EC LAW ON EQUAL TREATMENT BETWEEN WOMEN AND MEN IN PRACTICE
Seminar for the judiciary – 19 October 2009

Positive action in EC law

Lynn Roseberry

1. Introduction: what is positive action and what are the relevant legal provisions in EC law?

Principle of equal treatment between men and women is understood to prohibit treating one person better or worse on grounds of sex than another person. The sex of the person is not supposed to be an element in determining whether a person will be granted a job or how much the person should.

"Positive action" in the context of EC law on equal treatment is understood as measures that take a person's sex into account in a positive way in order to promote substantive equality between men and women.

a. **Article 2(4) in the Equal Treatment Directive (Directive 76/207/EC) of 1976** - The first legal provision permitting positive action:

"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)."

b. **Article 141(4) EC (introduced by Treaty of Amsterdam, signed by Heads of State 2 October 1997, entered into effect 1 May 1999)**

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 underrepresented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers.

c. **Directive 2002/73/EC of 23 September 2002 amending Council Directive 76/207/EEC:**

Replaced Article 2 of the original equal treatment directive with a new and more detailed provision

i. Article 2(8)

"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".

ii. Article 2(3)

Member Sates 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.

d. Recast Gender Employment Directive, Directive 2006/54/EC of 5 July 2006 implementation deadline August 15, 2008

i. Article 3 – Positive action

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 in working life.

ii. Article 31(3) – same as Article 2(3) in the 2002/73 directive.

2. The ECJ's case law

When considering the case law of the ECJ on positive action it is important to recognize the difference between the formulation in Article 141 EC and that of Article 2(4) in directive 76/207. The positive action allowed by Article 2(4) is described as "measures to promote equal opportunity" "in particular by removing existing inequalities which affect women's opportunities". The positive action allowed by Article 141is described as "measures providing for specific advantages in order to make it easier for the underrepresented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers."

I will accordingly divide the case law into two groups – the pre-Amsterdam Treaty cases, i.e. before 1999, and the post-Amsterdam Treaty cases, i.e. after 1999.

a. Pre-Amsterdam Treaty cases

Commission v France, Case 312/88 [1988] ECR 6315

Kalanke, Case C-450/93 [1995] ECR I-3051

Marschall, Case C-409/95 [1997] ECR I-6363

i. Commission v France, Case 312/88 [1988] ECR 6315.

France had sought to invoke Art 2(4) of the ETD in order to justify maintaining a provision of the French Labour Code which allowed employers to maintain terms of employment contracts or collective agreements granting particular rights to women in force at the

date on which national legislation implementing the equal treatment directive was adopted. Employers, organisations of employers and organisations of employed persons were instead required to "proceed, by collective negotiation, to bring such terms into conformity' with the provisions of the Labour Code.

The special rights granted to female workers in collective agreements related to extended maternity leave, reduction in working hours for women aged 59, bringing forward retirement age, time off for sick children, extra days' holiday each year per child, a day off on the first day of the school term, some hours off on Mothers' Day, daily breaks for women working on computer equipment or as typists or switchboard operators, the grant of bonuses from the birth of the second child for calculating pensions, and payment of allowances to mothers who have to pay costs of nursery or child minders.

Although the provision in question was discriminatory on its face, France alleged that the practices covered by the provision were permitted by Article 2(3) and (4) of the ETD, which cover respectively measures for the protection of women particularly as regards pregnancy and maternity and those aiming to promote equal opportunity for men and women.

The Court noted:

"[14] ….the particular rights which are kept in force sometimes aim to protect women in their capacity as aged workers or as parents, although male workers can be in these positions as well as female workers."

Thus Article 2(3) could not be invoked to justify those measures.
[15] As regards the exception provided for by Article 2(4) it has the precise, limited object of authorising measures which, although discriminatory in appearance, actually aim to eliminate or reduce *de facto* inequalities which may exist in actual working life. However, there [was nothing] to indicate that the general retention of particular rights for women in collective agreements may correspond to the situation envisaged by this provision.

As AG Sir Gordon Slynn pointed out, "It is not permissible to argue, as France appears to argue, that because women in general have been discriminated against then any provisions in favour of women in the employment field are per se valid as part of an evening-up process".

ii. Kalanke, Case C-450/93 [1995] ECR I-3051

Concerned application of paragraph 4 of the Bremen Act on Equal Treatment (LGG) which allowed women to be given automatic priority in sectors where they are underrepresented where men and women who are candidates for the same promotion are equally qualified.

Ms. Glissman was promoted instead of Mr. Kalanke to the post of Section Manager in the Bremen Parks Department. Both had made it to the short list of employees to be promoted.

Para 22 – "national rules which guarantee women absolute and unconditional priority for appointment or promotion go beyond promoting equal opportunities and overstep the limits of the exception in Article 2(4) of the Directive."

Para 23 – 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 Art 2(4) the result which is only to be arrived at by providing such equality of opportunity.

iii. Marschall, Case C-409/95 [1997] ECR I-6363

Mr. Marschall, a teacher, was not promoted at the time he had envisaged because a female colleague of equal qualification was preferred in line with national law. He had considered that he had a right to promotion because he was older, had served for longer and had dependent children, which was in line with general practice in Germany before preferential rules were applied.

Para 24 - unlike the provisions in question in Kalanke, the provision in question in this case contains a [savings clause] to the effect that women are not to be given priority in promotion if reasons specific to an individual male candidate tilt the balance in his favour.

Para 25 – therefore necessary to consider whether a national rule containing such a clause is designed to promote equality of opportunity between men and women within meaning of Art 2(4) of the Directive

Para 27 – Art 2(4) authorizes national measures relating to access to employment, including promotion, which give a specific advantage to women with a view to improving their ability to compete on the labour market and to pursue a career on an equal footing with men .

Para 29 – 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.

Para 30 – 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.

Para 31 – it follows that a national rule in terms of which, subject to the application of the saving clause, female candidates for promotion who are equally as qualified as the male candidates are to be treated preferentially in sectors where they are underrepresented may fall within the scope of Art 2(4) if such a rule may counteract the prejudicial effects on female candidates of the attitudes and behavior described above and thus reduce actual instances of inequality which may exist in the real world.

Para 32 - However, since Art 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.

Para 33 – …a national rule which…contains a saving clause does not exceed those limits if, in each individual case, it provides for male candidates who are equally as qualified as the female candidates a guarantee that the candidatures will be the subject of an objective assessment which will take account of all criteria specific to the individual candidates and will override the priority accorded to female candidates where one or more of those criteria tilts the balance in favour of the male candidate. In this respect, however, it should be remembered that those criteria must not be such as to discriminate against female candidates.

Evaluation: clear affirmation by the Court that the existence of a "saving" clause brings a preferential promotion programme within the protection of Article 2(4) of the Directive. A "silent revision" of the Kalanke judgment from 2 years earlier. The ECJ in *Marschall* recognizes the existence of social prejudice and stereotyping, and therefore of the need to allow for certain forms of preferential treatment even in the presence of equally qualified individuals competing for the same position.

b. Post-Amsterdam Treaty cases

Badeck, Case c-158/97 [2000] ECR I-1875

Abrahamsson, Case C-407/98 [2000] ECR I-5539

Lommers, Case C-476/99 [2002] ECR I-2891

Briheche, Case C-391/03 [2004] ECR I-8807 (second chamber)

i. Badeck, Case C-158/97 [2000] ECR I-1875, 28 March 2000

State constitutional court of the Land of Hesse refers questions on interpretation of ETD in regards to Hessen Act on Women's Equality (HGIG). These provisions comprise outreach measures in form of an interview quota, obligations to install gender equality plans combined with an objective obligation to eventually prefer a member of the underrepresented sex, and strict quotas for training positions, PhD positions and for the members of committees.

Held: no violation of ETD.

Para 14 – the interpretation of Article 141(4) EC which concerns such [positive action]measures is…material to the outcome of the dispute in the main proceedings *only if* the Court considers that Article 2 of the ETD precludes national legislation such as that at issue in the main proceedings.

(1) – national rule gave priority, in sectors of the public service where women were under-represented, where male and female candidates for selection had equal qualifications, to female candidates where that proved necessary to comply with the binding targets in the women's advancement plan, if no reasons of greater legal weight were opposed.

Para 29 – according to the order for reference, the system introduced by the HGIG ensures that a candidate's sex is never decisive for the purposes of a selection procedure where that is not necessary in the particular case. That is so in particular where the initial evidence that a situation is unfavourable to women, based on the fact that they are under-represented, is disproved.

Para 37 – it is for the national court to assess, in the light of the above, whether the rule at issue in the main proceedings ensures that candidatures are the subject of an objective assessment which takes account of the specific personal situations of all candidates.

Para 38 – the answer must therefore be that the ETD does not preclude [such a national rule] provided that that rule guarantees that candidatures are the subject of an objective assessment which takes account of the specific personal situations of all candidates.

(2) Establishment of binding targets in the women's advancement plan for temporary posts in the academic service and for academic assistants.

This system was also compatible with Community law.

Para 42 - This system did not fix an absolute quota on the number of women to be appointed- the number was instead fixed by reference to the number of persons

who had received appropriate training, and was therefore dependent on a factual situation.

(3) National rule for the public service, which, in trained occupations in which women were under-represented and for which the state did not have a monopoly of training, allocated at least half the training places to women.

Not contrary to the Directive.

Para 51 – 53 - The rule did not entail total inflexibility – if there are not enough applications from women, it is possible for more than half of the places to be taken by men. In addition, it is not places in employment which are reserved for women, but places in training with a view to obtaining qualifications with the prospect of subsequent access to trained occupations in the public service. Furthermore, the quota applies only to training places for which the State does not have a monopoly, and therefore concerns training for which places are also available in the private sector, no male candidate is definitely excluded from training. The provision at issue therefore merely improves the chances of female candidates in the public sector.

(4) National rule guaranteeing, where male and female candidates have equal qualifications, that women who are qualified are called to interview, in sectors in which they are under-represented.

Para 60 – as the AG observes…the provision at issue in the main proceedings does not imply an attempt to achieve a final result – appointment or promotion – but affords women who are qualified additional opportunities to facilitate their entyr into working life and their career.

Para 61 – the provision, although laying down rules on the number of interviews to be given to women, also provides that a preliminary examination of the candidatures must be made and that only qualified candidates who satisfy all the conditions required or laid down are to be called to interview.

Para 62 – this is consequently a provision which, by guaranteeing, where candidates have equal qualifications, that women who are qualified are called to interview, is intended to promote equal opportunity for men and women within the meaning of Article 2(4) of the Directive.

(5) Rule providing that when appointments are made to employees' representative bodies and administrative and supervisory bodies, at least half the members must be women.

Para 65 - It is a non-mandatory provision which recognizes that many bodies are established by legislative provisions and that full implementation of the requirement of equal membership of women on those bodies would in any event require an amendment to the relevant law. Moreover, it does not apply to elected offices. That would also require the relevant statutory bases to be amended. Finally, since the provision is not mandatory it permits, to some extent, other criteria to be taken into account.

Evaluation:

This judgment reinforces the rulings in *Marschall* and *Kalanke: c*ertain conditions have to be satisfied before female candidates with qualifications equal to those of their male counterparts can be accorded priority in certain sectors in which they are under-represented. There must always be a 'saving clause' and an objective assessment of the candidatures which takes account of the specific personal situations of all candidates, thereby allowing a male candidate to be chosen if reasons specific to him support that result.

However, in relation to those provisions that do not relate specifically to places in employment or promotion, but rather to preliminary steps in this process, such as training opportunities, the ECJ has adopted a more liberal approach. In these cases there is no need for the 'saving clause' nor an objective assessment, but just a requirement that the number or quota of women to be selected is not fixed in such absolute terms that men with equal qualifications are clearly excluded.

ii. Abrahamsson, Case C-407/98 [2000] ECR I-5539

Legal provisions at issue: regulations on positive action in filling professors' and research assistants' positions. Rule providing for automatic recruitment of a sufficiently qualified member of the underrepresented sex, unless this would give rise to a breach of the requirement of objectivity in making appointments.

Facts: On 3 June 1996 the University of Göteberg announced a vacancy for an academic position, making explicit that the appointment should contribute to promotion of equality of the sexes in professional life and that positive discrimination might be applied in accordance with Regulation 1995:936. 8 candidates applied, including Ms. Abrahamsson, Ms. Destouni, Ms. Fogelqvist and Mr. Anderson. The selection board voted twice. In the first vote, based only on the candidates' academic qualifications, Mr. Anderson came first and Ms. Destouni second. On the second vote, taking into account both the academic

merits and Regulation 1995:936, Ms Destouni came first and Mr. Anderson second; Ms. Fogelqvist was ranked third. When Ms. Destouni withdrew her application, the Rector referred the matter back to the selection board. The board stated that they had already considered the question of equality and did not change the order. Despite this, the Rector of the University of Göteborg decided to appoint Ms. Fogelqvist, referring to Reg 1995:936 and to the university's plan for equality between men and women. He stated that the difference between the respective merits of Mr. Anderson and Ms. Fogelqvist was not so considerable that positive discrimination in favour of the latter constituted a breach of the requirement of objectivity in the making of appointments. Mr. Anderson and Ms. Abrahamsson appealed against the decision before administrative tribunal which requested a preliminary ruling from the ECJ .

Held: Art 2(1) and (4) ETD precludes national legislation under which a candidate for a public post belonging to the underrepresented sex and possessing sufficient qualifications must be preferred over 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 underrepresented sex and the difference between the respective merits is not so great as to give rise to a breach of the requirement of objectivity. National legislation of that kind is also precluded where it applies only to procedures for filling a predetermined number of posts or posts created as part of a specific programme of a particular higher educational institution allowing the application of positive discrimination measures.

Para 52 –…the legislation at issue in the main proceedings automatically grants preference to candidates belonging to the underrepresented sex, provided that they are sufficiently qualified, subject only to the proviso that the difference between the merits of the candidates of each sex is not so great as to result in a breach of the requirement of objectivity in making appointments.

Para 53 – the scope and effect of that condition cannot be precisely determined, with the result that the selection of a candidate from among those who are sufficiently qualified is ultimately based on the mere fact of belonging to the underrepresented sex, and that this is so even if the merits of the candidate so selected are inferior to those of a candidate of the opposite sex. Moreover, candidatures are not subjected to an objective assessment taking account of the specific personal situations of all the candidates. It follows that such a method of selection is not such as to be permitted by Art 2(4).

Para 54 – In those circumstances, it is necessary to determine whether legislation such as that at issue in the main proceedings is justified by Art 141(4)EC.

Para 55…it cannot be inferred from [art 141(4)) that it allows a selection method of the kind at issue…which appears, on any view, to be disproportionate to the aim pursued.

iii. Lommers, Case C-476/99 [2002] ECR I-2891

Dutch ministry reserved a limited number of subsidized nursery places made available by the ministry to its staff for female officials alone whilst male officials could have access to them only in cases of emergency, to be determined by the administration. – in order to tackle extensive underrepresentation of women.

ECJ took the view that Art 2(1) and (4) do not preclude such a scheme, provided, however, that male employees placed in a situation similar to that of the female employees (who, under the scheme, are presumed to be the child-carers within the family) are recognised as having the same opportunities to benefit from the nursery services.

iv. Briheche, Case C-391/03 [2004] ECR I-8807 (second chamber)

Proceedings between Serge Briheche and the French Minister for the Interior, the Minister of National Education and the Justice minister concerning their refusal of his application to sit several competitive examinations organized for the recruitment of administrative assistants or secretaries on the ground that he did not fulfill the age requirement laid down by the French legislation for entry to those competitive examinations. Law No 2001-397 had abolished the age limit for obtaining access to public-sector employment for certain categories of women to make it applicable, if they are obliged to work, to mothers with 3 or more children, widows who have not remarried, divorced women who have not remarried, legally separated women and unmarried women with at least one dependent child,

Briheche, a 48-year-old widower who had not remarried with one dependent child, applied to sit various competitive examinations organized by the French public administration, including a competitive examination organized by the Ministry for the Interior in 2002 for the recruitment of administrative assistants within central government. His application to sit the latter exam was rejected by decision of 28 Jan 2002 on the ground that he did not fulfill the age requirement laid down in the first paragraph of art 4 of the decree for entry to that examination. He appealed against that decision, claiming that, following the entry into force of Law No 2001-397 the age limits of 45 years could no longer be enforced against him.

Para 22 – as the Court has already held, Article 2(4) is specifically and exclusively designed to authorize 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 (Case C-409/95 Marschall – para 26).

Para 23 – a measure which is intended to give priority in promotion to women in sectors of the public service 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).

Para 24 – those conditions are guided by the fact 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 be reconciled as far as possible with the requirements of the aim thus pursued.

para 25 – art 2(4) of the Directive thus authorizes national measures relating to access to employment which give a specific advantage to women with a view to improving their ability to compete on the labour market and to pursue a career on an equal footing with men. The aim of that provision 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 the persons concerned (Kalanke, para 19 and Abrahamsson, para 48).

Para 26 – French government maintains that the national provision in question …was adopted with a view to reducing actual instances of inequality between men and women, in particular due to the fact that women take on most of the housework, above all when there are children in the family, and with a view to facilitating the integration of women into work.

Para 27 – as the Commission has correctly pointed out, such a provision automatically and unconditionally gives priority to the candidatures of certain categories of women, including widows who have not remarried who are obliged to work, reserving to them the benefit of the exemption from the age limit for obtaining access to public-sector employment and excluding widowers who have not remarried who are in the same situation.

Para 28 – it follows that such a provision, under which an age limit for obtaining access to public-sector employment is not applicable to certain categories of women, while it

is to men in the same situation as those women, cannot be allowed under Article 2(4) of the Directive.

Para 29 – nevertheless it is necessary to establish whether the provision is allowed under art 141(4) EC.

Para 30 – that article authorizes the MS to maintain or adopt measures providing for specific advantages in order…to prevent or compensate for disadvantages in professional careers, with a view to ensuring full equality in practice between men and women in working life.

Para 31 – irrespective of whether positive action which is not allowed under art 284) of the Directive could perhaps be allowed under Art 141(4), it is sufficient to state that the latter provision cannot permit the MS to adopt conditions for obtaining access to public-sector employment of the kind in question, in the main proceedings which prove in any event to be disproportionate to the aim pursued…

Conclusions

1. Positive action in favour of women aimed at achieving equal "opportunity" cannot pursue equal "results". This is seen as being contrary to the principle of equal treatment whereby each person has the right not to be disadvantaged on grounds of sex.

2. The ECJ has categorized hiring and promotion as results, thus precluding the possibility of giving preference to the under-represented sex in hiring or promotion cases, where the preference is given automatically and absolutely, i.e. the rejected candidate of the opposite sex is not allowed to bring any arguments forward that might tilt the balance in her or her favour.

3. Vocational training and calls to job interviews are considered to be opportunities, and therefore preferential treatment accorded to the under-represented sex in these situations are considered with less severity.

4. Basic approach:

a. Positive action may only be justified where it is shown that there is existing inequality, i.e. one sex is under-represented.

b. The positive action must be directed at rectifying that particular existing inequality and target the conditions giving rise to the inequality, e.g. Commission v France, Briheche.

c. No automatic absolute preference may be given to one sex in regards to hiring or promotion. ABrahamsson, Marschall.

d. Preference may be given to the under-represented sex in regards to hiring or promotion if is there is a “saving” clause, i.e. possibility of bringing individual arguments forward that may tilt the decision in favour of a person of the over-represented sex.

e. Automatic preferences may be given in the context of allocating training places and calls to interviews, where the under-represented sex are not completely excluded from the possibility of getting training or being called to interview when they have equal qualifications.