

2002

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Recommended Citation

Hodapp, Paul; Trelogan, Thomas; and Mazurana, Steve (2002) "Positive Action and European Union Law in the Year 2000," *Annual Survey of International & Comparative Law*: Vol. 8: Iss. 1, Article 3.

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POSITIVE ACTION AND EUROPEAN UNION LAW IN THE YEAR 2000

PAUL HODAPP, THOMAS TRELOGAN AND
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I. INTRODUCTION

This paper is the third in a series in which we examine the similarities and differences between the European and American approaches to the problem of positive (or affirmative) action. In the two previous papers we examined whether certain positive action plans adopted by European legislatures would be constitutional under the Equal Protection clause of the U.S. Constitution.¹ In this paper our aim is limited to updating our analysis of positive action in the European Union with an analysis of three recent European Court of Justice (“the Court”) decisions. The decisions are *Re: Badeck*,² *Abrahamsson*,³ and *Schnorbus v. Land Hesse*.⁴ We shall also consider proposed changes to the Equal Treatment Directive, the basic legal principle at the foundation of the Court’s judgments in these cases.

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1. Paul Hodapp & Steve Mazurana, *Affirmative Action in Public Employment: An International Comparison*, 16 *MIDWEST L. REV.* 90 (1999); Paul Hodapp, Steve Mazurana and Thomas Trelogan, *Affirmative Action in Public Employment: An International Comparison II*, in *EUROPEAN STUDIES CONFERENCE PROCEEDINGS: SELECTED PAPERS FROM 1993 TO 1999*, 171-184 (Odwarka and Stefancic eds., 2001). For a general discussion of the equal treatment principle in European Union law, see ANTHONY ARNULL, *THE EUROPEAN UNION AND ITS COURT OF JUSTICE* (Oxford University Press 1999).

2. Case C-158/97, *re: Badeck*, 2000 E.C.R. I-1875 (Mar. 28, 2000).

3. Case C-407/98, *Abrahamsson v. Fogelqvist*, 2000 E.C.R. I-5539 (July 6, 2000).

4. Case C-79/99, *Schnorbus v. Land Hesse*, 2000 E.C.R. I-0000 (Dec. 7, 2000).

II. THE ISSUE IN THREE RECENT CASES OF THE EUROPEAN COURT OF JUSTICE

The general issue before the Court in these cases was whether certain provisions of the national laws at issue were consistent with the Equal Treatment Directive.⁵ These provisions provided positive or affirmative action in public employment for women in order to gain equal access to employment by means of binding employment targets.

A. BACKGROUND OF POSITIVE ACTION IN EUROPE

The Equal Treatment Directive provides that there shall be no discrimination, either direct or indirect, on the basis of sex, but there is an exception to the prohibition for measures to promote equality of opportunity for men and women, particularly those measures that remove existing inequalities affecting women's opportunities. The Court applied the principles it had already enunciated in *Marschall v. Land Nordrhein-Westfalen*⁶ and *Kalanke v. Freie Hansestadt Bremen*.⁷ In deciding the general issue in the three cases under discussion, the Court was not required to establish new legal principles for the interpretation of the Directive.

However, the Court relied on changes that had been made in European Community law since the time it reached these decisions. A new paragraph 4 of Article 119 of the Treaty of Rome (now 141 of the Treaty of Amsterdam)⁸ states that to achieve full practical equality between men and women in public employment, member states may adopt specific advantages for an under-represented sex to pursue a vocational activity or to overcome disadvantages in professional careers. Declaration 28 concerning Article 141 annexed to the final act of the Treaty of Amsterdam states that member states should, in the first instance, aim at improving the situation of women in working life.⁹

5. Council Directive 76/207, 1976 O.J. (L 39/40).

6. Case C-409/95, *Marschall v. Land Nordrhein-Westfalen*, 1997 E.C.R. I-06363, 1997 E.C.J. Celex Nexis 4798 (Nov. 11, 1997).

7. Case C-450/93, *Kalanke v. Freie Hansestadt Bremen*, 1995 E.C.R. I-03051 (1995). The basic rule established by these two cases is that an employer must have discretion to overcome the presumption favoring a female candidate due to information concerning special circumstances of equally qualified male candidates so long as these special circumstances are not themselves discriminatory.

8. 4 *Eur. Union L. Rep.* (CCH) para. 25,500 at 10526-7 (ratified May 1, 1999).

9. *Id.*

In our view the language of the Treaty is stronger and more proactive regarding equality for women than the language of the Directive. The Directive permits member states to adopt positive action plans if they are intended to achieve equality of opportunity for women by removing obstacles to fair competition between men and women. The Treaty permits the use of positive action not only as a means to formal or competitive equality but also as a means to substantive equality for women as persons who work but who have additional responsibilities to provide for families as well.¹⁰

Similarly, the Advocate General (“AG”) who authored the opinion to assist the Court in *Re: Badeck* took a more radical position than the Court in relying, as he did, on these additions to European Community law. He interpreted the new provisions in the Treaty of Amsterdam as requiring a broad interpretation of the Equal Treatment Directive and the equality provisions in the treaties — one that capitalizes as much as possible on what they permit.¹¹ The AG went so far as to suggest that positive action is a permissible means to equal treatment of men and women when some gender-based disadvantage cannot be remedied in any other way. In effect, the AG cast doubt on the Court’s interpretation that positive action is an exception to the equality principle in the Directive that must be narrowly interpreted.

The AG also rejected the Court’s starting gate analogy, an analogy that suggests that positive action is justified only when it enables women to compete with men for jobs. Instead, the AG proposed that positive action may be justified when women are in a particularly difficult situation in the job market and the principle of non-discrimination does not assist in improving their situation. In these situations member states may use positive preferences for women to increase the number of women in the workplace and thus to have a real effect on the social

10. Those who seek formal equality focus on notions of equal opportunity and formal, procedural, and neutral application of non-discriminatory and gender-neutral law in public employment and in the marketplace. Those who seek substantive equality are more concerned with results and outcomes, with equal shares rather than equal treatment. Proponents of substantive equality favor direct intervention in workplace practices in order to achieve a proportional distribution of men and women in the workforce. They also favor such measures as quotas, preferential hiring of women and unconditional rights for the disadvantaged gender or group in the workplace. See Catherine Barnard, *Gender Equality in the EU: A Balance Sheet*, in *THE EU AND HUMAN RIGHTS* 215-279 (Alston ed., 1999).

11. Case C-158/97, *re: Badeck*, 2000 E.C.R. I-1875 (Mar. 28, 2000), Opinion at para. 26-27. For a general discussion of the Advocate General in the European Court of Justice, see ARNULL, *supra* note 1, 7-9. In summary, the AG, a member of the Court, submits a written opinion to the deciding judges of the Court. The AG’s opinion outlines how the case fits within existing EC law and recommends a resolution of the case which the Court may use as the basis for its judgment.

integration of women, provided the content of the positive action plan is not arbitrary, that it does not excessively impinge on the rights of men, and that it is not disproportionate to the real needs of women. In other words, the AG adopted a substantive, results-oriented approach to positive action to replace the formal, rights-oriented approach the Court had previously used.

The distinction between formal and substantive equality must be grasped to understand the position of the Court in the cases that will be discussed below. The Court, unlike this AG, has accepted formal or competitive positive action as the only permissible means to achieve gender equality, understood in terms of the goal of removing obstacles to equal opportunity for women. The Court appears to believe that its position is a compromise between permitting no gender discrimination whatsoever and promoting substantive equality for women. The Court may also reject the communalistic defense sometimes given for substantive gender equality, namely, that substantive gender equality is a social good that outweighs the right of each individual to have his or her merit evaluated individually.¹²

It is also important to understand the limited jurisdiction of the Court to hear these cases. The procedural posture of these three cases was that the Court had jurisdiction to hear the cases pursuant to Article 177 (now 234 of the Treaty of Amsterdam) which permits the Court to hear cases submitted by national courts within the European Union.¹³ In each case the national court asked the Court to interpret the relevant European Union law so that the national court might use that interpretation of EU law in interpreting its national law consistently with EU law. The Court did not render a judgment for one party under the national law; it clarified EU law for the national court that rendered a judgment for the parties. Thus, the function of the Court under Article 177 is to ensure the uniform interpretation of EU law, not by making direct rulings on the compatibility of national law with EU law but by interpreting EU law in the context of a specific national law.

12. Services Industrial Professional & Technical Union [hereinafter SIPTU] at www.siptu.ie. See also Gwyneth Pitt, *Can Reverse Discrimination Be Justified?* in *DISCRIMINATION: THE LIMIT OF LAW* 281-99 (Hepple and Szyszczak eds., 1992).

13. *Eur. Union L. Rep.*, *supra* note 8. For a general discussion of preliminary rulings by the Court, see *RENAUD DEHOUSSE, THE EUROPEAN COURT OF JUSTICE* (St. Martin's Press 1998) and *ARNULL*, *supra* note 1, at 49-69.

B. RE: BADECK**1. Issue**

The specific issue before the Court was whether certain provisions adopted by the Government of Hesse, Germany, containing binding targets for increasing the proportion of women in sectors of public employment in which they were under-represented could be so interpreted as to be consistent with the Equal Treatment Directive.

2. Procedural History

Forty-six members of the Hesse legislature (the applicants) initiated legal proceedings to review the legality of certain positive action provisions in the law of Hesse. The national court sought a preliminary ruling from the European Court of Justice interpreting the EU's equality law with respect to the national law. The applicants argued that the national law violated the principle of merit and the fundamental right of each employee to equality of opportunity because it ensured a final result or quota and thereby gave women an unfair advantage in employment.

3. First Challenged Provision

The Land Hesse required that its administrative departments eliminate under-representation of women by means of advancement plans for women.¹⁴ Each plan had to provide that more than one-half of job openings must be offered to women who were equally qualified with the male candidates, unless there existed reasons of greater legal weight that opposed the preference for a female candidate. The plans for each career group were valid for two years or until the number of women employees equaled or exceeded the number of male employees in the group.

AG Saggio decided that this provision of the law could be interpreted as consistent with the EU law.¹⁵ The national law did not prevent male applicants from competing with female applicants by establishing a quota of female hires without regard to the suitability of all candidates for a specific position.

The Court agreed that there was no inconsistency between the national law and the equality provisions of EU law so long as the national law

14. Case C-158/97, *re: Badeck*, 2000 E.C.R. I-1875 (Mar. 28, 2000), Judgment at para. 7-9.

15. Case C-158/97, *re: Badeck*, 2000 E.C.R. I-1875 (Mar. 28, 2000), Opinion at para. 7,8 & 33-38.

allowed each applicant to be objectively assessed for each position in a way that involved considering all relevant information for each candidate for each position.¹⁶ The national law allowed preferences to promote the disabled, part-time employees, certain former public service and military employees, and men who had been unemployed for a long time.¹⁷ Thus, in evaluating each candidate, an employer had to consider all these preferences, in addition to the preference for women. Furthermore, an employer, in deciding whether a preference had been rebutted, had to consider all relevant individual characteristics of each employee, e.g., length of service, work history, and job mobility.

In conclusion, in *Re: Badeck* the Court continued to insist that any preference for women in employment constitute not an absolute presumption but at most a rebuttable presumption that could be rebutted in favor of a male candidate by any relevant objective consideration that was not itself discriminatory against women.

4. Second Challenged Provision

The second specific provision before the Court created binding targets for women's employment in certain academic positions, i.e., temporary positions and assistantships. Specifically, the law provided that these posts had to be filled with the same proportion of women as women graduates, or those who had received the appropriate training in the relevant discipline.¹⁸

The AG reached the same result based on the same reasoning he used for the first issue.¹⁹ The Court agreed.²⁰ The Court noted that any hiring decision had to be subject to overriding objective criteria such as those described in the discussion of the first issue. The Court concluded that the law did not establish a binding target or quota requiring that a certain number of women be appointed for each position. Instead, the number of women appointed was fixed by the number of persons trained for the position. In other words, the quota was not absolute or inflexible but was relative to a reasonable standard, the number of women trained for the position. In addition, women were to be encouraged to apply for these positions, but if no qualified women applied, then a male candidate could be hired.

16. Case C-158/97, *re: Badeck*, 2000 E.C.R. I-1875 (Mar. 28, 2000), Judgment at 35-38.

17. *Id.*

18. Case C-158/97, *re: Badeck*, 2000 E.C.R. I-1875 (Mar. 28, 2000), Judgment at para. 39.

19. Case C-158/97, *re: Badeck*, 2000 E.C.R. I-1875 (Mar. 28, 2000), Opinion at para. 39.

20. Case C-158/97, *re: Badeck*, 2000 E.C.R. I-1875 (Mar. 28, 2000), Judgment at para. 40-44.

5. Third Challenged Provision

The third provision before the Court was a provision of the law that fixed a minimum quota for women receiving job training based on the proportion of women already employed in specific job sectors, but that required that at least one-half of all training places be allocated to women.

The AG allowed that on its face this provision sought a specific result, namely, a fixed percentage of women in training positions,²¹ but he maintained that the law could be interpreted as consistent with EU law because the result sought was not an employment result but a training result. Consequently, he argued, the provision could be justified as a way to increase employment opportunities for women by removing an important cause of their lack of employment, namely, lack of training.

The Court agreed, and carefully distinguished this training case from cases involving employment decisions.²² The Court emphasized that since the state had no monopoly on training opportunities (since training programs were also available in the private sector) this provision of the law did not totally exclude men from training opportunities since the law governed only public employment in Land Hesse. Even so, the Court recognized that the chance that a man would be accepted into a training program was reduced because of the law, yet it held that this reduction was justified because women's opportunities to compete with men for later employment could not be increased without increasing the number of training positions for women, and because the training quota did not completely exclude men from such positions.

Thus, the Court rejected the argument that a quota automatically violates men's rights to equal opportunities, and in so doing, moved away from the strict dichotomy between permissible equal opportunities and impermissible equal results that the applicants claimed was the holding of *Kalanke v. Bremen*.²³ Instead, the Court stressed that the Equal Treatment Directive prohibits inflexible quotas. Since training positions were available in the private sector, it reasoned, no man was completely excluded from training by the government quota.

It would thus appear that according to the Court an inflexible quota is one that completely excludes men from a position. It remains to be seen

21. Case C-158/97, *re: Badeck*, 2000 E.C.R. I-1875 (Mar. 28, 2000), Opinion at para 40.

22. Case C-158/97, *re Badeck*, 2000 E.C.R. I-1875 (Mar. 28, 2000), Judgment at para. 51-55.

23. Case C-450/93, *Kalanke v. Freie Hansestadt Bremen*, 1995 E.C.R. I-03051 (1995).

if this reading of the Directive will be limited to pure training positions held prior to employment or will be extended to employment/training positions. Pure training is necessary for employment, but training for a higher position may require employment in a lower position that in effect operates as on-the-job training.

If the Court's ruling is not limited to pure training positions, then arguably a quota for an employment/training position is not inflexible and thus is permissible so long as there is evidence that male candidates for the position can obtain similar positions in the private sector. Since this will often be the case, virtually no quota for an employment/training position can be considered inflexible and hence impermissible on this basis alone.

The authors are not challenging the Court's result, of which we approve. But we do wish to emphasize that the Court is allowing member states to use positive action in a way that virtually compels an employment decision favoring women. This is an important policy preference for the Court not for this reason alone, but also because of the opposition in some of the member states to any form of quota, which, it is argued, is a form of impermissible reverse discrimination.²⁴

6. Fourth Challenged Provision

The fourth specific issue before the Court concerned a provision of the law that guaranteed job interviews for qualified women for positions for which women were under-represented.

The AG and the Court agreed that this provision was consistent with the EU Directive.²⁵ The provision did not require an inflexible result in hiring a certain number of women, but merely aided women in the deliberative process for a position. Thus, as with the training issue, the Court construed the Equal Treatment Directive broadly so as to allow positive action to aid women in the process up to the final employment decision. This result is consistent with the prior position of the Court that positive action is permissible so long as it helps women achieve equality of opportunity with men. Positive action is inconsistent with equal opportunity when it seeks to achieve a specific result, that is, a

24. EU PROPOSALS TO COMBAT DISCRIMINATION, English House of Lords, Select Committee on the E.U. 9th Report, 25 May 2000 at para.122-24 at <http://www.parliament.the-stationery-office.co.uk/pa/ld199900/ldselect/lducom/68/6809.htm>.

25. Case C-158/97, *re Badeck*, 2000 E.C.R. I-1875 (Mar. 28, 2000), Opinion at para 41; Judgment at para. 60-63.

specific number of women in a specific job, by means of an inflexible quota.

One may wonder if the Court would have reached the same result had there been evidence before it that qualified men might not be granted interviews because an employer determined that for cost reasons, say, it could interview only a certain number of persons, all of whom were qualified women. Suppose, for example, that an employer decides that it can afford to interview only three candidates for any job openings. Three women are qualified and thus are interviewed. One male candidate has qualifications that appear superior to the qualifications of any of the female candidates prior to the interviews. But as a result of the interviews at least one female candidate is judged superior to the male candidate. Each candidate has been objectively considered in light of all available evidence, but the male candidate has not been afforded the opportunity to provide the sort of evidence that can emerge from a job interview. Such a procedure might greatly aid the job prospects of women and so allow employers to structure the evaluation process to favor women. Opponents of positive action might argue that such a procedure hardly appears consistent with equal opportunity for men and women. The interview quota creates an obstacle to the hiring of men that does not exist for women. And yet such a procedure might not appear impermissible to the Court, because the inequality would exist with respect to a pre-employment decision and the Court is prepared to allow greater member-state flexibility for positive action in such decisions than it would for positive action in employers' final employment decisions. However, at least one commentator believes that any all-woman short list violates the Equal Treatment Directive.²⁶

Again, we are not challenging the Court's decision, of which we approve; rather we seek to make it clear that the Court is allowing member states' legislative bodies to virtually compel employment decisions favoring women without expressly stating so.

7. Fifth Challenged Provision

The fifth specific provision before the Court did not involve employment directly. Instead, it involved appointments to employee representative bodies and to supervisory bodies, i.e., internal administrative bodies of

26. Peter Jebson, *The Need for More Women Members of Parliament*, NEW L.J. (April 7, 2000) at www.peterjepson.com/new_page_18.htm.

the employer. The law at issue required that one-half of all the members of these bodies be women.

The AG decided that there was no way to interpret this provision to make it consistent with the Equal Treatment Directive,²⁷ as on its face the position created a fixed number of positions for women regardless of their qualifications and the rights of men to compete for these positions.

The Court disagreed.²⁸ The Court interpreted this provision as non-mandatory, thus reading it in light of the provision discussed earlier to the effect that certain objective criteria may rebut the presumption in favor of the woman. According to the Court, the provision did not establish a mandatory or inflexible quota. Instead, the law recommended a goal to the employer which allowed the employer to consider criteria other than gender in making appointments to these bodies, so long as gender was one factor in the decision until women constituted fifty percent of the members of these bodies. Only under this second interpretation could the national law be consistent with EU law.

8. Significance of This Decision

First, the AG proposed that in light of recent provisions regarding gender equality in the Treaty of Amsterdam, national laws promoting positive action for women are to be broadly interpreted so as to increase the integration of women into the workplace. In deciding this case, the Court did not need to revisit its interpretation of the Equal Treatment Directive that positive action is only justified to enable women to compete with men. Perhaps in a future case the Court will follow this AG and interpret positive action not as a narrow exception to the equality principle but as an indispensable means to the end of fully integrating women into the workplace whenever other means have failed to achieve this goal.

Second, the Court has insisted that any preference for women must be rebuttable by objective criteria that do not themselves discriminate against women. In this case, the Court allowed a national legislature to create other gender-neutral preferences that public employers may use to override the gender preference. In addition, the European Commission has submitted a proposal to implement the principle of equal treatment for all persons by prohibiting discrimination based on race and ethnic

27. Case C-158/97, *re Badeck*, 2000 E.C.R. I-1875 (Mar. 28, 2000), Opinion at para. 42.

28. Case C-158/97, *re Badeck*, 2000 E.C.R. I-1875 (Mar. 28, 2000), Judgment at para. 64-66.

origin.²⁹ Future empirical investigations should reveal whether public employers are using preferences for other groups to dilute the effect the gender preference might have in placing more women in substantial positions in the workplace.

Third, the limitations, if any, on an employer's consideration of the objective criteria justifying hiring a man contrary to a preference for women have not been settled by the Court. For example, work history and length of service are objective criteria that are relevant to an employment decision, and so they are available in a specific employment decision to enable a public employer to hire a man over an equally qualified women for a position where women are under-represented. However, if women in fact are out of the workplace for longer periods than men, in part because of the need to care for children, then is this criterion impermissible because it has a discriminatory impact on female employment?

Fourth, if evidence becomes available that positive action is not working to increase the number of women in significant positions in the workplace,³⁰ in part because of the reasons described above, is the Court prepared to say that positive action has increased opportunities for women to compete for jobs? If the answer is "yes," then must the Court conclude that women have failed to compete successfully because of individual or social forces that the EU law is not prepared to remedy? Or will the Court adopt the position of AG Saggio that EU law should be broadly interpreted so as to permit positive action to go farther than it presently has?

Fifth, the Court has affirmed its intent to continue to distinguish between impermissible fixed quotas and permissible flexible goals. However, in the case of employment quotas tied to vocational training and interview quotas, the Court is prepared to search out ways to allow quotas that initially appear inflexible. For example, the Court allows academic quotas when they are tied to the number of persons trained, a number that may vary from time to time so that men are not completely excluded from these positions. However, opponents of positive action may argue that a quota is still inflexible if the employer selects a method that virtually or in practice guarantees that a woman will be hired, even without setting an absolute number of women to be hired. In these

29. Council Directive 2000/43/EC of June 29, 2000 Implementing the Principle of Equal Treatment between Persons Irrespective of Racial or Ethnic Origin, 2000 O.J. (L 16E/56).

30. ARNULL, *supra* note 1, at 505.

circumstances, is the Court balancing the desirability of men's not losing significant employment opportunities to women if similar training opportunities are available in the private sector against the gain in employment opportunities for women? What if the facts that must be considered to achieve such a balance are different in different cases? What if the cost of private training is prohibitively expensive?

In summary, the Court must be forward-looking in its principles. What if the free market economy does not insure that employers do not discriminate in the final analysis? If the Court's narrow interpretation of the Equal Treatment Directive in terms of a sharp dichotomy between equal opportunities and equal results is intended to allow the market to solve this problem and it does not, then what will the Court do? It is possible that the Court will appeal to judicial conservatism, maintaining that it is merely an interpreter of laws passed by others. It seems to us that the Court should recognize that a key principle of interpretation is to appreciate the goal sought by the lawmaker and to assist the lawmaker in achieving that goal. We question whether the flexible/inflexible dichotomy will achieve the goal of improving the situation of working women under the narrow interpretation of the Court, unless the Court's reasoning is expanded as has been suggested above. The Court should recognize that an employment quota, and not merely training or interview quotas, even if it is inflexible in the short term, is a permissible means to achieve equality of opportunity, especially if the more limited forms of positive action permitted by the Court continue to be ineffective in integrating women into vocational and professional positions. Finally, as argued below, the Court should recognize that changes in the Treaty of Amsterdam point to a more expansive notion of equality than formal equality of opportunity. They encourage a notion of substantive equality that requires the workplace to be structured to accommodate different social and familial responsibilities of men and women.

C. *ABRAHAMSSON*

1. Issue

The issue of first impression in this case was whether the Equal Treatment Directive permitted the use of positive action where a female

candidate is qualified but lacks qualifications equal to those of a male candidate.³¹

2. Procedural History

The University of Göteborg in Sweden decided to appoint a woman to a professorial chair. A Swedish regulation required positive action to be used in making such decisions since added effort was necessary to significantly increase the number of female professors. Swedish law provided that positive action could not be used when the difference in candidate qualifications was so great that ignoring that difference would breach the requirement of objective decision-making. This objectivity requirement had been interpreted to mean that a difference is too great if and only if the appointment of the less qualified candidate is likely to reduce the level of performance in the position.³²

The University had also instituted a plan to achieve a fairer allocation of teaching positions between men and women. In light of these considerations, the Rector of the University decided that the difference between the merits of a female candidate and those of a male candidate who was judged better qualified was not so great as to override the preference for a female candidate. He appointed the female candidate to the position.³³

The male candidate and another female candidate appealed. The male candidate claimed the appointment of the first female candidate was contrary to Swedish law and the Equal Treatment Directive.³⁴ The second female candidate appealed on the ground that her qualifications were in fact higher than those of the female candidate who was appointed, and who had been ranked ahead of her in scientific qualifications by the selection board. She did not dispute that the male candidate had scientific qualifications superior to hers.

The Court interpreted Swedish law as requiring that the preference favoring women be absolute. The Court found nothing in Swedish law

31. Case C-407/98, *Abrahamsson v. Fogelqvist*, 2000 E.C.R. I-05539 (July 6, 2000), Judgment at para. 45.

32. Case C-407/98, *Abrahamsson v. Fogelqvist*, 2000 E.C.R. I-05539 (July 6, 2000), Judgment at para. 23-26.

33. Case C-407/98, *Abrahamsson v. Fogelqvist*, 2000 E.C.R. I-05539 (July 6, 2000), Judgment at para. 16-20.

34. Case C-407/98, *Abrahamsson v. Fogelqvist*, 2000 E.C.R. I-05539 (July 6, 2000), Judgment at para. 21.

to allow a genuine assessment of the objective qualifications of all candidates for a position. Under this interpretation, Swedish law was contrary to EU law. The Court then considered whether Swedish law could be upheld because the law was a proportionate or permissible means to achieve equality of opportunity. The Court concluded that it was not and thus found that the Swedish positive action law was contrary to the Equal Treatment Directive.³⁵

The Court also considered numerous secondary issues, which did not affect its result or its analysis. For example, the Court ruled its result would not be changed if the academic posts to which positive action was applied were limited to lower level positions.³⁶

3. Significance of This Decision

A key question regarding the Court's reasoning is why the Court did not expansively interpret the Swedish law by reading into the law its requirement that any preference favoring women must be rebuttable by evidence of objective considerations that may exist for each candidate.

One answer is that the Swedish court's interpretation of the objectivity principle in Swedish law precluded the Court from interpreting the principle differently from the way national courts had interpreted it. Presumably by interpreting the objectivity principle in terms of the likely effect of the appointment on the level of performance in the position, the Swedish court intended the interpretation of the principle to focus on consequences and not the evaluation of candidate qualifications. The Court may have been signaling lawmakers in other member states to eschew the Swedish interpretation of similar principles in favor of the Court's interpretation of that language. The Court may have felt that the Swedish interpretation was too permissive, since appointments will rarely be so adversely affected by differences in qualifications. Also, the Swedish interpretation's forward-looking stance does not allow for the gender preference to be rebutted by other legally permissible preferences for other under-represented groups.

35. *Id.*

36. Case C-407/98, *Abrahamsson v. Fogelqvist*, 2000 E.C.R. I-05539 (July 6, 2000), Judgment at para. 57, 66.

D. *SCHNORBUS V. LAND HESSE*

1. Issue

The primary issue before the Court was whether an automatic priority in admission to legal training for persons who complete compulsory national service that is only available to men violated the Equal Treatment Directive.³⁷

2. Procedural History

Ms. Schnorbus applied for practical legal training but was rejected because there were already too many applications from persons who had completed compulsory national service. Her appeal was rejected on the ground that the preference for applicants to legal training who had completed compulsory service was objectively justified.³⁸

She appealed this decision to a higher court. In the meantime, her application for training was granted. Nevertheless, she maintained her appeal for declaratory relief that the decisions denying her training were a form of unlawful gender discrimination.³⁹

3. Analysis

The Court first considered whether the compulsory service preference constituted direct or indirect discrimination. Direct discrimination explicitly or necessarily treats persons differently because of their sex. Indirect discrimination occurs when a seemingly neutral factor (provision, criterion or practice) disadvantages a disproportionately large number of persons of one sex but not the other.⁴⁰

The Court decided that the compulsory service preference was not directly discriminatory, but was indirectly discriminatory, because women, not being subject to the requirement of such service, cannot

37. Case C-79/99, *Schnorbus v. Land Hesse*, 2000 E.C.R. I-0000 (Dec. 7, 2000), Judgment at para. 16, Opinion at para. 1.

38. Case C-79/99, *Schnorbus v. Land Hesse*, 2000 E.C.R. I-0000 (Dec. 7, 2000), Judgment at para. 14-16.

39. Case C-79/99, *Schnorbus v. Land Hesse*, 2000 E.C.R. I-0000 (Dec. 7, 2000), Judgment at para. 17-19, Opinion at para. 12-17.

40. Case C-79/99, *Schnorbus v. Land Hesse*, 2000 E.C.R. I-0000 (Dec. 7, 2000), Judgment at para. 30-39, Opinion at para. 30-46, referring to Case 96/80, *Jenkins* 1981 E.C.R. 911, 937. See generally, *Regina V. Secretary of State for Employment*, Case C-167/97, *Ex parte Seymour-Smith*, 1999 E.C.R. I-0623, C.E.C. 79 (1999); and ARNULL, *supra* note 1, 486-94.

benefit from the preference. In reaching this decision the Court did not consider statistics regarding the actual effect of the preference on women because the number of women who could take advantage of the preference was zero.⁴¹

The Court then considered whether the preference could be saved from a judgment of invalidity because any discrimination is justified by objective considerations which are not themselves discriminatory. The Court concluded that the preference provided a justified way of counterbalancing the delay in training suffered by men required to undergo compulsory service. Therefore, it held, the compulsory service preference did not violate the Equal Treatment Directive.⁴²

4. Significance of This Decision

The Court's reasoning can be clarified by consideration of the opinion of the Advocate General ("AG").⁴³ According to the AG, two different but related justifications exist for discrimination in EU law. One, expressly relating to indirect discrimination, is set forth in Directive 97/80, which provides that indirect discrimination may be justified by objective factors unrelated to sex. The Court relied on this justification in its judgment. A second justification for discrimination is provided for in the Equal Treatment Directive and is not limited to indirect discrimination. This Directive provides that discrimination is justified by measures that are intended to promote equality of opportunity for men and women. The significance of the Court's judgment is that it held that the first or objective factors justification, though originally created for indirect discrimination cases, is available for direct discrimination cases as well. This means that a national legislature or an employer may create preferences for groups other than women and then may justify rebutting the preference in favor of women by these other objective preferences.

EU equality law and the Court's gender discrimination decisions may create unrealized expectations in women, because preferences for women may be rebutted by preferences for other groups created by employers or national legislatures. The problem of balancing different preferences for under-represented groups is a difficult one. However, is it realistic to

41. Case C-79/99, Schnorbus v. Land Hesse, 2000 E.C.R. I-0000 (Dec. 7, 2000), Judgment at para. 30-39.

42. Case C-79/99, Schnorbus v. Land Hesse, 2000 E.C.R. I-0000 (Dec. 7, 2000), Judgment at para. 40-47.

43. Case C-79/99, Schnorbus v. Land Hesse, 2000 E.C.R. I-0000 (Dec. 7, 2000), Opinion at para. 34-35, 47-55.

expect that the limited positive action endorsed by the Court will actually improve the situation of women in the workplace if the limited preference of women can be rebutted by preferences for other under-represented groups? Women will not believe that the failure to achieve equal results in the workplace lies with them, or that they have been allowed equality of opportunity but have simply been unable to compete with men.

III. AMENDMENT TO THE EQUAL TREATMENT DIRECTIVE

On June 7, 2000, the European Commission published its proposal to amend the Equal Treatment Directive. The primary purpose of the amendments was to establish new provisions regarding sexual harassment. But some amendments were made to bring the Directive in line with the Court's positive action case law and the Treaty of Amsterdam and the Commission's 1999 anti-discrimination directives.⁴⁴

The Commission summarized the positive action principles derivable from the Court's case law as follows. Positive action is an exception to the principle of equal treatment that is limited to measures intended to eliminate or reduce actual instances of inequality. No automatic priority for women, even if they are under-represented in a job, can be justified, but a rebuttable presumption in their favor can be justified if equally qualified male candidates for a position will be objectively assessed for the position. In addition, the Commission added a new Article 8 to the Directive, requiring member states to establish an independent body to promote equal treatment of men and women, which will investigate sex discrimination complaints, initiate administrative and judicial proceedings, and publish surveys and reports.

The proposal is fine as a summary of the Court's judgments up to *Badeck*; however, the proposal does not go far enough in light of the criticisms of the Court's position and in light of the more proactive language of the Treaty. One scholar has criticized the Court's emphasis on free market individualism as an assumption for interpreting the Equal Treatment Directive. Sandra Fredman advocates that the Court consider that group membership is a legitimate non-discriminatory basis for member states to enact positive action plans that favor women.⁴⁵ Others

44. See European Industrial Relations Observatory On-Line, *Commission Proposes Amendments to 1976 Equal Treatment Directive* at www.eiro.eurofound.ie/2000/06/features/EU0006255F.html.

45. Sandra Fredman, *Reversing Discrimination*, 113 L.Q. REV. 575, 596 (1997).

have also argued that women's unequal place in society, including the workforce, is the result of socio-historical forces, and that this inequality cannot be reduced by market forces alone without government intervention.⁴⁶

Part of the solution may be provided by the proposal for gender mainstreaming, a proposal rooted in recognition that market and government policies have a different impact on men and women because of their different family roles and due to the traditional structure of the workplace as a place that husbands go while their wives stay home. According to proponents of gender mainstreaming, positive action must require not just numerical equality of women with men in traditional husband-structured workplaces but reorganization of the workplace to make it easier for women to work on the job and in the home.⁴⁷ The European Commission has adopted gender mainstreaming and has required that it be incorporated in all Commission policies and activities.⁴⁸ The Commission has also recognized that the Treaty of Amsterdam has formalized the European commitment to gender mainstreaming by specifying that the principle of equal treatment shall not prevent any member state from taking steps to promote equality between men and women.⁴⁹

As these advances in the Commission's thinking about gender equality are incorporated by the Court, undoubtedly the Court's positive action judgments will move beyond formal equality of opportunity for women to compete with men in a man's world. The Court will likely recognize that genuine gender equality requires that positive action plans be constructed to recognize differences in the biology, culture, and social responsibilities of men and women. A successful positive action plan

46. NEW ZEALAND MINISTRY OF JUSTICE, *Affirmative Action: A Discussion Paper*, Consistency 2000 Report, Part C at www.justice.govt.nz/pubs/reports/1998/hrc_consistency/part_c_12.html.

47. *Gender Mainstreaming: Conceptual Framework, Methodology and Presentation of Good Practices*, Final Report of Activities of the Group of Specialists on Mainstreaming, Council of Europe Comm. of Ministers, Doc. No. GR-EG(98)1 (1998) at <http://www.coe.fr/cm/reports/1998/98greg1.htm>. See also Pollack & Hafner-Burton, *Mainstreaming Gender in the European Union*, 7 J. EUR. PUB. POLY 432 (2000).

48. Incorporating Equal Opportunities for Women and Men into all Community Policies and Activities, 1996 O.J. (C 386), COM(96)67. See also *Mainstreaming Equal Opportunities for Women and Men in Structural Fund Programmes and Projects*, COM(98)122. But see, SIPTU, *supra* note 12 where it is stated that despite the verbal commitment the Commission has made little progress in integrating research into the differential effects of its policies on men and women, which is a first step in effective gender mainstreaming.

49. *Towards A Community Framework Strategy on Gender Equality (2001-2005)*, COM(00)335, Brussels, July 6, 2000.

consistent with EU law not only reduces inequalities so that women can join men in the traditional workplace, but also creates workplaces in which differences between men and women are respected.

IV. CONCLUSION

Although affirmative action cases in the United States involving gender discrimination have recently received less attention than cases involving racial discrimination, particularly cases involving public contracts and higher education, the authors believe it is important for the United States to remain focused on the need for affirmative action for women. Recent decisions of the European Court of Justice involving positive action for women in employment and the amendments to the underlying EU gender equality law should help Americans keep the issue alive. Further, familiarity with European opinions, judgments, directives, and treaties can not only help Americans rethink arguments for and against various affirmative action proposals in light of the reasoning employed in European discussions,⁵⁰ it can also make them aware of new methods of affirmative action being tried in Europe that might be attempted in the States.

50. European plans upheld by the European Court of Justice in *Marschall*, *Badek*, *Abrahamsson*, and *Schnorbus* would allow an affirmative action plan that seeks to achieve the same proportion of women in each job as exists in the general population. Such plans have been rejected by the U. S. Supreme Court on numerous occasions on grounds that they are based on an unsupported assumption that women will make up the same percentage of applicants for any given position as they do in the general population.

