



Reports of Cases

OPINION OF ADVOCATE GENERAL
MENGOZZI
delivered on 3 September 2015¹

Case C-407/14

María Auxiliadora Arjona Camacho
v
Securitas Seguridad España, SA

(Request for a preliminary ruling from the Juzgado de lo Social No 1 de Córdoba (Spain))

(Male and female workers — Conditions of employment — Discriminatory dismissal — Equal treatment — Infringement — Article 6 of Directive 2006/54/EC — Requirement of dissuasive compensation or reparation — Full compensation — Adequate compensation — Penalty — Powers of the national court to impose punitive damages)

1. Does a Member State satisfy the requirement for dissuasive reparation or compensation laid down by Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation² ('Directive 2006/54') if it goes no further than to provide, in the event of discriminatory dismissal, for full compensation for the damage suffered by the victim, and if its national law does not provide for punitive damages to be awarded in such a case? That is the question raised by this reference for a preliminary ruling.

2. While this is the first time that the Court has been called on to consider the interpretation of Article 18 of Directive 2006/54, which obliges the Member States to take such measures as are necessary to ensure compensation or reparation for the loss and damage sustained, in a way which is dissuasive and proportionate, its previous case-law on similar issues may enable me to clarify the scope of that article in a way which is of assistance.

I – The legal framework

A – Directive 2006/54

3. Recital 33 of Directive 2006/54 states that 'it has been clearly established by the Court of Justice that in order to be effective, the principle of equal treatment implies that the compensation awarded for any breach must be adequate in relation to the damage sustained'.

¹ — Original language: French.

² — OJ 2006 L 204, p. 23.

4. Directive 2006/54 ‘contains provisions to implement the principle of equal treatment in relation to ... working conditions’³ and ‘also contains provisions to ensure that such implementation is made more effective by the establishment of appropriate procedures’.⁴

5. Article 14(1)(c) of Directive 2006/54 provides that ‘[t]here shall be no direct or indirect discrimination on grounds of sex in the public or private sectors, including public bodies, in relation to ... employment and working conditions, including dismissals ...’

6. Article 18 of Directive 2006/54 provides that ‘Member States shall introduce into their national legal systems such measures as are necessary to ensure real and effective compensation or reparation as the Member States so determine for the loss and damage sustained by a person injured as a result of discrimination on grounds of sex, in a way which is dissuasive and proportionate to the damage suffered. Such compensation or reparation may not be restricted by the fixing of a prior upper limit, except in cases where the employer can prove that the only damage suffered by an applicant as a result of discrimination within the meaning of this Directive is the refusal to take his/her job application into consideration.’

7. Article 25 of the directive concerns penalties. It provides that ‘Member States shall lay down the rules on penalties applicable to infringements of the national provisions adopted pursuant to this Directive, and shall take all measures necessary to ensure that they are applied. The penalties, which may comprise the payment of compensation to the victim, must be effective, proportionate and dissuasive. The Member States shall notify those provisions to the Commission by 5 October 2005 at the latest and shall notify it without delay of any subsequent amendment affecting them.’

8. Article 27(1) of Directive 2006/54 stipulates that ‘Member States may introduce or maintain provisions which are more favourable to the protection of the principle of equal treatment than those laid down in this Directive’.

B – *Spanish law*

9. Amongst other things, Organic Law 3/2007 of 22 March 2007 on effective equality between women and men (Ley Orgánica 3/2007 para la igualdad efectiva de mujeres y hombres)⁵ transposed Directive 2006/54 in the Spanish legal system. Article 10 of that Law provides that ‘Where acts under and terms of legally binding arrangements constitute or cause discrimination on grounds of sex, they shall be regarded as null and void, and shall give rise to liability [on the part of the person responsible] through a system of reparation or compensation that shall be real, effective and proportionate to the damage suffered, and, where necessary, through an efficient and dissuasive system of penalties that prevents the occurrence of discriminatory conduct’.

10. Article 183 of Law 36/2011 of 10 October 2011 governing the social courts (Ley 36/2011 reguladora de la jurisdicción social)⁶ is set out in the following terms:

‘1. Where the judgment declares that an infringement has taken place, the court shall rule on the amount of any damages that may be payable to the applicant for discrimination suffered or any other infringement of his/her fundamental rights and civil liberties, on the basis of both the non-material damage linked to the infringement of the fundamental right and the additional damage and losses arising therefrom.’

3 — Point (b) of the second paragraph of Article 1 of Directive 2006/54.

4 — Third paragraph of Article 1 of Directive 2006/54.

5 — BOE No 71 of 23 March 2007, p. 12611.

6 — BOE No 245 of 11 October 2011.

2. The court shall rule on the amount of the damage, making a careful determination of it where it is too difficult or costly to prove the exact amount, in order to compensate the victim sufficiently and, so far as possible, fully restore him/her to the position he/she was in prior to the damage, and to contribute to the objective of preventing damage’.

II – The main proceedings, the question referred and the proceedings before the Court

11. The applicant in the main proceedings was dismissed by her employer in 2014. Following an unsuccessful conciliation procedure, she brought proceedings before the referring court in which she sought, first, a declaration that her dismissal was null and void, in that it constituted discrimination on grounds of sex, and, secondly, compensation for that dismissal in the form of an award of EUR 6 000 in respect of non-material damage.

12. The referring court accepts that the dismissal constituted discrimination on grounds of sex, and was thus contrary to the Spanish legislation which transposed the requirements of Directive 2006/54. As a matter of Spanish law, the applicant’s dismissal should, in its view, be considered null and void.⁷

13. For reasons which are not explained in the order for reference, the referring court informs the Court that it proposes to grant the applicant in the main proceedings damages in the amount of EUR 3 000, a sum which, in its view and pursuant to national law, is sufficient to compensate her fairly for the damage suffered.

14. In doing so, the referring court has doubts as to whether such compensation would be sufficient, in view of the fact that the sole objective pursued by damages is to provide reparation, whereas Directive 2006/54, and more specifically Article 18 thereof, appear also to require Member States to introduce measures designed to dissuade those who have engaged in discrimination from doing so in future.

15. The referring court considers that such an objective of dissuasion could be achieved if it were able to order the employer to pay a further EUR 3 000 in respect of damages which it describes as ‘punitive’. However, this concept is foreign to the Spanish legal tradition. The referring court is therefore not empowered by national law to make such an order.

16. Doubting, for those reasons, whether Spanish law meets the requirements laid down by Directive 2006/54, the Juzgado de lo Social No 1 de Córdoba decided to stay the proceedings and, by a request for a preliminary ruling received by the Court registry on 27 August 2014, to refer the following question to the Court, pursuant to Article 267 TFEU:

‘May Article 18 of Directive [2006/54] which refers to the dissuasive (in addition to real, effective and proportionate) nature of the compensation to be awarded to a victim of discrimination on grounds of sex, be interpreted as meaning that it enables the national court to award the victim reasonable punitive damages that are truly additional, that is to say, an additional amount which, although going beyond the full reparation of the actual loss and damage suffered by the victim, serves as an example to others (in addition to the person responsible for the damage), provided that the amount in question is not disproportionate, that also being the case even when the concept of punitive damages does not form part of the legal tradition of that national court?’

17. Written observations were lodged before the Court by the applicant in the main proceedings, the Spanish and United Kingdom Governments and the Commission.

⁷ — In accordance with Article 108(2) of Law 36/2011.

III – Legal analysis

18. In basing its question on Article 18 of Directive 2006/54, the referring court expresses uncertainty as to whether full reparation of the injury suffered by the applicant in the main proceedings is alone sufficient to ensure that the reparation or compensation is dissuasive for the purposes of that article or whether, on the contrary, the requirement of dissuasion must be understood as meaning that the national court is obliged to order an employer who has discriminated on grounds of sex to pay punitive damages even though, in any event, Spanish law does not permit it to go beyond full compensation for the damage sustained by the victim.

19. To answer this question, it is appropriate, first, to draw attention to the fact that Article 18 of Directive 2006/54 follows on in the line of equivalent provisions contained in the earlier directives which were supplemented and consolidated by Directive 2006/54. It will then be necessary to analyse the case-law of the Court relating to those directives — case-law which retains its full relevance to the resolution of the present dispute in the main proceedings. The conclusions reached through textual and purposive analysis, and analysis of the case-law, will lead me to the view that the question referred should be answered in the negative. Lastly, I will develop two lines of final remarks which point in favour of such a response, relating, first, to the fact that the conditions governing reparation or compensation for the damage sustained have not been harmonised, and, secondly, to the issue of whether Article 18 of Directive 2006/54 has direct effect.

A – Textual and purposive analysis

20. Achieving equality between men and women is both a task and an aim of the EU under the Treaties.⁸ Directive 2006/54 thus recites that such equality has the status of a ‘fundamental principle’ of EU law.⁹ It was therefore logical, and in line with the directives which it recast,¹⁰ for the EU legislature to prohibit all discrimination on grounds of sex.

21. Precisely because, in this area, it is not simply a matter of stating a principle but, on the contrary, of achieving the concrete outcomes laid down by primary law, the introduction of ‘appropriate procedures’¹¹ by the Member States, so as to ensure compliance with the obligations imposed by the directive, was considered essential to ‘the *effective* implementation of the principle of equal treatment’.¹²

8 — See recital 2 of Directive 2006/54. Equality between men and women is also enshrined in Article 23 of the Charter of Fundamental Rights of the European Union (OJ 2007 C 303, p. 1).

9 — See recital 2 of Directive 2006/54.

10 — Directive 2006/54 brought together, in a single text, the main provisions which existed in this area (and which had hitherto been found in 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 (OJ 1976 L 39, p. 40), Council Directive 86/378/EEC of 24 July 1986 on the implementation of the principle of equal treatment for men and women in occupational social security schemes (OJ 1986 L 225, p. 40), Council Directive 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 (OJ 1975 L 45, p. 19) and Council Directive 97/80/EC of 15 December 1997 on the burden of proof in cases of discrimination based on sex (OJ 1998 L 14, p. 6)).

11 — Recital 28 of Directive 2006/54.

12 — Recital 29 of Directive 2006/54. Emphasis added.

22. Since the introduction of procedures is not, by itself, sufficient to ensure effective legal protection of the rights which individuals derive from Directive 2006/54, Article 18 of that directive, which is contained in the ‘Remedies’ section of the chapter concerning remedies and enforcement, reiterates the new feature introduced by Directive 2002/73/EC of the European Parliament and of the Council of 23 September 2002 amending Directive 76/207¹³ by specifying the required outcome of such procedures, that is, compensation or reparation¹⁴ for the damage sustained by the victim.

23. An obligation to achieve a particular outcome (‘to ensure real and effective compensation or reparation’) is thus imposed on the Member States, with Directive 2006/54 leaving it to them, essentially,¹⁵ to select the means (‘as the Member States so determine ... in a way which is dissuasive and proportionate to the damage suffered’). It is apparent from the wording of Article 18 of Directive 2006/54 that the latter does not require the Member States to take any specific measure, and leaves them free to choose among the various possibilities which are appropriate for achieving the objective pursued by Directive 2006/54.¹⁶ Thus, the standard to be used in assessing the action taken by Member States in the area of combating discrimination on grounds of sex lies in achieving the objective pursued by the directive and in ensuring that it has useful effect by protecting the rights of those subject to its legal system.

24. Article 18 of Directive 2006/54 cannot be analysed without having some regard to Article 25 of that directive, which borrows from the terminology of Article 18 in that the legislature affirms that the penalties that the Member States are to impose ‘may comprise the payment of compensation to the victim’ and, like the compensation or reparation referred to in Article 18, must be ‘effective, proportionate and dissuasive’. In that way, the EU legislature has required the Member States to put in place ‘effective, proportionate and dissuasive penalties for breaches of the obligations under [the directive]’.¹⁷ It is this requirement that is given concrete form in Article 25 of Directive 2006/54, which is entitled ‘Penalties’¹⁸ and is contained in the chapter of Title III concerning general horizontal provisions. Article 25 also requires the Member States to notify the Commission of the measures adopted pursuant to that article.

25. To summarise, Article 18 of Directive 2006/54 goes no further than to require that the reparation or compensation be effective, proportionate and dissuasive. On the face of that article, it seems clear that the legislature does not regard compensation or reparation, as such, as a penalty. The punitive dimension of the measures which the Member States are required to adopt is expressly provided for only in Article 25 of Directive 2006/54.¹⁹

26. It remains to be verified whether an analysis of the case-law will confirm this first impression, based on a literal and purposive analysis of Article 18 of Directive 2006/54, given that that directive is to be interpreted having regard to the body of case-law which preceded its adoption and to which it sometimes makes express reference.²⁰

13 — OJ 2002 L 269, p. 15.

14 — ‘Indemnización o reparación’ in the Spanish version of Directive 2006/54, ‘Schadenersatz oder Entschädigung’ in the German version of Directive 2006/54, ‘Indemnisation ou réparation’ in the French version of Directive 2006/54, ‘Risarcimento o riparazione’ in the Italian version of Directive 2006/54, and ‘Indemnização o reparação’ in the Portuguese version of Directive 2006/54.

15 — See paragraph 15 of the judgment in *von Colson and Kamann* (14/83, EU:C:1984:153); paragraph 15 of the judgment in *Harz* (79/83, EU:C:1984:155); and paragraphs 17 and 18 of the judgment in *Marshall* (C-271/91, EU:C:1993:335).

16 — See, *mutatis mutandis*, the judgments in *von Colson and Kamann* (14/83, EU:C:1984:153, paragraph 18); in *Harz* (79/83, EU:C:1984:155, paragraph 18); and in *Paquay* (C-460/06, EU:C:2007:601, paragraph 44).

17 — Recital 35 of Directive 2006/54.

18 — ‘Sanciones’ in the Spanish version of Directive 2006/54, ‘Sanktionen’ in the German version of Directive 2006/54, ‘Sanctions’ in the French version of Directive 2006/54, ‘Sanzioni’ in the Italian version of Directive 2006/54, and ‘Sanções’ in the Portuguese version of Directive 2006/54.

19 — Admittedly, Article 25 of Directive 2006/54 suggests that such penalties could take the form of compensation paid to the victim. Nevertheless, this arises from a semantic confusion that originated in the case-law of the Court: see point 35 of this Opinion.

20 — See, for example, recital 33 of Directive 2006/54. It will also be noted that both Article 18 and Article 25, which I will consider below, of Directive 2006/54 correspond to provisions which were introduced by Directive 2002/73.

B – *The existing case-law*

27. While the Court has never ruled specifically on the interpretation to be given to Article 18 of Directive 2006/54, it has nevertheless had occasion, several times, to adopt a position on the corresponding provisions of the directives which preceded Directive 2006/54, foremost of which is Article 6 of Directive 76/207.²¹

28. In analysing the case-law of the Court, it could be concluded that, although it has described a compensatory measure as a ‘sanction’, the Court has never required such a measure to go beyond ‘adequate’ compensation. Spanish law as described by the national court provides, as I see it, every assurance of such compensation.

1. The requirement of dissuasion in the case-law of the Court is satisfied if the compensation envisaged is ‘adequate’

29. The problem of how, in an employment context, to combat discrimination on grounds of sex is not new. The Court has been asked to consider the issue on several occasions. In my view, the conclusion it reached²² in interpreting Article 6 of Directive 76/207 applies, *mutatis mutandis*, to the interpretation of Article 18 of Directive 2006/54 which replaces it and specifies its content in greater detail, as that provision gives Member States the same freedom concerning the type of measures to be adopted as Article 6 of Directive 76/207 previously did.

30. In the light of what the Court has held in relation to Article 6 of Directive 76/207, it is clear that Article 18 of Directive 2006/54 requires Member States to introduce into their national legal systems such measures as are necessary to enable all persons who consider themselves wronged by discrimination to obtain redress. The Member States are required to adopt measures which are sufficiently effective to achieve the objective of that directive, and to ensure that those measures are capable of being effectively relied on by the persons concerned before national courts, although EU law does not prescribe any particular form that those measures must take. They may therefore take a variety of forms, such as an obligation to enter into a contract of employment with a candidate who has been discriminated against, the re-employment of a person who has been dismissed for discriminatory reasons, or adequate financial compensation.²³

31. In 1984, the year in which the Court delivered its judgments in *von Colson and Kamann* and *Harz*, it declined to interpret Article 6 of Directive 76/207 as requiring Member States to adopt a specific measure, which in those cases was a measure obliging an employer who had discriminated on grounds of sex to enter into an employment contract with a candidate whose application had been rejected for discriminatory reasons.

21 — That article provided that ‘Member States shall introduce into their national legal systems such measures as are necessary to enable all persons who consider themselves wronged by failure to apply to them the principle of equal treatment ... to pursue their claims by judicial process after possible recourse to other competent authorities’. Article 6 of Directive 76/207 was amended by Article 1(5) of Directive 2002/73, producing a wording close to that which was to be adopted in Article 18 of Directive 2006/54 (see more particularly Article 6(3) of the consolidated version of Directive 76/207). Directive 2002/73 is also the source of the introduction, into EU legislation to combat discrimination on grounds of sex in relation to working conditions, of a distinct provision concerning penalties (see Article 8d of the consolidated version of Directive 76/207, recast as Article 25 of Directive 2006/54).

22 — According to this conclusion, ‘it follows from [Article 6 of Directive 76/207] that Member States are required to adopt measures which are sufficiently effective to achieve the objective of the directive and to ensure that those measures may in fact be relied on before the national courts by the persons concerned. Such measures may include, for example, provisions requiring the employer to offer a post to the candidate discriminated against or giving the candidate adequate financial compensation ... 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’ (judgments in *von Colson and Kamann* (14/83, EU:C:1984:153, paragraph 18) and in *Harz* (79/83, EU:C:1984:155, paragraph 18)).

23 — The Court even envisaged that the various measures could be ‘backed up, where necessary, by a system of fines’ (see paragraph 18 of the judgment in *von Colson and Kamann* (14/83, EU:C:1984:153)). In my view, under Directive 2006/54, such a system relates more closely to the requirements laid down by Article 25 of that directive (see below at point 53 of this Opinion).

32. As matters stand in 2015, when the present request for a preliminary ruling is before the Court, there has been no substantive change in EU law which would lead the Court to a different conclusion, that is, which would lead it to require Member States to adopt specific measures such as the imposition of punitive damages.

33. The reference to dissuasive effect in Article 18 of Directive 2006/54 cannot alter this observation.

34. The text of Article 18 has indeed been developed by adding a reference to the dissuasive effect of the reparation or compensation for which the national legal systems are to provide. However, while there was no express reference to dissuasion in Article 6 of Directive 76/207, it was already present in the Court's mind when it interpreted that provision, holding that '[a]lthough ... full implementation of [Directive 76/207] 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. Moreover, it must also have a real deterrent effect on the employer. It follows that where a Member State chooses to penalise the breach of the prohibition of discrimination by the award of compensation, that compensation must in any event be adequate in relation to the damage sustained'.²⁴

35. Two lessons may be derived from this case-law. First, the origins of the reference to compensation as a type of penalty, in Article 25 of Directive 2006/54, are clearly to be found in this line of case-law. Secondly, to the Court's mind adequate compensation is, in any event, such as to guarantee real and effective judicial protection of the rights conferred, in the area of combating discrimination on grounds of sex, on those subject to the legal system. Moreover, it is precisely because the Court was content with compensation which is adequate, and which remains in proportion to the damage sustained, that it does not constitute a true 'penalty', in the punitive sense of that term.²⁵

36. Furthermore, since the requirements of effective judicial protection and dissuasion 'necessarily entail that the particular circumstances of each breach of the principle of equal treatment should be taken into account',²⁶ the Court has taken a case-by-case approach to assessing the sufficiency of measures taken by Member States to implement Article 6 of Directive 76/207, and thus to transpose that directive in an effective manner.

37. Thus, national provisions limiting to a purely nominal amount the right to compensation of persons who have suffered discrimination as regards access to employment do not satisfy the requirements of effective transposition.²⁷ Where reparation takes a pecuniary form, the Member States may not impose a prior upper limit on damages.²⁸

24 — Judgments in *von Colson and Kamann* (14/83, EU:C:1984:153, paragraph 23) and in *Harz* (79/83, EU:C:1984:155, paragraph 23). Emphasis added. On dissuasive character, see also paragraph 24 of the judgment in *Marshall* (C-271/91, EU:C:1993:335). As to the adequacy of compensation, see also paragraph 28 of the judgment in *von Colson and Kamann* (14/83, EU:C:1984:153), paragraph 28 of the judgment in *Harz* (79/83, EU:C:1984:155), paragraph 26 of the judgment in *Marshall* (C-271/91, EU:C:1993:335) and paragraphs 46 and 49 of the judgment in *Paquay* (C-460/06, EU:C:2007:601).

25 — Certain commentators see in this a regrettable confusion between legal concepts: see van Gerven, W., 'Of rights, remedies and procedures', *Common Market Law Review* 2000, p. 530 and note 11.

26 — Paragraph 25 of the judgment in *Marshall* (C-271/91, EU:C:1993:335) and paragraph 46 of the judgment in *Paquay* (C-460/06, EU:C:2007:601).

27 — See paragraph 24 of the judgment in *von Colson and Kamann* (14/83, EU:C:1984:153) and paragraph 24 of the judgment in *Harz* (79/83, EU:C:1984:155).

28 — Paragraphs 30 and 32 of the judgment in *Marshall* (C-271/91, EU:C:1993:335). The legislature had due regard to this case-law: see recital 33 and the second sentence of Article 18 of Directive 2006/54.

38. In relation to discriminatory dismissal, the Court has also held that ‘a situation of equality could not be restored without either reinstating the victim of discrimination *or, in the alternative*, granting financial compensation for the loss and damage sustained’,²⁹ provided that such compensation is adequate, that is, that it ‘[enables] the loss and damage actually sustained as a result of the discriminatory dismissal to be made good in full in accordance with the applicable national rules’.³⁰

39. It follows from the foregoing that, in holding that national legislation which provided adequate financial compensation for the damage sustained was in conformity with Article 6 of Directive 76/207, the Court took the view that such compensation satisfied the requirement of dissuasion that it identified behind the legislative intention expressed through Article 6 of Directive 76/207. In other words, in relation to reparation or compensation, dissuasive effect is not necessarily dependent, under the case-law of the Court, on the inclusion of a direct punitive element.

2. Application to the present case

40. Today, when the requirement of dissuasive effect is laid down explicitly in Directive 2006/54, there is, in my view, no reason for the Court to depart from this line of case-law. On that basis, the question is whether Spanish law offers the applicant in the main proceedings every assurance of adequate compensation.

41. In this regard, it is apparent from the request for a preliminary ruling that Spanish law provides for the court to declare acts adopted in breach of the principle of equal treatment of men and women to be null and void,³¹ and that, as a further consequence, there is a mechanism for compensation of damage, the Spanish legal system having chosen a measure of financial compensation in order to achieve the objective of effective equal opportunity laid down by Directive 2006/54. The national court considers that the sum of EUR 3 000 is sufficient to provide ‘fair compensation’ for the damage sustained by the applicant in the main proceedings.³² With reference again to national law, damages are intended to compensate the victim for all damage sustained, including non-pecuniary damage, and are calculated in such a way as to restore the victim, as far as possible, to the position he was in before the discrimination occurred.³³ Since non-pecuniary damage is, by its nature, difficult to quantify, Spanish law gives the national court the power to adjust the damages so as to take account of the seriousness of the breach of the principle of equal treatment between men and women. An award of damages can thus cover the full value of the loss sustained by the victim (*damnum emergens*) including profits which cease or fail to materialise (*lucrum cessans*).

42. The mechanism of compensation described above can be regarded as compliant with Article 18 of Directive 2006/54 on the strict condition that national law provides for financial compensation which covers in full all facets of the damage sustained by a victim of discrimination on grounds of sex and is proportionate to that damage, this being a matter for the national court to confirm.

43. The Court would therefore be doing no more than confirming its previous settled case-law in holding that full compensation of that kind is adequate and, consequently, sufficient to ensure that the national measures which Member States are required to put in place so as to guarantee effective equality of opportunity, under Article 18 of Directive 2006/54, have a genuine dissuasive effect.

29 — Paragraph 25 of the judgment in *Marshall* (C-271/91, EU:C:1993:335). Emphasis added.

30 — Judgment in *Marshall* (C-271/91, EU:C:1993:335), paragraph 26.

31 — Article 10 of Organic Law 3/2007.

32 — Paragraph 2.2.2 of the request for a preliminary ruling.

33 — Article 183 of Law 36/2011.

C – Final remarks

44. In any event, even if the Court were to hold otherwise — which, in my view, it should not — it could not adopt a position, which the referring court invites it to adopt, in favour of imposing punitive damages on the employer of the applicant in the main proceedings.

45. First, Directive 2006/54 did not harmonise the conditions governing reparation or compensation for the damage sustained by reason of discrimination of grounds of sex in the context of working conditions, and secondly, I have serious doubts as to whether Article 18 of Directive 2006/54 can have direct effect in the main proceedings.

1. The conditions governing reparation or compensation for the damage sustained have not been harmonised

46. To date, the Court has only ever defined the requirements imposed by Directive 76/207 on Member States negatively, by determining what did not comply with that directive. It has never dictated the approach that Member States should take. However, the question referred amounts to asking the Court — because it is not done in Directive 2006/54 itself — to make a colossal qualitative leap in its case-law which seems to me to go well beyond its powers.

47. For the Court to hold unequivocally that Article 18 of Directive 2006/54 is to be interpreted as requiring Member States to provide for the award of punitive damages to victims, in cases of discrimination on grounds of sex which come within the scope of that directive, would be for it to adopt a definitive position in a debate which, to my mind, ought to be left to the Member States.

48. In the Member States which do not recognise punitive damages,³⁴ their introduction is a matter of debate and the issue is generally the subject of much discussion.³⁵ Punitive damages are frequently perceived as a paradigm change in the law on liability. Some legal systems remain very much attached to the idea that the system of liability should have a strictly compensatory function. Damages are awarded, by a method resembling an accounting exercise, so as to provide full compensation for the damage sustained, neither more nor less, the object of the exercise being to restore the balance which was upset by the discriminatory conduct. However, the guarantee of full compensation is already regarded, in and of itself, as a means of dissuasion from such conduct.

49. With punitive damages, the system of liability also takes on a moral function which is truly punitive. Punitive damages have their theoretical basis in private sanctions: the objective is no longer simply to compensate, but also to award damages which go beyond full compensation, in the hope that the deterrent effect which is in the nature of such damages will deter the person who has caused the damage from engaging (to relate matters to the present case) in further discriminatory conduct, while also deterring others from engaging in like conduct.

34 — A rapid comparative analysis shows that the Member States with legal systems which provide for punitive damages are very much in the minority within the EU.

35 — For an examination of the matter in relation to the French legal system, see Méadel, J., 'Faut-il introduire la faute lucrative en droit français?', *Les Petites Affiches*, 17 April 2007, No 77, p. 6.

50. It might prove to be very problematic for certain Member States, beginning with the Kingdom of Spain, to introduce punitive damages, precisely because this may be regarded as the intrusion of a quasi-criminal-law mechanism into the domain of civil liability. Furthermore, the compulsory introduction of punitive damages might conflict, as the referring court observed, with the principle of unjust enrichment which is recognised in the majority of Member States.³⁶ This could be avoided by providing for the punitive damages to be paid to the State, but in this way, in practice, the question of to whom these ought to be paid would then arise.³⁷

51. In my view, to hold that Member States are required, under Article 18 of Directive 2006/54, to provide for the award of punitive damages would result in a judicial harmonisation of the conditions of reparation or compensation in cases of discrimination on grounds of sex, which I do not believe was the intention of the EU legislature, at least not at this level of detail.³⁸

52. This may well be regrettable, conscious as I am that the system of liability described above is far from fulfilling its compensatory function in a systematically satisfactory way, but, as EU law presently stands, I doubt whether the Court can go very much further in terms of what it can require in relation to reparation or compensation. I would add that any deficiencies in the system of liability have been compensated for by Article 25 of Directive 2006/54, which requires the Member States to adopt a system of penalties.

53. In the end, Directive 2006/54 provides for discrimination on grounds of sex to be combated in two stages. There is the Article-18 stage, or in other words the stage of reparation or compensation — which must be adequate, as has been seen. Then there is the Article-25 stage, or in other words the stage of penalties or punishment, which is not necessarily concurrent with the reparation or compensation stage, or even cumulative.³⁹ The imposition of punitive damages relates more closely to this second stage, although it is possible to imagine many other forms of penalty and, once again, the Court cannot prescribe any particular one.⁴⁰

2. The problem as to whether Article 18 of Directive 2006/54 has direct effect

54. To recognise a power in the national court to impose punitive damages on an employer who has discriminated on grounds of sex, in the name of the effectiveness of Article 18 of Directive 2006/54, and in circumstances where national law is silent, inevitably raises the issue of whether that article has direct effect.

36 — The Court has never sought to cast doubt on this principle, having repeatedly held that '[EU] law does not prevent national courts from taking steps to ensure that the protection of the rights guaranteed by [EU] law does not entail the unjust enrichment of those who enjoy them' (judgment in *Manfredi and Others* (C-295/04 to C-298/04, EU:C:2006:461, paragraph 94 and the case-law cited).

37 — Punitive damages could be ordered to be paid either to the victim or the State, or indeed to both. However, the referring court appears to have envisaged that they would be paid to the victim of the damage.

38 — This doubt also derives from the fact that, as far as I am aware, the Commission has not brought infringement proceedings against the Member States — a majority — whose legal systems do not provide for the award of such damages. In this regard, it is interesting to note that, in its report on the application of Directive 2002/73 — the directive which introduced the equivalent of Articles 18 and 25 of Directive 2006/54 into Directive 76/207 — the Commission observed that most Member States had fulfilled their obligation to introduce penalties which were effective, proportionate and dissuasive, even though, as I have highlighted above, a large majority of Member States do not recognise punitive damages (see the Report from the Commission to the Council and the European Parliament, COM(2009) 409 final, p. 7).

39 — Where, for example, damage is not caused to a specific person but to a group, possibly represented by an association, it may be envisaged that there would not be compensation pursuant to Article 18 of Directive 2006/54. On the other hand, there should be a penalty pursuant to Article 25 of that directive.

40 — A whole range of penalties is available to Member States, be they financial in nature (such as fines or punitive damages), more psychological and based on 'naming and shaming' (such as an order to apologise to the victim, possibly in conjunction with measures intended to publicise the matter, such as an order to publish the condemnation in a newspaper) or the withdrawal of State benefits from parties guilty of discrimination.

55. It is true that the Court has already held that a victim of discriminatory dismissal may rely, against his or her employer, on the provisions of Article 6 of Directive 76/207, in particular so as to obtain the removal of a provision of national law imposing limits on the amount of damages which may be recovered by way of compensation.⁴¹ Nevertheless, first, I doubt whether the same approach can be adopted in relation to the imposition of punitive damages, as it is far from obvious on the face of Article 18 of Directive 2006/54 that that article imposes such an obligation on the Member States. Secondly, it is clear that the judgments to which I have referred above were delivered in circumstances where the employer was a public authority, which would not appear to be the position in the present case. Thus, to hold that, in the main proceedings, the national court is obliged to impose punitive damages pursuant to Article 18 of Directive 2006/54 could amount to establishing that that article has direct horizontal effect.

D – *Conclusions of the analysis*

56. Having completed my analysis, I am thus inclined to conclude that Article 18 of Directive 2006/54 must be interpreted as meaning that the Member States are free to choose the means to be adopted in order to guarantee that the reparation or compensation provided to victims of discrimination on grounds of sex within the scope of that directive is dissuasive, provided that it is ensured that the objective of the directive is achieved. While not precluding it, that article does not require Member States to provide for the payment of punitive damages to the victim. It cannot, in any event, allow the national court to order the payment of such damages in circumstances where national law is silent on the matter.

57. Where Member States opt for a financial form of compensation, such compensation must, in order to satisfy the requirement of dissuasiveness, be adequate, which is to say that it must be full compensation and must take proper account of all elements of the damage sustained, as well as of the seriousness of the breach of the principle of equal treatment of men and women. It is for the national court to satisfy itself that that is indeed the case.

41 — Here again, it is useful to refer to the case-law of the Court concerning Article 6 of Directive 76/207. At first, in paragraph 27 of its underlying judgments in *von Colson and Kamann* (14/83, EU:C:1984:153) and in *Harz* (79/83, EU:C:1984:155), the Court held that that directive did not include ‘any unconditional and sufficiently precise obligation as regards sanctions for discrimination which, in the absence of implementing measures adopted in good time, may be relied on by individuals in order to obtain specific compensation under the directive, where that is not provided for or permitted under national law’.

Subsequently, the Court refined its position in the judgment in *Johnston* (222/84, EU:C:1986:206), in which it held, at paragraphs 58 and 59, that ‘in so far as it follows from [Article 6 of Directive 76/207], 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 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. ... [T]he provision contained in Article 6 to the effect that all persons who consider themselves wronged by discrimination between men and women must have an effective judicial remedy may be relied upon by individuals as against a Member State which has not ensured that it is fully implemented in its internal legal order’.

On a third occasion, the Court held in the judgment in *Marshall* (C-271/91, EU:C:1993:335), that Article 6 of Directive 76/207 could be relied on by a private individual against a public employer in a case where national law, instead of providing for full compensation for the damage sustained, set a prior limit on such compensation. As Article 6 of Directive 76/207 is ‘an essential factor for attaining the fundamental objective of equal treatment’ (paragraph 34), ‘the combined provisions of Article 6 and Article 5 of the Directive give rise, on the part of a person who has been injured as a result of discriminatory dismissal, to rights which that person must be able to rely upon before the national courts as against the State and authorities which are an emanation of the State. The fact that Member States may choose among different solutions in order to achieve the objective pursued by the Directive depending on the situations which may arise, cannot result in an individual’s being prevented from relying on Article 6 in a situation such as that in the main proceedings where the national authorities have no degree of discretion in applying the chosen solution’ (paragraphs 35 and 36). The Court concluded from this ‘that a person who has been injured as a result of discriminatory dismissal may rely on the provisions of Article 6 of the Directive as against an authority of the State acting in its capacity as an employer in order to set aside a national provision which imposes limits on the amount of compensation recoverable by way of reparation’ (paragraph 38). I would point out that Advocate General Van Gerven had invited the Court to hold that Article 6 of Directive 76/207 had horizontal direct effect (see point 21 of the Opinion of Advocate General Van Gerven in *Marshall* (C-271/91, EU:C:1993:30)).

IV – Conclusion

58. Having regard to all of the foregoing considerations, I propose that the Court should reply as follows to the question referred to it by the Juzgado de lo Social No 1 de Córdoba:

Article 18 of Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation must be interpreted as meaning that the Member States are free to choose the means to be adopted in order to guarantee that the reparation or compensation provided to victims of discrimination on grounds of sex within the scope of that directive is dissuasive, provided that it is ensured that the objective of that directive is achieved. While not precluding it, that article does not require Member States to provide for the payment of punitive damages to the victim. It cannot, in any event, allow the national court to order the payment of such damages in circumstances where national law is silent on the matter.

Furthermore, where Member States opt for a financial form of compensation, such compensation must, in order to satisfy the requirement of dissuasiveness, be adequate, which is to say that it must be full compensation and must take proper account of all elements of the damage sustained, as well as of the seriousness of the breach of the principle of equal treatment of men and women. It is for the national court to satisfy itself that that is indeed the case.