galmot

Delivered in open court in Luxembourg on 21 May 1985.

P. Heim
Registrar

A. J. Mackenzie Stuart
President