OPINION OF ADVOCATE GENERAL VAN GERVEN

delivered on 26 January 1993 *

Mr President,
Members of the Court,

1. The case before the Court is an application from the House of Lords for a preliminary ruling on Article 6 of Council Directive 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 [1] (hereinafter 'the directive'). The questions arose in a dispute between Miss Marshall (the appellant in the main proceedings) and the South-West Hampshire Area Health Authority (the respondent in the main proceedings, hereinafter 'the Authority').

Article 6 of the directive reads as follows:

'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 within the meaning of Articles 3, 4 and 5 to pursue their claims by judicial process after possible recourse to other competent authorities.'

Background to the case

2. By judgment of 26 February 1986 the Court answered a preliminary question from the Court of Appeal of England and Wales on Article 5(1) of the directive. That article prohibits all discrimination on grounds of sex with regard to access to employment and working conditions. The Court held that an individual may rely upon Article 5(1) against a State authority acting in its capacity as employer, in order to avoid the application of any national provision which does not conform to that article. [2] Miss Marshall, who was the victim of discrimination contrary to Article 5(1), was the appellant in the main proceedings in that case.

Following the judgment of 26 February 1986, the Court of Appeal remitted the case to the Industrial Tribunal, the competent body for matters concerning discrimination in employment, in order to determine the compensation to be awarded to Miss Marshall. Even before the case had been remitted to the Industrial Tribunal, the Authority had paid her compensation of UKL 6 250. Under section 65(2) of the Sex Discrimination Act 1975 (hereinafter 'the SDA'), that was the maximum compensation payable by an industrial tribunal.

* Original language: Dutch.

1 — OJ 1976 L 39, p. 40.

2 — Judgment in Case 152/84 *Marshall* v *Southampton and South-West Hampshire Area Health Authority* [1986] ECR 723.

However, the Industrial Tribunal awarded Miss Marshall compensation of UKL 19 405, including UKL 7 710 in respect of interest [3] and UKL 1 000 in respect of injury to feelings. Following that award, the Authority paid Miss Marshall a further UKL 5 445, with the result that the total compensation paid to her amounted to UKL 11 695. However, the Authority appealed against the award of UKL 7 710 in respect of interest and its appeal was upheld by the Employment Appeal Tribunal.

Miss Marshall appealed to the Court of Appeal. Here, too, she was unsuccessful, it being held that she was not entitled to rely on Article 6 as having direct effect to set aside the upper limit laid down by section 65(2) of the SDA.

3. Finally, Miss Marshall appealed to the House of Lords, which referred three questions to the Court of Justice for a preliminary ruling. The questions are reproduced *in extenso* in the Report for the Hearing, which also contains a further explanation of the facts of the case, to which I would refer.

Although the appeal before the House of Lords relates exclusively to the power of the Industrial Tribunal to award interest, it appears from the Statement of Facts appended to the order for reference that, in the view of the House of Lords, the limit on compensation imposed by section 65(2) of the SDA is also at issue: 'If applicable to the compensation awarded to Miss Marshall, section 65(2) would provide a complete answer to her claim for interest since the capital element of her loss exceeded the statutory limit' (paragraph 12). In other words, the award of interest was also precluded in this case by the existence of that limit and not simply because the Industrial Tribunal was not empowered to award interest (moreover, English law is not unambiguous as to whether such a power is lacking: see paragraph 8(5) of the Statement of Facts). In view of that statement of reasons, I would propose that the Court should not take up the suggestion made by the United Kingdom and Ireland to the effect that it should rule only on the validity of any prohibition of the award of interest by way of compensation, but that it should also consider the validity of a statutory limit on compensation.

May individuals rely on Article 6 of the directive before national courts?

4. I shall consider the national court's third question first. By this question, the House of Lords seeks to establish whether a victim of discrimination prohibited by the directive is entitled to rely in the national courts against a public body of his or her Member State on Article 6 of the directive in order to set aside the limits imposed by the national legislation on the amount of compensation recoverable. [4]

3 — The Statement of Facts submitted by the House of Lords refers to a sum of UKL 7 700 in respect of interest. However, I infer from paragraph 11 of the Statement, which mentions 'the sum of UKL 5 445.00, being the balance of the capital sum awarded to Miss Marshall by the Industrial Tribunal', that this must be a typing error. In any event, in their written observations to the Court both the Commission and the United Kingdom refer to an amount of UKL 7 710.

4 — The Court decided as early as 1982 that the provisions of a directive may, under certain conditions, be relied upon in the national courts directly by individuals against public authorities. See the judgment in Case 8/81 *Becker* v *Finanzamt Münster-Innenstadt* [1982] ECR 53, paragraph 25.

5. *(Vertical) direct effect of Article 6 in so far as it provides for a judicial remedy.* The Court has already considered the question of the direct effect of Article 6 of the directive in its judgment of 15 May 1986 in *Johnston* v *Chief Constable of the Royal Ulster Constabulary*. [5] The Court identified two elements in Article 6: the obligation for Member States to provide for an effective judicial remedy and the obligation to impose sanctions in respect of any prohibited discrimination. As far as the first element is concerned, the Court held as follows:

'[paragraph 18] The requirement of judicial control stipulated by [Article 6 of the directive] reflects a general principle of law which underlies the constitutional traditions common to the Member States. That principle is also laid down in Articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. [...]

[paragraph 19] By virtue of Article 6 of [the directive], interpreted in the light of the general principle stated above, all persons have the right to obtain an effective remedy in a competent court against measures which they consider to be contrary to the principle of equal treatment for men and women laid down in the directive. It is for the Member States to ensure effective judicial control as regards compliance with the applicable provisions of Community law and of national legislation intended to give effect to the rights for which the directive provides.

[paragraph 58] [...] [I] n so far as it follows from that article, construed in the light of a general principle which it expresses, that all persons who consider themselves wronged by sex discrimination must have an effective judicial remedy, that that provision is sufficiently precise and unconditional to be capable of being relied upon as against a Member State which has not ensured that it is fully implemented in its internal legal order.'

6. *Does Article 6 have no (vertical) direct effect in so far as it introduces a requirement to impose sanctions, but only embodies an obligation to interpret national law in conformity with the directive?* In contrast, in so far as the obligation to impose sanctions in respect of discrimination contrary to the directive is concerned, the Court held in *Johnston* that the directive did not contain in that regard any unconditional and sufficiently precise obligation which, in the absence of implementing measures adopted in good time, might be relied upon by individuals in order to obtain specific compensation under the directive, where that is not provided for or permitted under national law. [6] In so doing, the Court confirmed two earlier judgments in *Von Colson* and *Harz*, [7] in which the same conclusion was reached (paragraph 10, below).

On the basis of that case-law, the answer to the national court's third question should be that the victim of discrimination prohibited by the directive *cannot* rely, *inter alia* against a (public body of a) Member State, on Article 6 of the directive in order to have the limits imposed by the national legislation on

5 — Case 222/84 *Johnston* v *Chief Constable of the Royal Ulster Constabulary* [1986] ECR 1651. See also the judgment in Case 222/86 *Union nationale des entraineurs et Cadres techniques professionnels du football (Unectef)* v *Heylens and Others* [1987] ECR 4097, paragraph 14.

6 — Judgment in *Johnston*, paragraph 58.

7 — Judgment in Case 14/83 *Von Colson and Kamann* [1984] ECR 1891, paragraph 27; judgment in Case 79/83 *Harz* v *Deutsche Tradax* [1984] ECR 1921, paragraph 27.

the amount of compensation recoverable set aside by the national courts. It will become clear from what I shall have to say later (paragraph 11, below) that I have come to a different conclusion.

7. The above does not signify that individuals affected by the limits in question may not derive any legal remedies at all from the Court's case-law as it stands. The Court has significantly extended the judicial protection of individuals in other ways, in particular by imposing on national courts an obligation to interpret their national law in accordance with Community law. In order to define that obligation, I should first call to mind the Court's case-law which specifies the rules of Community law relating to sanctions in respect of Community provisions.

The starting point for this case-law is that Member States must secure the full effectiveness of Community law and, more specifically, of directives. This implies that they must impose sanctions under civil, administrative or criminal law, depending on the case, in respect of prohibitions laid down by directives. The Court bases that obligation on the obligation to guarantee the application and effectiveness of Community law imposed on Member States by Article 5 of the Treaty:

'[W]here Community legislation does not specifically provide any penalty for an infringement or refers for that purpose to national laws, regulations and administrative provisions, Article 5 of the Treaty requires the Member States to take all measures necessary to guarantee the application and effectiveness of Community law.' [8]

The Court has also stated with regard to the directive at issue in these proceedings 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.' [9]

8. However, the third paragraph of Article 189 of the EEC Treaty leaves the Member States free to choose the forms and methods of implementing directives. As regards the obligation to impose sanctions contained in Article 6 of the directive, the Court has stated as follows:

'Such measures may include, for example, provisions requiring the employer to offer a post to the candidate discriminated against or giving the candidate adequate financial compensation, backed up where necessary by a system of fines. However the directive does not prescribe a specific sanction, it leaves Member States free to choose between the different solutions suitable for achieving its objective.' [10]

8 — See the judgment in Case 68/88 *Commission* v *Greece* [1989] ECR 2965, paragraph 23; the judgment of 10 July 1980 in Case C-326/88 *Hansen* [1990] I-2911, paragraph 17; the judgment in Case C-7/90 *Vandevenne* [1991] I-4371, paragraph 11. The judgment in Case 50/76 *Amsterdam Bulb* [1977] ECR 137, paragraphs 32 and 33, already contains the beginnings of this case-law.

9 — Judgments in *Von Colson* and *Harz*, paragraph 22. See also paragraph 15.

10 — Judgments in *Von Colson* and *Harz*, paragraph 18.

This freedom on the part of the Member States is not, however, unlimited. As is pointed out in the passage quoted in the preceding section, it follows from the purpose of Article 6 of the directive that the Member States must provide for 'an appropriate system of sanctions'. This entails, as the Court goes on to say in the judgments in *Von Colson* and *Harz*, 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.

In consequence it appears that national provisions limiting the right to compensation of persons who have been discriminated against as regards access to employment to a purely nominal amount, such as, for example, the reimbursement of expenses incurred in connection with their application, would not satisfy the requirements of an effective transposition of the directive.' [11]

With regard to criminal penalties, the Court explained on a later occasion that while the Member States are free to chose the penalties to be imposed, they must be effective, proportionate and dissuasive. [12]

9. The Court also stated that infringements of Community law should be penalized, not only in a 'sufficiently enforceable' manner but also in a 'comparable' manner, that is say, under procedural and substantive conditions which are analogous to those applicable to corresponding infringements of national law:

'Moreover, the national authorities must proceed, with respect to infringements of Community law, with the same diligence as that which they bring to bear in implementing corresponding national laws.' [13]

In addition, not only the sanctions themselves have to fulfil the abovementioned criteria of 'sufficient enforceability' and 'comparability', but this also applies to the procedural rules which result in the imposition of sanctions. They may not be 'less favourable than those relating to similar actions of a domestic nature nor framed so as to render virtually impossible the exercise of rights conferred by Community law'. [14]

10. Thus, even if individuals cannot rely, as regards rules on sanctions, directly on Article 6 of the directive (section 6, above, but see section 11, below), it is for the national courts, where a provision of a directive without direct effect is not implemented on time or even if it is incompletely or incorrectly implemented, to interpret the sanctions

11 — Judgments in *Von Colson* and *Harz*, paragraphs 23 and 24

12 — See the judgments (cited in footnote 8) in *Commission* v *Greece*, paragraph 24, *Hansen*, paragraph 17, and *Vandevenne*, paragraph 11.

13 — Judgments in *Commission* v *Greece*, paragraphs 24 and 25, *Hansen*, paragraph 17, and *Vandevenne*, paragraph 11. Although those judgments are concerned with criminal penalties, the criterion of comparability applies undiminished to civil sanctions, see the judgment of 19 November 1991 in Joined Cases C 6/90 and C 9/90 *Francovich and Bonifaci* [1991] ECR I 5357, paragraph 43.

14 — Judgment of 25 July 1991 in Case C 208/90 *Emmott* v *Minister for Social Welfare and the Attorney General* [1991] ECR I 4269, paragraph 16.

contained in their national legislation in accordance with the rules of Community law ensuing from Article 6 of the directive as described above.

That obligation of the national court, 'in so far as it is given discretion to do so under national law', [15] to interpret national provisions — dating from after and even before the directive [16] — in so far as possible in conformity even with a directive without direct effect [17] is not completely watertight. It does not oblige the national court to interpret national law, such as, for example, a specific rule on sanctions, *contra legem*. [18] The national court should, however, interpret ambiguous provisions, such as those mentioned in this case which debar the Industrial Tribunal from awarding interest, [19] in accordance with Community law. Moreover, it may be obliged, if permitted by the national interpretation rules, to replace specific national rules which conflict with the directive by general national rules which do not. [20]

11. *The requirement to impose sanctions laid down by Article 6 of the directive none the less has direct effect.* The national court will therefore not always be capable of being induced to achieve the result laid down by Community law by means of interpretation. If therefore the requirement for sanctions prescribed by Article 6 of the directive is to be sufficiently effective, it must be construed, just like the requirement for judicial protection which that provision entails (section 5, above), as a provision having direct effect *at least vis-à-vis the Member States*. I consider that there is every reason for taking this view.

As long ago as the judgments in *Von Colson* and *Harz* the Court held that it follows from the purpose of the directive and from Article 6 thereof that the equality of opportunity laid down by the directive cannot be established without an appropriate system of sanctions (section 7, above). It can further be inferred from the Court's case-law (sections 8 and 9, above) what criteria have to be taken into account in achieving such an appropriate system of sanctions. The Court derives those sufficiently precise criteria from principles of Community law. It appears to me that, as a result, it is clear at the same time that the requirement to impose sanctions which is entailed by the directive has direct effect vis-à-vis Member States and their public bodies by virtue of those principles of Community law.

The judgment in *Johnston* holds, in connection with the obligation stipulated by Article 6 to provide for effective *judicial protection*, that Article 6 has direct effect, on the ground that 'that article, construed in the light of a general principle which it expresses,' is sufficiently precise and unconditional to be capable of being relied upon 'as against a Member State which has not ensured that it is fully implemented in its internal legal order'

15 — Judgments in *Von Colson* and *Harz*, paragraph 28.

16 — Judgment in Case C-106/89 *Marleasing* [1990] ECR I-4155.

17 — Albeit having regard to the general principles of law, such as the principles of legal certainty and non-retroactivity: see the judgment in Case 80/86 *Kolpinghuis Nijmegen* [1987] ECR 3969, paragraph 13.

18 — Y. Galmot and J. C. Bonichot, 'La Cour de Justice des Communautés européennes et la transposition des directives en droit national', *Rev. fr. droit. adm.* 1988, 1, especially at p. 20 et seq.

19 — See the Statement of Facts, paragraph 8(3), cited in section 3 above.

20 — As in the case of the German court after *Von Colson*, Arbeitsgericht Hamm, judgment of 6 September 1984, *Der Betrieb* (1984), p. 2700.

(section 5, above). For the same reasons, I take the view that the *requirement to impose sanctions* laid down by Article 6 (section 6, above) now also has direct effect as against the Member States, on the ground that the principles of Community law on which that requirement is based, has in the meantime likewise been defined sufficiently precisely in the Court's case-law discussed above (and will be further defined in the judgment to be delivered in this case). [21] The view taken by the Court in the judgments in *Colson*, *Harz* and *Johnston* seems to me to have been overtaken in this respect.

Recognition of the (vertical) direct effect also of the requirement to impose sanctions contained in Article 6 would of course foster the uniformity of Community law, since it would then no longer depend on national interpretation rules whether the national court was empowered to interpret its national law in conformity with Community law. The Court has held that such uniformity as regards enforcement of the rights arising under Community law for individuals is a fundamental requirement of the Community legal order in the judgment in the *Zuckerfabrik* case with regard to national rules concerning the suspension of enforcement of national administrative measures. [22] On that basis the Court was prepared in that judgment to define the conditions for such suspension of enforcement in a uniform manner.

12. During the oral procedure in this case, the following anomaly was raised: employees in the service of public bodies (in the broad sense given to that expression in the Court's case-law) are entitled, as against their employer, to rely upon provisions of directives which are sufficiently precise and unconditional — even, as in this case, with a view to obtaining compensation [23] — even though employees in the private sector have no such remedy available against their employer. As appears from the judgment in *Harz*, [24] employees in the private sector are entitled in the national courts only to invoke the obligation, to which I have already referred, to interpret national law in conformity with the directive.

In order to decide the present case — which involves an employee of a public body — it is not strictly necessary to consider that point. For the sake of completeness, I would argue that, in my view, the coherence of the Court's case-law would benefit if the Court were now also to confer *horizontal direct effect* on sufficiently precise and unconditional provisions of directives. The Court's case-law concerning the judicial protection of individuals in relation to directives which

21 — It appears from the Court's case law that, as far as provisions of national law are concerned, the scope of a legislative provision has to be determined in the light of the interpretation given to that provision by the courts see the recent judgment of 16 December 1992 in Joined Cases C 132/91, C 138/91 and C 139/91 *Katsikas and Others* [1992] ECR I 6577, paragraph 39; cf. the judgment in Case C 347/89 *Eurim Pharm* [1991] ECR I 1747, paragraph 15

22 Judgment in Joined Cases C 143/88 and C 92/89 *Zuckerfabrik Suderdithmarschen and Zuckerfabrik Soest* [1991] ECR I 415, paragraph 25 et seq

23 Judgment in Case C 188/89 *Foster and Others* [1990] ECR I 3313, paragraph 22

24 In the case dealt with in that judgment, the discrimination challenged by the plaintiff in the main proceedings was committed by a company governed by private law, namely a German Gesellschaft mit beschrankter Haftung (limited liability company).

are implemented late, insufficiently or incorrectly presents a satisfactory picture overall. However, as a result of the particular nature of the process of judicial interpretation, which proceeds on a case-by-case basis, that picture is not free of inconsistencies and distortions. I shall mention three. First, as a result of the broad construction put on the expression 'Member States', provisions of directives have obtained (vertical) direct effect as against public institutions and undertakings but not as against private institutions or undertakings (with which the former are sometimes nevertheless in competition), [25] even though the negligence of 'the' Member State in implementing directives can generally be attributed just as little to public bodies as it can to private bodies. Secondly, as a result of the requirement to interpret national law in conformity with directives, national courts are under a duty, in the event of a failure of the national legislature to implement a directive, to use their uttermost possibilities and powers in order to ensure that the directive is correctly incorporated into their national law. [26] This can give rise to problems in connection with the delimination of judicial powers in the relevant national law. Lastly, following the Court's judgment in *Francovich* [27] the Member States may be ordered in certain circumstances to pay compensation on account of their failure correctly to implement directives. But that — in principle, favourable — development does not remedy the fact that individuals who are operating in a Member State which implemented the directive correctly and are therefore bound by the obligations to which they are subject under the directive are disadvantaged in comparison with individuals (perhaps their competitors) who are operating in a Member State which has not yet correctly implemented the directive.

It appears to me that those inconsistencies and distortions may be set to rights by also recognizing the direct effect of sufficiently precise and unconditional provisions of directives vis-à-vis individuals on whom the directive would have imposed obligations had it been correctly implemented. [28]

13. *Conclusion.* In the light of the above, I propose that the Court should answer the national court's third question as follows. The requirement to impose sanctions arising under Article 6 of the directive — as has been specified in the meantime by the Court's case-law on the basis of general principles of Community law — may be relied upon by individuals in any event against the Member State and its public bodies and undertakings. In the event that the Court should not accept that direct effect, the national courts should nevertheless interpret and apply their national law as far as possible in accordance with the system of sanctions prescribed by Article 6 as it has been specified in the Court's case-law.

25 — See, *inter alia*, the judgment in *Foster*, cited above.

26 — For the problems to which this has given rise in the United Kingdom see G. de Búrca, 'Giving effect to European Community Directives', *Modern Law Review*, 1992, 215-240.

27 — See footnote 13.

28 — See to this effect F. Emmert, 'Horizontale Drittwirkung von Richtlinien? Lieber ein Ende mit Schrecken als ein Schrecken ohne Ende', *Europäische Wirtschafts-und Steuerrecht-EWS*, 1992, p. 56 et seq. In that article the misapprehension is refuted that at the end of the period for implementation — not before — the recognition of horizontal direct effect would remove the distinction drawn by Article 189 of the EEC Treaty between regulations and directives.

Is a statutory upper limit on compensation compatible with Article 6 of the directive?

14. Section 65(1) of the Sex Discrimination Act 1975 provides that an Industrial Tribunal can make an order requiring compensation to be paid where it finds a complaint relating to sex discrimination in employment is well founded. Under section 65(2) of the SDA, however, the amount of such compensation may not exceed a specified limit. When Miss Marshall's complaint was considered by the Industrial Tribunal, that limit was UKL 6 250. Since then, it has been increased on several occasions, so that it now amounts to UKL 10 000.

In its first question, the House of Lords wishes to establish whether such an upper limit is compatible with Article 6 of the directive. In its second question, it asks whether it is essential to the due implementation of that article that the amount of compensation to be awarded should not be less than the amount of the actual loss found to have been sustained and that it should include an award of interest on the principal amount of the loss from the date of the unlawful discrimination to the date when compensation is paid.

15. Before answering those two questions, I would refer to the relationship between the two criteria applied by the Court with regard to national systems for imposing sanctions in respect of provisions of Community law. Earlier (section 9, above) I referred to those two criteria as the criterion of 'sufficient enforceability' and the criterion of 'comparability'. The two criteria are cumulative. In other words, it is not sufficient that an infringement of Community law should be repressed in a comparable way to an analogous infringement of national law if it appears that the sanctions imposed for infringements of Community law and national law are not capable of securing actual and effective judicial protection or do not have sufficient deterrent effect, and are therefore not adequate in relation to the damage sustained. In my view, this follows from the requirement as to the uniform application of Community law (section 11, above), which requires the same infringement of Community law to be repressed in a sufficiently effective and deterrent manner in *all* the Member States.

I shall now discuss those two criteria individually in relation to the case before the Court.

16. *The criterion of sufficient enforceability.* The Court has stated with regard to this criterion 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'. 'A purely nominal amount, such as for example the reimbursement of expenses incurred in connection with [a candidate's] application' does not satisfy that criterion (see the passage from the judgments in *Von Colson* and *Harz* quoted at the end of section 8).

From the phrase that a penalty imposed in respect of a breach of the prohibition of discrimination must 'in any event' be adequate in relation to the damage sustained, the Commission appears to infer that national rules laying down a upper limit, such as those contained in section 65(2) of the SDA, do not fulfil the criteria laid down by the Court. I am not convinced by that

argument. [29] As Ireland and the United Kingdom observe, the aim cannot be to exclude categorically any limit imposed on compensation, certainly not now that a number of Council Directives — listed by the Commission itself in its written observations — provide for such a maximum limit. [30] By stating that 'in any event' the compensation should be adequate in relation to the damage sustained, the Court wished, on the contrary, to make it clear that nominal compensation is not enough, as is clear from the passage of those judgments immediately following, which is also quoted above.

17. The fact that the compensation should in any event be 'adequate in relation to the damage sustained' must however mean, in my view, also that the Court — *in the present state of Community law* and therefore in the absence of rules harmonizing the divergent national rules governing liability — is prepared to accept less than compensation for the full damage sustained. In other words, the compensation must be adequate in relation to the damage sustained but does not have to be equal thereto.

That approach is not contradicted, but rather supported, by the judgment in *Francovich* which the Court recently delivered in connection with Member States' liability on account of infringements of Community law in general and the failure properly to implement directives in particular. As far as the latter aspect is concerned, the Court established in that judgment a number of uniform minimum conditions with regard to liability on the part of the Member States. One such condition is that there must be 'a causal link between the breach of the State's obligation and the harm suffered by the injured parties'. [31] However, no uniform rules relating to the nature or the extent of the damage can be derived therefrom. On the contrary, in that judgment the Court states expressly that, 'in the absence of Community legislation', the Member States should make reparation for the consequences of the harm caused in accordance with the rules of national law on liability. [32] According to the next paragraph, that applies more specifically to the 'substantive and procedural conditions laid down by the national law of the various Member States on compensation for harm'. Indeed, it is stated in that regard that such conditions 'may not be less favourable than those relating to similar internal claims and may not be so framed as to make it virtually impossible or excessively difficult to obtain compensation'. [33]

The latter limiting conditions, as laid down in the judgment in *Francovich*, which national rules on liability have to satisfy do not differ essentially from the 'comparability' and 'sufficient enforceability' criteria

29 — The phrase used 'in any event' ('in elk geval', 'en tout cas') does not seem to me to be synonymous with 'in each [particular] case' ('in ieder [afzonderlijk] geval', 'dans chaque cas [particulier]').

30 — These are Directives 80/987/EEC of 20 October 1980 (OJ 1980 L 283, p. 23), 85/374/EEC of 25 July 1985 (OJ 1985 L 210, p. 29) and 90/314/EEC of 13 June 1990 (OJ 1990 L 158, p. 59) on, respectively, wage claims of employees of insolvent undertakings, product liability and package holidays.

31 — Judgment in *Francovich and Bonifaci*, cited in footnote 13, paragraph 40.

32 — *Idem*, paragraph 42.

33 — *Idem*, paragraph 43.

mentioned above. [34] As far as the latter criterion under consideration here is concerned, what is said in the judgment in *Francovich* is, in my view, consonant with the approach described above whereby 'compensation which is adequate in relation to the damage sustained' — in, I repeat, the present state of Community law — does not necessarily have to be equal to full compensation. The grant of compensation 'adequate in relation to the damage sustained' is not, to my mind, such as to 'make it virtually impossible ... to obtain compensation'. Provision for adequate (rather than full compensation) in (in this case, specific) national rules can be regarded as 'a substantive condition on compensation for harm' in respect of which the judgment in *Francovich* refers to the internal legal orders of the Member States. Since such adequate compensation, as defined below, does not make it 'virtually impossible to obtain compensation', it is sufficient under Community law. [35]

18. It therefore appears to me that to lay down national upper limits on compensation is, as Community law stands, not unlawful. However, the precondition is that the limit should be pitched high enough in order not to deprive the sanction of its 'effective, uniform and deterrent' nature and does not prevent its being 'adequate in relation to the damage' normally sustained as a result of an infringement.

However, I do not wish to let matters rest with that general analysis. In order to be more certain that the sanction by way of financial compensation for which a Member State has opted is adequate in relation to the damage sustained, it should be such as to compensate adequately for the damage *having regard to* the most important components of damage which are traditionally taken into account in rules governing liability. I am thinking in this connection of loss of physical assets (*damnum emergens*), loss of income (*lucrum cessans*), moral damage and damage on account of the effluxion of time. [36]

I shall return to the last mentioned head of damage in more detail later on.

As far as those four components of damage are concerned, the above does not mean that national legislation which does not provide expressly for compensation for each of those components is incompatible with Community law. It only means that, in assessing whether the compensation is adequate in relation to the damage, the national court must take account of each of those components. Indeed, in the absence of more precise Community rules, it is for that court to assess the adequacy of the ratio between the compensation and the damage in the actual

34 This is, moreover, no more than logical. The system of sanctions required under Article 6 of the directive can be regarded as a *lex specialis* — namely in connection with compensation for discrimination prohibited by the directive — as against the *Francovich* liability which, more specifically with regard to the failure correctly to implement directives, constitutes the *lex generalis*.

35 This does not prevent national legal systems — and indeed Article 215 of the EEC Treaty — from laying down, as a general rule, an obligation to compensate in full (or almost in full, see footnote 41). I consider nevertheless that it does not follow from Community law as it stands at present that a national legal system may not lay down a statutory limit on specific claims for damages, the precondition being that the criteria of sufficient enforceability and comparability discussed above are complied with.

36 According to the Statement of Facts appended to the order for reference, the award of moral damages ('injury to feelings') and of interest is a remedy available in the ordinary courts.

case, having regard to the limits imposed on compensation by its national law. If the limitations are such that normally compensation is not, or scarcely, granted for one of those four types of damage (in so far as they are applicable having regard to the type of infringement), it cannot be said that the compensation, taken as a whole, is adequate in relation to the damage sustained.

19. In the case before the Court, the Industrial Tribunal assessed the actual damage sustained by Miss Marshall at UKL 19 405, made up of UKL 1 000 in respect of injury to feelings, UKL 8 220 in respect of loss of earnings, UKL 2 475 in respect of *inter alia* loss of pension and UKL 7 710 in respect of interest on the heads of financial loss. As far as that sum in respect of interest is concerned, it relates, as far as I can see, to interest accruing between the date of the unlawful discrimination and the date of the Industrial Tribunal's decision of 21 June 1988.

The maximum compensation which Miss Marshall was entitled to receive under section 65(2) was UKL 6 250, which is approximately one-third of her loss inclusive of interest up until the date of the Industrial Tribunal's decision, or half of the loss exclusive of interest. Undoubtedly, that amount is more than merely nominal. But I have doubts whether the limit applied also permits the grant of compensation which is adequate in relation to the damage sustained, as is required by Article 6 of the directive. The amount excludes compensation in respect of either at least one of the components to which I have referred, namely all the interest accruing up until the time of the Tribunal's decision (and, *a fortiori*, interest in respect of the subsequent period, a matter which I shall consider in section 26, above), or the three other components.

A further indication that the upper limit applied does not allow adequate compensation to be granted lies, in my view, in the additional payment made by the Authority on grounds of fairness of UKL 5 445. As a result of this additional payment, the compensation paid in this case is perhaps adequate in relation to the damage sustained up until the date of the Industrial Tribunal's decision (the ratio being almost 2 to 3) but this does not result from the statutory upper limit. Another indication of the inadequacy of the sanction in force at the material time can be inferred from the fact that victims of unfair dismissal on account of discrimination in the United Kingdom can rely nowadays on important new legal remedies. [37]

20. *The criterion of comparability.* As has already been stated, this criterion has to be applied cumulatively with the above. It entails that if more extensive compensation is provided for for comparable infringements of national law — for instance, compensation in full — than the adequate compensation required by Community law, the more extensive compensation should also apply in respect of infringements of Community law. In order to ascertain whether the United Kingdom (also) falls short in this respect, consideration should be given to the machinery for sanctions established by the SDA at the material time.

Whilst the directive deals only with equal treatment of men and women as regards

37 — It appears from the United Kingdom's observations — which are not contradicted in this respect by any of the other parties — that victims of unfair dismissal can now require themselves to be reinstated in their posts. If a recommendation to this effect by a court is ignored, they will be entitled to additional compensation of up to UKL 10 650.

access to employment, vocational training and promotion, and working conditions, the SDA also extends into other areas. Thus, a landlord who wishes to rent only to persons of a particular sex comes within the scope of the SDA but not within that of the directive. Although, as a result, the SDA covers several areas, it draws a distinction as regards sanctions between discrimination in employment and discrimination in other areas. It brings the first type of discrimination within the jurisdiction of the industrial tribunals, [38] which can award only an amount of compensation subject to a statutory upper limit and has no, or at least no statutory, power to award interest. Proceedings may be brought in respect of other discrimination in the County Court, which may apply the same sanctions as the High Court. [39] This means in practice that no statutory upper limit is laid down for any compensation for damage and that interest may be awarded. [40] Consequently, the principle of compensation in full applies as regards such other discrimination. [41]

21. At first sight, one might infer from this that the United Kingdom proceeds less diligently against infringements of Community law (sex discrimination *in employment*) than it does against infringements of analogous national law (sex discrimination *in other areas*). In my view, such an inference is not justified. There is a good explanation for the distinction made by the United Kingdom: the industrial tribunals set up in 1965 deal with all complaints relating to unfair dismissal, a statutory tort introduced by the Employment Protection (Consolidation) Act 1978. Thus complaints based on racial discrimination in employment are also dealt with by an industrial tribunal and the compensation which may be awarded in such cases is also subject to upper limits identical to those laid down in section 65(2) of the SDA. [42]

Instead of opting for a legal system in which all complaints relating to *sex* discrimination (irrespective as to whether they relate to employment or some other field) are dealt with by one court, the United Kingdom legislature opted for a legal system in which all claims based on unfair dismissal *in the field of employment* are dealt with by one court in accordance with specific substantive and procedural rules. That court has jurisdiction over questions of unfair dismissal in the field of employment, irrespective as to whether the dismissal was based on discrimination on grounds of sex, race or some other unlawful criterion, or was unlawful for other reasons, and irrespective as to whether the complaint was based on national or Community law.

38 — Section 63(1) of the SDA.

39 — Section 66(4) of the SDA.

40 — According to the Commission's written observations, both the industrial tribunals and the County Court can also apply other sanctions (such as, for example, an order to reinstate the person who has suffered discrimination), but such an order is rare.

41 — The principle of compensation in full (or virtually in full: differences remain between the national legal systems, for instance in connection with moral damage or unforeseen damage) is, indeed, the system common to the laws of the Member States. This does not prevent there being in all countries and even in Community law itself (see footnote 30) limits applied to specific damage claims for various reasons, such as exist in the United Kingdom in respect of the rules at issue in this case. Greater uniformity in this sphere can be contemplated only by the Community legislature.

42 — See section 54 of the Race Relations Act 1976.

Both options appear to me to be of equal validity. Therefore, it cannot be inferred from the option chosen by the United Kingdom that less effective sanctions are imposed in that country in respect of Community law than are imposed in respect of corresponding national law.

I therefore consider that, as far as the criterion of comparability is concerned, the limit on compensation imposed by section 65(2) of the SDA does not conflict with Article 6 of the directive.

Is a possible lack of power to award interest compatible with Article 6 of the directive?

22. It appears from the Statement of Facts appended to the order for reference that 'there was at the relevant time no power — or alternatively the relevant provisions of English law were ambiguous as to whether there was a power — in the Industrial Tribunal to award interest on, or as an element of, compensation for an act of unlawful sex discrimination in relation to employment'.

I would first point out that a national court which determines that its national law is not unequivocal should in any event interpret that law in such a way that it is conformity with the provisions of directives (in this case Article 6 of Directive 72/207/EEC). It is established that that obligation also applies in respect of national law which was already in existence before the directive in an area which was later covered thereby (section 10, above). That obligation holds good even if Article 6 of the directive were to have no (vertical, let alone horizontal) direct effect in respect of sanctions. If the rules on sanctions laid down by Article 6 do indeed have direct effect, as it is argued above (section 11 et seq., above), rules conflicting with that article should of course in any event not be applied.

23. *Compensatory versus legal interest.* As appears from the passage quoted in section 22, the preliminary questions relate to interest granted 'on, or as an element of, compensation'. Indeed, in the second part of its second question for a preliminary ruling, the House of Lords seeks to establish whether correct implementation of Article 6 of the directive requires the compensation to include interest on the principal amount from the date of the unlawful discrimination to the date when compensation is paid.

In my view, in answering this question two periods of time, and therefore also two types of interest, should be distinguished. On the one hand, there is interest, to which I shall refer as 'legal interest', which as a rule [43] begins to run *as from* the date of delivery of the judgment (in so far as it is upheld on appeal) establishing the amount of compensation as assessed on the date of the judgment. This is the interest *on* the compensation awarded by the court in its judgment. On the other hand, there is interest, to which I shall refer to as 'compensatory interest', which is a component of the total compensation for the unlawful conduct the amount of

43 — I say 'as a rule', since sometimes legal interest starts to run from the date of the document by which the proceedings were brought before the court.

which, as I have just mentioned, is determined by the court. Whether such interest is due depends on the extent to which the court determining the amount of the damage could take account of the development of the damage *up until* the date of its judgment (at first instance and, where applicable, on appeal). If it concludes the calculation of the damage at an earlier date, for instance because it lacks reliable data concerning the damage up to the date of judgment or, as in the present case, because the damage relates only to a period which has expired (long since) at the time of delivery of the judgment, [44] it should — as the Industrial Tribunal itself did in this case — add interest to the amount of compensation up to the date of its decision. Such interest is awarded as a *component* of the compensation.

I would emphasize this distinction, since I consider that the answer to the question which has been put differs according to the type of interest. Before I consider this, I shall briefly examine whether guidance can be obtained from the Court's case-law with regard to the award of interest. [45]

24. *Case-law of the Court on the award of interest.* First I shall consider the case-law on the award of interest in proceedings based on Articles 178 and 215 of the EEC Treaty. This established case-law certainly does not leave any doubts subsisting as to the *permissibility* of a claim for the grant of interest. As the Court held in the judgment in *Sofrimport*:

'As the claim relates to the non-contractual liability of the Community under the second paragraph of Article 215, it must be considered in the light of the principles common to the legal systems of the Member States to which that provision refers. According to those principles a claim for interest is, as a general rule, permissible. On the basis of the criteria adopted by the Court in similar cases, the obligation to pay interest arises on the date of this judgment inasmuch as it establishes the obligation to make good the damage'. [46]

That judgment lies somewhere between compensatory and legal interest as I have defined those expressions. In my view, a mixture of the two is involved (and, as a

44 — The pecuniary loss determined by the Industrial Tribunal related primarily (apart from interest) to Miss Marshall's loss of salary for the period between her unfair dismissal on her 62nd birthday and the date when she reached the age of 65 (that is to say, when she would have reached pensionable age if she had not been subject to discrimination) and her loss of pension as a result of her premature dismissal.

45 — Up to now, I have avoided the use of the expression 'default interest'. That expression is more general: it encompasses both types of interest to which I have referred, namely compensatory and legal interest, and covers all interest awarded an account of effluxion of time before or after judgment.

46 — Judgment in Case C-152/88 *Sofrimport* v *Commission* [1990] ECR I-2477, paragraph 32, subsequently confirmed by the judgment in Joined Cases C 104/89 and C-37/90 *Mulder* [1992] ECR I-3062, paragraph 35. See previously also the judgments in Case 238/78 *Ireks-Arkady* v *Commission* [1979] ECR 2955, paragraph 20, in Joined Cases 241, 242 and 245 to 250/78 *DGV* v *Council and Commission* [1979] ECR 3017, paragraph 22, in Joined Cases 261 and 262/78 *Interquell Stärke-Chemie* v *Council and Commission* [1979] ECR 3045, paragraph 23, in Joined Cases 64 and 113/76, 167 and 239/78, 27, 28 and 45/79 *Dumortier Frères* v *Council* [1979] ECR 3091, paragraph 25, in Joined Cases 64 and 113/76, 167 and 239/78, 27, 28 and 45/79 *Dumortier Frères* v *Council* [1982] ECR 1733, paragraph 11, in Case 256/81 *Pauls Agriculture* v *Council and Commission* [1983] ECR 1707, paragraph 17, and in Joined Cases 256, 257, 267/80, 5 and 51/81 and 282/82 *Birra Wuhrer* v *Council and Commission* [1984] ECR 3693, paragraph 37.

result, default interest in general [47]), since the interest arises on the date of the judgment laying down the *obligation* to pay compensation, which is a date which in 'Article 215 cases' does not necessarily coincide with the date on which the Court itself, in the absence of an agreement between the parties as to the amount of damage, determines the *extent* of the damage.

It should further be noted that the amount of the interest awarded in the case-law which I have cited varies. Initially, a rate of 6% was employed, later, in the *Sofrimport* judgment (paragraph 32), it was increased to 8%. In *Mulder's* case (paragraph 35), which I have cited, it was added that that rate should 'not exceed the rate claimed in the forms of order sought in the applications'. In another case, concerning an application for suspension of operation of a decision under Article 39 of the ECSC Treaty (and hence not a claim based on Article 178 or 215 of the EEC Treaty), the President laid down the following condition for suspension of the operation of the relevant decision:

'the applicant [must first] provide a bank guarantee for the payment of the fine imposed by that decision together with any default interest which may be calculated for the purposes of this order, at 1% above the discount rate fixed by the Bank of France'. [48]

25. Although the Court's staff case-law is concerned with cases coming under the special rules of the Staff Regulations, I would not leave it completely out of account, since it nevertheless also applies other provisions of Community law.

Thus, it appears from the relevant judgments that considerations of fairness may play a role with regard to the grant of interest. As early as 1978, for example, the Court held as follows:

'[paragraph 35] ... it appears reasonable to fix the date from which default interest should be calculated at 1 September 1968. ...

[paragraph 37] Finally, default interest at the rate of 8% per annum in respect of the above years by way of damages *appears justified* in the circumstances of the case, having regard *inter alia* to the fact that it is a fixed rate and to the *lengthy delay preceding settlement of the claims arising from the accident.*' [49]

Those cases further confirm that a party entitled to compensation by virtue of a decision of the Court can also claim default interest. The Commission refers in this connection to the judgment in *Samara.* [50] That case was concerned with a decision annulled by the Court by judgment of 15 January 1985 [51] classifying an official in a particular grade and step. The Commission complied with that judgment only in part and after a

47 — See footnote 45.

48 — Order of the President of the Court in Case 78/83 R *Usinor* v *Commission* [1983] ECR 2183, paragraph 1 of the operative part.

49 — Judgment in Case 115/76 *Leonardini* v *Commission* [1978] ECR 735.

50 — Judgment in Case 21/86 *Samara* v *Commission* [1987] ECR 795.

51 — Judgment in Case 266/83 *Samara* v *Commission* [1985] ECR 189.

delay. As a consequence, the Court by the judgment in Case 21/86 granted Miss Samara default interest on the higher salary to which she was entitled as a result of her reclassification in a higher step. It held as follows:

'[paragraph 9] That being so, proper compliance with the judgment demands that, in order to put the applicant back in the position which should lawfully have been hers, account be taken of the loss which she has incurred by reason of the fact that she was restored to that position only after an appreciable lapse of time and that she could not have the use of the sums to which she was entitled on the dates on which they would normally have fallen due. To that end the applicant should be awarded default interest at a flat rate of 8% per annum, running from the date on which each instalment became due until final settlement.'

26. *Is there an obligation to pay interest under Article 6 of the directive?* The Court's case-law which I have discussed above indicates in any event that it is possible under Community law to award interest on account of the time elapsed between the determination by the court of the unlawful act which gives rise to the obligation to pay compensation and therefore certainly as from the judicial decision determining the amount of the damage. But is there also any obligation to that effect?

In this connection, the distinction between compensatory and legal interest is important. I shall first consider legal interest (on which the Industrial Tribunal made no pronouncement). In my view, it follows from the requirement for judicial protection laid down in Article 6 of the directive — which, according to the Court's present case-law, has direct effect in any event vis-à-vis the Member States; section 5, above — there is an obligation to pay legal interest in full as from the judgment in which the first court determined the *amount* of the damage sustained, in so far as that judgment is subsequently definitively confirmed. As far as that type of interest is concerned, it follows that no statutory upper limit can be relied upon in order to limit the amount of damage. As the Court held in the judgment in *Johnston* (cited above in section 5), 'the requirement of judicial control stipulated by [Article 6 of the directive] reflects a general principle of law [to the effect that] all persons have the right to obtain an effective remedy in a competent court' against discrimination prohibited by the directive. To my mind, that principle of Community law also requires that, in so far as the national legal order gives people a right of appeal or other legal remedies against the decision of the first court, they must be able to avail themselves of those avenues without being disadvantaged financially. This implies that they should be compensated for the delay in the payment of the compensation resulting from the appeal or other legal remedies. Otherwise it would mean that a party claiming compensation would be penalized financially if he decided to appeal against a judicial decision not affording him satisfaction and he might even be induced not to take such a step for reasons unrelated to the law. Otherwise it would also mean that the party ordered to pay compensation in the proceedings at first instance would be encouraged to appeal in any event in view of the financial advantage which he might obtain thereby.

The above is particularly relevant in the present case. Already in the judgment of 26 February 1986 the Court interpreted Article 5(1) of the directive to the effect that discrimination against Miss Marshall could be based thereon. As a result, the Court of Appeal remitted the case on 22 July 1986 to the Industrial Tribunal in order to determine the compensation payable. On 21 July 1988 the Industrial Tribunal determined the amount of compensation at UKL 19 405. This was subsequently reduced as a result of the Court of Appeal applying the statutory upper limit, in so far as it was not already paid by the Authority (see section 2 above). The present case is concerned with the application of that statutory upper limit. In my view, if it is determined that the upper limit was applied unlawfully, legal interest should certainly be paid on the amount which was wrongfully reduced (unless the damage resulting from the delay in payment is compensated for by a subsequent court decision or in some other way) as from the date of the Industrial Tribunal's decision.

27. This answers only part of the preliminary question as it was put by the House of Lords. The question relates to all interest due from the date of the unlawful discrimination to the date when compensation is paid. I should therefore further consider to what extent Community law entails an obligation to award compensatory interest as a *component* of the compensation determined by the first court. As I have already mentioned, the interest of UKL 7 710 awarded by the Industrial Tribunal constitutes such compensatory interest. It relates to the damage sustained by Miss Marshall up until the date of the Tribunal's decision.

That interest is a component, in the full sense of the word, of the damage which Miss Marshall sustained as a result of and as from the discrimination which was found to exist until the damage was quantified by the Industrial Tribunal. As regards the damage, I have already stated in general that an upper limit imposed on compensation by national law — where it does not enable an important component of the damage to be compensated for by the award of compensatory interest — cannot result in adequate compensation as required by Article 6 of the directive for a victim of discrimination.

28. For the sake of completeness, I would add a few words on the rate of interest. In principle, in the absence of Community legislation, this is a matter for the national court to decide. However, in order for the interest applied to constitute adequate compensation, it should be commensurate with claimant's loss of purchasing power caused by the effluxion of time. In my view, this means that the rate may vary from country to country, since it is related to the inflation rate obtaining in the country concerned and to the usual interest paid on capital.

Conclusion

29. In conclusion, I propose that the Court should answer the questions put by the House of Lords, in the order in which I have considered them in my Opinion, as follows:

(1) If it should appear that the national legislation of a Member State does not embody an adequate system of sanctions, as is required by the purpose of Council Directive 76/207/EEC of 9 February 1976 and Article 6 thereof, a person who is a victim of discrimination prohibited by the directive is entitled to rely directly on Article 6 of that directive in any event as against a public body of that Member State.

(2) Where a Member State's national legislation provides for the payment of compensation as one remedy available by judicial process to a person who has been subjected to unlawful discrimination of a kind prohibited by Council Directive 76/207/EEC, in the present state of Community law the Member State is not automatically guilty of a failure to implement Article 6 of the directive by reason of the imposition by the national legislation of an upper limit.

(3) However, such an upper limit is incompatible with Article 6 of Directive 76/207/EEC if it has the result that the compensation — taking account of the most important components of compensation, including compensatory interest — is not adequate in relation to the damage sustained. Furthermore, such an upper limit may not result in Community law being subject to less effective sanctions than corresponding national law.

(4) As a result of the requirement for judicial protection laid down in Article 6 of Directive 76/207/EEC, which may be relied upon directly by individuals, legal interest is due in the event of an appeal or some other legal remedy as from the date of the judgment in which the first court determined the amount of the damage sustained in so far as that judgment is subsequently definitively confirmed.