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THE EUROPEAN FREE TRADE ASSOCIATION COURT AND POSITIVE ACTION

By THOMAS TRELOGAN, STEVE MAZURANA & PAUL HODAPP

I. INTRODUCTION

In this paper our aim is to update the reader regarding positive action law in the European Union (EU).¹ We consider the recent judgment of the European Free Trade Association (EFTA) Court, which summarizes the state of the law.² We begin with a short introduction to positive action law in the European Union.

II. BACKGROUND—POSITIVE ACTION LAW IN THE EUROPEAN UNION

“Positive action” is the European name for what Americans call “affirmative action.”³ A Communication from the European Commission to the European Parliament and the European Council⁴ describes positive action as embracing:

all measures which aim to counter the effects of past discrimination, to

1. In 1957 the EU was created to enable six European states to become a single economic entity. See generally NEILL NUGENT, *THE GOVERNMENT AND POLITICS OF THE EUROPEAN UNION* 23-31 (4th ed. 1999).

2. Case E-1/02, *EFTA Surveillance Authority v. The Kingdom of Norway*, 1 C.M.L.R. 23 ¶¶ 5-13 and 36-43 (EFTA Court 2003), available at <www.eftacourt.lu/pdf/E_1_02Decision-E.pdf>.

3. Katherine Cox, *Positive Action in the European Union: From Kalanke to Marschall*, 8 COLUM. J. GENDER & L. 101, 105 (1998) (discussing how the government of the United Kingdom may have chosen the phrase “positive action” as an alternative to “affirmative action” because of the controversy associated with the latter phrase in the United States).

4. The Commission is the primary initiator of EU legislation. The Council of Ministers is the primary decision-making body. The Parliament exercises limited advisory and supervisory powers over legislation. The fourth principal EU institution is the Court of Justice, which we will discuss later. For a general discussion of the functions of each of these bodies, see NUGENT, *supra* note 1, at 99-241.

eliminate existing discrimination and to promote equality of opportunity between women and men, particularly in relation to types or levels of jobs where members of one sex are significantly underrepresented.⁵

The sources of EU law include treaties and legislation. For our purposes the most important treaty is the Treaty of Amsterdam (Treaty), which provides the EU with the power to take “appropriate action to combat discrimination based on sex.”⁶ The Treaty also provides that member states may maintain and adopt “measures providing for specific advantages in order to make it easier for the underrepresented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers.”⁷ The purpose of these provisions is to insure full equality in practice for men and women in employment.

The most important legislation is the Equal Treatment Directive (Directive).⁸ The Directive prohibits all sex discrimination, but it allows measures that promote equality of opportunity for men and women—in particular measures that remove existing inequalities that affect women’s opportunities in access to employment, including promotion and vocational training.⁹ The Directive was drafted to focus solely on formal equality of

5. Communication from the Commission to the European Parliament and the Council on the interpretation of the judgment of the Court of Justice on 17 October 1995 in Case C-450/93, *Kalanke v. Freie Hansestadt Bremen*, COM(96)88 final at 3.

6. Treaty of Amsterdam Amending the Treaty on European Union, the Treatises Establishing the European Communities and Certain Related Acts, Oct. 2, 1997, art. 13, 1997 O.J. (C 340) 173. For a clear discussion of the Treaty in relation to positive action, see Rebecca Means, *Kalanke v. Freie Hansestadt Bremen: The Significance of the Kalanke Decision on the Future of Positive Action in the European Union*, 30 VAND. J. TRANSNAT’L L. 1087, 1089-94 (1997) and Elizabeth Defeis, *The Treaty of Amsterdam: The Next Step Towards Gender Equality*, 23 B. C. INT’L & COMP. L. REV. 1, 30-33 (1999).

7. Treaty of Amsterdam art. 141(4). Article 2 also provides “equality between men and women” as one of the tasks of the EU. Article 3(2) states that the EU is to “aim to eliminate inequalities, and to promote equality, between men and women.” Article 13 allows the EU to “take appropriate action to combat discrimination based on sex.” And Article 137 includes “equality between men and women with regard to labour market opportunities and treatment at work” as activities of member states that the EU promises to support. Finally, Declaration 28 annexed to the Treaty and commenting on Article 141 states that in adopting measures to ensure the equality of men and women in working life, member states “should, in the first instance, aim at improving the situation of women.”

8. NUGENT, *supra* note 1, at 246-47. Directives are binding as to the result to be achieved but leave to the member states the choice of form and methods to achieve that result. Directives apply only to member states and are not enforceable against purely private parties. Christopher McCrudden, *The Effectiveness of European Equality Law: National Mechanisms for Enforcing Gender Equality Law in the Light of European Requirements*, 13 OXFORD J. LEG. ST. 320, 323 (1993).

9. Council Directive 76/207 EEC of 9 February 1976 on the Implementation of the Principle of Equal Treatment for Men and Women as Regards Access to Employment,

opportunity for women working outside the home. Legal advisers to the EU believed that existing treaties allowed the EU to legislate only in employment matters. They argued that any stronger conception of equality than formal equality of opportunity would require that the EU intrude into the distribution of family responsibilities, and that legislation in relation to the family would have exceeded the limits of legality. Commentators note that this reasoning demonstrates how family and work have been constructed as mutually exclusive spheres in EU law.¹⁰ In our opinion, the Treaty has weakened this separation and allows positive action that may intrude on the distribution of family responsibilities.

III. EFTA SURVEILLANCE AUTHORITY V. THE KINGDOM OF NORWAY

In its judgment in this case, the Court summarized the EU law on positive action so clearly that its judgment is an excellent introduction to EU positive action law. But before we turn to this judgment, we should explain the relationship between the EFTA Court that decided this case and the European Court of Justice.

A. The European Court of Justice and the EFTA Court

The European Court of Justice (ECJ) is the fourth major political institution of the EU. At present the Court has twenty-five judges who are appointed for six-year terms. Member states typically nominate “men of affairs” who have been involved in government but have limited judicial experience. Currently, there are two female judges on the court. Judgments of the court are deliberated in secret and decided by majority

Vocational Training and Promotion, and Working Conditions, art. 2, 1976 OJ (L39) 40. Council Directive 2002/73 EEC of 23 September 2002 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, 2002 OJ (L269) 15, replaces Article 2(4) with a new paragraph 8 that states, “Member States may maintain or adopt measures within the meaning of Article 141(4) of the Treaty with a view to ensuring full equality in practice between men and women.” EU legal documents are available online at <<http://europa.eu.int/eur-lex/en/index.html>>.

In our view the language of the Treaty is more forceful and more favorable to women’s equality than the language of the Directive. Arguably the Directive allows positive action for women only by removing obstacles to equal opportunity for women to compete against men for jobs. The Treaty goes beyond this formal equality and allows positive action to achieve substantive equality for women in the workplace, that is, a proportional representation of men and women in employment.

10. Gillian More, *Equality of Treatment in European Community Law*, in *FEMINIST PERSPECTIVES ON THE FOUNDATIONAL SUBJECTS OF LAW 261-78* (Anne Bottomly ed., 1996); Gillian More, *Equal Treatment of the Sexes in EC Law*, 1 *FEM. LEGAL ST.* 45, 55-59 (1993).

vote without a published dissent.¹¹ The Court is aided in its decision-making by eight Advocates General who write opinions for the Court's consideration. These opinions are more detailed in their reasoning than the Court's judgments and can be helpful in understanding the Court's decision.¹²

The typical procedure in these cases is that a case is assigned to a Judge Reporter and an Advocate General. After a hearing, if it is necessary, the Advocate General issues an opinion. The Judge Reporter informs the Court whether he or she intends to follow the opinion and whether a discussion with a chamber of the Court is necessary. The Court may issue a judgment that simply refers to the Advocate General's Opinion, or the Judge Reporter may write a draft judgment for the Court.¹³

All other things being equal, the Court interprets the law teleologically. The Court considers EU law to constitute a grand design and sees individual legal materials as constituents of that design. The law has a purpose that the Court must discover and make effective.¹⁴ In this process of discovery, the Court is not bound by the common law doctrine of precedent. In principle, the Court could revise its view of a law's purpose at any time. Nevertheless, the Court does not lightly create conflicts among its judgments, and national courts consider the Court's judgments applicable and binding throughout the member states for all future cases.¹⁵

Cases reach the Court in a number of ways. In positive action cases, the Court's judgments are issued in the form of preliminary rulings concerning the legal questions presented by the national courts of the member states. The Court interprets the relevant EU legal authorities to determine if the challenged positive action plan is consistent with EU law.

11. For a general discussion of the Court, see NUGENT, *supra* note 1, at 262-75 and Jo Hunt, *The Legal System of the European Union*, in THE EUROPEAN UNION HANDBOOK 213, 219-20 (Jackie Gower ed., 2002).

12. A. ARNULL, THE EUROPEAN UNION AND ITS COURT OF JUSTICE 7-9 (1999); L. Molinari, *The Effect of the Kalanke Decision on the European Union*, 71 ST. JOHN'S L. REV. 591, 601-02 (1997); K.P.E. LASOCK, LAW AND INSTITUTIONS OF THE EUROPEAN UNION 289-94 (7th ed. 2001) (discussing how the office of Advocates-General, like much of the Court's procedure, is derived from French law; and how the Advocates-General are the "embodied conscience of the Court" who speak only for law and justice and not the particular interests of the EU or its member states). For the most recent information, visit the Court's Web site at <<http://curia.eu.int/en/>>.

13. ARTICLE 177 REFERENCES TO THE EUROPEAN COURT: POLICY AND PRACTICE 24-26 (Mads Andenas ed., 1994).

14. Molinari, *supra* note 12, at 602-03 n.83-84.

15. LASOK, *supra* note 12, at 163.

The Court does not decide the case for the parties. The Court issues its preliminary ruling regarding the consistency of the positive action plan with EU law and the national court decides the case for the parties. The national court is bound to follow the judgment of the ECJ.¹⁶

The EFTA Court¹⁷ has jurisdiction over the three EFTA states that are parties to the European Economic Area Agreement (EEAA) but not members of the EU, namely Iceland, Liechtenstein, and Norway. The aim of the EEAA is similar to that of the EU: to guarantee free trade among the member states, to provide fair competition, and to abolish discrimination in all of the EEAA states, the EU member states, and the three non-member states. The Agreement incorporates pertinent EU law, including the Equal Treatment Directive, and is supervised in two different ways: (1) the European Commission supervises compliance with the Agreement by the EU member states, and (2) the EFTA Surveillance Authority supervises the three non-member states. The ECJ has jurisdiction over disputes involving the EU member states and the EFTA Court has jurisdiction over the three non-member states. The EFTA Court considers the decisions of the ECJ on EU law to be relevant to its decisions on similar issues in order to ensure uniformity between the EU and the EFTA.

The EFTA Court has three judges. Each of the three countries nominates one judge who serves a three-year term. Typically the Court proceedings, which include written and oral submissions, are conducted in English.

B. The Judgment of the EFTA Court in EFTA Surveillance Authority v. The Kingdom of Norway

1. Issue and Conclusion

The EFTA Surveillance Authority sought a declaration from the Court that Norway had failed to fulfill its obligations under the EEA Agreement

16. *Id.* (discussing how the ECJ is a “continental court” because it has no law-making powers and merely fills in gaps in legislation). An interesting and important question is to what extent the Court articulates constitutional principles that are fundamental to EU law. Clearly, the ECJ is not a constitutional court in the American sense. In preliminary ruling cases the ECJ is not an appellate court that reviews the decisions of lower courts and strikes down legislation inconsistent with a constitutional document. For a discussion of this issue, see Kendall Thomas, *Constitutional Equality: The Political Economy of Recognition: Affirmative Action Discourse and Constitutional Equality in Germany and the U.S.A.*, 5 COLUM. J. EUR. L. 329, 351 n.94 (1999).

17. Information about the EFTA Court is available on its website at <www.eftacourt.lu/introduction.asp>.

and the Equal Treatment Directive because of legislation that reserved a certain number of academic positions solely for women. The Court agreed with the Surveillance Authority and declared that by reserving academic positions solely for women, Norway had failed to meet its obligations under the Agreement and the Equal Treatment Directive.¹⁸

*2. Facts*¹⁹

Norway's University Act permitted advertisements for academic posts that were open only to the underrepresented sex, in this case, women. In 1998 the Norwegian government assigned 20 post-doctoral research grants to the University of Oslo. The University marked all these positions for women in academic areas where women were underrepresented and the recruitment of women needed to be strengthened. Of the 179 post-doctoral appointments at the University from 1998-2001, only twenty-nine were reserved for women. Of the 227 permanent academic appointments during that period, only four were reserved for women. Under the University Plan for 2000-2004, ten post-doctoral and twelve permanent positions were reserved for women. The University would distribute the positions to faculties where women were considerably underrepresented. The University was to give priority to fields in which fewer than 10% of the academics were women, and in which women in permanent positions were glaringly underrepresented given the number of female students.

3. Reasoning

a. Introduction

On one level, this decision was easy for the EFTA Court. The Court of Justice had clearly ruled that positive action plans that guarantee women absolute priority for appointment in public service are incompatible with the Equal Treatment Directive. Since the Norwegian law and the University of Oslo guaranteed women an absolute priority for certain academic positions, Norway had failed to live up to its obligations under the Directive that is a part of the EEA Agreement. As the Court noted, these positive action plans go beyond promoting equality of opportunity and seek to establish an equality of representation.²⁰

18. Case E-1/02, EFTA Surveillance Authority v. The Kingdom of Norway, 1 C.M.L.R. 23 ¶¶ 5 and 59 (EFTA Court 2003), available at <http://www.eftacourt.lu/pdf/E_1_02Decision-E.pdf>.

19. *Id.* ¶¶ 2-4.

20. *Id.* ¶ 37.

On a deeper level, however, the Court's judgment is interesting and important not only because a different set of judges is examining the issue but also because these judges are presented with arguments by the defendant, Norway, that bring together all of the recent ECJ judgments and all of the legal arguments against those judgments. One unfortunate omission from the Court's reasoning is any consideration of the effect of the amendments to the EU Treaty and Directive—provisions that are not part, or not yet part, of the EEA Agreement. The Court recognizes that EU positive action law is expanding. Thus, the Court recommends that in the future defendants present evidence to the Court regarding the factors that place women at a disadvantage and call for positive action. The Court also recommends that defendants include in their plans provisions weighing female life experiences, such as family responsibilities, positively in assessing the qualifications of candidates.²¹

b. Prior ECJ positive action judgments

The Court summarizes the ECJ's leading positive action judgments as follows.²² In *Kalanke*,²³ the ECJ rejected absolute priorities for women in employment. In *Marschall*,²⁴ the ECJ heard evidence that stereotypes regarding women prevented them from being fairly considered in competition for jobs with men. To allow women the same chances to compete for jobs, the ECJ allowed preferential treatment for women when they were underrepresented in a particular position, when individual female candidates were equally qualified with men, and when positive action plans contained a flexibility clause guaranteeing male candidates an objective assessment of their individual circumstances that could rebut the presumption favoring the female candidate.

The Court in *Badeck*²⁵ established three new rules for evaluating

21. *Id.* ¶¶ 55-57. The first recommendation appears to be based on the ECJ Judgment in *Marschall* and the second on its Judgment in *Badeck*. These judgments will be discussed later in this paper.

22. *Id.* ¶¶ 37-43.

23. Case C-450/93, *Kalanke v. Freie Hansestadt Bremen*, 1995 E.C.R. I-3051, 1 C.M.L.R. 175 ¶¶ 18-19 (1996).

24. Case C-409/95, *Marschall v. Land Nordrhein Westphalen*, 1997 E.C.R. I-6363 ¶¶ 9 and 35.

25. Case C-158/97, *Badeck and others*, 2000 E.C.R. I-1875 ¶¶ 26-27. Binding prescriptions favoring the hiring of women in academic positions and in training positions are common in Europe, and especially in Germany. ANNE PETERS, *WOMEN, QUOTAS AND CONSTITUTIONS* 134-35 (1999). The EFTA Court did not discuss the final two issues in *Badeck*. The ECJ upheld an ambiguous preference for women that appears to require that at least as many women as men be interviewed for positions where women are

positive action plans. First, plans could include factors for evaluating the qualifications of candidates that were intended to aid women in reducing inequalities that actually occur in their social life, including their domestic responsibilities. For example, capabilities and experiences acquired in family work may be taken into account if they are important to the suitability, performance, and capability of candidates. In addition, family status and partner income are irrelevant, as are part-time work, leaves, and delays in training that are the result of looking after children or dependents in need of care. Finally, seniority, age, and the date of the last promotion should not be given undue weight in assessing a candidate's qualifications. These factors had to be expressed in gender-neutral terms so that they could benefit men and women alike.

Second, the Court held that binding targets that required certain academic positions to be filled by a percentage of women that was at least equal to the percentage of women among graduates, holders of higher degrees, or students in each discipline were consistent with the Directive. The Court reasoned that the targets were not inflexible quotas, because the targets were based not on some scheme that was being imposed, but on a matter of fact—namely, the number of women who had received the appropriate training.

Third, at least half of the training places for occupations requiring training were set aside for women who were underrepresented in these occupations. The measure addressed clear barriers to equal opportunity for women. However, these set-asides were not inflexible quotas in practice, because women had to be qualified for the training or else qualified men, trained in private programs, would assume these places.

The EFTA Court recognized that the Norwegian post-doctoral positions were similar to training positions.²⁶ Both are temporary and both

underrepresented. This result is consistent with the Court's training decision, which, in effect, held that the Directive should be more liberally interpreted when it is applied to pre-employment positive action plans. Again, this result is consistent with German practice. Some German states require that when women are underrepresented, one-half of the candidates offered an interview for a position must be women. One state requires that all qualified women must be offered an interview. *Id.* at 134-35. The ECJ also upheld what it described as a non-mandatory recommendation that one-half of the appointments to employee representative bodies, and administrative and supervisory bodies should be women. Most German states require that half the members of an official organization should be women. *Id.* at 136. After a decade of positive action in some of the German states, the proportion of positions occupied by women increased by less than one percent. *Id.* at 210 n.525.

26. Case E-1/02, EFTA Surveillance Authority v. The Kingdom of Norway, 1 C.M.L.R. 23 ¶¶ 49-50 (EFTA Court 2003), available at <http://www.eftacourt.lu/pdf/E_1_02Decision-E.pdf>.

are intended to develop the competencies to compete for higher-level positions. In addition, the Court recognized positive action plans for training positions may be justified by a “restricted concept of equality of opportunity.” But according to the EFTA Court, the plan still could not be inflexible, and similar opportunities in the private sector had to be available. In rejecting Norway’s plan, the EFTA Court distinguished the facts in its case from the facts in *Badeck*. There the plan was clear that when an insufficient number of qualified women applied for training, men could assume the additional places. By contrast, the Norway positive action plan did not rule out the possibility that an unqualified female candidate could be selected for one of the post-doctoral positions.²⁷ In addition, the ECJ in *Badeck* was clear that training positions were available to men in the private sector, even if they were more costly than the subsidized government training. By contrast, the EFTA Court noted that private alternatives for post-doctoral positions appeared to be rather limited.

In *Abrahamsson*²⁸ the ECJ interpreted the savings clause that it requires of all positive action plans as allowing male candidates to be objectively assessed for the position in light of their individual circumstances. The Court held that an objective assessment must be transparent and amenable to review and must not allow for an arbitrary assessment of the candidates’ qualifications. At issue was a Swedish decision to promote a female candidate to full professor even though she was not the best qualified candidate. According to the Swedish court, the preference for the female candidate was not rebutted because the differences in the candidates’ qualifications were not so great as to make it likely that her job performance would be inferior to that of the best-qualified male candidate. The ECJ rejected the claim that the Swedish standard of objectivity was consistent with the ECJ standard. Instead, the

27. In light of the evidence in note 28 *infra* that women who are rated just as competent as men must be 2.5 times as productive as men, we wonder what it can mean in terms of fairness to say that a woman is under-qualified for an academic position, especially given the dismal results of a decade of positive action in Germany.

28. Case C-407/98, *Abrahamsson v. Fogelqvist*, 2000 E.C.R. I-5539. The 1995 Swedish regulation is referred to as the “Tham package” after a former minister of education. In 1995, fewer than ten percent of the full professors in Sweden were women. One argument for the Tham package was that a more equal representation of women in higher research positions would positively affect the scope and content of academic research. Ann Numhauser-Henning, *Swedish Sex Equality Law before the European Court of Justice*, 30 *INDUS. L.J.* 121, 121-22 (2001). According to a recent Swedish study, women applying for postdoctoral fellowships had to be 2.5 times more productive than the average male applicant to receive the same competence score. PETERS, *supra* note 25, at 303 n.122.

ECJ concluded that the Swedish standard was so lacking in specificity that it, in effect, granted women an absolute preference, contrary to the Directive.

According to the EFTA Court, since the Norwegian plan went even further than had the Swedish plan in *Abrahamsson*, it too ran afoul of the Equal Treatment Directive. The Court meant that even though the Swedish plan had allowed in principle for the objective assessment of all candidates, the ECJ had rejected it, and the Norwegian plan contained *no* basis for assessing the credentials of male candidates for the post-doctoral positions.²⁹

c. Conclusion

The EFTA Court summarized the judgments of the ECJ Court concerning what positive action plans are consistent with the Equal Treatment Directive as follows. First, positive action is permissible to achieve substantive equality and not just formal equality.³⁰ Second,

29. This passing remark of the EFTA Court is interesting regarding the ECJ's judgment in *Abrahamsson*. The EFTA Court seems to be saying that the ECJ could have upheld the Swedish plan by reinterpreting the phrase "objective criteria" in the Swedish Constitution. The interpretation of the phrase that the ECJ said was lacking in specificity came from the Swedish University Appeals Board. *Abrahamsson*, *supra* note 28, ¶¶ 7-15 and 25. But the ECJ need not have asserted a superior position in interpreting Swedish law. The Court might simply have suggested to Sweden that if "objectivity" retained the meaning given to it by the Swedish Board, then its positive action plans were inconsistent with the Directive. If, however, objectivity were interpreted along the lines of the *Marschall* judgment, then the inconsistency would disappear. Even if the ECJ did not wish to go this far in offering advice regarding Swedish law, the Court might have pointed out that the inconsistency between Swedish law and the Directive really resided in what the Swedish interpretation of objectivity left unsaid. The Court might have stressed that the Swedish test of objectivity in terms of a prediction of the probability that one candidate's job performance will be inferior to that of another candidate requires a *Marschall*-like evaluation of the individual qualifications of each candidate. The inconsistency between EU law and Swedish law existed only if the Swedish Board failed to make this evaluation in this case. But no helpful remarks to save the Swedish law came from the ECJ. The remark about the possibility of saving the Swedish law leads us to question whether the EFTA Court was obliquely criticizing the ECJ as heavy-handed in foreclosing the positive action path of Scandinavian countries that are considered more progressive in Europe.

30. *Kingdom of Norway* ¶¶ 43-45. One way to picture the formal/substantive equality distinction is in terms of an analogy with a foot race. Substantive equality requires that all racers start with the same chances of winning: each racer is able to take advantage of the opportunities to compete and has, in principle, an equal chance of winning. By contrast, formal equality merely requires the removal of all obstacles that might keep anyone from competing. Background conditions may still stand in the way of all the competitors' having an equal chance of winning. More distinctions are possible and are made in the literature regarding substantive equality: equality of result, equality of opportunity, equality of substantive rights, and equality of respect. For a fuller discussion, see Catherine Barnard

positive action, as an exception to the fundamental individual right to be free from discrimination, must satisfy the principle of proportionality that the means – positive action – must be appropriate and necessary to achieve the end – gender equality. Thus, positive action must balance improvement for the underrepresented gender with the opportunity for members of the opposite gender to have their qualifications objectively assessed.

The key to the Court's finding that Norway failed to fulfill its obligations under the EEA Agreement and the Directive is that the Norway positive action plan might allow women applicants with inadequate qualifications to be selected in lieu of the best qualified male candidates.³¹ The importance of the Norway decision lies in the careful consideration that the Court gives to the arguments of Norway in favor of its positive action plan.

d. Norway's arguments in favor of its positive action plan

First, Norway argued that gender was a *bona fide* occupational qualification (BFOQ) for the at-issue academic position. The Court simply rejected the argument on the ground that the BFOQ exception to the equality principle had been limited by the ECJ to certain police or military positions reserved for men because of the public security requirements.³²

Second, Norway relied on the ECJ's Judgment in *Lommers*, in which the Court allowed a positive action plan that reserved a number of subsidized nursery positions for female officials. The EFTA Court distinguished *Lommers* from the present case because in an emergency, male officials would be allowed access to the nursery slots and because nursery slots remained available in the private sector.³³ Thus, the child-

and Bob Hepple, *Substantive Equality*, 59 CAMBRIDGE L.J. 562, 565-67 (2000). See also McCrudden, *supra* note 8, at 326-27 (discussing how normal equality or individual justice is concerned with cleansing the decision-making process and not with the results of the process; how it is individualistic in orientation and yet universalistic in that both men and women are to be equally protected; how it respects efficiency and merit within the economic market; and how substantive equality or group justice tends to redistribute market share so that the position of women in the market is improved relative to that of men). *Badeck* has been viewed as the first judgment of the ECJ in a positive action case to abandon its exclusive reliance on the formal equality principle and allow substantive equality or equality of result as a permissible goal of positive action. See Kristina Kuchhold, *European Developments – Badeck – The Third German Reference on Positive Action*, 30 INDUS. L.J. 116 (2001).

31. *Kingdom of Norway* ¶ 45. In its answer to written questions from the Court, Norway admitted that this situation was possible.

32. *Id.* ¶ 46.

33. *Id.* ¶ 47. The ECJ saw these child-care quotas as similar to the absolute training quotas that were allowed in *Badeck* in so far as they are "designed to eliminate the causes of

care positive action plan was proportional to the end of reducing *de facto* equality, while the Norway plan was not proportional in that it did not balance the interests of men and women.

Third, Norway relied on the ECJ's Judgment in *Schnorbus*,³⁴ in which the ECJ allowed a two-year automatic preference for legal training for veterans of compulsory public service that was mandated only for men. The EFTA Court distinguished *Schnorbus* from the present case on the grounds that that discrimination against women had been objectively justified by the two-year requirement for compulsory public service and because the preference was intended to counter-balance the two-year delay in men's training.

Fourth, Norway argued that because the post-doctoral positions were new positions, no men would lose positions as a result of their being filled by women.³⁵ The Court pointed out that men could lose positions in the future if evaluations of the positive action plan showed that it was not working to end gender discrimination. Under these circumstances, the plan might mandate the allocation of a larger percentage of the total number of post-doctoral positions to women. Because Norway failed to explain to the Court that this could not happen, the Court rejected Norway's argument.

Fifth, Norway argued that the professorships earmarked for women were merely temporary positions because they would cease to exist upon the retirement of the women who held them.³⁶ The Court rejected the argument on the ground that the Directive as interpreted by the ECJ does not permit a temporariness defense in situations such as Norway's, in

women's reduced opportunities of access to employment and careers and intended to improve the ability of women to compete on the labour market and pursue a career on an equal footing with men." Case C-158/97, *Badeck and others*, 2000 E.C.R. I-1875 ¶ 33.

34. *Kingdom of Norway* ¶ 48 (citing Case C-79/99, *Schnorbus v. Land Hessen*, 2000 E.C.R. I-10997). Based on its judgment in *Marschall*, the ECJ might have reasoned that the automatic veteran's preference was inconsistent with the Directive unless women were allowed individualized consideration to rebut the preference, for example, with evidence of hardships of their own that delayed their training. The ECJ's failure to recognize this line of reasoning suggests that the *Marschall* savings clause is limited to discrimination cases where the cause of the inequality is gender stereotyping such as was evidenced in *Marschall*. Further, the gender stereotyping must be immediate or direct, because it is possible that the male-only compulsory public service requirement was based on gender stereotyping. Thus, the automatic veteran's preference was one step removed from stereotyping and thus permissible according to the ECJ.

35. *Id.* ¶ 52.

36. *Id.* ¶¶ 53-54. The Court noted that those parts of Norway's positive action plan in academia that did not involve earmarking positions exclusively for women were not challenged by the EFTA Surveillance Authority, for example, targets for new professorships and priority in the allocation of positions to fields having fewer than 10% female academics and fields having a high proportion of female students and graduates.

which a positive action plan is inflexible and grants an absolute priority to female candidates.³⁷

Sixth, Norway submitted that the Court should evaluate its plan under the new Article 141(4) of the Treaty of Amsterdam and under the new Directive 2002/73/EC amending the 1976 Equal Treatment Directive.³⁸ The Court refused on the ground that these provisions have not been made a part of EEA law. But the Court recognized that changes in the Treaty and the Directive have given EU member states greater competency to confront gender equality. For example, Articles 2 and 3(2) require member states to promote gender equality. Article 13 gives the Council competency to take appropriate action to combat sex discrimination. Article 141(4) emphasizes the goal of full equality in practice between men and women in working life, and to this end, permits member states to adopt and maintain measures that give specific advantages to members of the underrepresented gender to make it easier for those persons to pursue a vocation or to prevent or compensate for disadvantages in professional careers.

The Court went further and offered advice to Norway in revising the challenged portions of its positive action plan. The Court recommended that until the changes in EU law were incorporated into EEA law, Norway should identify the evidence of the factors in academia that place female candidates at a disadvantage against competing male candidates. Second, its plans should include provisions that give weight to the life experiences of women outside of academia that are relevant to qualifications for higher academic positions.

Seventh, Norway submitted that the Court should evaluate its plan under international law — in particular, the Covenant on the Elimination of all Forms of Discrimination against Women (CEAFDAW).³⁹ The Court refused on the ground that the ECJ had not relied on international law in its judgments interpreting the Directive and because the positive action provisions in international law are permissive and not mandatory.

IV. CONCLUSION

Discrimination is an infection throughout the world that we all must

37. The short duration of an affirmative action plan is one factor considered by the United States courts in evaluating American plans. *See Johnson v. Transp. Agency of Santa Clara*, 480 U.S. 616, 630 (1987) (gender discrimination); *United Steelworkers v. Weber*, 443 U.S. 193, 216 (1979) (race discrimination).

38. *Kingdom of Norway* ¶¶ 55-57.

39. *Id.* ¶ 58.

work to eradicate.⁴⁰ We hope to keep the discussion of gender discrimination alive in Europe and America by reporting on new cases that remind us how far we have progressed and how much remains to be done. New cases remind us of the new methods of affirmative action that are being used to bring about equality for women.

40. See generally Ruth Bader Ginsburg & Deborah Jones Merritt, *Affirmative Action: An International Human Rights Dialogue*, 1 RUTGERS RACE & L. REV. 193 (1999).