Positive Action Within the Field of Sex-Equality in the Context of EEA Law

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This article provides in-depth analysis of Case E-1/02, EFTA Surveillance Authority v. The Kingdom of Norway,[1] and affirmative action for the promotion of gender equality in Europe more generally. Furthermore, the article uses the context of gender equality for an exploration of the relationship between EEA Law, i.e. the law applicable in the European Economic Area, and EC Law, i.e. the law applicable to those members of the EAA that are also members of the European Union.

A. Introduction

'Statutes are the result of political compromises' as one of my colleagues puts it.[2] Indeed, that may be true, as those who adopt legislation are political representatives of the people in a democratic society. Keeping this in mind, it should not be surprising that complications follow law both in theory and practice. This may be illustrated by a judgment handed down by the European Free Trade Association Court.[3]

The EFTA Court released this judgment in the beginning of 2003 concerning legislation passed by Norway in the field of sex equality law. Based on that legislation, the University of Oslo reserved various academic positions exclusively for women so as to achieve gender equality in higher education – a so-called positive or affirmative action. The Court determined that the legislation went beyond the scope of Article 2(4) of Directive 76/207/EEC[4] as it

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[1] Judgment of 24 January 2003, see http://www.dinesider.no/customer/770660/archive/files/Decided%20Cases/2003/e_1_02decision-e.pdf.

[2] The phrase is used quite often, in fact.See, e.g., Elaine Fultz & Markus Ruck, *Pension Reform in Central and Eastern Europe: An Update on the Re-structering of National Pension Schemes in Selected Countries*, ILO Central and Eastern European Team, Budapest 2000, at p. 16.

[3] The basic provisions on the Court are contained in the Agreement between the European Free Trade Association States on the Establishment of a Surveillance Authority and a Court of Justice; text available at http://www.eftacourt.lu/esacourtagreement.asp.

[4] 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 (generally referred to as the Second Equal Treatment Directive), (OJ 1976 L 39/40).

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gave absolute and unconditional priority to female candidates.

This case has interesting features from the perspective of European Economic Area[5] law, as well as the law of sex equality in a more general sense. From the perspective of EEA law, it provides for an interesting analysis because of its complex relationship to EC law. For example, the Social Agreement was integrated into the European Community Treaty[6] after the EEA Agreement was concluded.[7] That is, a fundamental change was made within the EC legal order while the EEA Agreement remained unchanged. Moreover, at the time of the judgment, the Directive had been revised and entered into force within the EC legal order[8] but had not become EEA law. Thus, the case raised the question how changes within the EC legal order affect the interpretation of EEA law in relation to the EFTA side of the EEA Agreement. The following questions will be discussed here:

1. Can it be inferred from the EFTA Court's finding that differences in scope and structure between the EC Treaty and the EEA Agreement, affect the interpretation of EEA law, possibly resulting in a slightly different interpretation than the one developed by the European Court of Justice for EC law?
2. What about fundamental changes made to the EC Treaty and secondary legislation not adapted by the EEA at the time of the judgment? One wonders whether or how the objective of homogenous interpretation can be maintained.
3. What will be the result if only the revised Directive is adapted into EEA law and not Art. 141 ECT as such?
4. Is a gap developing between EEA law and EC law or is it being bridged through interpretation?

The EFTA case also provides for an interesting analysis from the perspective of positive action in favour of women in the field of employment, as the case is the first one released by the EFTA Court. It raises questions regarding the legitimate scope and content of positive or affirmative action. So far, the line between legal and illegal action is less than clear. The following questions will be discussed:

While the EFTA case was pending before the EFTA Court, Directive 2002/73/EC amending Directive 76/207/EEC was adopted but had not been adapted to European Economic Agreement law (OJ 2002 L 269/15).

[5] Agreement on the European Economic Area, together with its Protocols and Annexes (OJ 1994 L 1/1). Updated version together with its annexes and protocols can be found at: http://secretariat.efta.int/Web/EuropeanEconomicArea/EEAAgreement/EEAAgreement.

[6] The abbreviation "EC" refers to the Amsterdam version of the Treaty Establishing the European Community or in other words the post-Maastricht version (OJ 1997 C 340/1). In the framework of the Maastricht revision, the name of the original "European Economic Community" was changed into the simple "European Community".

[7] The integration of the Social Agreement into the Treaty Establishing the European Community was made by the Amsterdam version (OJ 1997 C 340/1). However, references made to the provisions of the Treaty will be based on the Nice version, as that is the Treaty version now in force (OJ 2002 C 325/1).

[8] According to Art. 3 of the revised Directive 2002/73/EC, it entered into force on the day of its publication in the Official Journal of the European Communities (OJ 2002 L 269/15). It was published on 5 October 2002.

1. What are the implications of the judgment in terms of the legitimate scope and content of positive action?
2. Did the EFTA Court follow the case laws of the ECJ in all respects? If not, why not? Depending on the answer, one wonders whether the criteria for lawful affirmative action are the same in the EC and in the EEA after the finding of the EFTA Court. Furthermore, can it be expected that the ECJ will now follow the approach taken by the EFTA Court?
3. What does the case contribute more generally to the development of positive action within the field of sex equality?

By using the EFTA case, the paper aims at illustrating two issues. First, the significance of the objective of homogeneity in application and interpretation of the EEA Agreement, in spite of fundamental differences in the structure and the legal environment of the EEA Agreement compared to the EC Treaty. Second, some general observations on the scope and content of positive action measures for the promotion of women in the field of employment. Accordingly, the structure of the paper is as follows: Section B provides for a general description of the concept of EEA law, its special features and the legal complications that follow from its parallel application with EC law; Section C is divided into two parts. The first part provides an outline of sex equality and positive action in favor of women in the EC legal order by illustrating the legal framework and the judgments of the ECJ, as well as the principles derived from case law. The second part, illustrating the legal framework within the EEA and the EFTA case, is presented against that background; Section D provides an analysis of the EFTA case and answers to the questions raised above. The section is again divided into two parts. In the first part, the case is analyzed from the perspective of positive action in the context of EC sex equality law; in the second part, the case is analyzed from the perspective of EEA law. Last but not least, Section E contains various conclusions.

B. The EEA Agreement

I. Introduction

Until 1984, each EFTA State cooperated with the EC through bilateral agreements. However, from that time on, the EFTA States and the EC decided to reinforce their cooperation especially in the field of trade in goods.[9] After a long process of negotiations, a multilateral agreement of association was concluded on 2 May 1992 in Oporto, Portugal, between the EFTA States on the one hand and the EC and each of its Member States on the other.[10] This agreement came

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[9] Stefánsson, *EES Samningurinn og lögfesting hans*, Reykjavík 1998, at p. 5.

[10] The Agreement on the European Economic Area entered into force on 1 January 1994 (OJ 1994 L 1/1). At the time of the negations, the EFTA States were Austria, Finland, Iceland, Norway, Liechtenstein, Sweden and Switzerland. However, by the time the EEA entered into force, Austria,

to be called the Agreement on the European Economic Area, respectively, the EEA Agreement. As a result, there are today 25 European States in the EC (or EU) and those same 25 European States plus another three in the EEA (namely Iceland, Liechtenstein, and Norway). In short, the EEA-Agreement establishes common rules for all 28 members, without however, establishing a common supranational institutional and power structure. As a result, 25 EEA members have their own supranational system - via the EC/EU - and the other three try to participate without subjecting themselves to the same or any supranational structures. That is why some say, the Agreement is an attempt to reach the nearly impossible.[11]

II. The Special Features of the EEA Agreement

Both from a political and from a legal point of view, the EEA Agreement is a crossbreed between an ordinary international treaty and the supranational status of the Community treaties.[12] Its formal status is clearly that of an ordinary international treaty. However, at the same time, the Agreement calls for a 'dynamic and homogeneous' European Economic Area.[13] Dynamic, because the EEA is intended to keep the legal rules and structures in the EFTA States fully up to date with the Community's internal market legislation and, possibly, even to allow the inclusion of new areas of cooperation without requiring a new treaty. At the same time, homogeneous means that EEA law shall be interpreted and applied, as far as possible, in the same way in the Member States of the EC and in the EFTA States.[14] In order to ensure such an application and

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Finland and Sweden were to become members of the EU from 1 January 1995. Thus, the Agreement in the end was only between the EU and the remaining EFTA States, excluding Switzerland, as it rejected the Agreement in a referendum. Politically, the Agreement was largely considered a dynamic means to provide for a smooth transition of EFTA members into full membership in the European Community, rather than as a permanent solution; see Müller-Graff, *EEA-Agreement and EC Law: A Comparison in Scope and Content – Overview on the Basic Legal Link between Norway and the European Union,* in: Müller-Graff & Selvig (eds.), The European Economic Area – Norway's Basic Status in the Legal Construction of Europe, Berlin 1997, pp. 17-41, at pp. 17-18.

[11] Müller-Graff, *EEA-Agreement and EC Law: A Comparison in Scope and Content – Overview on the Basic Legal Link between Norway and the European Union*, at p. 19; and Sejersted, *Between Sovereignty and Supranationalism in the EEA Context – On the Legal Dynamics of the EEA Agreement,* in: Müller-Graff & Selvig (eds.), The European Economic Area – Norway's Basic Statutes in the Legal Construction of Europe, Berlin: Berlin Verlag 1997, pp. 43-73, at p. 46.

[12] Sejersted, *Between Sovereignty and Supranationalism in the EEA Context – On the Legal Dynamics of the EEA Agreement*, *supra* note 11.

[13] Sejersted, *Between Sovereignty and Supranationalism in the EEA Context – On the Legal Dynamics of the EEA Agreement*, at p. 44. See also the 4th recital of the preamble to the EEA Agreement.

[14] Christiansen, *The EFTA Court,* European Law Review 1997, pp. 539-553, at pp. 539-540; and Forman, *The EEA Agreement Five Years On: Dynamic Homogeneity in Practice and its Implementation by the two EEA Courts,* Common Market Law Review 1999, pp. 751-781, at pp. 760-761. See also Sevón & Johansson, *The Protection of the Rights of Individuals under the EEA*

interpretation of the Agreement, a complex institutional framework was established. These institutional structures and procedures of the Agreement may be complex but the manner in which they are to operate is quite clear. The EFTA States are to take over the entire Community acquis communautaire,[15] to the extent it is 'relevant'.[16] The EEA Agreement itself included the majority of the EC's internal market legislation in force at the time of signature of the Agreement. Specifically, the EFTA States adopted the provisions on free movement of goods, persons, services and capital, the so-called four freedoms in the internal market. In addition, several other EC devices were implanted into the Agreement to support the functioning of the four freedoms, in particular the EC provisions on competition, including the rules on state aid. Furthermore, there are horizontal provisions relevant to the four freedoms, such as provisions on social policy, and provisions on cooperation in fields such as tourism.

The respective parts of the Agreement are mostly worded identically to the provisions of the EC Treaty. Deviations are only made to the extent necessary for their adaptation to the special nature of the Agreement. As a result, the Agreement presupposes that it is possible to uphold the interpretation of its provisions through the case law of the ECJ, that means the ECJ supplies authoritative interpretation of the EEA Agreement via interpretation of the parallel provisions of the EC Treaty.[17] At the same time, the Agreement is meant to change, develop and expand over time in parallel to new and future EC legislation. Therefore, the Agreement also provides for special procedures to take over new Community legislation.[18]

A so-called two-pillar system of institutions was set up[19] to implement the objectives of the Agreement.20 Since the legislative and other activities of the EC institutions are relevant for and binding only upon the EC Member States, the EFTA States agreed to establish parallel institutions to implement the legal

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Agreement, European Law Review 1999, pp. 373-386, at pp. 374-376, for more detailed description of the homogeneity elements of the EEA. Arts. 105-7 EEA provide a special procedure for the achievement of this aim.

[15] In this context, it means all EC legislation, international agreements that the EC is a signatory state to and case law of the ECJ; see Stefánsson, *Evrópusambandið og Evrópska Efnahagssvæðið,* 1st ed., Reykjavík 2000, at p. 42.

[16] Forman, *The EEA Agreement Five Years On: Dynamic Homogeneity in Practice and its Implementation by the two EEA Courts*, at p. 755.

[17] Friðfinnsson, *Fyrirlestrar um EES-efn,*. Chapter 10, 1999, at p. 2; text available at http://www.ees.is/interpro/utanr/utanrad.nsf/pages/wpp1914.

[18] In particular Arts. 102-104 EEA.

[19] The draft of the Agreement provided for the setting up of an EEA Court, which meant that the EEA Court would have had to rule on the competence of the Community and the Member States as regards matters governed by the Agreement. In *Opinion 1/91 EEA I* [1991] ECR I-6079, the ECJ ruled such jurisdiction to be incompatible with Community law as the ECJ had the exclusive jurisdiction according to Arts. 220 and 292 of the Treaty establishing the European Community. Thus, the Agreement was altered in such away that a two pillar system was set up which the ECJ concluded to be compatible with the Treaty establishing the European Community in its Opinion 1/92 EEA II [1992] ECR I-2821.

[20] See the 15th recital of the preamble to the EEA Agreement and the 3rd recital of the preamble to the ESA/EFTA Court Agreement.

rules and handle related matters for the EFTA States.[21] In particular, an EFTA Surveillance Authority (ESA) and an EFTA Court were established and entrusted with tasks largely equivalent to the Commission and the ECJ on the EC/EU side.[22] However, the big difference between the EEA and the EC/EU is the absence of supranational powers in the EEA. Therefore, the EEA Agreement does not require transfer of legislative powers of the EFTA States to the EEA institutions and, of course, the EFTA States are not subjected to the supranational powers of the EC/EU.[23] In the end, the institutional framework and the mechanisms to achieve the goal of keeping EC/EU and EFTA/EEA rules parallel for the internal market are complex and have yet to stand the test of time. Ideally, the goal will be achieved via mutually respectful and bi-directional dialogue on the interpretation of EC and EEA law.

III. Legal Complications

While the EEA Agreement only seeks to establish homogeneous European Economic Area, the EC, on the other hand, is a supranational organization with much broader goals. For instance, the EC is a custom union, while the EEA is only a free trade area.[24] Thus, differences in objectives may require differences in interpretation, although the provisions in both treaties may be identical in content and wording.

Furthermore, although both the EC Treaty and the EEA Agreement are concluded in the form of international agreements, their legal effects differ considerably. The EEA Agreement does not produce any formal transfer of sovereign powers from the member States to the inter-governmental institutions established under the Agreement;[25] quite to the contrary, the Agreement is only intended to create rights and obligations between the Contracting Parties.[26] It is,

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[21] Based on Art. 108 EEA, separate agreements were concluded between the EFTA States for the establishment of these institutions. For instance, the ESA/EFTA Court Agreement signed on 2 May 1992, and the Agreement on an EEA Joint Parliamentary Committee, signed on 20 May 1992.

[22] As for information about the EFTA Court, see for instance Christiansen, *The EFTA Court*, op. cit. note 14, pp. 539-553; and Haug, *The EFTA Court,* in Müller-Graff & Selvig (eds.), The European Economic Area – Norway's Basic Status in the Legal Construction of Europe, Berlin 1997, pp. 75-80.

[23] Protocol 35 on the implementation of EEA Rules states that the Contracting Parties do not transfer any legislative powers to any institutions of the Agreement, as the homogeneous Economic Area will be achieved through national procedures.

[24] See for instance Müller-Graff, *EEA-Agreement and EC Law: A Comparison in Scope and Content – Overview on the Basic Legal Link between Norway and the European Union*, at pp. 31-32 and Stefánsson, *Evrópusambandið og Evrópska Efnahagssvæðið,* at pp. 112 and 120. Nevertheless, the EFTA Court has held that even though the depth of integration of the EEA Agreement is less far-reaching than under the EC Treaty, its scope and objective goes beyond what is usual for an agreement under public international law; see Case E-9/97, *Erla María Sveinbjörnsdóttir v The Government of Iceland*, 1998 Rep EFTA Ct., 95, para 59.

[25] See above, note 22.

[26] See for instance *Opinion 1/91*, para 20. Although, that was clearly not the aim at the time of

therefore, up to the national legislators to implement the EEA Agreement, and the acts based upon it, into the national system.[27] Only in this indirect way, the Agreement and any acts based on it may create rights and obligations for individuals in Iceland, Liechtenstein, and Norway. By contrast, as is well known, the EC Treaty requires transfer of legislative, executive and judicial powers from the Member States to the EC/EU, with the result that a new legal order is established. The EC institutions have powers to adopt legislation, which then has primacy over national law of the Member States[28] and may create rights and obligations directly for individuals, on the basis of the doctrine of direct effect, as developed by the ECJ.[29] Due to the fact that the EEA Agreement was ratified not only by the 25 EC/EU Member States but also by the EC itself, individuals in the EC/EU may be able to rely on the EEA Agreement directly as part of EC legislation. Accordingly, the EEA Agreement can have different effects in the internal legal order of the contracting parties, depending whether they are also members of the EC/EU.

Based on the principle of supremacy, the EC Treaty has constitutional qualities unlike the EEA Agreement. The EC Treaty prevails over incompatible legislation adopted by the Member States, whether the national law pre-dates or post-dates the Treaty itself. This quality of the Treaty, furthermore, is extended to secondary legislation adopted by the Community institutions on the basis of powers conferred upon them in the Treaty.[30] By contrast, Art. 2 EEA states that "the Agreement" means the main Agreement, its Protocols and Annexes as well as the acts referred therein. In other words, secondary legislation of EC law taken over via the EEA Agreement has the same status in EEA law as the main Agreement. Art. 119 EEA reinforces this by stating that the Annexes, acts referred therein and the Protocols form an integral part of the main EEA Agreement. Consequently, the main Agreement, the Protocols, the Annexes and

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signature of the Agreement, it is debated whether the EEA Agreement has primacy over national law and whether it involves taking over the doctrine of direct effect. Reference can be made to Baudenbacher, *The Legal Nature of EEA law in the Course of Time*, *A drama in Six Acts and More May Follow,* in Björgvinsson (ed.), Afmælisrit Þór Vilhjálmsson, Reykjavík 2000, pp. 39-64, at pp. 51-56; Norberg, *Perspectives on the Future Development of the EEA,* in Björgvinsson (ed.), Afmælisrit Þór Vilhjálmsson, Reykjavík 2000, pp. 367-379, at pp. 371-373; Graver, *The EFTA Court and the Court of Justice of the EC: Legal Homogeneity at Stake?,* in Müller-Graff & Selvig (eds.), EEA-EU Relations, Berlin 1999, pp. 31-67, at pp. 53-59; and Sevón & Johansson, *The Protection of the Rights of Individuals*, pp. 373-386.

[27] Accordingly, it depended upon whether the State adhered to the monist or dualist approach. As Iceland and Norway both adhere to the dualist approach, the EEA Agreement was integrated into their legal order by legalizing it. In Iceland, the statute is No 2/1993. According to Art. 3 of that statute, other laws and rules shall be interpreted in harmony with the EEA Agreement and rules that follow. For more information, see for instance Stefánsson, *The EEA Agreement and its adoption into Icelandic law,* Oslo 1997.

[28] Established in Case 6/64 *Flaminio Costa v. ENEL* [1964] ECR 585.

[29] Established in Case 26/62 *Van Gend en Loos v Nederlandse Administratie der Belastingen* [1963] ECR 1 for the Treaty provisions, and Case 41/74 *Van Duyn v Home Office* [1974] ECR 1337 for directives.

[30] The Community competence is based on the rule of law and the principle of subsidiarity. Reference can be made to Arts. 5 and 7 ECT.

the secondary legislation taken over shall be interpreted and applied as one whole. Therefore, the EEA Agreement does not have the same status in the context of EEA law as the EC Treaty in the EC legal order, which also may result in differences of interpretation.

'The art of treaty-making is in part the art of disguising irresolvable differences between the contracting States'[31] is an appropriate statement as one may have realized by now. The important differences inherent in the structure of the instruments, on the one hand, and the principle of a dynamic and homogeneous interpretation of the provisions of both instruments, on the other hand, make the task of judicial oversight very complex. In order to achieve this dual goal without a single and common supranational judicial authority, the EEA Agreement provides a special procedure for judicial supervision.[32] Art. 6 EEA states that

> in so far as [the provisions of the Agreement] are identical in substance to the corresponding rules of the Treaty establishing the European Economic Community and the Treaty establishing the European Coal and Steel Community and to acts adopted in application of these two Treaties, [they] shall, in their implementation and application, be interpreted in conformity with the relevant rulings of the Court of Justice of the European Communities given prior to the date of signature of this Agreement [i.e. prior to 2 March 1992].

Thereby the case law of the ECJ up to the date of signature of the EEA Agreement was taken over lock, stock and barrel, and declared binding for the EFTA Court.[33] However, no such obligation can be found as regards the case law of the ECJ after the date of signature of the EEA Agreement. Such an obligation would have bound the contracting parties to accept any future rulings of the ECJ and would not have been acceptable to the three countries who are not members of the EC/EU and not represented on the ECJ. Nevertheless, Art. 3(2) of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice (the ESA/EFTA Court Agreement)[34] states that the ESA and the EFTA Court 'shall pay due account to the principles laid down by the relevant rulings by the Court of Justice of the European Communities given after the date of signature of the EEA Agreement' (emphasis added), at least to the extent that these rulings concern the interpretation of the EEA Agreement or of provisions in EC law that 'are identical in substance to the provisions of the EEA Agreement' or of the

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[31] Public lecture by Judge Pescatore in 1963, cited in Brown & Kennedy, *The Court of Justice of the European Communities*, 4th ed., London 1994, at p. 308.

[32] It is evident that having two independent courts responsible for the interpretation of basically identical provisions can pose problems for homogeneity; see Baudenbacher, *The EFTA Court and the European Court,* in Müller-Graff & Selvig (eds.), EEA-EU Relations, Berlin 1999, pp. 69-96, at p. 95.

[33] However, the ECJ is not bound by its own case law prior to 2 May 1992. Such an obligation would have amounted to a potential barrier to the development of the case law and would have been unacceptable to the Community; see Christiansen, *The EFTA Court*, op. cit. note 14, at p. 545.

[34] Text available at http://www.eftacourt.lu/esacourtagreement.asp.

respective secondary legislation. A reciprocal obligation for the ECJ does not exist, however.[35]

As can be seen, the EEA Agreement leaves the objective of homogeneity to special procedures and places a rather one-sided burden on the EFTA Court. It certainly does not provide a solution for any serious disputes on interpretation between the EFTA Court and the ECJ.[36] Moreover, the challenge of maintaining a homogeneous interpretation may increase with amendments to the EC Treaty, which affect the interpretation of those EC provisions inserted into the EEA Agreement in their original version, even in those cases where EC law provisions are only amended contextually and not changed textually. Such changes may lead to a reconsideration of the interpretation of EC provisions which cannot be accepted by the EFTA Court. This, in turn, may not conflict per se with the EEA Agreement, but certainly runs against the objective of establishing a homogeneous economic area.[37] While deviations in the reasons do not as such affect the homogeneity,[38] it is the conclusion that matters.

C. Sex Equality and Positive or Affirmative Action

I. EC Law

Social policy within the EC is a loose term, which lacks a unanimously agreed upon definition. For some it is synonymous with labor and employment law, while for others it implies a much wider scope.39 Since the EC was founded in the 1950s primarily for economic reasons, social issues were included only to the extent it was considered necessary from the economic perspective.40 Nevertheless, over time, social policy has become one of the fundamental policies of the EC/EU. Sex equality is just one of many facets of EC/EU social policy.

1. Sex Equality Law in General

The original EEC-Treaty[41] contained a chapter on social policy with one

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[35] For further description, see in particular Christiansen, *The EFTA Court,* op. cit. note 14, at pp. 544-549.

[36] Graver, *The EFTA Court and the Court of Justice of the EC: Legal Homogeneity at Stake?*, op. cit. note 26, at p. 65, states that in the relationship between the two courts, the EFTA Court cannot expect to take the leading role.

[37] Müller-Graff, *The Treaty of Amsterdam: Content and Implications for EEA-EU Relations,* in Müller-Graff & Selvig (eds.), EEA-EU Relations, Berlin 1999, pp. 11-30, at pp. 27-28.

[38] Baudenbacher, *The EFTA Court and the European Court,* op. cit. note 32, at p. 81.

[39] See Craig & de Búrca, *EU Law – Text, Cases and Materials*, 3rd ed., Oxford 2002, at p. 843.

[40] See for instance description of the legislative background and framework of the social chapter in Heide, *Supranational Action against Sex Discrimination: Equal Pay and Equal Treatment in the European Union*, International Labour Review 1999, pp. 381-410, at pp. 383-386.

[41] The abbreviation "EEC" refers to the pre-Maastricht Treaty. See note 5 for further explanation.

provision on sex equality. Art. 119 of the EEC Treaty, now Art. 141 ECT, was the only substantive provision of the chapter and had only limited application. It only granted the right to equal pay for equal work to men and women. Nevertheless, the ECJ interpreted it as also including the right to equal pay for work of equal value.[42] Furthermore, the ECJ recognized that although Art. 119 EEC was mainly adopted with economic reasons in mind,[43] it had a social relevance.[44] Moreover, the ECJ recognized the direct effect of the provision, both in horizontal and vertical relationships.[45] Thus, the ECJ played an important role in the development of sex equality in the EC legal order. However, sex equality in the workplace has many aspects beyond remuneration which could not be deduced from the limited language of Art. 119. Therefore, secondary laws were passed over the years, resulting in a substantial body of law covering a range of work related issues.[46] Since the Treaty did not contain a specific legal basis for legislation in the area of sex equality law, general legal basis provisions were used for the adoption of secondary legislation.[47] The first group of directives were directives generally referred to as the "Equal Treatment Directives".[48] Directive 76/207, which is of primary relevance for our present purposes, is part of that group of laws.[49]

The Treaty of Maastricht accelerated development in the field of social law via adoption of the Social Agreement,[50] which contains several specific legal

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[42] The ECJ held in Case 96/80 *Jenkins v Kingsgate* [1981] ECR 911, para 22, that Directive 75/117/EEC on the application of the principle of equal pay for men and women, did not change the scope of Art. 119 EEC. In effect, it means that the right to equal pay for work of equal value is supposed to be part of the provision itself; see also Tobler, *EC Sex Equality Law,* unpublished course reader of the Leiden Master's Program in EC Law 2002/2003, reader VII, pp. 1499-1517, at p. 1500; found in Martinho & Cardoso (eds.), *A Igualdade entre mulheres e homens na Europa às portas do século XXI. Equality between women and men in Europe: at the gateway of the 21st century,* Porto 2000, pp. 21-47.

[43] See for instance the discussion in Barnard, *The Economic Objectives of Article 119*, in Hervey & O'Keeffe (eds.), Sex Equality Law in the European Union, Chichester 1996, pp. 320-334.

[44] See Case 43/75 *Defrenne v SABENA* (*Defrenne II*) [1976] ECR 455, para 12, where the ECJ said: "This double aim, which is at once economic and social, shows that the principle of equal pay forms part of the foundations of the Community." A reference may also be made to Case C-50/96 *Deutsche Telekom AG v Lilli Schröder* [2000] ECR I-743, para 57, where the ECJ held the economic aim secondary to the social aim pursued by Art. 119 EEC, which expressed a fundamental human right.

[45] See *Defrenne II*, quoted in the preceding note, at para 39.

[46] See, for example, the overview in Tobler, *EC Sex Equality Law*, op. cit. note 42, at pp. 1501-1503.

[47] See, in particular, Arts. 100 (now 94) and 235 (now 308) ECT.

[48] Directive 75/117/EEC on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women is the so-called First Equal Treatment Directive (OJ 1975 L 45/19).

[49] 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).

[50] The United Kingdom, at the time when the Maastricht Treaty was signed, was the only Member State to resist further development of secondary law on social issues. Thus, the twelve Member States at the time agreed in the Social Protocol that eleven of them were entitled to move forward

basis provisions referring, inter alia, to sex equality issues.[51] Nonetheless, the most fundamental changes within the field of sex equality occurred only recently, through the Treaty of Amsterdam.[52] The legal framework changed radically as the provisions of the Social Agreement were integrated into the EC Treaty itself.[53] In this way, both substantive and legal basis provisions dealing specially with sex equality were integrated into the social chapter.[54] As a result, the EC Treaty now specifically deals with sex equality issues on the level of primary law. Sex equality has become one of the principles[55] and accordingly, a superior aim of the EC. Sex equality now has to be taken into consideration as a horizontal obligation. It imposes a general obligation on the EC to eliminate inequality and promote equality in all of its activities.[56]

2. The Principle of Equal Treatment of Men and Women[57]

The fundamental right of men and women to equal treatment has long been deduced from the EC Treaty and the Equal Treatment Directives.[58] The essence of the right is that men and women have to be treated in the same way whenever they are in the same or a comparable situation.[59] The adoption of legislation prohibiting discrimination based on sex is the result of the fact that men and women were previously treated differently.[60] Whether or not the differences in treatment resulted simply from the fact that the older rules were made by men, or whether they were more or less justified by actual differences between the sexes, or a little bit of both, need not be analyzed for the present purposes.

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in the area of social law by application of the Social Agreement. For further information, see for instance, Barnard, *The United Kingdom, the Social Chapter and the Amsterdam Treaty,* Industrial Law Journal 1997, pp. 275 –282.

[51] An example of a directive adopted on the basis of the Social Agreement is Directive 96/34/EC on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC (OJ 1996 L 145/4).

[52] The Treaty of Amsterdam entered into force 1 May 1999. For description of the changes, see, for instance, Numhauser-Henning, *On Equal Treatment, Positive Action and the Significance of a Person's Sex,* in: Numhauser-Henning (ed.), Legal Perspectives on Equal Treatment and Non-Discrimination, London/The Hague/Boston 2001, pp. 217-249, at pp. 220-223; and Tobler, *Sex Equality Law under the Treaty of Amsterdam,* European Journal of Law Reform 2000, pp. 135-153.

[53] A change of government in the United Kingdom led to the integration of the previously annexed Agreement into the EC Treaty. For further information, see, for instance, Barnard, *The United Kingdom, the Social Chapter and the Amsterdam Treaty,* op. cit. note 50, pp. 275-282.

[54] See Arts. 13, 137, 139 and 141 ECT.

[55] See Arts. 2 and 3(2) ECT.

[56] See Defeis, *The Treaty of Amsterdam: The Next Step Towards Gender Equality?,* Boston College International and Comparative Law Review 1999, pp. 1-33, at p. 31.

[57] For a comprehensive overview, see, Craig & de Búrca, *EU Law – Text, Cases and Materials*, op. cit. note 39, pp. 842-935.

[58] This right generally guaranteed in the constitutions of democratic nations; see, for example, Art. 65 of the Icelandic Constitution, statute nr. 33/1944.

[59] See Tobler, *EC Sex Equality Law*, op. cit. note 42, at p. 1505.

[60] Numhauser-Henning, *On Equal Treatment, Positive Action and the Significance of a Person's Sex*, op. cit. note 52, at p. 237.

Prohibited discrimination is defined in two ways. Direct discrimination occurs when a person is treated differently by reason of her sex or on grounds that are inseparably linked to gender. On the other hand, indirect discrimination occurs when the use of a seemingly neutral criterion leads to a result that a negatively affects a considerably larger percentage of one sex.[61] In these cases, the use of an apparently neutral criterion works at the end just like the use of an obviously different criterion due to the circumstances in which it is used.[62] Though both direct and indirect discrimination can, on occasion, be objectively justified, the distinction is important because justifications for direct discrimination will be far more limited[63] as the distinguishing criterion – gender – is inherently suspect.

According to Art. 2(1) of Directive 76/207, which remains the same in the revised version, the principle of equal treatment means that there shall be no discrimination whatsoever on grounds of sex, either directly or indirectly. Nonetheless, the ECJ regards Arts. 2(2)-(4) of the original version of the Directive as derogations to the principle stated in paragraph 1.[64] In such a framework, direct discrimination can be justified on the basis of certain provisions expressly allowing unequal treatment. Such provisions may be expressed in secondary legislation as well as in primary law. However, whether such provisions are truly derogations in terms of their nature is another question.

One of those provisions allowing for unequal treatment is the promotion of opportunities for the under-represented sex, in particular by removing inequalities that affect this sex as regards access to employment, vocational training and promotion, and working conditions, so as to achieve full equality in practice; this is so-called positive or affirmative action.

3. Positive Action

Positive action may be taken in different fields and appear in different forms.[65]

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[61] See definitions and discussion in Senden, *Article 119, The Equal Treatment Principle and The Concepts Of Direct and Indirect Discrimination in Community Sex Equality Law*, Finnish Yearbook of International Law 1997, pp. 385-400, at pp. 393-399; and Luxton, *Equality and Sex Discrimination in the European Union – Is Shifting the Burden of Proof the Answer?,* Dickinson Journal of International Law 1999, pp. 357-382, at pp. 364-365. The prohibition of direct and indirect discrimination is inserted in Art. 2(1) of the Directive.

[62] See Tobler, *EC Sex Equality Law*, op. cit. note 42, at p. 1505.

[63] See Senden, *Article 119, The Equal Treatment Principle and The Concepts Of Direct and Indirect Discrimination in Community Sex Equality Law,* op. cit. note 61, at p. 394.

[64] See Case 222/84 *Margurite Johnston v Chief Constable of the Royal Ulster Constabulary* [1986] ECR 1651, paras 36 and 44 for Arts. 2(2) and (3) of the Directive, and Case C-450/93 *Eckhard Kalanke v Freie Hansestadt Bremen* [1995] ECR I-3051 for Art. 2(4) of the Directive, para 21. It may be added that Senden, *Positive Action in the EU Put to the Test. A Negative Score?,* Maastricht Journal of European and Comparative Law 1996, pp. 146-164, at p. 159, considers it clear that the European legislator drafted Arts. 2(2)-(4) of the Directive as derogations from the principle in Art. 2(1) of the Directive.

[65] For a description of different forms of positive action see Schiek, *Sex Equality Law after Kalanke and Marschall*, European Law Journal 1998, pp. 148-166. Additionally, an overview of the scope and limits of positive action in the European Union may be found in Caruso, *Limits of*

For instance, based on Art. 13 ECT, directives may be adopted providing for positive action measures to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.[66] However, the present paper focuses on positive action in favor of women in the field of employment.

In EC law, there is no official definition of positive action.[67] Nonetheless, the consensus seems to be that the concept embraces all measures to counter the effects of past discrimination, to eliminate existing discrimination and to promote equality of opportunity between women and men. They are specifically aimed at types or levels of jobs where members of one sex are significantly under-represented.[68] Such measures may appear to be fundamentally flawed at first glance, as sex is used as a criterion for selection of benefits such as jobs and promotion.[69] They may seem unjustified from a formal perspective, but a strategy based on gender may be the only way to prevent the continuation of inequalities in practice. To achieve this, two approaches may be taken.

The formal equality approach, assumes that men and women are comparable in all relevant aspects. Accordingly, a woman can expect equal treatment as long as she adheres to the male norm.[70] The inequality in practice is seen as a result of individual choices rather than structural problems.[71] However, substantive equality rejects the male criteria as the norm and justifies different treatment of women arising from biologically or socially determined differences between men and women.[72] Substantive equality demands that persons be judged on their individual merits as well as the real situation, which places women in a weaker position in the market.[73] According to this view, the aim of equality laws is to correct actual injustices in a society.[74] Which path to be taken is the subject of a

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the Classic Method: Positive Action in the European Union After the New Equality Directives, Harvard International Law Journal 2003, pp. 333-386.

[66] See, for instance, Art. 5 of Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (OJ 2000 L 180/22). As yet, no directive has been adopted to combat sex discrimination.

[67] See http://citizens.eu.int/en/en/gf/eq/ie/gi/104/giitem.htm, where positive action adopted in the EC for the promotion of equal treatment related to employment is outlined.

[68] See Defeis, *The Treaty of Amsterdam: The Next Step Towards Gender Equality?*, op. cit. note 56, at p. 17.

[69] See Fredman, *After Kalanke and Marschall: Affirming Affirmative Action,* Cambridge Yearbook of European Legal Studies 1999, pp. 199-215, at p. 200.

[70] See Fenwick, *Special Protections For Women in European Union Law,* in Hervey & O'Keeffe (eds.), Sex Equality Law in the European Union, Chichester 1996, pp. 63-80, at p. 65.

[71] See Fenwick & Hervey, *Sex Equality in the Single Market: New Directions for the European Court of Justice*, Common Market Law Review 1995, pp. 443-470, at p. 444. According to Mancini & O'Leary, *The New Frontiers of Sex Equality Law in the European Union*, European Law Review 1999, pp. 331-353, at p. 334, the ECJ is seen by most commentators to have favored a formal understanding of equality.

[72] See Fenwick, *Special Protections For Women in European Union Law*, op. cit. note 70, at p. 66.

[73] See Fenwick & Hervey, *Sex Equality in the Single Market: New Directions for the European Court of Justice*, op. cit. note 71, at p. 445.

[74] Fredman, *After Kalanke and Marschall: Affirming Affirmative Action*, op cit. note 69, at p. 201. Caruso, *Limits of the Classic Method: Positive Action in the European Union After the New*

never ending legal debate that provides important input for the development of the case law of the ECJ on positive action.[75]

a) Legislation

The scope for so-called positive action in favor of women in the field of employment has been regulated since the 1970s by Art. 2(4) of Directive 76/207. The provision makes different treatment of men and women possible in some contexts. It aims at the creation of substantive equality as it is aimed at removing inequalities in practice. It reads as follows:

> The 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 Art 1(1).

This language could be seen either as a derogation from the principle of equal treatment or as a means for achieving real equality of treatment.[76] The ECJ interpreted the provision in Kalanke as a derogation from an individual right laid down in the Directive,[77] an approach that was recently confirmed in Lommers.[78]

The importance of positive actions to achieve equality between the sexes was specifically addressed in the nineties by the EC through the Council Recommendation on the Promotion of Positive Action for Women[79] and the Community Charter on the Fundamental Social Rights of Workers.[80] Moreover, it was also expressed in Art. 6(3) of the Social Agreement. However, that article ceased to exist when the Social Agreement was integrated into the Treaty of Amsterdam. As a result, Art. 141(4) ECT was adopted which some believe to be wider in scope than Art. 2(4) of the Directive.[81] The ECJ appears to have taken

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Equality Directives, op. cit. note 65, at p. 342, is of the view that positive action is inspired by the goal of substantive equality.

[75] See for instance discussions concerning the ECJ approach in Case C-409/95 Hellmut Marschall v Land Nordrhein-Westfalen [1997] ECR I-6363, compared to its prior judgment in Kalanke by Mancini & O'Leary, The New Frontiers of Sex Equality Law in the European Union, op. cit. note 71, at pp. 341-346; and Cabral, A Step Closer to Substantive Equality, European Law Review 1998, pp. 481-487, at pp. 484-486. In addition, see the discussion of the approach taken in Case C-158/97 Georg Badeck and Others v Staatsgerichtshof des Landes Hessen [2000] ECR I-1875, compared to Kalanke and Marschall in Schiek, Positive Action before the European Court of Justice – New Conceptions of Equality in Community Law? From Kalanke and Marschall to Badeck, International Journal of Comparative Labour Law and Industrial Relations 2000, pp. 251-275, at pp. 263-273.

[76] Senden, *Positive Action in the EU Put to the Test. A Negative Score?*, op. cit. note 64, at p. 159.

[77] See *Kalanke*, para 21.

[78] Case C-476/99 *H. Lommers v Minister van Landbouw, Natuurbeheer en Visserij* [2002] ECR I-2891, para 39.

[79] Council Recommendation 84/635/EEC on the promotion on positive action (OJ 1984 L 331/34).

[80] Resolution on the Community Charter of the Fundamental Social Rights of Workers, the Social Action Programme and the Intergovernmental Conference on Political Union (OJ 1991 C 326/202).

[81] See for instance Koukoulis-Spiliotopoulos, *From Formal to Substantive Gender Equality. Are*

the same view because the Court stated in Badeck[82] and Abrahamsson[83] that the interpretation of Art. 141(4) ECT would only be material for the outcome of the case, if the Court considered Art. 2 of the Directive to preclude the national legislation at issue.[84] Furthermore, it has been argued that the provision in Art. 141(4) is not framed as a derogation.[85] It reads as follows:

> 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.

Noticeably, it only speaks of positive actions for the under-represented sex; no specific reference is made to women. To that effect, Declaration No 28, annexed to the Treaty of Amsterdam, states that Member States should, when adopting measures based on Art. 141(4) ECT, first and foremost aim at improving the situation of women in working life.[86]

This fundamental change has been followed up in an amendment to the Directive[87] where positive action is now stated in Art. 2(8) by referring to Art. 141(4) ECT.[88] No change in this respect was made through the Treaty of Nice, but the Charter of Fundamental Rights does address social rights in different contexts, for instance in Chapter III on 'Equality'.[89]

International and Community Law Converging?, European Review of Public Law 1999, pp. 516-564, at p. 544; and Betten & Shrubsall, *The Concept of Positive Sex Discrimination in Community Law – Before and after the Treaty of Amsterdam,* International Journal of Comparative Labour Law and Industrial Relations 1998, pp. 65-80, at p. 78.

[82] *Badeck,* para 14.

[83] Case C-407/98 *Katarina Abrahamsson and Leif Anderson v Elisabet Fogelqvist* [2000] ECR I-5539, para 40.

[84] Whether the provision has actually expanded the scope of positive action is another question, especially after the ruling in *Abrahamsson.* See for instance, Numhauser-Henning, *Swedish Sex Equality Law before the European Court of Justice,* Industrial Law Journal 2001, pp. 121-126, at p. 125; Mazurana, Trelogan & Hodapp, International decisions (case note on Badeck, Abrahamsson and Schnorbus), American Journal of International Law 2002, pp. 453-460, at p. 459; and Waddington & Bell, *More Equal Than Others: Distinguishing European Union Equality Directives,* Common Market Law Review 2001, pp. 587-611, at p. 602.

[85] See the discussion in Tobler, *Positive Action under the Revised Second Equal Treatment Directive,* 2002, at p. 22 ; text available at http://www.ewla.org/wf_dl/tobler.doc.

[86] Declaration on Article 119 (4) of the Treaty establishing the European Community (OJ 1997 C 340/136).

[87] Directive 2002/73/EC amending Directive 76/207/EEC.

[88] All those three provisions are to a certain extent co-existing as Art. 2(4) of the Directive continued to exist when Art. 141(4) ECT entered into force on 1 May 1999 and the original Art. 2(4) of the Directive and the new Art. 2(8) both continue to be relevant while the Member States implement the revised Directive.

[89] Charter of Fundamental Rights of the European Union (OJ 2000 C 364/01).

b) Judgments of the ECJ

As one might expect, the scope and content of positive action, as a legal issue, has been the object of a number of judgments by the ECJ. The cases that have come before the ECJ have proven to be essential vehicles in the transformation of Article 119 EEC to Art. 141 ECT. It has developed 'from a modestly conceived provision designed to prevent competitive disadvantage and social dumping to an integral part of one of the most fundamental principles of the Union's constitutional code'.[90] As those judgments form the background to the EFTA case, along with the legislation explained above, their main elements shall be summarized briefly at this point.

Commission v France[91]

The ECJ first interpreted Art. 2(4) of the Directive in Commission v France. A provision of French law that permitted collective agreements to provide special rights for women was not considered justified under Art 2(4) of the Directive, as France could not show that the measures for preservation of special rights for women would reduce actual instances of inequality in social life. The Court stated that the provision was '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'.[92] As can be seen from this judgment, the provision in Art. 2(4) was interpreted in a narrow way by the ECJ.

Kalanke

The quest to find the line between unlawful and lawful positive action in the field of sex equality began in earnest with Kalanke, which was released a few years later and, which was to be expected, entailed a lot of criticism and comments,[93] including some from the Commission.[94] It concerned German state legislation that provided for preference in appointment and promotion of women over equally qualified men if women were under-represented in the sector.[95] The Court noted that a difference in treatment between men and women to the disadvantage of men was discriminatory.[96] In its examination to decide whether the measure could be permissible under Art. 2(4) of the Directive, the Court

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[90] Mancini & O'Leary, *The New Frontiers of Sex Equality Law in the European Union*, op. cit. note 71, at pp. 332-333.
[91] Case 312/86 *Commission v France* [1988] ECR 6315.
[92] *Commission v France*, para 15.
[93] See, for instance, Senden, *Positive Action in the EU Put to the Test. A Negative Score?,* op. cit. note 64, pp. 146-164; and Moore, *Nothing Positive from the Court of Justice,* European Law Review 1996, pp. 156-161.
[94] 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/96/088).
[95] *Kalanke*, para 3.
[96] *Kalanke*, para 16.

referred to its earlier statement in Commission v France and the aforementioned Council Recommendation.[97] It held that Art. 2(4) of the Directive is a derogation from an individual right expressed in the Directive and, therefore, needs to be interpreted strictly.[98] Based on that, the Court found the national measure which guaranteed women absolute and unconditional priority for appointment or promotion to go beyond merely promoting equal opportunities; mandatory preferences could not be justified under Article 2(4) of the Directive.[99] Any positive action measure could only provide for equality of opportunity; any measure going beyond that by prescribing a specific result would be unlawful.[100]

Marschall

In the next case, *Marschall*, the ECJ narrowed the Kalanke rule in line with suggestions contained in a communication from the Commission.[101] Thereby, it rejected the proposal submitted in AG Jacobs's opinion.[102] The case concerned German legislation similar to the one in Kalanke, but with the crucial difference that the national legislation contained a so-called saving-clause. The clause required priority to be given to women in promotion in the event of equal suitability, competence and professional performance, unless reasons specific to a male candidate led to preference for the man.[103] The Court referred to its statements in Kalanke but made an important difference by recognizing that equal qualifications are not the same as equal opportunities.[104] It underlined that Art. 2(4) of the Directive is a derogation from the principle of equal treatment and thus the national measure may not guarantee absolute and unconditional priority for women. However, as the national rules at issue were subject to a saving-clause, the national rules were justifiable under Art. 2(4) of the Directive.[105]

Badeck

The first case decided by the Court after the entry into force of the Treaty of Amsterdam, although filed before that time, was Badeck. The case concerned German legislation that provided a women's advancement plan. The provisions contained binding targets but were not automatic and unconditional as they admitted exceptions and took account of the specific personal situations of all candidates. The selection procedure was based upon assessment of suitability, capability and professional performance, where certain criteria were to be taken into account in so far as they were of importance, such as family work and

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[97] Council Recommendation 84/635/EEC on the promotion on positive action, op. cit. note 79.
[98] *Kalanke,* para 21.
[99] *Kalanke*, para 22.
[100] *Kalanke*, para 23.
[101] See note 94.
[102] See the opinion of AG Jacobs in *Marschall*, at para 47.
[103] *Marschall*, paras 3 and 24.
[104] *Marschall*, paras 29-30.
[105] *Marschall*, paras 31-33.

age.[106] The female candidate was to be chosen when necessary for the objectives of the advancement plan as long as there were no reasons of greater legal weight to the contrary.[107] Possible reasons of greater legal weight were expressed in statutory legislation, as well as in administrative decrees, generally without reference to gender. As a preliminary note, the Court stated that Art. 141(4) ECT was only material for the outcome of the case in so far as Art. 2 of the Directive precluded the national legislation at issue.[108] After having summarized Kalanke and Marschall, the ECJ stated the following:

> It follows 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.
>
> It is for the national court to determine whether those conditions are fulfilled on the basis of an examination of the scope of the provision at issue."[109]

Based on this formula, the Court found the legislation acceptable.[110] The case also concerned binding targets for temporary posts that provided for a minimum percentage of women, at least equal to the percentage of women among graduates, holders of higher degrees and students in each discipline.[111] The Court found such a system acceptable, as it did not fix an absolute ceiling, but rather fixed targets based on actual facts as a quantitative criterion for giving preference to women.[112] Furthermore, the Court accepted measures requiring the allocation of at least half of the available training places in the public sector to women in professions where women were under-represented, as long as additional training places were available in the private sector.[113] The Court considered the rules at issue to entail enough flexibility as it was possible for more than half of the places to be taken by men and because the quota only applied to training places over which the state did not have a monopoly. Therefore, no male was considered definitely excluded.[114]

Abrahamsson

Abrahamsson followed Badeck. The case was also lodged before the entry into

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[106] *Badeck*, paras 30-31. In para 32, the Court noted that the criterion was not challenged in the case at issue.
[107] *Badeck*, para 33.
[108] *Badeck*, para 14.
[109] *Badeck*, paras 23-24.
[110] *Badeck*, paras 34-38.
[111] *Badeck*, para 39.
[112] *Badeck*, paras 42-43. See also para 39 of AG Saggio's opinion.
[113] *Badeck*, para 45.
[114] *Badeck*, paras 51-55.

force of the Treaty of Amsterdam but the judgment was given after it. Accordingly, the Court stated, as in Badeck, that Art. 141(4) ECT was only material for the outcome of the case in so far as Art. 2 of the Directive precluded the national legislation at issue.[115] Moreover, it repeated its abovementioned statements in Badeck.[116] This time, Swedish legislation was contested. The rules at issue provided that women were to be hired preferentially for posts of higher education if they were sufficiently qualified. However, the rules were not to be applied in cases where the difference between the candidates was so great that giving preference to the woman would amount to a breach of the requirement of objectivity in making the appointments.

The Court stated that selection for a post as a rule required an assessment of qualifications and in that context referred to Badeck.[117] It noted the importance of laying down criteria for selection procedures which are transparent and amenable to review to avoid any arbitrary assessment of the qualifications of candidates.[118] The Court found the selection procedure at issue not to fulfill the criteria laid down in its earlier case law. The provision at issue was considered to automatically grant preference to candidates belonging to the under-represented sex, as long as they were sufficiently qualified and the candidates belonging to the over-represented sex were not significantly better qualified. Since the qualification could rarely be precisely determined and as the candidates were not to be subjected to an objective assessment, taking account of the specific personal situations of all candidates, the rule could not be justified under Art. 2(4) of the Directive.[119] Next, the Court held that positive action of the kind in question could not be justified under Art. 141(4) ECT either and that the national rule also seemed disproportionate to the aim pursued.[120] The fact that the national measure applied only to procedures for filling a predetermined number of posts as part of a specific program for the purpose of positive action could not change its absolute and disproportionate character.[121] In that respect it was irrelevant whether the reseved posts were in lower or higher levels of education.[122] However, the Court also stated that Community law did not preclude a national rule pursuant to which a candidate belonging to the under-represented sex may be granted preference, if she possesses equivalent or substantially equivalent merits, as long as such a rule provides for an objective assessment which takes account of the specific personal situations of all candidates.[123]

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[115] *Abrahamsson*, para 40.
[116] *Abrahamsson*, para 43.
[117] *Abrahamsson*, paras 46-47.
[118] *Abrahamsson*, paras 48-49.
[119] *Abrahamsson*, paras 52-53.
[120] *Abrahamsson*, para 55.
[121] *Abrahamsson*, paras 57-58.
[122] *Abrahamsson*, para 64.
[123] *Abrahamsson*, paras 60-61.

Schnorbus[124]

In Schnorbus, which was also lodged before the entry into force of the Treaty of Amsterdam but given after, the national court asked whether yet another German rule could be justified under Art. 2(4) of the Directive.[125] The rule at issue granted men who had performed military or civil service preferential access to a specific part of legal education in case there were not enough places for all applicants. The Court concluded that the rule was evidence of indirect discrimination, since only men had access to military and civil service. However, as the rule was objective in nature, the Court did not consider it contrary to the principle of equal treatment for men and women. Furthermore, the Court considered the rule proportionate as it gave priority only for a limited time. The Court concluded the rule to be justified under the Directive, without referring specifically to Art. 2(4) of the Directive.[126] For that very reason, it could be argued that Schnorbus is not an Art. 2(4) case at all.

Lommers

The most recent case given by the ECJ, and so far the only one lodged and released after the entry into force of the Treaty of Amsterdam, is Lommers. The case concerned a scheme set up by a Dutch ministry to tackle under representation of women. The ministry reserved a certain number of subsidized nursery places for its staff, and reserved those exclusively for children of female employees, admitting children of male employees only in cases of emergency.[127] Thus, the issue did not concern preferential access to employment but preferential treatment with respect to a working condition.[128] The Court first concluded that the situation for male and female employees with respect to their possible need for nursery facilities is comparable. Therefore, the measure involved different treatment of comparable situations and had to be examined under Art. 2(4) of the Directive.[129] Based on existing case law, the Court concluded that the measure met the standards developed in Badeck and, in any case, met the guidelines of the Council Recommendation.[130] Therefore, the measure could be justified.[131] The Court had evidence before it that at the time of the adoption of the measure, women were significantly under-represented at the

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[124] Case C-79/99 *Julia Schnorbus v Land Hessen* [2000] ECR I-10997. Whether the case should be understood as an example of objective justification of indirect discrimination, as one of positive action or both of them, or as an issue of lack of comparability is an open question; see Tobler, *Positive Action under the Revised Second Equal Treatment Directive,* op. cit. note 85, at pp. 6-7, footnote 19. In light of this ambiguity, the case is included here only because the EFTA Court refers to it in its judgment.
[125] *Schnorbus*, para 40.
[126] *Schnorbus*, paras 43-47.
[127] *Lommers*, paras 9 and 11.
[128] *Lommers*, para 26.
[129] *Lommers*, paras 30-31.
[130] Council Recommendation 84/635/EEC on the promotion on positive action, op. cit. note 79.
[131] *Lommers*, para 34.

ministry. The Court also accepted the argument that a proven lack of suitable and affordable nursery facilities was likely to result in certain female staff giving up their jobs.[132] The ECJ then stated that as a derogation from the principle of equal treatment of men and women, Art. 2(4) of the Directive has to be proportionate, which requires the derogation to remain within the limits of what is appropriate and necessary.[133] Finally, the ECJ found the measure to be proportionate as there was only limited number of nursery places reserved for children of female employees and the children of male employees were admitted in cases of emergency.[134]

c) Principles Inferred from the Judgments[135]

From the judgments analyzed above, certain general principles can be deduced regarding the scope and limits of positive actions. Pursuant to Kalanke, Art. 2(4) of the Directive should be construed as a derogation from an individual right that must be interpreted strictly. A rule that guarantees female candidates with equal qualifications absolute and unconditional priority goes beyond the limits of Art. 2(4) of the Directive.[136] In Marschall, it was recognized that equally qualified does not mean equal opportunities and thus preferential treatment of women can be justified if it counteracts the prejudicial effects and reduces actual instances of inequality. However, the measure taken must be subject to a saving clause, that is, there has to be an element of flexibility. Specifically, the measure must provide a guarantee that equally qualified male and female candidates will be subject to an objective assessment, which takes account of all criteria specific to the individual candidates and overrides the priority accorded to the woman where one or more of those criteria tilt the balance in favor of the male candidate. Furthermore, the criteria for the assessment of the candidates should be neutral as regards gender.[137] These guidelines were the basis of the ECJ judgments in Badeck as well as Abrahamsson.[138] In Abrahamsson, the Court added that the criteria for the procedure of selection must be transparent and amenable to review in order to obviate any arbitrary assessment of the qualifications of the candidates.[139] To base the selection on the mere fact of belonging to the under-represented sex is not acceptable.[140] Furthermore, the selection procedure and the preferential mechanism has to be proportionate to the aim pursued.[141] Based on Abrahamsson and taking the issue further, Lommers provided for a shift in the interpretation of the scope of positive action.

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[132] *Lommers*, paras 36-37.
[133] *Lommers*, para 39.
[134] *Lommers*, paras 41-49.
[135] This section reflects the writer's personal opinion with regard to the general principles that can be inferred from the judgments.
[136] *Kalanke*, paras 21-22.
[137] *Marschall*, para 35.
[138] *Badeck*, para 23 and *Abrahamsson*, para 43.
[139] *Abrahamsson*, para 49.
[140] *Badeck*, paras 33 and 36 and *Abrahamsson*, paras 52-53.
[141] *Abrahamsson*, para 55.

The ECJ referred to Art. 2(4) of the Directive as a derogation, as it did in Kalanke. However, this time the Court stated that as a derogation it must be interpreted in light of the principle of proportionality, instead of being interpreted restrictively. The principle of proportionality requires that measures must remain within the limits of what is appropriate and necessary in order to achieve the aim and the principle of equal treatment must be reconciled as far as possible with the requirements of the aim thus pursued.[142]

II. EEA Law

As previously stated, the EFTA States took over the majority of the Community's internal market legislation in existence at the time of signature of the EEA Agreement. Moreover, they took over a number of horizontal provisions relevant to the four freedoms, including certain provisions concerning social policy.[143] In recital 11 of the preamble to the EEA Agreement, the importance of the development of the social dimension is emphasized, including equal treatment of men and women in the entire EEA area.

1. Legislation

Art. 69(1) EEA corresponds to the former Art. 119 EEC. However, paragraph two results from the special features of the EEA Agreement. In paragraph two, reference is made to Annex XVIII for the implementation of paragraph one. Additionally, Art. 70 EEA states that the Contracting Parties shall promote the principle of equal treatment of men and women by implementing the provisions specified in Annex XVIII. Annex XVIII, in turn, contains a list of Community directives which the contracting parties promise to implement in their legal order. In point 18 of the Annex, reference is made to Directive 76/207 in its original version. It should be noted that Art. 7 EEA declares acts referred to in the Annexes to be binding upon the contracting parties and to be part of their legal order.

As the EEA Agreement has remained the same since the time of signature, Art. 69 EEA has not been changed as a result of changes made in the EC via the Treaty of Amsterdam.[144] However, the EEA Agreement provides for a procedure, in particular in Arts. 102-104 EEA, to take over new Community legislation by amendment of the relevant annex. At the time of the EFTA case, an amendment to Annex XVIII had not been made. Thus, the Directive had not been adapted in EEA law; on the other hand, it is presumably only matter of time before this is done.[145]

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[142] *Lommers*, para 39.
[143] Arts. 66 -71 EEA.
[144] For the implications of the Treaty of Amsterdam in the context of EEA law see, in particular, Müller-Graff, *The Treaty of Amsterdam: Content and Implications for EEA-EU Relations*, op. cit. note 37, pp. 11-30.
[145] According to the Acquis Implementation Database at the ESA web page, last updated on 6

2. The EFTA Case

The case at issue was the first case decided by the EFTA Court on positive action measures in the context of sex equality. Keeping in mind the difference in scope and structure of the EC Treaty and the EEA Agreement, as well as the different status of legislation in the EC and the EEA at the time of the judgment, it provides for an interesting analysis. To that end, the case shall first be summarized.

a) Facts

The case involved academic positions earmarked for women, either by direction of the Norwegian government (Norway) or by the University. Based on a provision in Norwegian law pursuant to which Norwegian Universities and Colleges were allowed to advertise certain posts as open only to members of the under-represented sex, certain post-doctoral research grants and permanent academic posts were advertised exclusively to women in fields where women were clearly under-represented. During the years 1998-2001, 29 out of 179 post-doctoral appointments and 4 out of 227 permanent positions were made available exclusively for women.[146]

The ESA considered the measure to go beyond the limits of Art. 2(4) of the Directive, based on the notion that any measure could only be justified if it did not give automatic and unconditional preference to one sex where men and women were equally qualified and that candidates had to be subjected to an objective assessment.[147] As the pre-litigation procedure between the ESA and Norway did not lead to any changes in the contested measure, the ESA initiated enforcement proceedings, against Norway on 22 April 2002 for failure to fulfill its obligations under the EEA Agreement.

b) Arguments of the Parties[148]

The ESA claimed that Norway had breached Arts. 7 and 70 EEA and Arts. 2(1), (4) and 3(1) of the Directive[149] by applying legislation that reserved a certain number of academic positions exclusively for women.[150] The ESA submitted

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October 2005; the revised Directive has as yet not been implemented: http://www.eftasurv.int/?showWithHandler=node/web/database#webpath#.

[146] *EFTA case*, paras 2-4.

[147] *EFTA case*, paras 15 and 17.

[148] The focus here is on the relevant arguments submitted for the purpose of this paper. Therefore, arguments concerning possible justifications by reference to international law, and arguments based Art. 2(2) of the Directive related to occupational activities where the sex of the worker constitutes a determining factor, have been skipped.

[149] Art. 2(1) of the Directive reads as follows: "For the purposes of the following provisions, the principle of equal treatment shall mean that there shall be no discrimination whatsoever on grounds of sex either directly or indirectly by reference in particular to marital or family status".

[150] *EFTA case*, para 1.

that the measure amounted to different treatment on grounds of gender by totally excluding men and, therefore, was in breach of Art. 2(1) of the Directive. Furthermore, the ESA submitted that a measure giving priority automatically and unconditionally to women constituted a violation of the Directive although the sector was characterized by gender inequality. The ESA held that the rule precluded an objective assessment of a possible male candidate. Thus, it could not be justified under Art. 2(4) of the Directive, and was in breach of the principle of proportionality. Moreover, the ESA submitted that the measure would not be lawful under Art. 141(4) ECT, which it stated in any event not to be part of EEA Law. The Commission of the EC supported the ESA in its submission. In its view, the total exclusion of one gender from a selection procedure could not be justified.[151]

Norway asked the Court to adopt its own interpretation of positive action and to view it as an intrinsic dimension of the very prohibition of discrimination based on sex. It admitted that the actions taken provided for an automatic and unconditional preference for one gender. However, it contended that the measure was not in breach of Art. 2(1) of the Directive as formal equality in treatment would not be sufficient to achieve substantive equality. According to Norway, the aim of the legislation was the achievement of real equality between men and women as groups, in the long run.[152]

Further, Norway maintained that the measure in question fell within the scope of Art. 141(4) ECT. Since the amended Directive made direct reference to Art. 141(4) ECT, the latter provision became part of the EEA Agreement when the amended Directive was made part of EEA law. Therefore, Norway asked the Court to apply Art. 141(4) ECT to the case at issue by analogy.[153]

Norway also argued that the ECJ had not ruled as yet whether earmarking of specific posts for women might fall within the scope of Art. 2(4) of the Directive. It claimed that Schnorbus and Lommers supported this position. In Schnorbus, preference had been automatically accorded to persons who had completed certain training, as the earmarking scheme was to compensate for an actually disadvantageous situation. The positive action in question in Lommers had been upheld by the ECJ even though all nursery places had been reserved, in principle, for the children of female employees, whereas Norway had only reserved a very limited number of all academic positions for women.[154]

Furthermore, Norway argued that the measure in question was proportionate and referred to Badeck as being a case on point. Since the post-doctoral positions were limited to four years and even the permanent posts would become available again for men at the latest when the female appointees retired, there was no permanent disadvantage for men. As for Abrahamsson, Norway claimed that the positive action in that case was significantly more disadvantageous to the other gender than the measure at issue here. In it's view, the contested

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[151] *EFTA case*, paras 21-24.
[152] *EFTA case*, paras 25-26.
[153] *EFTA case*, para 28.
[154] *EFTA case*, paras 30-31.

measure was at least neutral with regard to qualifications and did not include the inevitable adverse effect of a rejection on a researcher's reputation. Finally, Norway submitted that as the positions in question presented only a minor part of all new temporary and permanent positions, and were an actual extension of the total number of already available posts, male candidates were not in a more difficult situation than before the entry into force of the scheme of earmarked posts.[155]

c) The Judgment of the Court

As a preliminary point, the Court noted that the case had to be analyzed in light of the Directive in its original version, as only that was made part of the EEA Agreement by the reference in point 18 of Annex XVIII. Furthermore, the Court referred to Art. 6 EEA and Art. 3(2) of the ESA/EFTA Court Agreement for the relevance of the case law of the ECJ for its interpretation of the Directive. Then follows a summary of the principles developed by the ECJ in Kalanke, Marschall, Badeck, Abrahamsson and Lommers.[156] From then on, the EFTA Court dealt with the arguments of Norway.

After referring to the homogeneity objective, it rejected to redefine the concept of discrimination on grounds of gender and gave the following statement:

> The directive is based on the recognition of the right to equal treatment as a fundamental right of the individual. National rules and practices derogating from that right can only be permissible when they show sufficient flexibility to allow a balance between the need for the promotion of the under-represented gender and the opportunity for candidates of the opposite gender to have their situation objectively assessed. There must, as a matter of principle, be a possibility that the best-qualified candidate obtains the post.[157]???

Subsequently, the EFTA Court addressed Norway's arguments regarding the case law of the ECJ. Lommers showed that an absolute rule, like the one presently at issue, exceeded what is acceptable under Art. 2(4) of the Directive. That precedent, consequently, could not support Norway's position. The EFTA Court rejected Schnorbus as relevant, since it involved measures that were found to constitute indirect discrimination, but were justified as objective in nature and solely set to counterbalance the delay in the progress of men's education. That was a special constellation unlike the one her at issue. As regards Badeck, the EFTA Court found that even for training positions, the law required a system that is not totally inflexible and added that alternatives for permanent positions seemed to be rather limited in the private sector. Furthermore, it found the Norwegian rules to go further than the legislation at issue in Abrahamsson, as in that case, a selection procedure was foreseen at least in principle. By contrast, the Norwegian rule fell foul of the principle of equal treatment of women and

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[155] *EFTA case*, paras 32-35.
[156] *EFTA case*, paras 36-43.
[157] *EFTA case*, para 45.

men a fortiori.[158]

The argument that the measure should be justified because the positions in question were new was rejected as the Court thought it unlikely that newly created positions would be allocated to specific disciplines, subjects or institutions without an evaluation of already existing posts or without regard to future needs and adjustment of other staff. Consequently, the earmarking scheme was going to have an impact on the number of future vacancies open to male applicants in any field in which it was applied. The argument that the permanent professorships were temporary in nature was rejected as well because they would often be occupied until a professor retired.[159]

For these reasons, the EFTA Court regarded the Norwegian legislation to go beyond the scope of Art. 2(4) of the Directive, which did not permit earmarking of certain positions for persons of the under-represented gender. The Court found the measure to give absolute and unconditional priority to female candidates without any flexibility. The outcome of the hiring procedure was determined automatically in favor of a female candidate. Furthermore, with respect to the principle of proportionality, the Court noted that the ESA was only objecting to the earmarking scheme and not to various other positive actions Norway had adopted. While these other measures might be compatible with the principle of proportionality, the earmarking scheme was not.[160]

Lastly, the Court noted that Art. 141(4) ECT and the amendments to the Directive had not been made part of EEA law. Thus, they could not provide a legal basis for the case, either directly or by analogy.[161] However, as an obiter dictum, the following statement was included:

> … that since the entry into force of the Directive substantial changes have occurred in the legal framework of the Community, providing inter alia for increased Community competences in matters relating to gender equality. […]

According to Article 141(4) EC, the principle of equal treatment shall, with a view to ensuring full equality in practice between men and women in working life, not prevent Member States 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. Inevitably, the interpretation of the Directive will reflect both the evolving legal and societal context in which it operates.

Under the present state of the law, the criteria for assessing the qualifications of candidates are essential. In such an assessment, there appears to be scope for considering those factors that, on empirical experience, tend to place female candidates in a disadvantaged position in comparison with male candidates. Directing awareness to such factors could reduce actual instances of gender inequality. Furthermore, giving weight to the possibility that in numerous

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[158] *EFTA case*, paras 47-51.
[159] *EFTA case*, paras 52-53.
[160] *EFTA case*, paras 54.
[161] *EFTA case*, para 55.

academic disciplines female life experience may be relevant to the determination of the suitability and capability for, and performance in, higher academic position, could enhance the equality of men and women, which concern lies at the core of the Directive".[162]

Based on these reasons, the EFTA Court concluded that Norway had failed to fulfill its obligations under the EEA Agreement and the Directive in its original version.[163]

D. Analysis of the EFTA Case

I. From the Perspective of Positive Action

In light of the differences in the legal status of the EC and the EEA and the principles inferred from the case laws of the ECJ, the EFTA Court was faced with a complex issue. In making its ruling, the EFTA Court first summarized the case law of the ECJ insofar as it dealt with legitimate measures to promote substantive equality under Art. 2(4) of the Directive. Moreover, the EFTA Court referred to Lommers for guidance as to how to interpret Art. 2(4) of the Directive. Based on those preliminary observations, it dealt with the arguments submitted by Norway and found the measure unjustified. It cannot be inferred from the judgment that the Court dealt specifically with the special features of the legislation at issue. It simply categorized it in light of the ECJ cases by emphasizing three main elements. Firstly, based on Kalanke, any measure must not be automatic and unconditional;164 rather, based on Marschall, any measure needs to provide for flexibility. Secondly, candidates of both sexes should have the opportunity to have their situation objectively assessed,[165] based on Marschall and its evolvement in Badeck and Abrahamsson. Finally, as a matter of principle, the best-qualified candidate must be able to obtain the post,[166] that is, based on Badeck in particular, priority should only be given to a woman when the male and female candidates cannot be distinguished on the basis of their qualifications. Accordingly, the EFTA Court found measures that per se exclude male candidates to be unjustified. This ruling was in line with the submission of the Commission.

From the judgment, it cannot be deduced that the special features of the measure at issue were taken into account when assessing its legitimacy based on Art. 2(4) of the Directive. The contested measure concerned posts that were exclusively advertised for women. Male candidates were not acceptable at all. Thus, "the door for male candidates" was closed from the start. All previous cases, on the other hand, had involved positions open to both sexes and it was

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[162] *EFTA* case, paras 56-57.
[163] *EFTA* case, para 59.
[164] *EFTA* case, paras 45 and 54.
[165] *EFTA* case, paras 45 and 54.
[166] *EFTA* case, para 45.

only at the time of selection that preference was to be given to under-represented women. Reference may be made to Marschall and Abrahamsson. Secondly, those posts exclusively earmarked for women were new as they were added to the posts already available to both sexes. Thirdly, they were of a limited number and small as compared to the total number of posts. Thus, Norway took the step a bit further than its neighbors in Sweden. In the parallel case Abrahamsson, a predetermined number of posts already provided for, should be granted to women. Lastly, it may be noted that the post-doctoral posts at issue were temporary, for a maximum of four years.

By overlooking those special features, the EFTA Court simply categorized the approach taken by Norway in light of existing judgments of ECJ. However, it appears that the only thing that the cases had in common was the fact that the contested measures were adopted for the purpose of achieving equality in practice. Norway had taken a different approach from any cases previously dediced by creating a relatively small number of new, i.e. additional, academic positions exclusively for women in an attempt to take action against the inequality persisting in higher education. Everybody knew from the beginning that only female candidates were going to be accepted as long as they also fulfilled the usual criteria required for academic appointments. Thus, the promotion of a female candidate over a male was never an issue as such, unlike, for example in Abrahamsson, where the posts had been advertised for both sexes. In Abrahamsson, using the sex of the under-represented group as the determining criterion for the selection between otherwise similarly qualified candidates, was held to be unjustifiable and accordingly unlawful, since the male candidates had limited or no chances of being selected.[167] Thus, in the author's opinion, the measures adopted by Norway differed in an important respect from the measures assessed so far by the ECJ, in particular when the aim of positive action is kept in mind, which is to promote opportunities for the under-represented sex to achieve equality in practice in the long run.

Moreover, the EFTA Court appears to have disregarded the relevance of the principle of proportionality. Kalanke established that Art. 2(4) of the Directive shall be interpreted as a derogation from the individual right of equal treatment of men and women. In Kalanke, it was explicitly stated that as a derogation the provision needs to be interpreted strictly.[168] In other words, measures to promote equal opportunities of men and women require a narrow or restrictive interpretation. In light of that approach, the contested Norwegian legislation could have fallen outside the scope of Art. 2(4) of the Directive. However, the ECJ appears to have changed its approach as regards the interpretation of the derogation. In Lommers, the Court flatly stated that in determining the legitimate scope of any derogation, due regard must be given to the principle of

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[167] What was rejected was a selection procedure which directly referred to the under-represented sex and not to overt and transparent criteria. Such procedure cannot in principle be acceptable, proportionate or justified under Art. 141(4) ECT; see Numhauser-Henning, *On Equal Treatment, Positive Action and the Significance of a Person's Sex*, op. cit. note 52, at p. 234.

[168] *Kalanke,* para 21.

proportionality.[169] The principle requires that derogations "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".[170] Thus, the ECJ moved from the traditional approach and replaced the requirement of strict interpretation by that of proportionality.[171] The decisive test is no longer whether a measure can stand up under a strict interpretation but whether it can be justified in light of the proportionality requirement.[172] This is further confirmed with the submission of the Commission that Art. 2(4) of the Directive should be construed as an expression of the proportionality test.[173] Based on the aforesaid, the scope for positive action measures under Art. 2(4) of the Directive appears to be broader than before. That, in turn, would be in line with amendments made by the Treaty of Amsterdam, in particular the broadening of Member State powers to adopt positive action measures achieved via Art. 141(4) ECT, which has been confirmed in literature as well as case law of the ECJ.[174]

In Lommers, the ECJ provided the national court with guidelines how the national measure at issue should be assessed, which was exactly what the national court had asked for in its request for a preliminary ruling based on Art. 234 ECT. Although those guidelines were given in a case concerning working conditions of employees, there is nothing to suggest that the ECJ approach is limited to such a situation. Therefore, those guidelines may be adapted to the issue presented in the EFTA case as follows. This will demonstrate that the contested Norwegian measure would have met the requirements and should have been upheld.

First, the purported aim of the national measure has to be the reduction or elimination of de facto inequality.[175] In the EFTA case, the Court accepted the fact there were very few women holding academic positions, compared to the number of women among the student body and that women tend to leave academic careers before they are qualified for higher academic positions. Thus, there was no doubt that the measure was indeed taken in a sector where women were significantly under-represented. Clearly, the contested policy was aimed at achieving long-term equality between men and women as groups.[176]

Secondly, total exclusion of members of the dominant group to promote the

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[169] An indication of this different approach was given in *Abrahamsson,* para 55.
[170] *Lommers*, para 39.
[171] According to Caruso, *Limits of the Classic Method: Positive Action in the European Union After the New Equality Directives*, op. cit. note 65, at p. 344, the test of proportionality consists of three parts: a) whether a given legislative or administrative measure aims at a legitimate goal; b) whether the challenged measure is in fact necessary to pursue the goal; and c) whether the means envisaged are not disproportionate to the goal pursued.
[172] Tobler, *Positive Action under the Revised Second Equal Treatment Directive*, op. cit. note 85, at p. 14.
[173] *EFTA case*, para 24.
[174] *Badeck,* para 14, and *Abrahamsson,* para 40; but see also the comments in note 84.
[175] *Lommers*, para 41.
[176] *EFTA case*, para 26.

under-represented group must be appropriate and necessary in light of the proportionality principle.[177] Similar as in Lommers, the posts were allocated only to women, they were limited in number and they did not guarantee positions to all women who possessed the qualification. Furthermore, the measure neither de iure nor de facto deprived men – or other women – from access to post-doctoral or permanent academic positions, since the earmarked positions were additional posts of a very low number compared to the total number of posts available. Thus, there were other alternatives at the University although positions in the private sector may have been limited.[178] In this context, it may be questioned whether the EFTA Court's statement that the creation of new posts will have a negative impact on the number of future vacancies for male (and female) candidates,[179] reflects a real danger. If Norway is willing to create additional academic positions for women until gender equality is achieved in practice, would that not seem to be the best solution also from the point of view of male applicants? Any other positive action would seem to be more burdensome for the opportunities of men. Obviously, reserving posts exclusively for the under-represented sex can be legitimate only as long as the aim of establishing equality in practice has not been achieved. As a result, the measures at issue will be temporary, expanding the opportunities for women without affecting the opportunities for men either way. Eventually, positions reserved exclusively for the under-represented sex will no longer be necessary, because there will no longer be an under-represented group in higher education. By then, the scheme will be phased out, again without negatively affecting the opportunities of male applicants. The reservations made with respect to post-doctoral positions were even more temporary and should easily pass the test of proportionality, similarly to the scheme in Badeck.[180]

Lastly, there could be a requirement that no male may be excluded by a positive action measure in case of emergency.[181] That might be inferred from Lommers but does not seem relevant here.

It appears to the author of this article that the EFTA Court meant to follow the principles inferred from the case law of the ECJ based on the objective of homogeneity. Nonetheless, it has been demonstrated that the EFTA Court overlooked two important elements that should have led to a different result in the EC legal framework. The EFTA Court's approach cannot be explained by the different legal status of the Directive in the EC and the EEA at the time of the judgment. Thus, one wonders whether the EFTA Court may have made a mistake. If it did, it is unlikely that the ECJ would rely on this judgment of the EFTA Court for its own future decisions; after all, the ECJ is not bound by the case law of the EFTA Court. If the ECJ would follow the EFTA Court, that would indeed be a step backwards for the type and scope of positive action

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[177] *Lommers*, paras 42-44.
[178] *EFTA* case, para 50.
[179] *EFTA* case, para 52.
[180] *Badeck*, para 9.
[181] *Lommers*, para 45.

permitted in the EC, since the ECJ has already shown signs of a more lenient approach in its interpretation of lawful positive action measures. Moreover, it would be contradictory to the purpose of the changes made to the EC Treaty by the Treaty of Amsterdam. In spite of this, it is clear from the perspective of the EFTA side of the EEA Agreement that one more door to achieving substantive equality has been closed – at least temporarily – for the purpose of promoting women in employment.

II. From the Perspective of EEA Law

Since the EFTA Court was for the first time faced with positive action in the field of employment, it was interesting to see the approach taken for the purposes of EEA law.

As a preliminary point, the EFTA Court declared the case law of the ECJ relevant for the interpretation of the Directive.[182] The EFTA Court did not say that it was merely required to take due account of those principles laid down in the case law of the ECJ, although the relevant cases were all released after the date of signature of the EEA Agreement. In other words, there would not have been an explicit obligation for the EFTA Court to follow the precedents of the ECJ;[183] the former could have limited itself to taking 'due account' of the principles laid down by the ECJ. Nevertheless, it was only after having summarized all relevant judgments of the ECJ, including those released after the entry into force of the Treaty of Amsterdam, that the EFTA Court rejected the contested legislation at issue by referring to the very principles developed in the case law of the ECJ.[184] It stated: "On the principles laid down in the foregoing, the Norwegian legislation in question must be regarded as going beyond the scope of Art. 2(4) of the Directive".[185] Accordingly, the EFTA Court based its judgment on case law developed by the ECJ after thedate of signature of the EEA Agreement, including judgments released after fundamental changes were made to EC law by the Treaty of Amsterdam, without making a distinction between the case law developed before or after the changes or even a specific comment in that regard. It would seem to follow that changes in the EC legal order, which are reflected in the decisions of the ECJ, were taken over as such into the EEA legal order without any deviation or modification.

The EFTA Court was asked to develop its own interpretation of the concept of discrimination on grounds of gender. It was invited to define positive action measures as an intrinsic dimension of the prohibition of discrimination between men and women, instead of viewing them as a derogation.[186] Accordingly, it was

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[182] *EFTA* case, para 36.
[183] In line with the conclusions of Forman, *The EEA Agreement Five Years On: Dynamic Homogeneity in Practice and its Implementation by the two EEA Courts*, op. cit. note 14, at p. 771, after examination of the case law of the EFTA Court.
[184] *EFTA case*, paras 43-53.
[185] *EFTA case*, para 54.
[186] *EFTA case*, para 25.

invited to take its own independent approach, possibly based on the hope that the EFTA Court would be willing to take a more realistic approach in determining the scope and content of positive action measures. However, the EFTA Court rejected this invitation in favour of the homogeneity aim underlying the EEA Agreement[187] and reviewed the contested legislation squarely in light of the principles developed in the case law of the ECJ. In spite of alternative options, the EFTA Court approached the contested legislation by following the path developed by the ECJ.

Likewise, the EFTA Court was invited to apply Art. 141(4) ECT by analogy to the case at hand. Norway had argued that the amended Directive made direct reference to Art. 141(4) ECT and, therefore, the provision should be applied as part of the EEA Agreement for the purposes of and within the scope of the new Directive, at least once the revised version of the Directive became part of the EEA law framework.[188] Again, the EFTA Court rejected this invitation, as neither had become part of EEA law yet, and therefore they could not provide a legal basis for the present case, either directly or by analogy.[189] Evidently, the rejection is based on the characteristics of the EEA Agreement, that is, since the EEA Agreement is an international treaty where no sovereign power is transferred, specific implementation of the legislation is needed. Accordingly, the EFTA Court rejected that textual changes in the EC legal order could have an effect on EEA law without specific procedures having been followed.

Nonetheless, the fact remains that the EFTA Court referred to all decisions of the ECJ, although several were adopted after the entry into force of the Treaty of Amsterdam, and in that way the fundamental changes in the EC did affect the interpretation of EEA law. Furthermore, although it found the contested legislation to go beyond the scope of Art. 2(4) of the Directive, and although it rejected to apply Art. 141(4) by analogy, the EFTA Court noted that since the original Directive had been taken over into EEA law, substantial changes had occurred in the legal order of the EC providing for increased Community competences in matters relating to gender equality. It referred directly to the relevant amendments of the EC Treaty such as Art. 141(4) ECT. It followed: "Inevitably, the interpretation of the Directive will reflect both the evolving legal and societal context in which it operates".[190] Accordingly, it found that the changes in the EC legal order should have an effect on the interpretation of EEA law, in spite of the fact that they had not as such been integrated in the EEA legal order. In other words, the Court found that such an effect of evolving EC law could not be avoided in the interpretation of the Directive for purposes of EEA law. As a result, the EFTA Court rejected to apply the textual changes in the EC based on a formal approach, while, on closer scrutiny, it is clear that the Court did take them into account through the application of Art. 2(4) of the Directive. It followed that "under the present state of law...," and implicitly

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[187] *EFTA case*, para 45.
[188] *EFTA case*, para 28.
[189] *EFTA case*, para 55.
[190] *EFTA case*, para 56.

referring to Badeck and Abrahamsson as to how the criteria for the assessment of the selection of candidates should be outlined, exclusivity for one sex is not allowed.

Although the EFTA Court had already rejected the legislation at issue as going beyond the limits of Art. 2(4) of the Directive, it appears to have added the above to indicate that the fundamental changes of the EC are to be taken into account in the EEA as well. The reason can only be the objective of homogeneity. Some would probably consider such an interpretation to be in accordance with the EEA Agreement, which is expected to change, develop and evolve in harmony with the EC Treaty. Nonetheless, it should be construed as an obiter dictum on behalf of the EFTA Court as it is an extra thing, given after the EFTA Court had already rejected the legislation at issue as going beyond the limits of Art. 2(4) of the Directive. It appears to be given for the purpose of precluding any doubts as to whether the changes in the EC will be taken over in the legal framework of the EEA. In other words, the EFTA Court emphasized that the legal status will remain parallel between the EC and the EEA, certainly in the field of sex equality. Therefore, we may probably assume that the EFTA Court will stretch the interpretation of Art. 2(4) of the Directive so far as may be needed to be in line with Art. 141(4) ECT, although the latter provision is considered to be broader in scope than the former. As a result, contested legislation that falls within the framework of Art. 141(4) ECT but is cannot be justified under Art. 2(4) of the Directive will, in the context of EEA law, be accepted by stretching the scope of Art 2(4) of the Directive through interpretation. That may be said to be in accordance with recital 15 of the preamble to the EEA Agreement as well as recital 3 of the preamble to the ESA/EFTA Court Agreement.

However, such far-reaching interpretation will no longer be required once the revised Directive is adopted into EEA Law. After the adoption, Art. 2(8) of the revised Directive will be available and will be interpreted in the same way in the EEA as it is in the EC, again to maintain the objective of homogeneity. In particular, the fundamental changes in the EC Treaty will be reflected in the interpretation of Art 2(8) of the revised Directive, which makes direct reference to Art. 141(4) ECT. Therefore, it will not make any difference whether Art. 141(4) ECT is adopted as such to EEA law. It is even possible to argue that Art. 69(1) EEA should be read in light of the revised Directive and Art. 141 ECT, as the main EEA agreement, its annexes, protocols and secondary legislation should be read as one whole. Moreover, there is nothing in the present judgment to suggest that the difference in aim and structure of the two treaties will affect the interpretation of EEA law, resulting in even the slightest deviation from EC law.

The EFTA Court's assigned task is to interpret the model provisions of the EC Treaty in the same way as developed by the ECJ and at the same time to take into account the special features of the EEA Agreement. Nonetheless, it is an undeniable fact, politically motivated or not, that its task is also to keep EEA law in line with EC law in those areas taken over for the sake of the aim of homogeneity. The EFTA Court undoubtedly contributes to the homogeneity

principle in a particularly dynamic way, since there is nothing in its ruling to suggest that the difference in scope or aim of the two treaties, or even fundamental changes on the one side, result in the slightest deviation in interpretation from the EC provisions. The objective of homogeneity is given such significant weight that it appears to bridge the gap between the two legal frameworks. Whether or not the EFTA Court is going too far in its interpretation is impossible to determine, but one thing can be said, namely that this far reaching approach by the EFTA Court is the result of an agreement which has always been an attempt at doing the impossible.

E. Conclusions

The EEA Agreement was analyzed to draw attention to the fact that there are important differences between the EC and the EEA, which give reason to believe that principles of EC law can only be taken over into EEA law with certain, if slight, modifications. However, for a supranational system to work in the context of an intergovernmental treaty, the EFTA States are obliged to follow the EC as far as possible. To ensure its uniformity and dynamic development, a two-pillar system was created. The task of maintaining homogeneity was given to two independent courts – the ECJ and the EFTA Court. The present case is an illustration how the system works. It is the first time that the EFTA Court had to hand down a judgment concerning sex equality. Furthermore, the contested issue required the EFTA Court to go first, as the ECJ has not yet ruled on the legitimacy of a measure exactly as the one contested here. Prior to detailed analysis of the case, the necessary background as regards the relevant legislation and judgments on positive action in the field of sex equality was summarized. The summary was from the perspective of EC law as well as EEA law. Finally, analysis of the EFTA case followed from the perspective of EC sex equality law, as well as from EEA law.

The EFTA Court referred to all relevant cases handed down by the ECJ and the principles to be inferred from them. It did so, in spite of the fact that some judgments of the ECJ were adopted after significant changes were made in the EC legal order via the Treaty of Amsterdam which have not (yet) been taken over into EEA law. In light of the objective of homogeneity, it rejected to interpret positive action as an intrinsic dimension of the prohibition of discrimination of men and women and to take a distinct approach for the purposes of EEA law. Art. 2(4) of the Directive was construed as a derogation instead, following the precedents of the ECJ. The EFTA Court rejected all justifications for the positive action submitted by Norway based on a particular reading of the ECJ's case law and found the measure to go beyond the limits of Art. 2(4) of the Directive. Although the EFTA Court rejected to apply the revised Directive and Art. 141(4) ECT by analogy, it recognized the relevance of the fundamental changes within the EC legal order by referring to judgments of the ECJ given after the Treaty of Amsterdam entered into force. Nevertheless, it applied a narrow reading of these precedents and found the measure to be

unjustifiable and unlawful.

From the perspective of sex equality, the EFTA Court's finding can be criticized in two respects. The case law of the ECJ so far concerned how preference can lawfully be given to women in selection procedures, when women are under-represented in a given sector and when male and female candidates are considered equally qualified. However, in the present case the contested measure involved new, additional and limited in number positions, that were earmarked for women. It did not concern how candidates, after having applied, should be selected. There were no male candidates. Secondly, the EFTA Court disregarded the emphasis on the principle of proportionality which can be found in the new approach taken by the ECJ in the interpretation of Art. 2(4) of the Directive. The ECJ has moved from a strict interpretation requirement in Kalanke to what can be regarded as appropriate and necessary in Lommers. As a result, the scope of positive action should be construed broader than in older case law. Moreover, it was demonstrated that the contested measure in the EFTA case would have fulfilled the guidelines given by the ECJ in Lommers. Accordingly, it appears that the EFTA Court misinterpreted the path taken more recently by the ECJ and either intentionally or by mistake categorized the contested measure in line with older judgments of the ECJ. If this reading of the decisions of the two courts is correct, we are faced with a deviation between EC and EEA law and it will remain to be seen whether and how a split can be avoided in the future.

The result of the EFTA Court's ruling is undisputedly that one more means to achieve substantive equality through positive action measures has been outruled, at least from the perspective of EEA law. It appears that the whole purpose of the positive action measure was overlooked, which was to promote one group over another to achieve equality in practice. From a policy perspective, it is a simple matter of fairness that both genders have the same opportunities, but once again the results appear to be slow in coming.[191] The acknowledgement of differences in respect of needs and resources need not result in unacceptable differential treatment of men or women. However, it requires thoughtful and cautious work involving weighing different values and interests against each other with the aid of objective arguments and consideration of proportionality.[192] Why should the earmarking of positions exclusively for the under-represented sex not be allowed if it could genuinely promote more equality? It appears that the pitfall of positive action in the field of sex equality is to see preferential treatment of women as a group as a derogation from the individual right of equal treatment between men and women. Undisputedly, the effect and, indeed, the intention of positive action is to discriminate in favor of a particular group, usually in favor of women,[193] and therefore it is hardly rational to speak of it as a

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[191] Mazurana, Trelogan & Hodapp *International decisions (case note on Badeck, Abrahamsson and Schnorbus),* op. cit. note 84, at p. 460.

[192] Numhauser-Henning, *On Equal Treatment, Positive Action and the Significance of a Person's Sex*, op. cit. note 52, at p. 248.

[193] See Szyszczak, *On Equal Treatment, Positive Action and the Significance of a Person's Sex, Comments on Ann Numhauser-Henning Article*, in Numhauser-Henning (ed.), Legal Perspectives

derogation.[194] How can substantive equality be achieved when the range of lawful measures is defined so narrowly? Positive action should rather be construed as a necessary tool to achieve substantive equality; in this case it is a coherent part of the framework and purpose of Directive 76/207, as amended, which in turn is the expression of legitimate legislative procedures and bodies, representative of society.[195]

From the perspective of EEA law, the EFTA Court disregarded the special features of the Agreement compared to the EC Treaty. It based its judgment on all prior judgments adopted by the ECJ, even though most of those judgments were given after significant changes occurred in EC law via the Treaty of Amsterdam and before those changes were taken over into EEA law. At the same time, the EFTA Court rejected to apply Art. 141(4) ECT and the revised Directive as neither had been adapted to EEA law according to the procedures that the EEA Agreement presupposes. Strangely enough, the EFTA Court still accepted the contextual changes that follow those amendments in the EC legal order by taking them into account in its interpretation of Art. 2(4) of the Directive and giving a specific statement in that regard, having already found the legislation unjustified by Art. 2(4) of the Directive. Therefore, it appears that the EFTA Court gave an obiter dictum to preclude any doubts as to whether the fundamental changes in EC law would be taken over in the EEA. The objective of homogeneity is to prevail over the formal status of the Agreement.

From the approach taken by the EFTA Court, it can be inferred that it will seek strict parallelism between EEA and EC law, although there are differences in the structure and aims of the treaties and although there will time and again be instances where only EC law has been formally changed. One may find this to be in accordance with the EEA Agreement, which is meant to develop, change and evolve in harmony with EC law. The objective of homogeneity is given priority to avoid deviations from the EC legal framework, although the structural differences between the two treaties and legal regimes would suggest a need for the occasional difference in interpretation. Whether there will be deviations anyhow, because of possible misinterpretations by the EFTA Court of the path taken by the ECJ, only the future will tell.

Even though it was not the intention of the EFTA States to transfer sovereign powers to the EEA, it cannot be denied that some powers were in fact transferred, since the principle of homogeneity requires that EEA law follows EC law, even in those cases where it was not formally taken over.[196]

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on Equal Treatment and Non-Discrimination, London/The Hague/Boston 2001, pp. 251-257, at p. 256.

[194] The dilemma of preference rules is that the right of men to be formally treated equally is set aside in the name of the right of women to be substantively treated equally; see Schiek, *Positive Action before the European Court of Justice – New Conceptions of Equality in Community Law? From Kalanke and Marschall to Badeck*, op. cit. note 75, at p. 266.

[195] Cabral, *A Step Closer to Substantive Equality*, op. cit. note 75, at p. 486.

[196] Adaptation is one way the EFTA countries need to follow their 'big brother'. In other words, there has to be a substantial transfer of actual sovereignty; Sejersted, *Between Sovereignty and Supranationalism*, op. cit. note 11, at p. 44.

Realistically, such a transfer of sovereign power is unavoidable to ensure the well functioning of the EEA Agreement. Therefore, the EEA Agreement is not different from any other contract - it is what an agreement contains that matters, and not its label. When scrutinized properly, we have to conclude that the result of a very complex and politically delicate task of the EFTA Court is the transfer of sovereign powers.[197] This transfer, of course, is not without limits but where the line is to be drawn is all but clear.

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[197] It should be noted that one must take into account that this paper analyzed only one of many EFTA Cases released, but the only one released in the context of sex equality. However, the author's opinion is not distinct from opinions expressed in legal writing on the features of the EEA Agreement and cases released by the EFTA Court in other fields. See for instance Baudenbacher, *The EFTA Court and the European Court*, op. cit. note 32, at p. 95; Sejersted, Arnesen, Rognstad, Foyn & Stemshaug, *EØS-rett*, 2nd ed., Oslo 1996, at p. 74; and Forman, *The EEA Agreement Five Years On*, op. cit. note 14, at p. 778.