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Organized by the Association Française des Femmes Juristes (A.F.F.J.) & the European Women Lawyers Association (EWLA)

Paris, 20 and 21 September 2002

POSITIVE ACTION

UNDER THE REVISED SECOND EQUAL TREATMENT DIRECTIVE

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[1] Paper presented at the European Congress on "Gender Equality and Professional Life - Current Developments in Europe", organised by the Association Française des Femmes Juristes (A.F.F.J.) & the European Women Lawyers Association (EWLA), Paris, 20 and 21 September 2002.

A. INTRODUCTION

I. The issue

Positive action in favour of women can take many forms. It also may appear in different contexts. One of these is politics, as is evidenced by France which has national legislation on quotas for election lists.[2] On the EC level, however, there is no legislation on gender balance in political decision making. A particularly interesting example appeared recently in the international press in the context of company law. The Norwegian centre-right Government announced plans for a law according to which the boards of state and partly state-run companies must consist of at least 40 % persons of either sex.[3] Again, so far there is no specific EC sex equality legislation in this area. Positive action was also discussed at the Berlin founding Congress of EWLA, two years ago, in the context of public procurement.[4] This issue does arise under EC law though there is no specific provision on it. Yet another example is given by SHAW (2001:113) who notes that the DAPHNE Programme[5] is in terms of nature a positive action measure. Probably the best known area where positive action is relevant is that of employment. Here, an explicit provision has been in existence since the mid-seventies on the level of secondary law in the form of Art. 2(4) of the so-called Second Equal Treatment Directive.[6] Meanwhile, the Treaty revision of Amsterdam has led to the adoption of Art. 141(4) EC[7] which addresses positive action on the level of the

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[2] Loi no 2000-493 du 6 juin 2000 tendant à favoriser l'égal accès des femmes et des hommes aux mandats électoraux et fonctions électives, Journal officiel, Lois et Décrets, no 131 of 7 June 2000, p. 8560 (available at http://www.legifrance.gouv.fr/html/frame.html, under *Journal officiel*); see TOBLER (2001, Parité) and LENOIR (2001). It seems that so far the law has had beneficial effects in the context of a type of election procedures only; see FrauenSicht 3/02, at 27. Inspired by the French example, left-wing politicians in the Swiss Canton of Geneva have recently suggested a law providing for similar quota regulations; see FrauenSicht 3/02, at 26.

[3] See FINANCIAL GAZETTE (2002). The Chinese Daily SHANGHAI STAR (2002) commented: "The male boardroom bastion seems a paradox for a country where 40 per cent of the cabinet of Prime Minister Kjell Magne Bondevid and 37 per cent of parliamentarians are women. And 82 per cent of women go out to work, among the highest rates in the world. Yet only 6 per cent of Norwegian firms now meet the demand for 40 per cent women in the boardroom, well behind a European average." Compare also the NEWSWEEK (2002:38) report on ethnic minorities in European boardrooms where Commerzbank spokesman Dennis Phillips is quoted as saying: "How can you talk about race when you can't even find a German woman there?"

[4] See TOBLER (2000, Public Procurement). Since the time of writing of this article, some questions then posed have been clarified through the Court's decision in the later Commission v France (2000) which effectively means that award criteria can be based on considerations other than the lowest price or the most economically advantageous tender. Consequently, social clauses can serve as legal award criteria under Community law. See also the Interpretative communication of the Commission on the Community law applicable to public procurement and the possibilities for integrating environmental considerations into public procurement, OJ 2001 C 33/12.

[5] Parliament and Council Decision 293/2000/EC adopting a programme of Community action (the Daphne programme) (2000 to 2003) on preventive measures to fight violence against children, young persons and women, OJ 2000 L 34/1; see also http://europa.eu.int/comm/justice_home/project/daphne/en/index.htm.

[6] Directive 76/207/EEC 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 39/40.

[7] The abbreviation "EC" refers to the Amsterdam version of the Treaty on European Community. References to Treaty provisions followed by "of the EEC Treaty" refer to the pre-Maastricht and "of the EC Treaty" to the post-Maastricht version; see the Court of Justice's note on the Treaty renumbering in OJ 1999 C 246/1 or at http://www.curia.eu.int/en/jurisp/renum.htm. In the framework of the Maastricht revision, the name of the original EEC was changed into the simple "European Community". Thereafter, there were three European Communities, namely the European Community on Coal and Steel (ECSC), the European Community on Atomic Energy and the European

Treaty itself. As a consequence, the Second Equal Treatment Directive has recently been amended so as to reflect that change in the Treaty law. This is the focus of the present paper and the question examined by it is very simply: what do these changes mean for positive action under national law and, more particularly, for the Member States who have to respect Treaty law and to implement Community Directives?

II. Relevant provisions

It is worth recalling that when the then European Economic Community (EEC) was set up in 1957, there was no provision on positive action in the Treaty. The only sex equality provision existing at the time, Art. 119 on equal pay for men and women, did not mention positive action. Also, sex equality was not an explicit objective of the Community, and there was no specific legal basis provision for this area (see TOBLER 2000:143, Amsterdam). The Community nevertheless adopted a number of Directives in this area. The Second[8] Equal Treatment Directive (henceforth: the Directive) was the first instrument relevant in the present context. For decades, its Art. 2(4) remained the central Community provision on positive action, though for some time there was also Art. 6(3) of the Social Agreement. However, this latter provision did not acquire much practical importance. It related to equal pay only, and it was not binding on the UK.[9] Plus, in the framework of the Treaty revision of Amsterdam,[10] the Social Agreement was integrated into the EC Treaty which means that Art. 6(3) has ceased to exist. Instead, there is now a

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Community. These days, only two of these are still existing, the ECSC having recently expired (Art. 97 CS). It was the only one of the three original Community Treaties to have been limited in terms of time.

[8] The First Equal Treatment Directive concerned pay and later Equal Treatment Directives social security and the position of the self-employed. There is a number of additional Directives that are relevant in the context of sex equality law. A useful online overview over Community sex equality legislation currently in force is provided by the Commission at http://europa.eu.int/comm/employment_social/equ_opp/rights_en.html. As a consequence of the Amsterdam revision, an amendment of the Equal Pay Directive has been announced; see Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions, Towards a Community framework strategy on gender equality (2001-2005), COM(2000) 335 fin., para. 3.3.1. and 4.4.1.

[9] The Social Agreement was concluded in 1992 based on the Social Protocol attached to the Maastricht Treaty (see OJ 1992 C 191/90). In the Social Protocol the then twelve Member States agreed that eleven of them (all except the UK) could proceed in the field of social law. This resulted in the Social Agreement which was, therefore, not binding on the UK. Art. 6(3) of the Agreement provided: "This Article shall not prevent any Member State from maintaining or adopting measures providing for specific advantages in order to make it easier for women to pursue a vocational activity or to prevent or compensate for disadvantages in their professional careers." The only decision of the Court of Justice on this provision is Griesmar. It concerned French legislation that, for the purposes of old age pensions, granted a bonification for bringing up children to women only, to the exclusion of men who actually raise children. The Court held that such legislation is not covered by Art. 6(3) because it does not "contribute to helping women conduct their professional life on an equal footing with men" (Griesmar, para. 64). FUENTES GARCIA (2002:53) also mentions Mouflin as a positive action case involving pay. However positive action appears neither in the national court's questions nor in the Court of Justice's answers or considerations. The case concerned a French pension scheme providing for a entitlement to a retirement pension with immediate effect for women under the condition that they suffer from a disability or incurable illness which makes it impossible for them to perform their former duties or that their husband suffers from a disability or incurable illness which makes it impossible for him to undertake any form of employment. The Court simply found unlawful different treatment on grounds of sex (Mouflin, para. 28 subs.).

[10] The revised text entered into force on 1 May 1999. No changes that are relevant in the present context had been brought about by the Maastricht revision of 1992 which entered into force on 1 November 1993.

provision on positive action on the level of the Treaty itself, namely Art. 141(4) EC.[11] This in turn has led to a revision the Second Equal Treatment Directive, including its provision on positive action.[12]

The present paper concentrates on these latter provisions. The focus is therefore necessarily on employment. New sex equality legislation with a farther reach has been announced but does not exist yet.[13] Other provisions on positive action – such can be found in the revised EU Staff law,[14] in the Human Rights Charter[15] (which, however, currently does not have the standing of legislation)[16] and, outside sex equality law, in the new Directives adopted on the basis of Art. 13 EC[17] - will not be

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[11] Art. 141(4) EC is a combination of the former provision of Art. 6(3) of the Social Agreement and a proposal made by the Commission for a change of Art. 2(4) of the Second Equal Treatment Directive, see TOBLER (2000:139, Amsterdam) and immediately below.

[12] Directive 2002/73/EC amending Council Directive 76/297/EEC 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 2002 L 269/15.

[13] This is a consequence of Art. 2 EC (which includes the promotion of "equality between men and women" in the list of the tasks of the Community), Art. 3(2) EC (which establishes the principle of gender mainstreaming) and Art. 13 EC (which is a new and general legal basis provision for non-discrimination law), all of them introduced in the framework of the Amsterdam revision; see Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions, "Towards a Community framework strategy on gender equality (2001-2005), COM(2000) 335 fin., para. 3.3.1. and 4.4.1. On the term "mainstreaming", see the information of the Commission's Employment and Social Affairs Directorate at http://europa.eu.int/comm/employment_social/equ_opp/gms_en.html.

[14] Staff Regulations (Regulation 781/98/EC, ECSC, Euratom amending the Staff Regulations of Officials and Conditions of Employment of Other Servants of the European Communities in respect of equal treatment, OJ 1998 L 113/4). Art. 1a(2) provides: "With a view to ensuring ensure full equality in practice between men and women in working life, the principle of equal treatment shall not prevent the institutions of the European Communities from maintaining or adopting measures providing for specific advantages in order to make it easier for the under-represented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers." Before the revision, the issue of positive action measures was raised in the case Delauche. However, the Court did not address the issue because it found that Ms Delauche was less qualified than the male candidate who had been promoted in her place.

[15] Charter of Fundamental Rights of the European Union, OJ 2000 C 364/1. Under the title "Equality between men and women", Art. 23 provides: "Equality between men and women must be ensured in all areas, including employment, work and pay. The principle of equality shall not prevent the maintenance or adoption of measures providing for specific advantages in favour of the under-represented sex." The European Women Lawyers Association (EWLA) recommended that Art. 23(2) should be amended so as to correspond to the *acquis communautaire* and therefore provide as follows: "With a view to ensuring full equality in practice between men and women, the principle of equality shall not prevent the maintenance or adoption of measures providing for specific advantages in favour of the under-represented sex or aiming at preventing or compensating disadvantages in professional or social life. These measures should, in the first instance, aim at improving the situation of women"; see Fourth Contribution of EWLA on the future of the Union (on file with the present writer), point 5.

[16] See Commission Communication on the legal nature of the Charter of Fundamental Rights of the EU, COM(2000) 644 fin., point 4 subs.

[17] Art. 5 of the Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ 2000 L 180/22 (Race or Vertical Directive), provides: "With a view to ensuring full equality in practice, the principle of equal treatment shall not prevent any Member State from maintaining or adopting specific measures to prevent or compensate for disadvantages linked to racial or ethnic origin." Art. 7 of the Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation, OJ 2000 L 303/16 (Horizontal Directive), states: "1. With a view to ensuring full equality in practice, the principle of equal treatment shall not prevent any Member State from maintaining or adopting specific measures to prevent or compensate for disadvantages linked to any of the grounds referred to in Article 1. 2. With regard to disabled persons, the principle of equal treatment shall be without prejudice to the right of Member States to maintain or adopt provisions on the protection of health and safety at work or to measures aimed at creating or maintaining provisions or facilities for safeguarding or promoting their integration into the working environment." See further BELL (2202).

discussed. It should also be remembered that important international law exists outside the framework of EC law, in particular the United Nation's Women's Convention (Convention on the Elimination of all Forms of Discrimination against Women, CEDAW).[18]

Against this background, three provisions are relevant for the purposes of this paper. In its original version, Art. 2(4) of the Second Equal Treatment Directive provides:

> "This Directive shall be without prejudice to measures to promote equal opportunity for men and women, in particular by removing existing inequalities which affect women's opportunities in the areas referred to in Article 1(1)."

In the revised Directive, the relevant provision is Art. 2(8). It reads as follows:

> "Member States may maintain or adopt measures within the meaning of Article 141(4) of the Treaty with a view to ensuring full equality in practice between men and women."

Finally, the provision forming the basis for the Directive's revision, Art. 141(4) EC, states:

> "With a view to ensuring full equality in practice between men and women in working life, the principle of equal treatment shall not prevent any Member State from maintaining or adopting measures providing for specific advantages in order to make it easier for the under-represented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers."

These provisions are in a certain sense co-existing. First, Art. 2(4) of the Directive continued to be in existence when, on 1 May 1999, Art. 141(4) EC entered into force. Concerning the relationship between them, the Court stated in Badeck (para. 14) that the interpretation of Art. 141(4) EC would be "material to the outcome of the dispute in the main proceedings only if the Court considers that Article 2 [of the Directive] precludes national legislation such as that at issue in the main proceedings" (see also Abrahamsson, para. 40). Second, until the expiry of the implementation period for the revised Directive, the original Art. 2(4) and the new Art. 2(8) both remain relevant, depending on the state of implementation of the revised Directive in the various Member States.

The following remarks will first outline the state of law under the original version of the Second Equal Treatment Directive,[19] then describe the process of the Directive's revision and finally examine how its final version might impact positive action under Community law.

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[18] Convention on the Elimination of All Forms of Discrimination against Women (the UN's Women's Convention), United Nations Treaty Series 1249, 13 (1981). Under the title "Special measures", Art. 4(1) of the Convention provides that "[a]doption by States Parties of temporary special measures aimed at accelerating de facto equality between men and women shall not be considered discrimination as defined in the present Convention". The Committe on the Elimination of Discrimination Against Women which is monitoring the implementation of the CEDAW is currently preparing a General Recommendation on Art. 4 of the Convention. The texts of the General Recommendations can be found at http://www.un.org/womenwatch/daw/cedaw/recommendations.htm.

[19] There is one case that will not be discussed, namely Schnorbus. This is because it is not clear what is the role of Art. 2(4) in the Court's decision. The case concerned German legislation granting men who had performed military or civil service preferential access to a specific part of the legal education in the case of lack of sufficient places. The Court found that such a rule leads to *prima facie* indirect discrimination (an approach that is not, in the present writer's opinion, very convincing). The national court explicitly asked whether the rule was justified under Art. 2(4). The Court in its answer did not refer to this provision but held very generally that the contested provision takes account of the delay

B. The meaning of Art. 2(4) of the Directive

I. Recalling the Court's case law

1. Two early hints

It is well known that the Court in two early cases made remarks of a general nature regarding Art. 2(4) of the Second Equal Treatment Directive. In Hofmann (para. 20), the Court explained that sections 2 to 4 of Art. 2 "indicate, in various respects, the limits of the principle of equal treatment laid down by the Directive". In Commission v France (para. 15), the Court remarked that "[t]he exception provided for in Article 2 (4) is specifically and exclusively designed to allow measures which, although discriminatory in appearance, are in fact intended to eliminate or reduce actual instances of inequality which may exist in the reality of social life". These statements were followed by a number of years of silence on the subject on the part of the Court of Justice. It was only in the nineties that the first case in which Art. 2(4) had to be interpreted against the background of actual facts arrived at the Court.

2. A (very) unpleasant surprise: Kalanke

Kalanke, a case that gained immediate notoriety, concerned legislation of the German *Land* of Bremen according to which women had to be given precedence in appointment and promotion over equally well qualified male candidates if women were underrepresented (meaning that they made up less than 50 % of the relevant part of the work force). The validity of this law was contested by Mr Kalanke who had applied for a promotion but was not appointed because Ms Glissmann had been given preference as a consequence of the Bremen law. When the case reached Luxembourg, the Court of Justice held that a measure of the kind at issue was not acceptable under the Second Equal Treatment Directive (Kalanke, para. 15 subs.). The Court's reasoning is extremely short and, therefore, difficult to understand. An analysis shows that the Court started by noting a difference in treatment between men and women to the disadvantage of men which it called discriminatory. It then turned to the question of whether the measure was nevertheless permissible under Art. 2(4). In answering that question, the Court countered statements made by the Council in a Recommendation about positive action[20] with a reference to the character of Art. 2(4) as an exception from an individual right laid down in the Directive (namely that to equal treatment). From this the Court concluded that Art. 2(4) must be interpreted restrictively. It is on this basis that the Court found that national rules which guarantee women absolute and unconditional priority for appointment or promotion overstep the limits of Art. 2(4) of the Directive (that is, they go beyond the "promotion of equal opportunities for men and women"; Kalanke, para. 22). It should be noted that it is the principle of strict interpretation that is the decisive aspect of the Court's reasoning (see SCHIEK 1996:243). By contrast, the additional statement regarding equality of opportunity, much discussed in

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experienced in the progress of their education by men performing military or civil service and that the rule therefore is objective and proportionate. It is open whether this has to be understood as an issue of objective justification of indirect discrimination (as suggested by AG JACOBS), as one of positive action (or both of them), or – more fundamentally – as an issue of lack of comparability; see TOBLER (2001, Schnorbus).

[20] Recommendation 84/635/EEC on the promotion of positive action for women, OJ 1984 L 331/34.

academic writing, was added as a mere afterthought (Kalanke, para. 23):[21] "Furthermore, in so far as it seeks to achieve equal representation of men and women in all grades and levels within a department, such a system substitutes for equality of opportunity as envisaged in Article 2(4) the result which is only to be arrived at by providing such equality of opportunity."

3. (Somewhat) mitigating Kalanke: Marschall

Following severe criticism of this first decision in academic writing,[22] the next positive action case decided by the Court, Marschall, seemed to mitigate somewhat the harsh impression created by Kalanke. The case concerned German legislation very similar to that at issue in Kalanke, with the important difference, however, that now the national legislation contained a so-called opening clause (or savings clause or hardship rule). This clause required that specific circumstances concerning male candidates had to be taken into account and that they could lead to giving preference to a man: "Where, in the sector of the authority responsible for promotion, there are fewer women than men in the particular higher grade post in the career bracket, women are to be given priority for promotion in the event of equal suitability, competence and professional performance, unless reasons specific to an individual [male] candidate tilt the balance in his favour." Contrary to the suggestion made by AG JACOBS (see VELDMAN 1997), the Court held that in view of this clause legislation of the type at issue was acceptable since it did not grant automatic and unconditional preference to women (Marschall, para. 23 subs.).

It should be noted that in doing so, the Court explicitly recalled its statements in Kalanke regarding the nature of Art. 2(4) as a derogation.[23] To that extent, Marschall does not reflect a fundamental change of approach (MANCINI/O'LEARY 1999:346). Nevertheless, there are certain differences in approach ("a subtle or hidden change", VELDMAN 1998:409; also FLYNN 2000:263). Most importantly, the Court recognised that equal qualifications do not necessarily correspond to equal opportunities in appointment (Marschall, para. 29 and 30): "As the Land and several governments have pointed out, it appears that even where male and female candidates are equally qualified, male candidates tend to be promoted in preference to female candidates particularly because of prejudices and stereotypes concerning the role and capacities of women in working life and the fear, for example, that women will interrupt their careers more frequently, that owing to household and family duties they will be less flexible in their working hours, or that they will be absent from work more frequently because of pregnancy, childbirth and breastfeeding. For these reasons, the mere fact that a male candidate and a female candidate are equally qualified does not mean that they have the same chances." It should also be noted that the Court did not repeat its earlier remarks regarding equality of opportunity and equality of result.

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[21] In so far the present writer would not agree with MANCINI/O'LEARY (1999:345) according to whom Kalanke "focused almost entirely on the difference between equality of opportunity and equality of result".

[22] A list of the enormous number of annotations that were written on this decision (as well as on the others discussed below) can be found on the Court's home page, at http://www.curia.eu.int/en/recdoc/notes/index.htm where the judgments are listed according to their number. In the following discussion of the Court's case law, only few comments are mentioned; they are meant to serve as mere examples.

[23] Marschall, para. 32: "However, since Article 2(4) constitutes a derogation from an individual right laid down by the Directive, such a national measure specifically favouring female candidates cannot guarantee absolute and unconditional priority for women in the event of a promotion without going beyond the limits of the exception laid down in that provision (Kalanke, paragraphs 21 and 22)." According to PIRSTNER (2000:479), the Court with this statement meant to confirm the principle of strict interpretation.

4. Hints of a new approach? Badeck

The notion of equality of opportunity reappeared in the Court's decision on the case of Badeck, though in one specific context only. Badeck again concerned German legislation, this time the Hesse Equality Act which provided for a women's advancement plan. Mr Badeck was one of 46 members of the *Landtag* (Parliament) of Hesse who applied to the courts for a review of the legality of this Act which they considered incompatible both with the Constitution of the Land of Hesse and with EC sex equality law. The Court began by summarizing its earlier case law on positive action measures by stating that

> "a measure which is intended to give priority in promotion to women in sectors of the public service where they are under-represented must be regarded as compatible with Community law if
> - it does not automatically and unconditionally give priority to women when women and men are equally qualified, and
> - the candidatures are the subject of an objective assessment which takes account of the specific personal situations of all candidates" (Badeck, para. 23).

Based on this formula, the Court, unsurprisingly, held that legislation of the type in question was acceptable (Badeck, para. 28 subs.). So far, the decision is simply repeating Marschall. However, there are certain additional aspects that are remarkable. First, it should be noted that the Court in Badeck did not explicitly reiterate the "derogation approach" it had used in Kalanke and confirmed in Marschall. Instead, it only recalled the final findings in these cases (Badeck, para. 17 subs.).

Second, the case also concerned certain stimulating measures, including a rule of preference for women in the context of the allocation of training places (Badeck, para. 45 subs.).[24] In that regard, the Court spoke about the intention to introduce a strict result quota with regard to professional training in order to establish a balanced allocation of training places at least in the public service. It added immediately that such a quota system does not necessarily entail total inflexibility given that if there are not enough applications from women it was possible under the rules at issue for more than half of the places to be taken by men. The Court further noted that it was not places in employment that were reserved for women but only places in training with a view to obtaining qualifications with the prospect of subsequent access to trained occupations in the public service. Further, the rule applied only to training places for which the State did not have a monopoly. From this the Court concluded that no male candidate was definitively excluded from training and that the provision at issue therefore merely improved the chances of female candidates in the public sector. According to the Court, this type of rule "forms part of a restricted concept of equality of opportunity" (Badeck, para. 52) and as such is acceptable under Art. 2(4) of the Directive. This finding is remarkable not only because it concerns result quota but also because the preferential treatment was not made dependent on equal qualification for the training (PIRSTNER 2000:480). According to LOENEN (2001:91), this means that preference had to be given to women even in the case of merely sufficient qualification (that is, even if there was a better qualified man).[25]

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[24] The Hesse rules provided that in trained occupations "in which women are under-represented, they are to be taken into account to the extent of at least one half in the allocation of training places" though this did not apply where training was provided by the State only.

[25] This was different from yet another aspect of the contested legislation, namely the setting of binding targets for temporary posts in the academic service and for academic assistants. According to this rule, there must be a minimum percentage of women which is at least equal to the percentage of women among graduates, holders of higher degrees and students in each discipline. The Court found that kind of approach acceptable in view of the fact that preference was given to women only in the case of equal qualification (Badeck, para. 39 subs.).

A third and remarkable aspect of the Badeck decision is that there is an explicit reference to substantive equality. In para. 32, the Court implicitly held that for the purposes of the assessment of a given candidate's qualifications - which is part of the selection procedure prescribed by the Hesse Equality Act – *prima facie* indirect discrimination against men caused through reliance on certain qualification criteria is acceptable (see also the later case of Abrahamsson,[26] mentioned below). In particular, under the Hesse law capabilities and experience which have been acquired by carrying out family work are to be taken into account in so far as they are of importance for the suitability, performance and capability of candidates. Further, the family status or income of the partner is immaterial, and part-time work, leave and delays in completing training as a result of looking after children or dependants in need of care must not have a negative effect. The Court, while noting that the legitimacy of these criteria was not challenged in the main proceedings, nevertheless noted that they, "although formulated in terms which are neutral as regards sex and thus capable of benefiting men too, in general favour women. They are manifestly intended to lead to an equality which is substantive rather than formal, by reducing the inequalities which may occur in practice in social life." This seems to introduce a different and new element in the discussion on quotas. At the same time, the statement just mentioned is a very cautious one: it is made in the context of a mere *obiter dictum* concerning a measure whose legality was not contested and which, if at all, could be said to lead to indirect discrimination at the most. In addition, the statement did not refer to positive action measures as such but only to the determination of candidates' qualifications.

5. One step too far for the Court: Abrahamsson

The next case dealt with the most far reaching national measures brought before the Court so far. Abrahamsson concerned Swedish positive action legislation relating to academic university posts. The national rules at issue provided that women were to be hired preferentially if they were sufficiently qualified though this was not to be applied in cases where the difference between the candidates' qualifications was so great that giving preference to the woman would give rise to a breach of the requirement of objectivity in making the appointments. As an explanation for this approach, the Swedish Government stated that progress towards a fairer allocation of teaching posts as between the sexes has been particularly slow, so that an extraordinary effort was needed in order to ensure, in the short term, a significant increase in the number of female professors. Indeed, women's particular under-representation in this area is so evident that the former president of the German Federal Constitutional Court, Prof. Jutta Limbach, once said that "the university is the most retarded of all provinces".[27] FREDMAN (1999:201) explains that , in the context of sex and race, the uncritical use of merit (in our context: qualification) as a criterion for employment or promotion could perpetuate disadvantage because, despite its appearance of scientific objectivity, the choice of criteria for deciding merit may well incorporate implicit discriminatory assumptions (also ARIOLI 1992:230). Some even argue that there is no such thing as equal qualifications (ABELE 1997:758, JAROSCH 2001:107). The Court in its decision did not address

[26] Abrahamsson, para. 47 and 48: "In paragraphs 31 and 32 of Badeck, cited above, the Court held that it is legitimate for the purposes of that assessment for certain positive and negative criteria to be taken into account which, although formulated in terms which are neutral as regards sex and thus capable of benefiting men too, in general favour women. […] The clear aim of such criteria is to achieve substantive, rather than formal, equality by reducing de facto inequalities which may arise in society and, thus, in accordance with Article 141(4) EC, to prevent or compensate for disadvantages in the professional career of persons belonging to the under-represented sex."

[27] FRANKFURTER RUNDSCHAU (1994).

these concerns (Abrahamsson, para. 49 subs.). It simply emphasised that the criteria used in the appointment process must be transparent and amenable to judicial review in order to obviate any arbitrary assessment of the qualifications of candidates. The Court found that these requirements were not fulfilled in the case of rules such as those at issue.

6. Working conditions and positive action: Lommers

The most recent case decided by the Court in the context of positive action in favour of women is Lommers. It is different from the cases already mentioned in that it does not concern women's preferential access to employment but rather a specific condition applying in the case of already existing employment. At issue were rules applicable in the case of employment with the Dutch Ministry of Agriculture and Fisheries which, in principle, made subsidised nursery places available to women only (exceptions in favour of men were possible). After having found that this concerns an employment condition, rather than pay (Lommers, para. 26 subs.), the Court first of all addressed the issue of comparability. It noted that, with regard to the need for child-minding facilities, the situations of employed young mothers and fathers who actually assume the upbringing of their children are comparable and that, therefore, the rules at issue involve different treatment within the meaning of Art. 2(1) of the Directive (Lommers, para. 30).[28] Referring to its findings in Badeck regarding training places (which, it will be remembered, included a reference to "a restricted concept of equality of opportunity"), the Court explained that similar considerations applied in the present context. It held that measures of the type at issue meet the guidelines given in the Council Recommendation on Positive Action[29] and are acceptable under Art. 2(4) of the Directive (Lommers, para. 34). The Court noted that the employment situation of women in the relevant Dutch Ministry was characterised by a significant under-representation. It also pointed out that a proven insufficiency of suitable and affordable nursery facilities is likely to induce female employees in particular to give up their jobs.

At the same time, the Court explicitly confirmed the character of Art. 2(4) as a derogation. It stated that "in determining the scope of any derogation from an individual right such as the equal treatment of men and women laid down by the Directive, due regard must be had to the principle of proportionality which requires that derogations must remain within the limits of what is appropriate and necessary in order to achieve the aim in view and that the principle of equal treatment is reconciled as far as possible with the requirements of the aim thus pursued" (Lommers, para. 39). The difference between this statement and that in Kalanke is that there the consequence of the provision's nature as a derogation was that it had to be interpreted restrictively, while now the only consequence mentioned by the Court is the requirement of proportionality. It could also be added that AG ALBER in his opinion on the case explained that Art. 2(4) of the Directive is an expression of the idea of substantive equality, as had been Art. 6(3) Social Agreement and as is now Art. 141(4) EC (Lommers, point 88 of the AG's opinion). However, the Court did not take up this point.

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[28] This meant that the case was not comparable to Abdoulaye where the Court found that different treatment of men and women did not amount to sex discrimination because of the difference in situation of women and men in the relevant context.

[29] Recommendation 84/635/EEC on the promotion of positive action for women, OJ 1984 L 331/34.

II. Some comments

Three elements of particular importance emerge from this case law: first, the statement that Art. 2(4) of the Directive is a derogation, second, the consequences of this assessment for the provision's interpretation, and, third, the concept of equality underlying the provision. The following remarks will analyse how these elements developed through the case law mentioned.

1. Art. 2(4) of the Second Equal Treatment as a derogation

As SENDEN (1996:159) explains, provisions such as Arts. 2(2) to (4) of the Directive in its original version can either be seen as derogations from the principle of equal treatment which, therefore, lead to *(prima facie)* direct discrimination, or they (in particular sections 3 and 4) might be considered as means for achieving real equality. The author adds that an examination of Art. 2 makes clear that the European legislator has opted for the first approach and that, therefore, the finding that Art. 2(4) is an exception is inherent in the conception of the Directive. Indeed, an analysis of Art. 2 shows that its underlying principle is that of equal treatment (section 1), with certain instances of different treatment nevertheless being accepted (sections (2) to (4): "This Directive shall be without prejudice to ….). As WENTHOLT (1996:147) notes, the very structure of this Directive "shows that equal treatment is the norm, with even preferential treatment constructed as an exception to it. In other words, in EEC terms, equal treatment means identical treatment."

Against this background and given the structure of Art. 2 of the Directive, the Court's finding in Kalanke that section 4 concerns a derogation is certainly not surprising (TOBLER 1997:94). At the same time, it is well known that AG DARMON in his opinion on the Hofmann case (point 9) argued that the provision is not really an exception and therefore should not be interpreted narrowly: "The exception set out in Article 2 (4) is in a category of its own. [..] It merely appears to make an exception to the principle: in aiming to compensate for existing discrimination it seeks to re-establish equality and not to prejudice it. In other words, since it presupposes that there is an inequality which must be removed, the exception must be broadly construed." Clearly, the Court did not adhere to this interpretation when handing down the Kalanke decision. Indeed, the derogation approach was explicitly repeated in Marschall and although it was not mentioned either in Badeck nor in Abrahamsson, Lommers shows that this element is still relevant.[30]

From this it appears clearly that even under the most recent case law Art. 2(4) is understood as a derogation because the starting point under the Directive is equal treatment. Consequently, positive action in favour of women is still qualified as discrimination against men[31] under Art. 2(1) of the

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[30] Compare, however, SCHIEK (2002:298) according to whom the Court's case law suggests that allowing some scope for positive action is more a question of balancing different aspects of the principle of equality with each other than of exceptions from its application.

[31] This "discrimination" can be direct or indirect, depending on whether or not the distinction made between men and women is expressly based on sex. By contrast, PRECHAL (1996:1252) argues that as far as Art. 2(4) of the Directive is concerned, only measures expressly aiming at women should be understood as positive action measures. In such a framework, the "discrimination" against men caused by positive action measures can only be direct: "It is submitted that as long as the measures at issue do not explicitly favour women, Article 2(4) is entirely irrelevant." PRECHAL's statement that "neutral measures will not run contrary to the prohibition of discrimination" seems to disregard the possibility of indirect discrimination.

Directive.[32] Though this is only a *prima facie* finding that can be corrected through the application of Art. 2(4), the fact remains that Community law in this point is not fully in line with Art. 4(1) CEDAW which states that positive action measures do not constitute discrimination - including "positive discrimination", a term sometimes used in the context of positive action measures (even by the Court in Abrahamsson)[33] but rightly criticised in literature (JAROSCH 2001:47).

2. How to interpret a derogation

In Kalanke, the Court also held that, as an exception, Art. 2(4) of the Second Equal Treatment Directive must be interpreted restrictively. This proved decisive for the outcome of the case, namely the Court's finding that absolute and unconditional measures in favour of women are not covered by Art. 2(4). It should be noted that the statement that a derogation needs to be interpreted restrictively corresponds to a general approach under Community law which was first developed outside the area of sex equality.[34] Again, it was AG DARMON in his opinion on the Hofmann case (point 9) who first argued that Art. 2(4) should be construed broadly. His argument was based on his conviction that Art. 2(4) is not, in terms of its nature, an exception. However, given that the Court explicitly confirmed this character as an exception, the question now must be whether the requirement of a narrow interpretation follows necessarily. In fact, the Court's own case law shows that this is not the case. The requirement was mentioned explicitly only in Kalanke. According to PIRSTNER (2000:479), the fact that it was missing in later cases can be interpreted as a move away from it. In Lommers, where the Court stated that "in determining the scope of any derogation from an individual right […], due regard must be had to the principle of proportionality", proportionality seems to take the place formerly held by the element of a restrictive interpretation. The description in Lommers of the test in the terms "appropriate and necessary in order to achieve the aim in view" and "reconciliation, as far as possible, of the principle of equal treatment with the aim requirements of the aim thus pursued" would seem to correspond to the classic German definition of proportionality.[35]

It is submitted that the above indicates an important shift in the Court's case law. In Kalanke, the national court examined the issue of proportionality but the Court of Justice did not mention it. This was noted by several commentators. FENWICK (1998:513), for instance, argues that it could have been asked whether, in permitting direct discrimination against men, the measure went beyond what was necessary and appropriate to achieve the end in question, namely the furtherance of substantive equality.

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[32] LOENEN (2001:92), for instance, criticises this approach as conceptually wrong: rather than as different treatment of two individuals because of sex, the Court should view positive action measures as a classification based on sex whose aim it is to achieve a certain social policy.

[33] An example for the argumentative difficulties that may arise in the context of legislation such as that of the Community is provided by the writings of MARTIN (1998:317). This author, who indeed uses the term "discrimination positives", writes that "dans la mesure où un système de quotas a précisément pour objectif spécific de créer une discrimination, il est inacceptable puisqu'il aboutit à vider de son sens le principe d'égalité. En d'autres termes, le principe d'égalité ne permet pas de remédier à une inégalité de fait par une discrimination de droit."

[34] See for instance SCHILLING (1996).

[35] According to EMILIOU (1996:25 subs.), the first element defined by the German Constitutional Court, namely suitability, means that the desired result can be furthered with the help of the means at issue. The second element, necessity, requires that the measure is permissible only if no less restrictive measure is available for the achievement of the legitimate objective pursued. Finally, the third element, proportionality *stricto sensu*, requires that the seriousness of the intervention and the gravity of the reasons justifying it are in adequate proportion to each other. At the same time, the author notes that the use of terminology and the counting of the elements in Germany lack consistency.

VELDMAN (1995:13) points out that in case law such as Johnston, which also concerned a "derogation" under Art. 2 of the Directive, proportionality was explicitly referred to by the Court. According to SENDEN (1996:152), the obscurity of Kalanke regarding the meaning of the absolute and unconditional nature of a measure "is due to the way in which the Court put the Bremen rule to the proportionality test, or rather, failed to put it to the test". Similarly, CHRISTOPHE TCHAKALOFF (1997:102) suggests that the proportionality control "est quasiment passé sous silence dans l'arrêt Kalanke, sans doute parce qu'il gênait la motivation". Rather than that of strict interpretation, a strict proportionality test was suggested in academic writing as the appropriate approach (PRECHAL 1996:1253, see also FREDMAN 1999:215, LOENEN/VELDMAN 1995:1526, SIEGWART 1998:342). This is precisely what seems to be reflected in Lommers.[36]

That proportionality should be a relevant element in the context of non-discrimination law is not surprising given that it is a general principle in Community law (see for instance TRIDIMAS 1996 and LEADER 1996). However, it should be noted that, from a conceptual point of view, the two elements of a narrow interpretation and of proportionality of the measure are not situated on the same level of the analysis. The principle of narrow interpretation concerns the interpretation of a certain term in the provision at issue (in the case of Art. 2(4) of the Directive: "to promote equal opportunity for men and women") which, as such, must be interpreted restrictively. The proportionality test follows later, namely when assessing whether a measure that has passed the hurdle of being covered by a narrowly interpreted provision in addition is proportionate.[37] By replacing the requirement of strict interpretation by that of proportionality, the Court in Lommers moved away from this traditional approach. Whatever the meaning of this in the framework EC law in a wider sense, in the present specific context it means that the decisive test is no longer that of strict interpretation but only that of proportionality.

3. Art. 2(4): what concept of equality?

Finally, what about the equality concept that is underlying Art. 2(4) of the Second Equal Treatment Directive? Obviously, the place of positive action in the framework of non-discrimination law depends on the concept of equality underlying such law. In academic writing, the structure of the Second Equal Treatment Directive under which Art. 2(4) is framed as a derogation from the principle of equal treatment is identified as an expression of formal equality. This approach is then contrasted with the development of a theoretical concept of equality where preferential treatment is seen as an expression of substantive equality and as necessary for its achievement (WENTHOLT 1996:147).[38] Against this background, the conception of the Directive is described as an uneasy compromise between substantive

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[36] In Abrahamsson the Court also referred to the requirement of proportionality, but here only in the context of Art. 141(4) EC and in a less explicit way; see below … #

[37] For a recent example, see the Court's approach in Commission v Portugal, para. 49 and 50. In the context of free movement of capital, the Court first deals with the possible derogation grounds and then refers to the subsequent requirement of proportionality: "The free movement of capital, as a fundamental principle of the Treaty, may be restricted only by national rules which are justified by reasons referred to in Article 73d(1) of the Treaty or by overriding requirements of the general interest and which are applicable to all persons and undertakings pursuing an activity in the territory of the host Member State. Furthermore, in order to be so justified, the national legislation must be suitable for securing the objective which it pursues and must not go beyond what is necessary in order to attain it, so as to accord with the principle of proportionality […]."

[38] The same could also be said with regard the general and unwritten equality principle in EC law which requires that "comparable situations must not be treated differently and different situations must not be treated in the same way unless such treatment is objectively justified"; Sermide, para. 28.

and formal equality (FENWICK 1998:511). As for the specific provision of Art. 2(4), it is said that it reflects a concern for substantive equality (e.g. AG TESAURO in his opinion on Kalanke, point 7 subs., AG SAGGIO in Badeck, points 26-28, AG ALBER in his opinion on Lommers, point 88; LANQUETIN 1996:501, SENDEN 1996:159, FREDMAN 1999:201). The same analytical framework is also applied to the Court's case law. Thus, Kalanke is criticised for reflecting a formal equality approach (e.g. PRECHAL 1996:1255, CHRISTOPHE TCHAKALOFF 1997:97, also MERTENS DE WILMARS 2000:185),[39] and the Court's remarks in Marschall concerning the factually unequal chances of men and women are seen as an indication of a substantive approach to equality (e.g. BARNARD/HEPPLE 2000:577, FENWICK 1998:514, MANCINI/O'LEARY 1999:336).

Whilst it is certainly possible to analyse Art. 2(4) as well as the Court's case law on it in terms of formal and substantive equality, it should be noted that these terms appear neither in the wording of Art. 2(4) of the Directive nor in the Court's analysis of that provision.[40] Rather, the Court focuses on the notion of equality of opportunity, in line with the wording of Art. 2(4) which indicates that the aim of this provision is the "promotion of equal opportunity for men and women". It is on the interpretation of this notion that the Court's help was needed by the national courts requesting preliminary rulings in the context of specific instances of positive action measures under national law. It is noteworthy that the Court in its case law never gave a *general* definition of the notion against which it then could have examined the specific type of the measures at issue (TOBLER 1997:96). In Kalanke, the Court merely indicated in its "furthermore" remark that equality of opportunity is to be distinguished from equality of result.[41] This view, which to some extent must have been influenced by AG TESAURO's opinion on the case, has been criticised as misconceived and as reflecting a formal notion of equality of opportunity. PETERS (1996:190 subs.), for instance, argues that in Kalanke the Court shows a lack in readiness to acknowledge the tensions arising from different equality paradigms (see also VELDMAN 1995:17, LOENEN/VELDMAN 1995:1524, MOORE 1996:159, SCHIEK 1997:595, TOBLER 1997:97 subs.). The German Federal Labour Court which had referred Kalanke to the Court of Justice in its follow-up decision[42] noted that the Court "obviously" did not adopt AG TESAURO's inappropriate views on this issue since the Court did not oppose the two notions in principle; it only held that certain types of quota (namely those of an automatic nature) can go beyond the mere promotion of equality of opportunity. That was confirmed in the Marschall decision. However, after this decision FREDMAN (1999:205 subs.) still sees a need for clarification. She in particular remarks that there seems to be no clear-cut distinction between equality of opportunity and equality of results since the Court did not explain why an

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[39] SCHIEK (1996:243) argues that the national court's second question in Kalanke was, in fact, about substantive equality. This question read (Kalanke, para. 11): "Must Article 2(1) of Council Directive 76/207/EEC be interpreted, having regard to the principle of proportionality, as meaning that it is not permissible to apply statutory provisions under which, when a position in a higher pay bracket is being assigned, women with the same qualifications as men applying for the same position are to be given priority if women are under-represented, there being deemed to be under-representation if women do not make up at least half of the staff in the individual pay brackets in the relevant personnel group within a department, which also applies to the function levels provided for in the organization chart?" According to SCHIEK, this is asking "whether the equality principle contained in Article 1(1) and Article 2(1) of the Directive embodies substantial equality – like the equality principle in the German constitution. If this was so it would be possible to view preferential treatment of women as being not in breach of the equality principle at all." SCHIEK therefore thinks it a pity that the Court did not answer that question.

[40] When the Court mentioned substantive equality in Badeck and Abrahamsson, this was with regard to a different issue, namely the criteria used in order to assess candidates' qualifications. In fact, references to substantive equality have appeared in the Court's case law only recently, and then only in certain specific contexts; see Thibault and Mahlburg.

[41] These notions had already been opposed to each other by VOGEL-POLSKY (1989:7 subs.), in a study on positive action, done for the Council of Europe in 1989 and therefore independently of Art. 2(4) of the Directive.

[42] Judgment of 5 March 1996, reported in Europäische Zeitschrift für Wirtschaftsrecht 1996, 474-479.

absolute and unconditional measure was not allowed but one with a savings-clause was.[43] Neither was there a general definition in Badeck where the Court explained that result quota with regard to training places can be acceptable because they reflect "a restricted concept of equality of opportunity". After having used this term, the Court merely emphasised that it is not places in employment which are reserved for women but places in training and that the relevant Member State did not have a monopoly for the training places at issue. In Lommers, the Court simply repeated those statements and held that similar considerations applied in the present case.

Therefore, from this case law it can only be concluded that the notion of the "promotion of equality of opportunity" does not exclude in principle measures leading to a certain result (see PIRSTNER 2000:479). In that sense, MANCINI/O'LEARY's (1999:342) interpretation of Kalanke as reflecting an assumption by the Court that equality of result "is not a goal which can be regulated; rather it is to be achieved in the thick of social relations by exploiting the equal starting points which the law may provide" does not seem accurate under the case law after Kalanke. The Court's approach in Badeck rather reflects the view of AG SAGGIO who in his opinion on this case explained that positive action measures may "be designed not merely to guarantee women an equal opportunity at the starting-point by creating the conditions to enable them to compete on an equal footing for each particular post, but to have a real effect on their social integration by giving them actual priority in appointment and promotion" (Badeck, points 26-28 of the AG's opinion). This development reflects the fact that equality of opportunity can be defined either in a narrow (or formal) or in a wide (substantive) way. According to JACOBS (1994:61 subs.), formal equality of opportunity "requires that everyone have the same legal rights of access to all advantaged social positions and offices and these positions and offices be open to talents in the sense that they are to be distributed to those able and willing to strive for them", whilst substantive equality of opportunity means that "those who are at the same level of talent and ability, and have the same willingness to use them, should have the same prospects of success regardless of their initial place in the social system" (see also KOGGEL 1994:43 subs.). This latter approach is clearly reflected in Badeck where the Court states that if there are not enough applications from women for trainings places it is possible for more than half of the places to be taken by men. The conclusion must be that there is an important development in the Court's case law regarding the notion of equality of opportunity. However, even under the Court's modified approach an important limitation of Art. 2(4) of the Second Equal Directive still lies in the fact the provision aims at the *promotion* of equality of opportunity only, rather than at is realization. The Court itself so far has not linked its understanding of the promotion of equality of opportunity to either formal of substantive equality. Finally, it remains open what equality of opportunity means in a general sense.

Summarising the above, it appears that in the course of the Court's case law regarding Art. 2(4) of the Directive some important changes occurred. As case law stands at this point of time, it is characterised by the following elements: first, the Court insists on conceiving of Art. 2(4) as an exception to the right to equal treatment; second, as an exception, this provision must be interpreted in the light of the principle of proportionality; third, the notion of the "promotion of equality of opportunity" does not exclude in principle measures aiming at a certain result, though what it means in a general sense is open.

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[43] According to FREDMAN (1998:206), this can only be explained by pointing out that the contested measure in Marschall aimed at a problem that, "from the UK or US perspective, looks like a classic indirect discrimination or disparate impact scenario". MANCINI/O'LEARY (1999:346) consider that the Court's approach "might be defined as follows: the Court strictly scrutinises measures which entail direct discrimination while a more lenient test is applied to indirect discrimination and those forms of affirmative action which provide a tie-break rule in recruitment and promotion procedures. It is impossible to squeeze more than this succinct formula from the case law."

C. Revising the Directive

I. A first attempt after Kalanke

According to HINTON (1997:233 subs.), the Court's primary objective in Kalanke was not to promote the rights of women in the workplace but rather to enhance the market. The author therefore suggested that women's rights advocates should shift their focus away from reliance on the Court to effect social change and gender equality in the workplace and find alternative means of changing EC law. Following Kalanke the Commission took steps in this direction in order to limit the perceived damage resulting from the judgment. The Commission issued a Communication[44] concerning the interpretation of the Court's decision in which it also suggested amendments to the text of Art. 2(4) of the Directive:[45] "This Directive shall be without prejudice to measures to promote equal opportunity for men and women, in particular by removing existing inequalities which affect the opportunities of the under-represented sex in the areas referred to in Article 1(1). Possible measures shall include the giving of preference, as regards access to employment or promotion, to a member of the under-represented sex, provided that such measures do not preclude the assessment of the particular circumstances of an individual case." Comments on the Commission's initiative were not very favourable. Thus, SCHIEK (1996:245) doubted that it was wise to make such proposals before the Court decided on the Marschall case, then pending,[46] and PRECHAL (1996:1258) raised the question whether the Commission's proposal did not amount to throwing out the baby with the bath water. Whatever the merit of the Commission's proposal, it never got into law because it was "overtaken" by the Amsterdam Treaty revision which led to the adoption of Art. 141(4) EC, as already mentioned.[47]

II. Revising the entire Directive

1. A new proposal and Parliament's first reading

After the Amsterdam Treaty revision, the Commission took steps in the direction of a major overhaul of the Second Equal Treatment Directive which was at the same time intended to take account of the Court's case law on the Directive. The Commission's new proposal[48] was based on Art. 141(3) EC

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[44] Communication from the Commission to the European Parliament and the Council on the Interpretation of the Judgment of the Court of Justice on 17 October 1995 in Case C-450/93, Kalanke v Freie Hansestadt Bremen, COM(96) 88 fin.

[45] Proposal for a Council Directive amending Directive 76/207/EEC 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, COM(1996) 93 fin., OJ 1996 C 179/8.

[46] According to FENWICK (1998:515), the definition proposed by the Commission was indeed rendered redundant by the Marschall decision.

[47] As in fact it is women who are discriminated against and therefore in need of positive action, the neutral character of this provision is an obvious shortcoming. At least the Member States have agreed on a declaration showing a certain awareness of this point: "When adopting measures referred to in Article 119(4) of the Treaty establishing the European Community, Member States should, in the first instance, aim at improving the situation of women in working life."; Declaration 28 is part of the Amsterdam Draft Treaty and can be found at OJ 1997 C 340, p. 136.

[48] Proposal for a Directive of the European Parliament and of the Council amending Council Directive 76/207/EEC 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, COM(2000) 334 fin., OJ 2000 C 337 E/204, see points 4 and 43.

which is one of the new legal basis provisions introduced through the Treaty revision of Amsterdam and which requires the co-decision procedure according to Art. 251 EC (TOBLER 2000:145 subs., Amsterdam). As far as positive action is concerned, recital 7 in the preamble to the proposed text stated: "The possibility for Member States to maintain or adopt positive action measures is enshrined in Article 141(4) of the Treaty. This Treaty provision makes the existing Article 2(4) of the Directive 76/204 redundant. The publication of periodical reports by the Commission on the implementation of the possibility offered by Article 141(4) will help Member States to compare the way it is implemented and citizens to have a full picture of the situation existing in each Member State." As for Art. 2(4) of the original Directive, the Commission proposed that it be replaced by the following: "On the basis of the information provided by the Member States pursuant to Article 9, the Commission will adopt and publish every three years a report establishing a comparative assessment of the positive measures adopted by the Member States pursuant to Article 141(4) of the Treaty." In its Explanatory Memorandum, the Commission wrote that this provision "implements Article 141, paragraph 4, of the Treaty by stating that Member States are entitled to adopt positive action measures to promote equality for men and women and should report on their activities regularly". The Commission also explained that the proposed replacement of Art. 2(4) "creates an obligation for the Commission to periodically report on the best of information provided by Member States on the use by Member States of the possibility granted to them by Article 141(4) of the Treaty to adopt positive action measures with a view to ensuring full equality in practice".

During the legislative procedure, this proposal underwent important changes. Whilst the Economic and Social Committee[49] welcomed the thrust of the Commission's proposal, the European Parliament voiced criticism. In a report tabled in the framework of Parliament's first reading on 16 May 2001, the rapporteur of the Committee on Women's Rights and Equal Opportunities, Ms Heidi Anneli Hautala,[50] suggested the following amendment to the preamble (Amendment 11, p. 12 of the report): "The possibility for Member States to maintain or adopt positive actions *with a view to ensuring full equality in practice of women and men in working life* is enshrined in Article 141(4) of the Treaty. This Treaty provision makes the existing Article 2(4) of the Directive 76/204 redundant. *Declaration No 28 annexed to the Treaty states that positive measures should, in the first instance, aim at improving the situation of women in working life.* The publication of *annual* reports by the Commission on the implementation of the possibility offered by Article 141(4) *will contribute to the dissemination of good practices. Such reports* will *also* help Member States *to realise the importance and necessity of such measures* compare the way *these provisions are* implemented and citizens to have a full picture of the situation existing in each Member State. *Such reports should be integrated into the annual report on the employment situation."* The Committee explained that this text "better reflects the spirit and the wording of the

[49] Opinion of the Economic and Social Committee on the 'Proposal for a Directive of the European Parliament and of the Council amending Council Directive 76/207/EEC 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 2001 C 123/81, point 3.6.

[50] Report on the proposal for a Directive of the European Parliament and of the Council amending Council Directive 76/207/EEC 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, A5-0173/2002 (see http://www2.europarl.eu.int/omk/sipade2?PUBREF=-//EP//TEXT+REPORT+S-COM+0+FORM+HTML+V0//EN, under "1999-2004" and "Women's Rights, Equal Opportunities"). The document also reproduces the opinions of the Committee on Industry, External Trade, Research and Energy (p. 37 subs.) and of the Committee on Employment and Social Affairs (p. 40 subs.). Part of the latter's suggestion for a positive action provision reads: "Measures providing for specific advantages with a view to ensuring full equality in practice between men and women in working life do not constitute discrimination and should in the first instance aim at improving the situation of women, are temporary and will lapse when full equality of opportunities and treatment has been achieved."

Amsterdam Treaty, as it recognises that positive actions must overcome de facto inequality". As for the proposed provision on positive action, the report stated: "The reference to Art. 9 of the Directive must be deleted, because it refers to exceptions to the principle of equality of women and men while positive action measures are not exceptions." (Amendment 26, p. 21 of the report). Instead, the Committee suggested the following text (Amendment 27, p. 22 of the report): "1. Positive actions shall consist of measures aiming to secure full equality in practical terms between women and men in professional activity, by providing in particular for specific advantages designed to facilitate the exercise of a profession by the under-represented sex or to counteract or compensate for disadvantages in the areas referred to in Article 1(1). Positive actions shall in the first instance aim at improving the situation of women. They shall be temporary and elapse when full equality for women and men has been achieved. 2. Member States shall submit annual reports […]." The Committee explained: "It should be made clear that positive actions are justified as long as the phenomenon of inequality exists, given that they are by their very nature temporary and cannot constitute discrimination." The European Parliament adopted Amendments 11, 26 and 27 in its vote on the amendments proposed in the Hautalaa report on 31 May 2001.[51]

2. The revised proposal, the Council Common Position and Parliament's second reading

The Commission accepted Amendments 26 and 11 (though the latter only in part) but did not incorporate Amendment 27. In its revised proposal,[52] the provision on positive action read as follows: "Member States shall submit reports to the Commission every two years on the positive actions they adopt or maintain and on their implementation, on the basis of which the Commission shall adopt and publish a report every two years establishing a comparative assessment of the positive measures which are in effect in each Member State pursuant to Article 141(4) of the Treaty and in the light of Declaration No 28 annexed to the Treaty." The Council did not accept all of the amendments proposed by Parliament and therefore on 23 July 2001 adopted a Common Position,[53] in accordance with Art. 251(2) EC. The Council voted in favour of replacing Art. 2(4) of the Second Equal Treatment Directive by the following text: "Member States may maintain or adopt measures within the meaning of Article 141(4) of the Treaty with a view to ensuring full equality in practice between men and women". However, the European Parliament's Committee on Women's Rights and Equal Opportunities did not consider this sufficient. In the framework of Parliament's second reading, the Committee on 17 October 2001 tabled a Recommendation[54] in which it suggested the following version of Art. 2(4): "Member States may maintain or adopt *positive* measures within the meaning of Article 141(4) of the Treaty with a view to

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[51] OJ 2001 C 47 E/19.

[52] Amended proposal for a Directive of the European Parliament and of the Council amending Council Directive 76/207/EEC 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, COM(2001) 321 fin., OJ 2001 C 270 E/9.

[53] Common Position (EC) No 32/2001 of 23 July 2001adopted by the Council, acting in accordance with the procedure referred to in Article 251 of the Treaty establishing the European Community, with a view to adopting a Directive of the European Parliament and of the Council amending Council Directive 76/207/EEC 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 2001 C 307/5.

[54] Recommendation for Second Reading on the Council common position for adopting a Directive of the European Parliament and of the Council amending Council Directive 76/207/EECon the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, A5-0358/2001 (see http://www2.europarl.eu.int/omk/sipade2?PUBREF=-//EP//TEXT+REPORT+S-COM+0+FORM+HTML+V0//EN, under "1999-2004" and "Women's Rights, Equal Opportunities").

ensuring full equality in practice between men and women. *Positive measures shall provide for specific advantages in order to make it easier for the under-represented sex to pursue a vocational activity, or to prevent or compensate for disadvantages in professional careers."* The Committee explained that it "is of paramount importance to include in the Directive a definition of positive measures fully in line with the provisions of the Treaty" (Amendment 8, p. 12 of the Recommendation). On 24 October 2001, the European Parliament adopted a Legislative Resolution on the Council's Common Position[55] providing for this latter version.

3. Conciliation and adoption

Following the above, the Commission[56] accepted that a description of positive measures could be given in the Directive's recitals providing the wording of the Treaty was respected. As for the Council, it once again did not accept all of the amendments adopted by the European Parliament. Consequently, the Conciliation Committee was convened in accordance with Art. 251(3) EC. On 19 April 2002, this Committee agreed on a joint text[57] which regarding positive action contains the text mentioned earlier. In the preamble, recital 14 reads: "Member States may, under Article 141(4) of the Treaty, maintain or adopt measures providing for specific advantages, in order to make it easier for the under-represented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers. Given the current situation, and bearing in mind Declaration 28 to the Amsterdam Treaty, Member States should, in the first instance, aim at improving the situation of women in working life." As for the reporting duty mentioned in the Commission proposal of 2000 in the very provision on positive action, it was now suggested to be mentioned in a separate provision of the amending Directive. Art. 2(3) provides: "Without prejudice to paragraph 2, Member States shall communicate to the Commission, every four years, the texts of laws, regulations and administrative provisions of any measures adopted pursuant to Article 141(4) of the Treaty, as well as reports on these measures and their implementation. On the basis of that information, the Commission will adopt and publish every four years a report establishing a comparative assessment of any measures in the light of Declaration No 28 annexed to the Final Act of the Treaty of Amsterdam."

A second Hautala Report, tabled on 29 May 2002[58] by the Parliament delegation to the Conciliation Committee, recommended that Parliament adopt the joint text. Parliament approved this text[59] in its

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[55] European Parliament legislative resolution on the Council common position for adopting a Directive of the European Parliament and of the Council amending Council Directive 76/207/EEC 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 2002 C 112 E/169.

[56] Opinion of the Commission pursuant to Article 251 (2), third subparagraph, point (c) of the EC Treaty, on the European Parliament's amendments to the Council's common position regarding the proposal for a Directive of the European Parliament and of the Council amending Council Directive 76/207/EEC 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 amending the proposal of the Commission pursuant to Article 250 (2) of the EC Treaty, COM(2001) 689 fin., point 3.2.1.2.

[57] Joint text approved by the Conciliation Committee provided for in Article 251(4) of the EC Treaty, document dating from 24 May 2002, 2000/0142 (COD), C5-0185/2002 (see http://www2.europarl.eu.int/omk/OM-Europarl?PROG=DOC-C&L=EN&SORT_ORDER=D&F_REFERENCE=*&REFERENCE=%&NAV=S, under no 3).

[58] Report on the joint text approved by the Conciliation Committee for a European Parliament and Council directive amending Council Directive 76/207/EEC 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, A5-0207/2002 2001 (see

plenary session of 12 June 2002.[60] The Council (Justice, Internal Affairs and Civil Protection) adopted the text on 13 June 2002.[61] The final text of the amending Directive bears the date of 23 September 2002. It was published in the Official Journal of 5 October 2002.[62] According to Art. 2(1) of the Directive, Member States have until 5 October 2005 for the implementation of the amendments into national law.

The development in the legislative process shows that Art. 2(8) of the revised Directive is much less explicit than advocated notably by the European Parliament. Similarly, KOUKOULIS-SPILIOTOPOULOS (2001:62) had suggested that the revised Directive "should clearly provide that positive measures do not constitute discrimination, that they are indicated and that they should, in the first instance, aim at improving the situation of women, the more so as the improvement of this situation is a strategic goal of the EU".[63] In the version eventually adopted, some of these elements are missing altogether while others appear in the preamble only, rather than in the binding provisions of the Directive.[64]

D. Interpreting the new provisions

I. Some academic arguments

Waiting for the first case law on the new provisions, academic commentators are trying to analyse them in comparison with Art. 2(4) of the Directive. Many point to the differences in wording, arguing that this indicates an important difference in aim and objective. It is noted in particular that the new provision does not refer to equality of opportunity, and it is pointed out that the reference to "ensuring full equality in practice" owes more to a substantive than to a formal equality model (e.g. FENWICK 1998:515/516). KOUKOULIS-SPILIOTOPOULOS (2001:24 subs.) puts the issue in the wider framework of the Amsterdam Treaty revision which gave sex equality a new and much more explicit place in the framework of the Treaty. By virtue of Arts. 2 and 3 EC it now enjoys a privileged status in Community

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http://www2.europarl.eu.int/omk/sipade2?PUBREF=-//EP//TEXT+REPORT+S-COM+0+FORM+HTML+V0//EN, under "1999-2004" and "Women's Rights, Equal Opportunities").

[59] More precisely, the text then adopted dated from 5 June 2002; document 2000/0142 (COD), C5-0185/2002. For the present purposes, it should be noted that in the text of May the positive action provision was Art. 2(7) while in the text dating of June it is Art. 2(8).

[60] See http://www3.europarl.eu.int/omk/omnsapir.so/pv1?PRG=CALEND&APP=PV1&LANGUE=EN&TPV=PROV&FILE=020612 (accessed 11 October 2002).

[61] See http://europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.gettxt=gt&doc=PRES/02/175|0|AGED&lg=EN (accessed 11 October 2002).

[62] Directive 2002/73/EC amending Council Directive 76/297/EEC 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 2002 L 269/15.

[63] This seems to be based on a very similar suggestion by the Greek League for Women's Rights and the Association of Women of Southern Europe (Association des Femmes de l'Europe Méridionale, AFEM) as reproduced in KOUKOULIS-SPILIOTOPOULOS (2001:125 subs., in particular 129).

[64] Recent case law from another area of Community law seems to indicate that the Court, in interpreting provisions of secondary law, is willing to take elements into account that appear in the preamble only and not in the relevant provision itself; see Grzelczyk and the comments in this regard by ILIOPOULOU/TONER (2002:611, footnote 8 and 613, footnote 12).

law, as a Treaty-based fundamental principle, a human right[65] and a strategic social and economic goal of the Union. According to KOUKOULIS-SPILIOTOPOULOS, the concept of inequality mentioned in Art. 3(2) EC is wider than, and different in nature from, the concept of discrimination because gender inequalities are *de facto* situations. Therefore, what the Treaty now requires is the effective eradication of direct and indirect sex discrimination as well as the achievement of "substantive, real or de facto gender equality, full equality in practice". This, in turn, implies the need for positive action measures because substantive equality cannot be reached without them.[66] More specifically regarding Art. 141(4) EC, the author argues that its aim goes beyond promoting "equal opportunity" to "ensuring full equality in practice" which includes both equality of opportunity and equality of result (on this point, see also SCHIEK 2002:299). KOUKOULIS-SPILIOTOPOULOS concludes that what was "the apple of discord" in Kalanke would now be irrelevant. The author further argues that positive action under Art. 141(4) has to be seen in the context of the Court's statement in Schröder (para. 57) that the economic aim pursued by what was then Art. 119 of the Treaty (now, after amendment, Art. 141 EC) is secondary to the social aim pursued by the same provision and that Art. 141(4) EC is authentically interpreted by Declaration 28 attached to the Treaty of Amsterdam.[67]

In academic literature it is further argued that in terms of wording and structure, Art. 141(4) EC is not framed as an exception. Thus, PIRSTNER (2000:480) considers that the provision's wording does not indicate a prohibition of positive action measures that are unconditional and automatic. Similarly, KOUKOULIS-SPILIOTOPOULOS (2001:58 subs.) explains that Art. 141(4) EC is a particular expression of Articles 2 and 3(2) EC and that "positive action cannot be considered discrimination or an exception to the gender equality principle" because substantive gender equality is now proclaimed by the Treaty and positive action is a necessary means for achieving it. Likewise, BARNARD/HEPPLE (2000:576) argue that Art. 141(4) EC does not have the character of a derogation because it is framed as essential to the achievement of "full equality" in practice, that is, substantive equality". In the present writer's view, it seems possible to argue that, in terms of its wording and structure, Art. 141(4) EC is not framed as an exception. At the same time, it should be noted that under Art. 2(8) of the Directive the Member States are not obliged to adopt positive action measures but only entitled to do so. In that sense, substantive equality is only to a certain degree reflected in the framing of the provision.

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[65] In that regard, see already Defrenne III, para. 26 and 27, and Schröder, para. 56 and 57.

[66] KOUKOULIS-SPILIOTOPOULOS also refers to the Nice Council. At its Nice Meeting, the European Council in 2000 approved the European Social Agenda whose text was annexed to the Presidency Conclusions; see http://ue.eu.int.Newsroom/LoadDoc.asp?BID=76&DID=64245&LANG=1, see point 15 subs. Annex 1 to the Presidency Conclusions. The text of the European Social Agenda is also published in the Bulletin Quotidien Europe's series of Europe Documents, under the number 222/2223 (published 12 December 2000). One of the goals mentioned in this document is increasing female employment (point 22). The Council agreed on the need to promote gender equality (point 32), and in this context the need to "increase women's access to decision-making by setting appropriate goals or time-bound targets for the public sphere and the economic and social sectors in every Member State" is mentioned (section V).

[67] In her view, this latter point results from the Court's case law that declarations annexed to the Treaty should be taken into account in the interpretation of Treaty provisions, even where they do not refer to a concrete provision. However, in Lehtonen, para. 33, to which the author refers, the Court only held that its earlier case law on free movement and sport is "supported by Declaration No 29 on sport annexed to the Final Act of the conference which adopted the text of the Treaty of Amsterdam". The Court did not make any general statements regarding the importance of declarations.

II. The Court's case law

The authoritative interpretation of Art. 141(4) EC as well as of Art. 2(8) of the Directive will have to come from the Court of Justice. Obviously, there is no case law on the revised Directive yet, and regarding Art. 141(4) EC there is very little. According to KOUKOULIS-SPILIOTOPOULOS (2001:60), the Court's approach in Badeck, where it stated that Art. 141(4) EC has to be examined only if Art. 2(4) of the Directive is infringed, confirms that the former is wider in scope and stronger in wording than the latter. In Abrahamsson, which is the first case in which a certain type of measure was actually examined in the light of Art. 141(4) EC, the Court held (Abrahamsson, para. 55 and 56): "In that connection, it is enough to point out that, even though Article 141(4) EC allows the Member States to maintain or adopt measures providing for special advantages intended to prevent or compensate for disadvantages in professional careers in order to ensure full equality between men and women in professional life, it cannot be inferred from this that it allows a selection method of the kind at issue in the main proceedings which appears, on any view, to be disproportionate to the aim pursued. The answer to the first question must therefore be that Article 2(1) and (4) of the Directive and Article 141(4) EC preclude national legislation under which a candidate for a public post who belongs to the under-represented sex and possesses sufficient qualifications for that post must be chosen in preference to a candidate of the opposite sex who would otherwise have been appointed, where this is necessary to secure the appointment of a candidate of the under-represented sex and the difference between the respective merits of the candidates is not so great as to give rise to a breach of the requirement of objectivity in making appointments."

Academic commentators have criticised that the Court does not explain what is meant by the expression "on any view" and that the short-cut approach it adopted is rather arrogant in view of the fact that the Member States intended the new provision to be interpreted not too restrictively. According to LOENEN (2001:92), the Court should rather have examined whether the Swedish rules had been adopted in view of a legitimate aim. It is also said that Abrahamsson means that the Court simply transports its case law on Art. 2(4) of the Directive without any changes to the new provision, even though Art. 141(4) EC is formulated differently (VELDMAN 2001:118). SUHR (1998:128) even argues that already with its decision in Marschall the Court avoided the danger of a contradiction with the Treaty of Amsterdam. He therefore thinks that under the new law the Court will be able to continue along the lines of its earlier case law without any major changes and that, therefore, its previous case law will be of decisive importance for the interpretation of Art. 141(4) EC. In the present writer's view, the Court's statements in Abrahamsson are too short to allow for a real comparison between the "old" and the "new" case law. In particular, the Court has not yet made any statements of a general nature on the new provision, its meaning and its place in the framework of equality law. New and more explicit case law will have to show what the differences are, if any.

E. Conclusion

The above analysis aimed to show that even under the original Art. 2(4) of the Equal Treatment Directive there has been an important development. The development is away from the seemingly rigid position of Kalanke and towards a better recognition of the problems posed by structural discrimination and of the role that positive action measures can play in this context. Yet, improvements are possible and should be achieved. The new EC law provisions on positive action provide an excellent opportunity for a better interpretation by the Court, along the lines that have been indicated in the context of substantive equality.

Pending clarifying case law, the Member States are placed in a difficult position. How are they to apply the new law? Under the principle of the primacy of Community law, Member States have to respect Art. 141(4) EC[68] and to implement the revised Directive.[69] Implementing the Directive as such is perhaps not problematic since the national legislator can simply copy the wording of the Community provisions. However, the true challenge is to apply the national law in such a manner that it is in line with the meaning of the Community law on which it is based – a meaning that, as was seen, as of yet is unclear. It should be added that a revision of the national law may not be necessary in all Member States[70] or at least not to the same degree. Thus, the Italian Law on positive actions has long stated that the law aims to promote the employment of women and to realise substantive equality between men and women.[71] In Germany, Ingo RICHTER,[72] a former director of the German Youth Institute (*Deutsches Jugendinstitut*) has argued that Art. 3(2) of the German Constitution[73] could (and should) be interpreted as referring to a group right, thereby including the possibility of quota regulations in favour of women. According to RICHTER, the traditional interpretation as an individual right rather than implementing sex equality has limited the provision's effectiveness. More generally, KOUKOULIS-SPILIOTOPOULOS (2001:at 28 and 60) notes that an increasing number of national constitutions guarantee substantive sex equality and provide for positive action, thus forming a constitutional tradition common to the Member States which under EU law is a source of fundamental rights (Art. 6(2) EU). Whether the Court will recognise such an approach under Art. 141(4) EC and Art. 2(8) of the revised Second Equal Treatment Directive remains to be seen. It is in any case to be hoped that the Court in its interpretative case law will give the aim of "ensuring full equality in practice between men and women" its appropriate place.

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[68] It will be remembered that the Court has declared Art. 119 of the EC Treaty to be directly effective, both vertically (as against the State) and horizontally (as against other individuals, i.e. employers); see Defrenne II and Jenkins. Whether now also Art. 141(4) EC is directly effective and if so, whether both vertically and horizontally, is as yet open. So far, the Court only confirmed the direct effect of Art. 141(1) EC (Lawrence, para. 13).

[69] Failing timely or correct implementation, provisions of Directives may be directly effective as well, though not horizontally; see Marshall I, confirmed in Faccini Dori. In any event, national courts have the duty, as far as possible, to interpret the national law in the light of EC law; see von Colson and Kamann and Marleasing. Breaches of EC law by the Member States, including non-implementation or faulty implementation of a Directive, can lead to a right to damages for the individuals concerned; see notably Francovich and Dillenkofer.

[70] See Commission v Germany, para. 23.

[71] Legge 10 Aprile 1991, n. 125, Azioni positive per la realizzazione della parità uomo-donna nel lavoro, Gazzetta ufficiale 15 April 1991, n. 88. Art. 1(1) reads: "Le disposizioni contenute nella presente legge hanno lo scopo di favorire l'occupazione femminile e di realizzare l'ugualianza sostanziale tra uomini e donne nel lavoro, al fine di rimuovere gli ostacoli che di fatto impediscono la realizzazione di pari opportunità." In Italy, formal and substantive equality have long been a subject for academic discourse; see for instance ROMANOLI (1973); also BALLESTERO (1994), and GIANFORMAGGIO (1996).

[72] ‚Bundesgleichstellungsgesetz soll Gruppengrundrecht der Frauen im Oeffentlichen Dienst durchsetzen', zwd Frauen und Politik of 8 May 2002 (as reported in FrauenSicht 3/02, at 15).

[73] Art. 3(2) of the German Constitution *(Grundgesetz)* provides: "Männer und Frauen sind gleichberechtigt."

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Note:
A list of the numerous annotations that were written on the Court's positive action case law can be found at http://www.curia.eu.int/en/recdoc/notes/index.htm (judgments listed according to their number).

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