

KELLY

JUDGMENT OF THE COURT (Second Chamber)

21 July 2011 *

In Case C-104/10,

REFERENCE for a preliminary ruling under Article 267 TFEU from the High Court (Ireland), made by decision of 29 January 2010, received by the Court on 24 February 2010, in the proceedings

Patrick Kelly

v

National University of Ireland (University College, Dublin),

THE COURT (Second Chamber),

composed of J.N. Cunha Rodrigues, President of the Chamber, A. Arabadjiev, A. Rosas (Rapporteur), U. Löhmus and P. Lindh, Judges,

Advocate General: P. Mengozzi,
Registrar: L. Hewlett, Principal Administrator,

* Language of the case: English.

having regard to the written procedure and further to the hearing on 13 January 2011,

after considering the observations submitted on behalf of:

- Mr Kelly, in person,

- the National University of Ireland (University College, Dublin), by M. Bolger SC, instructed by E. O’Sullivan, Solicitor,

- the German Government, by J. Möller, acting as Agent,

- the European Commission, by M. van Beek and N. Yerrell, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

¹ This reference for a preliminary ruling concerns the interpretation of European Union law and, in particular, of Article 4 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 (OJ 1976 L 39, p. 40), Article 4(1) of 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) and Article 1(3) of Directive 2002/73/EC of the European Parliament and of the Council of 23 September 2002 amending Directive 76/207 (OJ 2002 L 269, p. 15).

- 2 The reference has been made in the course of legal proceedings brought by Mr Kelly against the National University of Ireland (University College Dublin) ('UCD'), following the latter's refusal to disclose unredacted documents relating to the selection procedure for a vocational training course.

Legal context

European Union legislation

Directive 76/207

- 3 Directive 76/207, applicable at the time of the facts which gave rise to the complaint of discrimination on grounds of sex, that is to say, during March and April 2002, provided in Article 4 as follows:

‘Application of the principle of equal treatment with regard to access to all types and to all levels, of vocational guidance, vocational training, advanced vocational training and retraining, means that Member States shall take all necessary measures to ensure that:

- (a) any laws, regulations and administrative provisions contrary to the principle of equal treatment shall be abolished;

- (b) any provisions contrary to the principle of equal treatment which are included in collective agreements, individual contracts of employment, internal rules of undertakings or in rules governing the independent occupations and professions shall be, or may be declared, null and void or may be amended;

- (c) without prejudice to the freedom granted in certain Member States to certain private training establishments, vocational guidance, vocational training, advanced vocational training and retraining shall be accessible on the basis of the same criteria and at the same levels without any discrimination on grounds of sex.’

4 Article 6 of that directive provided:

‘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.’

Directive 2002/73

- 5 Directive 76/207 was amended by Directive 2002/73, the first subparagraph of Article 2(1) of which states that Member States were to bring into force the laws, regulations and administrative provisions necessary to comply with that directive by 5 October 2005 at the latest.

- 6 Directive 2002/73 revokes, in particular, Article 4 of Directive 76/207 and, pursuant to Article 1(3), gives the following wording to Article 3 of Directive 76/207:

‘1. Application of the principle of equal treatment means that there shall be no direct or indirect discrimination on the grounds of sex in the public or private sectors, including public bodies, in relation to:

...

- (b) access to all types and to all levels of vocational guidance, vocational training, advanced vocational training and retraining, including practical work experience;

...

2. To that end, Member States shall take the necessary measures to ensure that:

- (a) any laws, regulations and administrative provisions contrary to the principle of equal treatment are abolished;

- (b) any provisions contrary to the principle of equal treatment which are included in contracts or collective agreements, internal rules of undertakings or rules governing the independent occupations and professions and workers' and employers' organisations shall be, or may be declared, null and void or are amended.'

Directive 97/80

- 7 Directive 97/80, the date of transposition of which was fixed at 1 January 2001, institutes rules relating to the burden of proof in cases of discrimination based on sex.

- 8 According to recital 13 in the preamble to that directive, the appreciation of the facts from which it may be presumed that there has been direct or indirect discrimination is a matter for national judicial or other competent bodies, in accordance with national law or practice.

- 9 Recital 18 in the preamble to that directive states that the Court of Justice has held that the rules on the burden of proof must be adapted when there is a prima facie case

of discrimination and that, for the principle of equal treatment to be applied effectively, the burden of proof must shift back to the respondent when evidence of such discrimination is brought.

¹⁰ Article 1 of that directive states that its aim is to ensure that the measures taken by the Member States to implement the principle of equal treatment are made more effective, in order to enable all persons who consider themselves wronged because the principle of equal treatment has not been applied to them to have their rights asserted by judicial process after possible recourse to other competent bodies.

¹¹ Under Article 3(1)(a) of Directive 97/80, the directive is to apply to the situations covered by Directive 76/207.

¹² Article 4(1) of Directive 97/80 reads as follows:

‘Member States shall take such measures as are necessary, in accordance with their national judicial systems, to ensure that, when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment.’

National legislation

- 13 It is apparent from the decision for reference that the principles relating to disclosure of documents under Order 57A rule 6(6) of the Circuit Court Rules correspond to the principles relating to discovery and inspection of documents under Order 32 of the Rules of the Circuit 2001-2006 and Order 31 of the Rules of the Superior Courts 1986, as amended.
- 14 Pursuant to those rules, discovery will be granted where it can be shown that the documents sought are relevant to the issues in the proceedings and, in particular, necessary for disposing fairly of the matter.
- 15 Notwithstanding the fact that documents are considered both relevant and necessary, their production may be refused where the documents, inter alia, are privileged or subject to confidentiality.
- 16 In case of conflict between the right to obtain production of a document, on the one hand, and the duty to protect confidentiality or to uphold any other countervailing obligation or entitlement, on the other, the national court hearing the action must balance both the nature of the claim advanced and the degree of confidentiality alleged, as against the public interest in full disclosure as part of the administration of justice.

The dispute in the main proceedings and the questions referred for a preliminary ruling

- 17 Mr Kelly is a qualified teacher and resident in Dublin.
- 18 UCD is a higher education establishment. For the academic period 2002-2004, it was offering a course entitled 'Master's degree in Social Science (Social Worker) mode A'
- 19 On 23 December 2001, Mr Kelly submitted an application to UCD seeking admission to the course. At the end of the selection process he was informed by letter dated 15 March 2002 that his application had not been successful.
- 20 Dissatisfied with that decision, Mr Kelly made a formal complaint of discrimination on grounds of sex to the Director of the Equality Tribunal in April 2002, claiming that he was better qualified than the least-qualified female candidate to be offered a place.
- 21 On 2 November 2006, an Equality Officer handling the complaint under the aegis of the Director of the Equality Tribunal reached a decision concluding that the complainant had failed to establish prima facie discrimination on grounds of sex. Mr Kelly appealed against that decision to the Circuit Court.

- 22 On 4 January 2007 Mr Kelly also applied to the Circuit Court, under Order 57A rule 6(6) of the Circuit Court Rules, seeking from UCD copies of certain specified documents ('the disclosure application'). He requested copies of the retained applications, copies of the documents appended to or included with those applications, and copies of the 'scoring sheets' of the candidates whose application forms had been retained.
- 23 The President of the Circuit Court refused the disclosure application by order of 12 March 2007. On 14 March 2007, Mr. Kelly appealed against that order to the High Court.
- 24 On 23 April 2007, Mr Kelly also applied to the High Court for a reference for a preliminary ruling to be made to the Court of Justice of the European Communities. On 14 March 2008, the High Court decided that such a reference was premature since it had not finally determined whether access to the documents in question could be granted under national law. Once it had completed its examination, the High Court concluded that, pursuant to national law, UCD did not have to disclose, pursuant to Mr Kelly's application, the documents in unredacted form.
- 25 Being unsure as to whether refusal of the disclosure request is contrary to European Union law, the High Court referred the following questions to the Court for a preliminary ruling:
1. Does Article 4(1) of Council Directive 97/80 ... entitle an applicant for vocational training, who believes that he or she has been denied access to vocational training because the principle of equal treatment was not applied to him or her, to

information on the respective qualifications of the other applicants for the course in question and in particular the applicants who were not denied access to vocational training so that the applicant can “establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination”?

2. Does Article 4 of Council Directive 76/207 ... entitle an applicant for vocational training, who believes that he or she has been denied access to vocational training “on the basis of the same criteria” and discriminated against “on grounds of sex” in terms of accessing vocational training, to information held by the course provider on the respective qualifications of the other applicants for the course in question and in particular the applicants who were not denied access to vocational training?

3. Does Article [1(3)] of Council Directive 2002/73 ... prohibiting “direct or indirect discrimination on the grounds of sex” in relation to “access” to vocational training entitle an applicant for vocational training, who claims to have been discriminated against “on the grounds of sex” in terms of accessing vocational training, to information held by the course provider on the respective qualifications of the other applicants for the course in question and in particular the applicants who were not denied access to vocational training?

4. Does the nature of the obligation under paragraph 3 of Article 267 TFEU differ in a Member State with an adversarial (as opposed to inquisitorial) legal system and, if so, in what respect?

5. Can any entitlement to information under the aforesaid directives be affected by the operation of national or European laws relating to confidentiality?

Consideration of the questions referred

The first question

- ²⁶ By its first question, the national court asks, in essence, whether Article 4(1) of Council Directive 97/80 must be interpreted as entitling an applicant for vocational training, who believes that his application was not accepted because of an infringement of the principle of equal treatment, to information held by the course provider on the qualifications of the other applicants for the course in question, in order that he may establish 'facts from which it may be presumed that there has been direct or indirect discrimination' in accordance with that provision.

Arguments of the parties

- ²⁷ Mr Kelly submits that under Article 4(1) of Directive 97/80 persons who consider themselves wronged because the principle of equal treatment has not been applied to them are entitled to information that would, if that principle has wrongly not been applied to them, establish, or assist in establishing, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect

discrimination. For applicants for a course of vocational training who consider themselves wronged because that principle has not been applied to them, this includes information on the qualifications of the other applicants.

- 28 The German Government contends that there is nothing in the wording of Article 4(1) of Directive 97/80 to indicate the grant of a right to disclosure. UCD and the Commission share its view that that provision sets out the conditions in which the burden of proof is shifted from the claimant to the respondent. According to those parties, that shift occurs only where a candidate has already established facts from which it may be presumed that there has been direct or indirect discrimination.

Findings of the Court

- 29 Directive 97/80 provides in Article 4(1) that the Member States are to take such measures as are necessary to ensure that, when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of that principle (see Case C-196/02 *Nikoloudi* [2005] ECR I-1789, paragraph 68).
- 30 Thus, it is the person who considers himself to have been wronged because the principle of equal treatment has not been applied to him who must initially establish the facts from which it may be presumed that there has been direct or indirect

discrimination. It is only where that person has established such facts that it is then for the defendant to prove that there has been no breach of the principle of non-discrimination.

- 31 In that regard, it is apparent from recital 13 in the preamble to Directive 97/80 that the appreciation of the facts from which it may be presumed that there has been direct or indirect discrimination is a matter for national judicial or other competent bodies, in accordance with national law or practice.
- 32 In consequence, it is for the national court or some other competent Irish body to assess, in accordance with Irish law and/or national practice, whether Mr Kelly has established the facts from which it may be presumed that there has been direct or indirect discrimination.
- 33 Nevertheless, it must be stated that Directive 97/80, pursuant to Article 1 thereof, seeks to ensure that the measures taken by the Member States to implement the principle of equal treatment are made more effective, in order to enable all persons who consider themselves wronged because the principle of equal treatment has not been applied to them to have their rights asserted by judicial process after possible recourse to other competent bodies.
- 34 Thus, although Article 4(1) of that directive does not specifically entitle persons who consider themselves wronged because the principle of equal treatment has not been correctly applied to them to information in order that they may establish ‘facts from which it may be presumed that there has been direct or indirect discrimination’ in accordance with that provision, the fact remains that it cannot be excluded that a refusal

of disclosure by the defendant, in the context of establishing such facts, could risk compromising the achievement of the objective pursued by that directive and thus depriving that provision in particular of its effectiveness.

- 35 In that regard, it must be borne in mind that Member States may not apply rules which are liable to jeopardise the achievement of the objectives pursued by a directive and, therefore, deprive it of its effectiveness (see Case C-61/11 PPU *El Dridi* [2011] ECR I-3015, paragraph 55).
- 36 According to the wording of the second and third subparagraphs respectively of Article 4(3) TEU, the Member States inter alia 'shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union' and 'shall ... refrain from any measure which could jeopardise the attainment of the Union's objectives', including those pursued by directives (see *El Dridi*, paragraph 56).
- 37 In the present case, it is, however, apparent from the decision for reference that, although the President of the Circuit Court refused the disclosure application, UCD offered to provide Mr Kelly with part of the information requested, which he does not dispute.
- 38 Accordingly, the answer to the first question is that Article 4(1) of Council Directive 97/80 must be interpreted as meaning that it does not entitle an applicant for vocational training, who believes that his application was not accepted because of an infringement of the principle of equal treatment, to information held by the course provider on the qualifications of the other applicants for the course in question, in order that he may establish 'facts from which it may be presumed that there has been direct or indirect discrimination' in accordance with that provision.

- 39 Nevertheless, it cannot be ruled out that a refusal of disclosure by the defendant, in the context of establishing such facts, could risk compromising the achievement of the objective pursued by that directive and thus depriving, in particular, Article 4(1) thereof of its effectiveness. It is for the national court to ascertain whether that is the case in the main proceedings.

The second and third questions

- 40 By its second and third questions, which should be examined together, the national court asks, in essence, whether Article 4 of Directive 76/207 or Article 1(3) of Directive 2002/73 must be interpreted as entitling an applicant for vocational training to information held by the course provider on the qualifications of the other applicants for the course in question, either because he believes that he has been denied access to vocational training on the basis of the same criteria as the other candidates and discriminated against on grounds of sex, referred to in Article 4 of Directive 76/207, or because that applicant complains that he was discriminated against on the grounds of sex, referred to in Article 1(3) of Directive 2002/73, in terms of accessing that vocational training.

Arguments of the parties

- 41 Mr Kelly submits that Article 4 of Directive 76/207 and Article 1(3) of Directive 2002/73 entitle persons who believe that they have been denied access to a vocational training course because of sex discrimination to information on the qualifications of the other applicants for that vocational training course.

- ⁴² The German Government and the Commission contend that those provisions contain substantive rules prohibiting discrimination on grounds of sex and that they do not extend to the issue of procedural rules. They argue that those provisions are not sufficiently specific to be understood as affording entitlement to a specific measure, such as entitlement to information.

Findings of the Court

- ⁴³ It does not emerge from the wording of Article 4 of Directive 76/207 or Article 1(3) of Directive 2002/73 that an applicant for vocational training is entitled to access to information held by the course provider concerning the qualifications of other applicants for that course.
- ⁴⁴ Article 4(c) of Directive 76/207 provides that application of the principle of equal treatment with regard to access to all types and to all levels, of vocational guidance, vocational training, advanced vocational training and retraining, means that Member States are to take all necessary measures to ensure that, without prejudice to the freedom granted in certain Member States to certain private training establishments, vocational training is to be accessible on the basis of the same criteria and at the same levels without any discrimination on grounds of sex.
- ⁴⁵ Article 1(3) of Directive 2002/73 provides that application of the principle of equal treatment means that there is to be no direct or indirect discrimination on the grounds of sex in the public or private sectors, including public bodies, in relation to access to all types and to all levels of vocational guidance, vocational training, advanced vocational training and retraining, including practical work experience. To that end, Member States are to take the necessary measures to ensure that any laws,

regulations and administrative provisions contrary to the principle of equal treatment are abolished.

⁴⁶ Those provisions seek to implement the application of the principle of equal treatment as regards access to training but, in accordance with the third paragraph of Article 288 TFEU, leave it, as to form and methods, to the national authorities to take the necessary measures to ensure that ‘any laws, regulations and administrative provisions’ contrary to that principle are abolished.

⁴⁷ Thus, it is not possible to derive from those provisions a specific obligation to grant an applicant for vocational training access to information concerning the qualifications of other applicants for that course.

⁴⁸ Accordingly, the answer to the second and third questions is that Article 4 of Directive 76/207 and Article 1(3) of Directive 2002/73 must be interpreted as meaning that they do not entitle an applicant for vocational training to information held by the course provider on the qualifications of the other applicants for the course in question, either because he believes that he has been denied access to vocational training on the basis of the same criteria as the other candidates and discriminated against on grounds of sex, referred to in Article 4 of Directive 76/207, or because that applicant complains that he was discriminated against on the grounds of sex, referred to in Article 1(3) of Directive 2002/73, in terms of accessing that vocational training.

The fifth question

- 49 By its fifth question, which it is appropriate to consider before the fourth question, the national court asks whether any entitlement to information under Directives 76/207, 97/80 and 2002/73 is affected by rules of national or European Union law relating to confidentiality.
- 50 Having regard to the answer to the first three questions and given that, under the procedure laid down in Article 267 TFEU, the Court has no jurisdiction to interpret national law, that task being exclusively for the national court (see Case C-53/04 *Marrosu and Sardino* [2006] ECR I-7213, paragraph 54, and Joined Cases C-250/09 and C-268/09 *Georgiev* [2010] ECR I-11869, paragraph 75), the fifth question must be understood as meaning that the national court asks, in essence, whether any right to rely on one of the directives referred to in the first three questions, in order to obtain access to the information held by the provider of vocational training concerning the qualifications of the applicants for that course, can be affected by rules of European Union law relating to confidentiality.

Arguments of the parties

- 51 According to Mr Kelly, a legally binding European Union act, including a directive as defined in the third paragraph of Article 288 TFEU, cannot be affected by national laws or their operation but only by another legally binding European Union act.

52 UCD and the German Government submit that that question should be answered only in the alternative since there is no entitlement to information as described by the plaintiff in the main proceedings pursuant to the provisions of Article 4 of Directive 76/207 or Article 1(3) of Directive 2002/73. However, if the Court were to conclude that the provisions at issue did afford Mr Kelly such entitlement, confidentiality, which is a concept recognised by European Union law and enshrined in a number of its acts, would take precedence over that entitlement.

Findings of the Court

53 It must be borne in mind that the Court has held, in paragraph 38 of the present judgment, that Article 4(1) of Council Directive 97/80 does not entitle an applicant for vocational training, who believes that his application was not accepted because of an infringement of the principle of equal treatment, to information held by the course provider on the qualifications of the other applicants for the course in question, in order that he may establish 'facts from which it may be presumed that there has been direct or indirect discrimination' in accordance with that provision.

54 Nevertheless, it has also been held, in paragraph 39 of this judgment, that it cannot be excluded that a refusal of disclosure by the defendant, in the context of establishing such facts, could risk compromising the achievement of the objective pursued by that directive and thus depriving Article 4(1) thereof in particular of its effectiveness.

55 In assessing such facts, national courts or other competent bodies must take into account the rules governing confidentiality which follow from European Union legal acts, such as Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing

of personal data and on the free movement of such data (OJ 1995 L 281, p. 31) and Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications) (OJ 2002 L 201, p. 37), as amended by Directive 2009/136/EC of the European Parliament and of the Council of 25 November 2009 (OJ 2009 L 337, p. 11). The protection of personal data is also provided for in Article 8 of the Charter of Fundamental Rights of the European Union.

- 56 Accordingly, the answer to the fifth question is that, where an applicant for vocational training can rely on Directive 97/80 in order to obtain access to information held by the course provider on the qualifications of the other applicants for the course in question, that entitlement to access can be affected by rules of European Union law relating to confidentiality.

The fourth question

- 57 By its fourth question, the national court asks whether the nature of the obligation contained in the third paragraph of Article 267 TFEU differs according to whether a Member State has an adversarial rather than an inquisitorial legal system and, if so, in what respect.

Arguments of the parties

- 58 Mr Kelly argues that a national court's obligation to refer questions to the Court for a preliminary ruling is wider in scope in an adversarial legal system than that on a court of a Member State in which there is an inquisitorial legal system, since it is the parties and not the court who determine the form, content and timing of the proceedings in

an adversarial legal system. Thus a national court in such a system cannot materially alter the content of a question raised by a party or submit to the court its own opinion suggesting an answer to the question.

- ⁵⁹ UCD, the German Government and the Commission share the view that the nature of the obligation under the third paragraph of Article 267 TFEU does not depend on the individual characteristics of Member States' legal systems. Furthermore, according to Case 283/81 *Cilfit and Others* [1982] ECR 3415, it is for the national court to decide if and, where necessary, how, to make a reference for a preliminary ruling.

Findings of the Court

- ⁶⁰ It is apparent from the settled case-law of the Court that Article 267 TFEU establishes a preliminary ruling mechanism which aims to avoid divergences in the interpretation of European Union law that the national courts have to apply and seeks to ensure this application by making available to national courts a means of eliminating difficulties which may be occasioned by the requirement of giving European Union law its full effect within the framework of the judicial systems of the Member States (see, to that effect, Opinion 1/09 [2011] ECR I-1137, paragraph 83 and the case-law cited).
- ⁶¹ Article 267 TFEU confers on national courts the power and, in certain circumstances, an obligation, to make a reference to the Court once the national court considers, either of its own motion or at the request of the parties, that the substance of the dispute involves a question which falls within the scope of the first paragraph of that article. It follows that the national courts have the most extensive power to make a reference to the Court if they consider that a case pending before them raises issues involving an interpretation or assessment of the validity of provisions of European Union law and requiring a decision by them (see, inter alia, Case C-210/06 *Cartesio*

[2008] ECR I-9641, paragraph 88, and Joined Cases C-188/10 and C-189/10 *Melki and Abdeli* [2010] ECR I-5667, paragraph 41).

- 62 Moreover, the Court has already held that the system established by Article 267 TFEU with a view to ensuring that European Union law is interpreted uniformly throughout the Member States institutes direct cooperation between the Court of Justice and the national courts by means of a procedure which is completely independent of any initiative by the parties (see, *inter alia*, *Cartesio*, paragraph 90).
- 63 In that regard, the system of references for a preliminary ruling is based on a dialogue between one court and another, the initiation of which depends entirely on the national court's assessment as to whether a reference is appropriate and necessary (*Cartesio*, paragraph 91).
- 64 Thus, not only is it for the national court to assess whether an interpretation of European Union law is necessary to enable it to resolve the dispute before it, having regard to the procedural mechanism laid down in Article 267 TFEU, but it is also for that court to decide the manner in which those questions are to be worded.
- 65 Although that court is at liberty to request the parties to the dispute before it to suggest wording suitable for the question to be referred, the fact remains that it is for it alone ultimately to decide both its form and content.

⁶⁶ Consequently, the answer to the fourth question is that the obligation contained in the third paragraph of Article 267 TFEU does not differ according to whether a Member State has an adversarial or an inquisitorial legal system.

Costs

⁶⁷ Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Second Chamber) hereby rules:

1. **Article 4(1) of Council Directive 97/80/EC of 15 December 1997 on the burden of proof in cases of discrimination based on sex must be interpreted as meaning that it does not entitle an applicant for vocational training, who believes that his application was not accepted because of an infringement of the principle of equal treatment, to information held by the course provider on the qualifications of the other applicants for the course in question, in order that he may establish ‘facts from which it may be presumed that there has been direct or indirect discrimination’ in accordance with that provision.**

Nevertheless, it cannot be ruled out that a refusal of disclosure by the defendant, in the context of establishing such facts, could risk compromising

the achievement of the objective pursued by that directive and thus depriving Article 4(1) thereof in particular of its effectiveness. It is for the national court to ascertain whether that is the case in the main proceedings.

2. Article 4 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 and Article 1(3) of Directive 2002/73/EC of the European Parliament and of the Council of 23 September 2002 amending Directive 76/207 must be interpreted as meaning that they do not entitle an applicant for vocational training to information held by the course provider on the qualifications of the other applicants for the course in question, either because he believes that he has been denied access to vocational training on the basis of the same criteria as the other candidates and discriminated against on grounds of sex, referred to in Article 4 of Directive 76/207, or because that applicant complains that he was discriminated against on the grounds of sex, referred to in Article 1(3) of Directive 2002/73, in terms of accessing that vocational training.

3. Where an applicant for vocational training can rely on Directive 97/80 in order to obtain access to information held by the course provider on the qualifications of the other applicants for the course in question, that entitlement to access can be affected by rules of European Union law relating to confidentiality.

4. The obligation contained in the third paragraph of Article 267 TFEU does not differ according to whether a Member State has an adversarial or an inquisitorial legal system.

Signatures