



**REPORT FOR THE HEARING**  
in Case E-1/02

APPLICATION to the Court pursuant to the second paragraph of Article 31 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice in the case between

**EFTA Surveillance Authority**

and

**The Kingdom of Norway**

seeking a declaration that, by applying its legislation so as to allow the University of Oslo to reserve certain post-doctoral positions for women only, the Kingdom of Norway has failed to fulfil its obligations under Articles 7 and 70 EEA as well as Articles 2(1), 2(4) and 3(1) of Directive 76/207/EEC.

**I. Introduction**

1. The case at hand concerns a provision in the Norwegian Act relating to Colleges and Universities providing for preferential treatment of women when advertising academic posts. The measure is intended to facilitate the recruitment of women to permanent academic positions in which women are generally underrepresented. It was applied by the University of Oslo, which reserved a number of post-doctoral and permanent academic positions for women in 1998 and 2000.

2. The EFTA Surveillance Authority's application is based on one plea in law, which is that the Norwegian legislation on Universities and Colleges, insofar as it permits the reservation of academic posts exclusively for women, is in breach of the EEA law provisions on gender equality.

## II. Legal background, pre-litigation procedure and procedure before the Court

### Legal background

#### *EEA law*

3. Article 7 EEA provides that acts referred to or contained in the Annexes to the Agreement or in decisions of the EEA Joint Committee shall be binding upon the Contracting Parties, and be, or be made, part of their internal legal order.

4. Article 70 EEA stipulates that the Contracting Parties shall promote the principle of equal treatment for men and women by implementing the provisions specified in Annex XVIII to the Agreement.

5. 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, vocational training, promotions and working conditions<sup>1</sup> (hereinafter the “Directive”) is listed in Annex XVIII to the EEA Agreement.

6. Article 2(1) of the Directive states that:

*“For the purposes of the following provisions, the principle of equal treatment shall mean that there shall be no discrimination whatsoever on the grounds of sex either directly or indirectly by reference in particular to marital or family status.”*

7. Article 2(2) states that:

*“This Directive shall be without prejudice to the right of member states to exclude from its field of application those occupational activities and, where appropriate, the training leading thereto, for which, by reason of their nature or the context of which they are carried out, the sex of the worker constitutes a determining factor.”*

8. Article 2(4) of the Directive states that:

*“This Directive shall be without prejudice to measures to promote equal opportunity for men and women, in particular by removing existing inequalities which affect women’s opportunities...”*

9. Article 3(1) of the Directive states that:

*“Application of the principle of equal treatment means that there shall be no discrimination whatsoever on grounds of sex in the conditions, including selection criteria, for access to all jobs or posts, whatever the*

---

<sup>1</sup> 1976 OJ L 39, p. 40-42.

*sector or branch of activity, and to all levels of the occupational hierarchy.”*

*The contested national law*

10. Article 30(3) of the Norwegian Act No. 22 of 12 May 1995 relating to Universities and Colleges (hereinafter the “contested Act”) reads as follows:

*“The appointing body advertises academic posts. A member of the Department’s Steering Committee or of the Appointments Committee can however always request the Board to advertise the post itself. If one sex is clearly under-represented in the category of post in the subject area in question, applications from members of that sex shall be specifically invited. Importance shall be attached to considerations of equality when the appointment is made. The Board can decide that a post shall be advertised as only open to members of the underrepresented sex.”*

11. On 17 July 1998, a new type of post-doctoral scholarship was established by amendment to Regulation 1983 No. 1608 of 11 November,<sup>2</sup> which is obtainable after completion of a doctoral degree and was designed as a temporary position with a maximum duration of four years.<sup>3</sup> It was intended to improve recruitment for high-level academic positions. According to the Directions issued by the Ministry of Education, Research and Church Affairs No. 87-1998 of 6 November 1998, these positions were to be made available in fields where recruitment needed to be strengthened. Fields where women are clearly underrepresented were also to be taken into consideration.

12. Based on the regulations outlined above, in 1998 the University of Oslo officially reserved 20 post-doctoral positions intended to stimulate the recruitment of women to permanent academic positions.<sup>4</sup> Furthermore, according to the University’s Plan for Equal Treatment 2000-2004, adopted on 7 March 2000, another 10 post-doctoral positions and 12 permanent academic positions are to be reserved for women.

---

<sup>2</sup> As the Government of Norway states more precisely, post-doctoral posts at universities and university colleges were already introduced by the Norwegian research councils in the 1980s. However, in 1998 a number of new post-doctoral research grants were for the first time funded through the Norwegian national budget and allocated by the Government to universities and university colleges, *inter alia* to the University of Oslo. Since 1998, a total of 218 new post-doctoral research grants were funded through the national budget, of which the Government decided that 40 should be reserved for women.

<sup>3</sup> According to the Government of Norway, normal duration is three years, four years if one year of teaching duties is included.

<sup>4</sup> The Government of Norway additionally refers to the purposes of developing particular competence in the research fields of priority of each university, to further mobility between various research communities, and to promote gender equality, as mentioned in the NIFU Report No. 25/2001, pages 37-38.

13. According to the Plan, the University will allocate the permanent positions to the faculties by way of a competition, based mainly on the following four criteria:

- Academic fields where women in permanent academic positions are considerably underrepresented. Fields with less than 10 percent female academics will be given priority;
- Academic fields where women in permanent academic positions are underrepresented compared to the number of female students;
- Academic fields where there is a sufficient number of qualified women for recruitment;
- The faculty must finance a research fellow position or a post-doctoral position linked to the permanent position.

14. Reserving positions implies that only a defined group may apply, in this case only women.

### **Pre-litigation procedure**

15. On 16 August 2000, the EFTA Surveillance Authority received a complaint alleging that, by reserving a number of academic positions at the University of Oslo for women only, Norway was in breach of the EEA Agreement. In the course of its examination of the complaint, the EFTA Surveillance Authority sent a request for information to the Government of Norway on 25 August 2000.

16. In its reply, received by the EFTA Surveillance Authority on 26 October 2000, the Government of Norway stated that Article 30(3) of the contested Act was in compliance with the EEA Agreement, as the provision was in accordance with the purpose of Article 2(4) of the Directive. The Government concluded that, since the number of women recruited to academic positions had declined during the nineties despite the existing pool of qualified female applicants, the opportunities presented to equally qualified males and females were unequal. Basing itself on the judgment of the Court of Justice of the European Communities in the *Marschall* case,<sup>5</sup> the Government maintained that the measures were permissible since the best means available to obtain equality was to reserve certain academic positions for women.

17. On 6 June 2001, the EFTA Surveillance Authority sent a letter of formal notice to Norway, concluding that, by maintaining a rule such as that provided for in Article 30(3) of the contested Act, Norway has failed to fulfil its

---

<sup>5</sup> Case 409/95 *Marschall v Land Nordrhein-Westfalen* [1997] ECR I-6363, paragraphs 29 and 30(hereinafter "*Marschall*").

obligations under Articles 7 and 70 EEA and Articles 2(1), 2(2), 2(4) and 3(1) of the Directive. The EFTA Surveillance Authority acknowledged that measures intended to promote women in sectors in which they are underrepresented, may be regarded as compatible with the exception clause laid down in Article 2(4) of the Directive and the relevant case law from the Court of Justice of the European Communities. However, with particular reference to the judgment of the Court of Justice of the European Communities in the *Abrahamsson* case,<sup>6</sup> the EFTA Surveillance Authority observed that such measures could only be accepted under EEA law if they did not automatically and unconditionally give priority to women when women and men were equally qualified. Moreover, the candidates in question must be subject to an objective assessment, which takes into account the specific personal situations of all candidates.

18. In its reply to the letter of formal notice of 10 September 2001, the Government of Norway maintained its view that the Norwegian system of reserving certain post-doctoral positions for women at the University of Oslo was in full compliance with the obligations of Norway under the EEA Agreement. The Government firstly referred to the serious under-representation of women in higher educational institutions. Although women have constituted 50% of the students for the past 20 years, they constitute only 29% of the associate professors and 13% of the professors. Moreover, the Government pointed to a need for positive action measures widely recognised in international law.<sup>7</sup> Furthermore, the Government submitted that Article 70 EEA must be interpreted in the light of the homogeneity objective of the EEA Agreement. The Government concluded that the Directive must be interpreted and applied in the same manner in the EFTA/EEA States as in the EU Member States, unless there are adaptations or particulars of the situation that imply a difference has been intended. Therefore, the Directive must be interpreted in the light of Article 141(4) EC, which, after the treaty amendments made at Amsterdam, explicitly allows for positive action measures and, in the event of conflict, takes precedence over provisions in the Directive. The Government further pointed out that in a Commission proposal for amending the Directive,<sup>8</sup> the existing Article 2(4) of the Directive is replaced by a simple reference to Article 141(4) EC. The Government also took the view that, in light of the rulings in *Abrahamsson* and the *Badeck* case,<sup>9</sup> positive action measures are admissible under Article 2(4) of the Directive provided that they are proportionate. Since the measures in question were temporary and formed part of a special programme targeting women as a last attempt to achieve a more balanced representation of the sexes, it was

---

<sup>6</sup> Case 407/98 *Abrahamsson and Anderson* [2000] ECR I-5539, paragraph 59 (hereinafter “*Abrahamsson*”).

<sup>7</sup> *Inter alia*, Article 4(1) of the United Nations Convention on the Elimination of all Forms of Discrimination Against Women, Article 4(2), and ILO-Convention No. 111 concerning Discrimination in Respect of Employment and Occupation.

<sup>8</sup> Amended proposal of 7.6.2000, COM(2001) 321 final.

<sup>9</sup> Case C-158/97 *Badeck and others* [2000] ECR I-1875, paragraph 23 (hereinafter “*Badeck*”).

maintained that they differed from the measures considered in *Abrahamsson* and were, therefore, proportionate.

19. On 28 November 2001, the EFTA Surveillance Authority sent a Reasoned Opinion to the Government of Norway. The EFTA Surveillance Authority maintained its view that the measures at issue were in breach of the EEA Agreement. The reasons given in the letter of formal notice were repeated. The EFTA Surveillance Authority particularly stressed that a rule whereby men are totally excluded from a selection process did not change the fact that it gave absolute and unconditional priority to women, contrary to the relevant jurisprudence of the Court of Justice of the European Communities concerning Community law. With regard to the argument put forward by the Government, whereby the provisions of the Directive must yield to Article 141(4) EC, the EFTA Surveillance Authority referred to the ruling in *Abrahamsson*, in which the Court of Justice of the European Communities held that the amendments to this Article had no influence on the conditions to be considered in this area as laid down in case law. As to the deletion of Article 2(4) of the Directive in the Commission proposal, the EFTA Surveillance Authority emphasized that positive action measures permitted under the proposed Directive cannot exceed that permitted in Article 141(4).

20. In a reply of 27 February 2002, the Government of Norway repeated its view that the measures taken were in compliance with the Directive. The arguments set forth in the reply to the letter of formal notice were invoked again. Additionally, in relation to its arguments concerning international agreements, the Government of Norway submitted that the Directive could not be interpreted in a manner contrary to other international obligations of the Contracting Parties. In that context, a specific reference was made to a recommendation of 15 June 2000 by the CEDAW Committee, in which said committee called upon the Government of Austria to introduce positive action measures to increase women's appointment to academic posts. Furthermore, the Government of Norway referred to the Court of Justice of the European Communities' judgment in the *Schnorbus* case,<sup>10</sup> in which it upheld a discriminatory measure on the grounds that it was based on an objective fact, i.e. the completion of compulsory military service, a duty imposed only on men. The measure was not held to be disproportionate as it counterbalanced the detrimental effect suffered by the candidates in question only to some extent. The Government maintained that the Norwegian measures were similarly based on an objective fact, i.e. the under-representation of women, and did not exceed what was necessary to counterbalance the effects of this fact, since it constituted a last attempt to achieve a more balanced representation of women in academia.

---

<sup>10</sup> Case 79/99 *Schnorbus* [2000] ECR I-10997, paragraphs 44-46 (hereinafter "*Schnorbus*").

### **Procedure before the Court**

21. Against the background of these circumstances, the EFTA Surveillance Authority filed the application at issue here, which was registered at the Court on 22 April 2002.

### **III. Forms of order sought by the parties**

22. The EFTA Surveillance Authority claims that the Court should:

(i) *declare that by maintaining in force a rule which reserves a number of academic posts exclusively for women, Norway has failed to fulfil its obligations under Articles 7 and 70 of the EEA Agreement and Articles 2(1), 2(4) and 3(1) of the Act referred to in point 18 of Annex XVIII to the Agreement (Directive 76/207/EEC of 9 February 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);*

(ii) *order the Kingdom of Norway to pay the cost of these proceedings.*

23. The Kingdom of Norway contends that the Court should:

(i) *dismiss the application as unfounded;*

(ii) *order the EFTA Surveillance Authority to bear the costs.*

### **IV. Written procedure**

24. Written arguments have been received from the parties:

- the EFTA Surveillance Authority represented by Dóra Sif Tynes, Officer, Legal and Executive Affairs, acting as Agent;
- the Government of Norway, represented by Fanny Platou Amble, Advocate, Office of the Attorney General (Civil Affairs), acting as Agent, and Ingeborg Djupvik, Legal Adviser, Ministry of Foreign Affairs, acting as Co-Agent.

25. Pursuant to Article 20 of the Statute of the EFTA Court, written observations have been received from:

- the Commission of the European Communities, represented by

John Forman, Legal Adviser, and Nicola Yerrell, Member of its Legal Service, acting as Agents.

## V. Summary of the pleas in law and arguments

### The EFTA Surveillance Authority

26. In its *application*, the EFTA Surveillance Authority begins by presenting the relevant case law of the Court of Justice of the European Communities at the outset. The EFTA Surveillance Authority submits that the correct legal basis for consideration of this case is the provisions of the Directive read in conjunction with the obligations imposed on the EFTA States, which are laid down in Articles 7 and 70 of the EEA Agreement. Article 141(4) of the EC Treaty, having been added by the Treaty of Amsterdam, does not apply in the present case. The EFTA Surveillance Authority submits that as the amendments made to the EC Treaty by the Treaty of Amsterdam have not been incorporated into the EEA Agreement they cannot provide a relevant legal basis in the present case. Relying on such a provision would extend the scope of application of the EEA Agreement beyond what the EFTA Court has deemed acceptable.<sup>11</sup>

27. Moreover, the EFTA Surveillance Authority submits that the reference made by the Government of Norway to its obligations under different international agreements is unwarranted in the present case.

28. The Norwegian law at issue permits certain academic posts to be reserved exclusively for women. This means that priority is automatically and unconditionally given to women. The EFTA Surveillance Authority submits that this gives rise to a differential treatment within the meaning of Article 2(1) of the Directive. The situation of a female candidate and a male candidate are comparable, as both sexes will be seeking employment in academia. Given that the rule clearly entails differential treatment on grounds of sex, it must be assessed whether it may nevertheless be permissible under Article 2(4) of the Directive.

29. A measure giving automatic and unconditional preference to female candidates was held by the Court of Justice of the European Communities in the *Kalanke* case<sup>12</sup> to be in violation of the Directive. Furthermore, in *Marschall*, it was held that such a rule would preclude any objective assessment of a possible male candidate and therefore not allow for the examination of the individual

---

<sup>11</sup> Case E-1/01 *Einarsson v Iceland* [2002], not yet reported, paragraph 45 (hereinafter, “*Einarsson*”).

<sup>12</sup> Case C-450/93 *Eckhard Kalanke v Freie Hansestadt Bremen* [1995] ECR I-3051, paragraph 21 (hereinafter “*Kalanke*”).

criteria specific to such a candidate, which exceeds the exceptions permitted by Article 2(4).

30. According to the EFTA Surveillance Authority, it is settled case law, that in determining the scope of any derogation from a fundamental right such as the equal treatment of men and women, due regard must be had to the principle of proportionality. This requires that derogations must remain within the limits of what is appropriate and necessary in order to achieve the objective and that the principle of equal treatment must be reconciled as far as possible with the requirements of the goal thus pursued.<sup>13</sup> The Norwegian rule, however, fails to meet these conditions. The EFTA Surveillance Authority submits that Norway has failed to show that the objective at issue cannot be achieved by less invasive measures.

31. The EFTA Surveillance Authority also submits that the ruling in *Schnorbus* does not alter this conclusion. In that case preferential treatment of men due to their compulsory military service was held to be proportionate as it was prompted solely by the desire to counterbalance to some extent the effects of delay. Furthermore, the Court of Justice of the European Communities held that the advantage conferred on the male applicants, whose enjoyment of priority might operate to the detriment of other applicants for up to 12 months, did not seem disproportionate as the delay they had suffered on account of the compulsory military service was at least equal to that period.<sup>14</sup> In the present case, however, the rule in question allows for the reservation of permanent positions for women, thus allowing for indefinite rather than temporary preferential treatment.

32. In the *Lommers* case,<sup>15</sup> the Court of Justice of the European Communities found that a scheme reserving a limited number of subsidised nursery places for female officials fell within the scope of the derogation provided for in Article 2(4), since, in cases of emergency, it permitted male officers access to them, thus allowing for individual assessment of the officials needs for day care facilities. The EFTA Surveillance Authority submits that this ruling shows, that an absolute rule such as the one contested in the present case clearly exceeds what is acceptable under Article 2(4).

33. In its reply, the EFTA Surveillance Authority affirms its position, limiting itself to addressing only one point of law raised by the Government in its defence and resubmitting that the earmarking of certain academic posts for women only encroaches upon the individual right to equality, laid down in Article 2(1) of the Directive. Contrary to the Government's point of view, the EFTA Surveillance

---

<sup>13</sup> Case 222/84 *Johnston v Chief Constable of the Royal Ulster Constabulary* [1986] ECR 1651, paragraph 38; and Case C-273/97 *Sirdar* [1999] ECR I-7403, paragraph 38.

<sup>14</sup> *Schnorbus*, paragraph 46.

<sup>15</sup> Case C-476/99 *Lommers* [2002], not yet reported, judgment delivered 19 March 2002, paragraph 45 (hereinafter "*Lommers*").

Authority assumes that this measure cannot be justified with the principle of proportionality.

34. The EFTA Surveillance Authority submits that the Government has failed to show that Article 2(4) of the Directive permits the disputed measures. Article 2(1) of the Directive establishes the individual right to equal treatment. Article 2(4) of the Directive, constituting derogation from that right, must, in light of the case law of the Court of Justice of the European Communities, be interpreted strictly.<sup>16</sup> It is settled case law that Article 2(4) of the Directive does not permit selection methods for employment that are unconditional and exclude an objective assessment of candidates taking into account their specific personal situations. According to the EFTA Surveillance Authority, it is for the Government to establish that the measures in question do not constitute such proscribed methods and are thus permitted by Article 2(4) of the Directive. In order for Article 2(4) of the Directive to apply, it is necessary to establish that the social reality of a given sector justifies the adoption of a positive action measure, i.e., that there is a clear case of existing inequality between the sexes. Secondly, the corrective measure in question has to fulfil two conditions. It cannot be unconditional, nor can it exclude an objective assessment, which takes into account the specific personal situations of all candidates.

---

<sup>16</sup> *Kalanke*, paragraph 22; *Marschall*, paragraph 33; *Badeck*, paragraph 23.

*To the Government of Norway's submission that the gender imbalance in the academic sector in Norway justifies the adoption of positive action measures, the EFTA Surveillance Authority replies that a rule permitting certain posts in academia to be earmarked for women only must be considered to be outside the derogation in Article 2(4) of the Directive. Such a rule is unconditional and precludes any objective assessment of male candidates since they are precluded from applying to the post. The EFTA Surveillance Authority, thus, submits that the earmarking of certain posts in academia for women only, interferes with the individual right laid down in Article 2(1) of the Directive. The EFTA Surveillance Authority further submits that it is irrelevant whether the Government has failed, by the employment of other means, to achieve its goals in the area of gender equality. Rather, what must be assessed is whether the measure in question encroaches upon the individual right to equality, laid down in Article 2(1) of the Directive. As the disputed measures preclude any assessment of prospective male candidates, they clearly overstep the bounds inherent in the derogation laid down by Article 2(4) of the Directive. In any event, the measures cannot be considered proportionate to the aim pursued as they are arbitrary in nature and interfere excessively with the individual right to equality laid down in the Directive.*

### **The Kingdom of Norway**

35. In its *defence*, the Government of Norway requests the Court to declare the application unfounded based on the following main submissions:

- The rule in question, a special measure aimed at accelerating *de facto* equality between women and men, is not in breach of Articles 2(1) and 3(1) of the Directive;
- The breach is in any way justified by Article 2(2) of the Directive and/or by its Article 2(4). In this connection, Article 141(4) EC is relevant to the interpretation of Article 2(4) of the Directive;
- The rule in question is not considered to be discriminatory within the meaning of relevant international conventions;
- The rule in question is proportional to the legitimate aim pursued, namely the promotion of gender equality in academia. The measure is temporary in nature, both for professors and post-doctors, and is employed only for a very limited number of the total appointments that take place in the University of Oslo. Other less invasive measures to raise the proportion of women in academic posts have been attempted in the whole university sector, but without discernible effect.
- The EFTA Surveillance Authority has not fulfilled its obligation under Article 31 of the Surveillance and Court Agreement.

*Factual background of Norwegian policy on gender equality in academia*

36. The Government points to the current under-representation of women in research, particularly in senior posts, at Norwegian universities; and notes that in almost all academic fields, the goal of equal gender representation in academia has not been reached, despite the fact that an increase in the percentage of women has been a main ambition in Norwegian research and education policy since the 1970s, and a number of relevant policy measures have been applied in order to achieve this goal. In the university sector, women comprised a mere 23% of the academic staff in 2000.<sup>17</sup> The proportion of women in academia decreases significantly towards the top of the academic hierarchy. Even though the ratio has improved, there is still a dramatic imbalance.<sup>18</sup>

37. According to the Government, these numbers stand in glaring contrast to the percentage of women in the student body. In 1999, women comprised approximately 60% of the student body in humanities, social sciences and medicine/dentistry, more than 50% in law, more than 40% in natural sciences and approximately 30% in economics and technology. From the early 1980s, the proportion of female master degree students at Norwegian universities has been above 50%. In the 1990s, the proportion of women in the recruiting base for academic posts rose markedly. In 2000, women comprised approximately one third of all doctor graduates.<sup>19</sup>

38. Despite the fact that the female recruiting base had never been better, the paradoxical experience in the late 1990s was that actual recruiting of women to academic posts levelled off. This gave the Government cause for concern, particularly in light of the significant number of permanent academic posts that must be filled in the Norwegian university and college sector over the next 10 years, due partly to the high average age of present academic staff, and partly to the Government's adopted policy – approved by the Norwegian Parliament – to increase the quality of Norwegian research.<sup>20</sup> The Government answers the question why women are still grossly underrepresented in academia, particularly in senior posts, although the recruitment base for quite some time has been

---

<sup>17</sup> Information from the Database for Statistics regarding Higher Education, compiled by the Norwegian Computer service for the Social Sciences, on behalf of the Ministry of Education and Science; the full database can be found at the website of the University of Bergen, cf. <http://www.nsd.uib.no/dbhvev/>.

<sup>18</sup> Whereas there were 5% female professors in 1981, the ratio increased to 9% in 1991 and 13% in 2000, varying between the various academic fields. Cf. *O. Tvede, I.M. Larsen and P. Aasen*, "Recruitment to research and teaching in the university and college sector," Norwegian Institute of Research and Education, (NIFU), Report no 25/2001, December 2001, page 22.

<sup>19</sup> Information from the Database for Statistics regarding Higher Education, cited above.

<sup>20</sup> Described in St.meld. nr 39 (1998-99) "Forskning ved et tidsskille" and St.meld. nr 35 (2001-2002) "Kvalitetsreformen. Om rekruttering til undervisnings- og forskerstillinger i universitet og høyskolesektoren," page 33-46 and NIFU Report No. 25/2001, section 2.2. The Government further refers to a comprehensive description of women's participation in research and the status of gender equality given in a report prepared by the Research Council of Norway on behalf of the Ministry of Education and Research in 2002.

adequate to ensure gender equality, by asserting that the traditional male dominance in research has led to a culture with values and standards that have the effect of indirectly discriminating against women.<sup>21</sup>

39. The fact that women leave academic careers before they are qualified for the top jobs is also observed in other European countries, and referred to as “the leaky pipeline.”<sup>22</sup> As one of the main aims in Norwegian higher education and research policy is to increase the proportion of women in top academic posts and to recruit more women to disciplines where female representation is particularly low, it is a major challenge to develop and secure conditions which ensure that a higher proportion of qualified women continues to the next level at each important turning point in academic careers. According to the Government, the earmarking of post-doctoral and professor posts at issue in the case at hand are measures to this effect. As post-doctoral posts are pure research positions, normally without teaching or administrative obligations, they are particularly well suited as a means to plug the “leaky pipeline.” The use of post-doctoral posts is widespread in medicine and natural sciences, while far less common in humanities and social sciences.<sup>23</sup> In the field of natural sciences, the ratio of female post-doctoral research was 28% in 1999.<sup>24</sup> This number includes posts earmarked for women.

40. The Government of Norway further describes the situation in other European countries with regard to women in academia, quoting from the so-called ETAN (European Technology Assessment Network) report “Science Politics in the European Union.”<sup>25</sup> The Government concludes from it that Norway is not in a unique position in Europe when it comes to the low representation of women in academia and provides figures for several states.<sup>26</sup> As

---

<sup>21</sup> In this regard, the Government refers to the Report “How to recruit more women to senior posts in the university and university college sector,” prepared by the Ministry of Education and Research.

<sup>22</sup> This phenomenon is later explained by experience, showing that in academic fields where women are in an extreme minority, they show an increased tendency to opt out. The reasons for this may be many. In fields where they are strongly under-represented, women experience a higher pressure towards student supervision and advising than their male colleagues, as many female students prefer advisers of the same sex. Further, the Norwegian Gender Equality Act in section 21 provides that at least 40% of each sex shall be represented on university councils, boards and committees. This represents a considerable extra workload in fields where women will have less time available to conduct research and thus fall behind in the competition for advancement.

<sup>23</sup> NIFU Report No. 25/2001, page 38, table 30.

<sup>24</sup> NIFU Report No. 25/2001, pages 23 and 38.

<sup>25</sup> “Women and Science” is a project supervised by the European Commission, Research Directorate-General, as part of the 5<sup>th</sup> Framework Programme, covering Research, Technological Development and Demonstration activities. The complete Report can be found at <http://www.cordis.lu/improving/women/documents.htm>.

<sup>26</sup> According to the report, “[w]omen are lost from the academic pipeline at a greater rate than their male counterparts (...) the proportion of women declines markedly at the postdoctoral level, where the career tracks begin. For each step up the ladder hereafter, the proportion of women declines. The drop in women both at the postdoctoral level and after it has been

to positive action measures, the Government refers to the discussion in the ETAN Report<sup>27</sup> and summarizes that such measures are employed in many Member States to improve the situation of women in academia. The ETAN Report concludes with a set of recommendations. Recommendation 7 deals with positive action.<sup>28</sup>

41. The Government concludes that the situation in Norway is similar to that found in other European countries with regard to the scarcity of women in senior academic posts, large discrepancies between disciplines and the “leaky pipeline” phenomenon. It further concludes that a whole range of positive action measures, including earmarking both of financial resources and positions, have been applied in Member States to alleviate this situation, encouraged by, *inter alia*, the ETAN Report. It is difficult to see that there are grounds to distinguish these measures legally from the earmarking at issue in the present case. Accordingly, it seems to the Government of Norway that the development of Member State policy in the field of gender equality in academia – a policy encouraged by the ETAN Report – is more dynamic than the development of EU law, as interpreted by the EFTA Surveillance Authority in application.

42. The Government of Norway goes on to describe the various measures undertaken to attain a higher percentage of women in senior academic posts. Most of these measures have been employed for many years before earmarking of positions for women was first tried, but without – as the statistics show – having the desired effect. Article 30(3) of the contested Act allows in its final sentence for the earmarking of single posts in favour of the underrepresented sex. However, the two foregoing sentences prescribe that when advertising posts, applications from the under-represented sex in that category of post shall be specifically invited, and importance shall be attached to considerations of equality when the appointment is made. Article 30(3) of the contested Act thus provides for moderate action measures to be the general rule, to be supplied with the earmarking of specific posts as an extraordinary measure. Further, the Government describes a measure to promote gender equality in the public sector through a regulation laid down in the Basic Collective Agreement.<sup>29</sup> Other

---

*attributed to a “leaky pipeline,”* *ibid.* page 12. See also Fig. 2.4-2.6 comparing six EU Member States.

<sup>27</sup> *Ibid.* pages 24-25.

<sup>28</sup> *“Positive action measures, although limited on their own, can be a powerful means of kick-starting change, and provide an incentive to the development of good practice. The Amsterdam Treaty allows for positive action of individuals in under-represented areas. However, such action can be more effective when used to tackle group disadvantage. There is plenty of scope for developing positive action measures in a wide range of areas related to women and science.”*

<sup>29</sup> It reads: *“If there are applicants to a vacant post in the state government who are approximately equally qualified, applicants of the sex representing less than 40% in the pertinent occupational group shall be given priority to the post. Normally, priority in favour of men should not be agreed upon.”* Even though this clause is legally binding on all government bodies, including the university and university college sector, it has only been applied in a very limited number of appointment procedures and thus has not been effective to obtain gender equality. The reason for

measures taken include the so-called “personal advancement” to professorships (of which a limited number was reserved for women),<sup>30</sup> gender equality action plans (now containing target percentages for women to be employed in academic posts), mentor programs for various groups of female academic staff, and other positive action measures to qualify women for further research carriers.<sup>31</sup>

43. In conclusion, the Government of Norway notes that the measures, still applied today, are too general, too limited or too modest to stimulate any discernable gender balancing in recruitment to research positions. The only exception was the reservation of a limited number of personal advancement posts for women in the mid 80s. Earmarking of posts for women is a special measure that is limited, temporary and targeted in scope, and at the same time has clear and immediate effects on reducing the present gender inequality in academia. Thus, in the opinion of the Government, earmarking is an important measure, to be applied temporarily and in addition to already existing measures.

44. The earmarking of post-doctoral posts at the University of Oslo is mentioned in the current action plan of the University as one amongst several means of increasing the proportion of female staff; all concerning new posts funded through the national budget in 1998 (and 2001). Earmarking of academic posts for women is based on the concern that women deviate from the academic career path at a higher rate than their male counterparts. By being unable to attract more of its female research candidates to permanent academic posts and further to senior academic posts, valuable academic resources are lost to the University. This loss of resources represents a quality problem to the academic standards of the University, as well as a quality problem to students who request the availability of an adequate number of female teachers, lecturers and advisers. An extremely low proportion, or even complete absence of women, is unfortunate in academic fields having a large proportion of female students. However, such a fact is equally unfortunate when recruiting more female students to fields that are still strongly male dominated, e.g. technology, where female role models are sorely needed.

45. As to the allocation of post-doctoral positions, the Government explains that of the 40 positions funded over the national budget for 1998, 20 were

---

this is likely to be the wide and to a large extent subjective element of discretion embodied in the basic legal and factual condition to apply the clause, namely “*approximately equally qualified.*”

<sup>30</sup> Even if this procedure did not involve new appointments, this form of “earmarking” had significant effect: After more than 20 years without an increase in the percentage of women professors, that is approximately 4,5% from 1961-84, the percentage was doubled during the last part of the 1980s. After this period, no specific reservations or quotas for women have been attached to personal advancements, and the increase in the percentage of female professors almost stagnated, until the earmarking schemes of recent years were implemented.

<sup>31</sup> Such as individual scholarships awarded to female academic staff, exemption from teaching obligations, and the prolongation of doctoral scholarships held by women. Further, the universities have adopted administrative routines including visibility of gender equality information on web sites etc., the anchoring of responsibility for promotion of gender equality in the top management of universities, and the appointment of special gender equality counsellors.

assigned to the University of Oslo. The Ministry of Education and Research issued directions for the use of these grants stating *inter alia* that fields where women are clearly under-represented should be taken into consideration when allocating these posts. In accordance herewith, the board of the University decided that all 20 post-doctoral research grants for this year should be earmarked for women, as a singular effort to stimulate the gender balance in research recruiting. In 2001, 40 out of 90 new post-doctoral research grants were reserved for women directly in the national budget. The University of Oslo received 14 of these earmarked post-doctoral research grants.

46. As regards professorships, the University of Oslo shall earmark three permanent senior academic posts for women, according to the gender equality action plan for the period 2000-2004. This amounts to a total of 12 permanent posts by 2004. In allocating the earmarked posts between various faculties and institutes, a competition procedure is applied. The criteria for allocation are that the academic unit considered must (1) have less than 10% female professors, (2) be able to establish that there is a base of qualified women prospective applicants, and (3) conduct research which meets the academic priorities of the University.<sup>32</sup>

47. Apart from the fact that they have been advertised as open only to women, all earmarked posts at the University of Oslo have been filled in accordance with regular employment procedures. In the competition to obtain the earmarked positions, solid interest and well-qualified recruiting bases were demonstrated, and competition was fierce. Of the posts that have been advertised and filled, the applicants have largely been very qualified. Qualification criteria have not been compromised in this process. In the opinion of the University and the Government of Norway, this procedure has contributed to strengthen rather than weaken the academic quality of the institution. It is in the best interests of the University of Oslo to employ measures that reduce the loss of quality inherent in losing a proportionally larger part of the female than of the male recruiting base.

48. Further, the Government presents statistics in order to prove that the earmarked posts constitute a small proportion of the total number of post-doctors and professors appointed at the University of Oslo during the period 1998-2002. According to these figures, there were 179 new appointments to post-doctoral research fellow positions in all faculties and institutions during 1998-2001, of which 91 were male and 88 were female. Of these, 29 post-doctoral posts were

---

<sup>32</sup> The approach of recruiting in areas with less than 10% women is based on the assumption that where women are in an extreme minority in academia, they show an increased tendency to opt out, e.g. because of higher pressure towards student supervision and advising, as many female students prefer advisers of the same sex. Another reason given is the fact that the Gender Equality Act provides that at least 40% of each sex shall be represented in university councils, boards and committees, thus creating a considerable extra workload for women in areas where they are clearly under-represented.

earmarked for women.<sup>33</sup> The earmarked positions have been established primarily in medicine, natural sciences and other academic fields with poor recruiting of women to permanent academic posts. The earmarking has contributed to the present gender balance in post-doctoral posts at the University of Oslo. As a post-doctoral grant is a recruiting measure for a permanent academic post, gender balance in this position is considered particularly important.

### *The law*

49. As its first line of defence, the Government of Norway denies that the rule in question is in breach of Articles 2(1) and 3(1) of the Directive. As a second line of defence, the Government submits that Article 2(4) of the Directive should be interpreted in light of the recent amendments and proposed amendments to EU legislation, leading the Court to conclude that the earmarking scheme in question falls within the scope of Article 2(4) of the Directive. As its third line of defence, the Government submits that Article 2(4) as hitherto interpreted by the Court of Justice of the European Communities, and/or Article 2(2) of the Directive, permits the Norwegian practice.

50. The Government's legal appraisal is based on the assumption that formal equality in treatment is not sufficient to achieve material equality in effect. Therefore, the main focus of Norwegian policy and legislation is the concept of gender equality between men and women as groups, reducing the concept of non-discrimination on a case-by-case basis to a secondary issue, and to a means rather than a goal in itself.

51. According to the Government of Norway, a focus on the ultimate goal of gender equality must, in social contexts where gender inequality is still substantial - as in academia, entail an acceptance of a differential treatment of the sexes in the short term, in order to achieve equality in effect for the under-represented sex as a group in the longer term. If formal equal treatment of the sexes is not likely to result in gender equality in practice within a reasonable time span, positive action measures such as the earmarking of academic posts may be applied.

52. In this context, the Government firstly presents its obligations under international law on gender equality, submitting that policy on women and gender equality is not a national or regional matter. The elimination of all inequalities between men and women is an internationally recognised objective. The concept of gender equality has evolved over time both internationally and within the European Community, under reciprocal influence.

---

<sup>33</sup> The total number of appointments to permanent senior academic positions (associate professorships and professorships) during the last four years has been 227, out of which four have been subject to earmarking.

53. The concept laid down in several international agreements and instruments, promoting positive action measures in order to eliminate inequalities between men and women, influences the legal basis for the Norwegian interpretation and practice of the principle of gender equality. In this context, it is submitted that the Court should pay due respect to the fact that the Norwegian rule in question, a special measure aimed at accelerating *de facto* equality between women and men, is not considered to be discriminatory within the meaning of several relevant conventions.

54. The Government of Norway particularly refers to the UN Convention on the Elimination of all forms of Discrimination against Women (CEDAW),<sup>34</sup> ratified by 169 countries including all EEA Members States. The aim of the Convention's ban on discrimination is to achieve not only equal opportunities *de jure*, but *de facto* equality (equality of outcome). As a consequence, the Convention bans direct and indirect discrimination against women, but goes on to state in Article 4(1) that specific temporary measures of positive action aimed at accelerating *de facto* equality between women and men shall not be considered discrimination.<sup>35</sup> In this sense, positive action measures in favour of women are defined and interpreted as an intrinsic dimension of the very ban on discrimination. As an alternative to the interpretation chosen by the Court of Justice of the European Communities in relation to the Directive, according to which positive action measures are legally defined as derogations from the ban on discrimination, the Government suggests an interpretation according to which positive action measures – being aimed at gender equality in practice as the goal of gender equality legislation, rather than ensuring non-discrimination in every individual case – are considered an intrinsic dimension of the very ban on discrimination.

55. In the opinion of the Government, the latter definition applies in the context of the CEDAW Convention, as well as of the Norwegian gender equality legislation. CEDAW member states are even encouraged by the CEDAW Committee to actively implement positive action measures for women, such as quotas, to increase the number of women in occupations that are of particular social importance, such as in universities and courts of justice.<sup>36</sup> The

---

<sup>34</sup> UN Convention on the Elimination of all forms of Discrimination Against Women (CEDAW), dated 18 December 1979, ratified by Norway on 3 September 1981, entered into force on the same date. On 5 March 2002, Norway further ratified the Optional Protocol to CEDAW, and thus recognized the competence of the Committee to receive and consider complaints from individuals or groups of individuals claiming to be victims of a violation of any of the rights set forth in the Convention.

<sup>35</sup> Furthermore, pursuant to the Convention Articles 3 and 11, the State Parties have a duty to take *all appropriate measures* to ensure equal rights for women in working life. The Government further refers to the general recommendation No. 23 on political and public life adopted by the Committee at its 16<sup>th</sup> session, in 1997. The Government quotes paragraph 15 of the recommendation, titled "*Temporary special measures.*" A summary of CEDAW General recommendation 23 is to be found at <http://www.unhchr.ch/tbs/doc.nsf>.

<sup>36</sup> In this respect, the Government draws the attention of the Court to the CEDAW General recommendation No. 5 (General Comments) from 1988, cf. CEDAW General recommendation

Government concludes from the above that positive action measures such as the earmarking of post-doctoral and professorship posts at the University of Oslo, in accordance with section 30(3) of the contested Act, is a measure permitted and encouraged under CEDAW.

56. To the Government of Norway, it is inconceivable that measures permitted and promoted by a widely ratified UN convention, based on a common international understanding of the importance of gender equality, should be prohibited by the Directive in a situation where this is the only appropriate measure. The Government is therefore of the opinion that the relevant EU/EEA legislation ought to be interpreted in light of the Convention. Moreover, the objectives of the Directive and those of the CEDAW overlap to a large degree. Therefore, the objectives should be interpreted and applied in the same manner. According to the Government, this will be even more the case when the amendments to the Directive enter into force, whereby there will be a direct reference to CEDAW in recital 2 of the Preamble of the Directive.

57. The Government further points to Article 14 of the European Convention on Human Rights, Protocol 12 to the same Convention, and Articles 2 and 5 of Convention 111 concerning Discrimination in Respect of Employment and Occupation (ILO), as well as to Recommendation No. R (85) 2 from the Council of Europe.

58. The Government of Norway does not agree with the EFTA Surveillance Authority's opinion, that the reference made by the Government to its obligations under different international agreements is unwarranted in the present case. It stresses that the Court of Justice of the European Communities in several cases has considered international agreements relevant to the application of Community law. In Case C-377/98 *Netherlands v Parliament and Council*, the relationship to other international agreements was one of the issues the Court of Justice of the European Communities had to assess.<sup>37</sup> According to the Government, the EFTA Court has adopted the same approach.<sup>38</sup>

59. Secondly, with regard to the amendment of the Community law provisions on gender equality implemented by the Amsterdam Treaty, the Government

---

5, A/43/38, to be found at <http://www.unhchr.ch/tbsldoc.nsf>. Moreover, the Government deems the comment on the combined third, fourth and fifth reports of Austria in 2000 particularly relevant to the case at hand. The Committee here expressed its concerns at the low representation of women in Academia, where women occupied only 25% of lower academic positions and only 4% at the level of professorships. The Committee commented on this as follows: "*The Committee also calls upon the Government to introduce affirmative action to increase women's appointments to academic posts at all levels and to integrate gender studies and feminist research in university curricula and research programmes*". The reports are available at <http://www.un.org/tivomenwatch/daw/cedaw/Austria%20as%20adopted.html>.

<sup>37</sup> Case C-377/98 *Netherlands v Parliament and Council* [2001] ECR I-7019, at paragraphs 54 and 67.

<sup>38</sup> Case E-8/97 *TV 1000*, [1998] EFTA Court Report 68, at paragraph 26, concerning the ECHR.

notes that the overall purposes of the Community as laid down in Article 2 EC, now provide, *inter alia*, that it is an important task to promote "*equality between men and women*." Furthermore, for the purpose set out in Article 2 EC, all the activities of the Community in Article 3 EC shall now be interpreted in light of the concept of gender equality. The Government quotes Article 3(2) EC and concludes that the concept of gender equality may now be seen as a general and explicit principle based on the Treaty itself. Furthermore, these provisions show that the aim is to achieve *de facto* equality, not just equal opportunities and equal treatment in legal terms. To effect this objective, a positive action provision is now also included in the EC Treaty itself, in paragraph 4 of the amended Article 141 EC. In the opinion of the Government, the earmarking of academic posts at issue is a positive action measure that falls within the scope of Article 141(4) EC.

60. The Government of Norway further points to what it considers the corollary to this new provision, the proposal introduced by the Commission to amend the Directive. The Commission has suggested that Article 2(4) of the Directive is to be replaced by a reference to Article 141(4) EC.<sup>39</sup> Moreover, a reference to a joint declaration of the Member States,<sup>40</sup> expressing the aim of improving the situation of working women, has been inserted into the proposed amendment to the Directive, in recital 13 of the Preamble.

61. As to differences in scope between Article 141(4) EC and the Directive, the Government recalls that the Treaty of Amsterdam, in Article 141(4), introduced into Community gender equality law two important new concepts. Firstly, "*full equality in practice*" is now stated as the aim of those provisions. Further, there is now a specific reference to positive action measures ("*measures providing for specific advantages*"). Neither of these principles is found in the relevant articles of the present Directive, in particular its Article 2(4).

62. In Article 2(4), the focus is on equal opportunity (which in the opinion of the Government of Norway is something other than equality in effect) and measures providing for specific advantages to promote this goal. Measures that provide specific advantages for women are more far-reaching than measures that provide equal opportunity for women. Article 141(4) therefore allows the Member States a greater opportunity to make use of positive action measures than Article 2(4) of the Directive.

63. The Government further submits that existing Court of Justice of the European Communities case law on the Directive is construed so as to regard equal treatment as a goal in itself and thus positive action measures as derogations from the basic non-discrimination principle of the Directive.

---

<sup>39</sup> See COM 2000/0142 (COD). It is expected that the European Parliament will approve the proposed amendments in late June 2002. The Government particularly refers to Article 1, second paragraph, 4, *litra* (d) of the proposed amendments to the Directive.

<sup>40</sup> Declaration No. 28 by all the Member States, cf. OJ 1997 C 340, p. 136.

64. However, the Government of Norway is of the opinion that the Court of Justice of the European Communities has confirmed its understanding in dealing with the relationship between Article 2(4) of the Directive and Article 141(4) EC. It submits that the wording of Article 141(4) EC indicates that the provision is to be interpreted more widely than Article 2(4) and refers to *Abrahamsson*.<sup>41</sup>

65. According to the Government, the Court of Justice of the European Communities does not consider the two provisions materially identical. On the contrary, when the Court of Justice of the European Communities assesses the provisions separately, it indicates that the scope of Article 141(4) is wider than that of Article 2(4) of the Directive. However, the Government mentions that *Abrahamsson* does not clarify this question, as the Court of Justice of the European Communities decided that case on the basis of lack of proportionality.<sup>42</sup>

66. In the view of the Government of Norway, the amendments to the EC Treaty Articles 2 and 3, the wording of Article 141(4) EC and the amendment to the Directive, including the new Preamble, all indicate that Community law is moving towards a focus on gender equality for women as a group, rather than focusing on formal equal treatment of the sexes on a case-by-case basis. Thus, the Community is moving away from a formalistic interpretation towards a pragmatic interpretation and one in which the focus is on the ultimate goal of gender equality. Through the adoption of Article 141(4) EC and the amendments to the Directive, the Community has introduced a new basic legal approach in the field of gender equality and equal treatment of the sexes. The shift in focus - which is in full conformity with the approach of relevant international conventions, particularly CEDAW - leads the Government to conclude that positive action measures should no longer be considered as derogations from the principle of equal treatment, as in *Kalanke*, but rather as an intrinsic dimension of the very ban on discrimination. Therefore, positive action measures, such as the earmarking of posts, are not contrary to Articles 2(1) and 3(1) of the Directive in the opinion of the Government.

67. With regard to a possible objection that no trace of such a revised legal basic approach can be seen in judgments rendered by the Court of Justice of the European Communities subsequent to the adoption of Article 141(4) in the Treaty of Amsterdam, particularly *Abrahamsson* and *Lommers*, the Government notes that, as it cannot be seen from these judgments that the relevant parties invoked such legal argument and submission, the Court of Justice of the European Communities had no occasion to address this issue.

68. As to the EFTA Surveillance Authority's opinion that Article 141(4) EC does not apply in the present case since the amendments made to the EC Treaty by the Treaty of Amsterdam have not been incorporated into the EEA

---

<sup>41</sup> *Abrahamsson*, paragraph 40.

<sup>42</sup> Cf. *Abrahamsson*, paragraph 55.

Agreement, the Government recalls that in the *Einarsson* case, the defendant submitted that the intentions reflected in the Joint Declaration correspond to the objectives of Article 151(4) EC, and that, by analogy, this provision of the EC Treaty, which was introduced by the Treaty of Amsterdam, may be relied upon by the Court in the present case. The Court considered that it would not be a proper exercise of the judicial function to seek to extend the scope of application of the EEA Agreement on that basis.

69. The Government of Norway concurs with the Court's general approach, namely that it would not be a proper exercise of the judicial function to seek to extend the scope of application of the EEA Agreement. However, the Government is of the opinion that a distinction should be drawn between, on the one hand, a situation where the Court is called upon to interpret the EEA Agreement expansively and, on the other hand, a situation where the Court is called upon to define more precisely provisions of the EEA Agreement. In the opinion of the Government, only the first-mentioned situation has the potential of resulting in a broadening of the scope of the EEA Agreement, and thus contradicts a proper exercise of the judicial function.<sup>43</sup>

70. If the Court should come to the conclusion that a derogation from the EEA Agreement which already forms a part of Community law amounts to a broadening of the scope of the Agreement, the Government is of the opinion that the present case and the *Einarsson* case might be distinguished on several points.

71. Firstly, the Government recalls that the Court in the *Einarsson* case was faced with a Joint Declaration with intentions corresponding to Article 151(4) EC, but without any direct link to that Article. This may be the reason why the Court finds it would not be a proper exercise of the judicial function to seek to extend the scope of application of the EEA Agreement “on that basis” (cf. paragraph 45). In the case at hand, the issue is the interpretation of already existing EEA legislation, namely Directive 76/207/EC.

72. Secondly, the Government notes that the Directive, as amended, makes a direct reference to Article 141(4) EC, thus incorporating by reference Article 141(4) EC into the EEA Agreement. For the purposes and within the scope of the

---

<sup>43</sup> The Government gives an example of this distinction in the interpretation of Article 61(3) EEA. Article 87(3) EC, amended by the Treaty of Amsterdam, provides in section (d) that aid to promote culture and heritage conservation may be considered to be compatible with the common market. The EEA Agreement has not been amended since its entry into force on 1 January 1994 and, consequently, the parallel Article 61(3) EEA does not provide a sufficiently legal basis for accepting aid to promote culture and heritage conservation. However, it is clear that the EFTA Surveillance Authority interprets Article 61(3) in the light of Article 87(3) and, as far as the Government is informed, is prepared to accept aid to promote culture and heritage conservation under Article 61(3). The Government assumes that the EFTA Surveillance Authority does not consider such an interpretation to be an extension in the scope of the EEA Agreement, but merely an *explicit adjustment* to a derogation that already forms a part of Community law. In the opinion of the Government, the situation in the above-mentioned example is parallel to the situation in the case at hand, when the Court is called upon to interpret Article 2(4) of the Directive in light of Article 141(4) EC.

Directive, Article 141(4) will apply as a part of the EEA Agreement. The Government admits that this situation will not occur formally until the EEA Joint Committee incorporates the amended Directive into the EEA Agreement. However, given the objective of homogeneous application and interpretation within the two pillars, which is a fundamental principle the Court has found “so strongly expressed in the EEA Agreement,”<sup>44</sup> Article 141(4) should carry considerable weight as an interpretative factor for the Court.

73. The Government of Norway accordingly concludes that Norway is not in breach of Articles 2(1) and 3(1) of the Directive by maintaining the questioned earmarking practice at the University of Oslo pursuant to section 30(3) of the University Act.

74. If, however, the Court should find that the Government of Norway is in breach of Articles 2(1) and 3(1), the Government is of the opinion that the breach is justified under Article 2(2) of the Directive and/or under its Article 2(4).

75. According to Article 2(2) of the Directive, the equal treatment provisions of the Directive do not preclude consideration of sex in cases where sex is a genuine occupational qualification to ensure the quality of the occupational activities carried out.

76. The Court of Justice of the European Communities has recognized the Member States' need to apply Article 2(2) according to the already existing legal framework in the Member States, and thus that the provision will serve varying purposes in the different states. The Government particularly refers to paragraph 34 of Case 248/83, *Commission v Germany*.<sup>45</sup> The Court of Justice of the European Communities did not rule on whether the practices mentioned are within the boundaries set forth in Article 2(2). However, according to the Government of Norway, the statement illustrates the various considerations Article 2(2) may comprise. The Government then quotes paragraph 36 of said judgment and notes that on this basis, the Court of Justice of the European Communities concluded that the provision in Article 2(2) could not be interpreted so as to bind the Member States to incorporate the provision in any given form.

77. Furthermore, the Government refers to Case 318/86 *Commission v France*, recognizing the earmarking of a certain number of posts to secure the appointment of both genders.<sup>46</sup> The question of separate recruitment, or quota systems, was not specifically discussed by the Court of Justice of the European Communities, as the parties agreed that national provisions prescribing the separate recruitment of men and women would not in itself constitute a breach of

---

<sup>44</sup> Case E-9/97 *Sveinbjornsdottir* [1998] EFTA Court Report 95.

<sup>45</sup> Case 248/83 *Commission v Germany* [1985] ECR 1459.

<sup>46</sup> Case 318/86 *Commission v France* [1988] ECR 3559, in particular at paragraph 23.

Article 2(2). The Court of Justice of the European Communities stressed that the application of Article 2(2) requires a specific consideration of the duties to be performed in individual cases, and that the practice of the derogation under Article 2(2) must be sufficiently transparent for supervision by the Commission. The separate recruitment practice was not found to be sufficiently transparent.<sup>47</sup>

78. The Government concludes that, within the mentioned boundaries, separate recruitment, *inter alia* quota systems, in order to ensure the recruitment of both genders so that all necessary occupational tasks may be carried out in an appropriate manner, will constitute an appropriate measure under Article 2(2). Accordingly, Article 2(2) must be interpreted to allow gender quotas to meet reasonable demands from the customers.<sup>48</sup> The allocation of earmarked positions in the University of Oslo is determined by the need for female faculty staff within each institution. The substantial under-representation of female staff implies that students' legitimate need for female advisers, etc. is not met.

79. As for the obligation to assess the exemptions practised by the Member States according to Article 2(2) of the Directive, cf. Article 9(2), the Government points out that the contested earmarking of academic posts concerns temporary positions, and that the need for further earmarking of new positions will have to be reconsidered if new positions are to be advertised. The Government submits that the allocation of earmarked posts as practised by the University of Oslo constitutes an individual assessment of the duties to be performed in individual cases, and that this practice is sufficiently transparent for supervision to be undertaken. Thus, the Government submits that the contested earmarking of academic posts falls within the scope of Article 2(2) of the Directive.

80. As to Article 2(4) of the Directive, the Government reiterates its assertion that recent developments in EC law, reflected in recent EC legislation, should be taken into consideration by the Court in its interpretation of Article 2(4), thereby permitting a more liberal approach to positive action measures than what is provided for in the relatively strict interpretation of Article 2(4) as reflected in existing Court of Justice of the European Communities case law. The current discussion, however, presupposes that the Court is not convinced by the Government's arguments in this respect, and decides the case on the basis of an isolated view of Article 2(4).

81. The Government refers to a series of decisions from 1986 to date, through which the Court of Justice of the European Communities has ruled on the interpretation and scope of Article 2(4). In *Kalanke*, it was stated that the Article

---

<sup>47</sup> See Case 318/86 *Commission v France* [1988] ECR 3559, paragraph 26.

<sup>48</sup> The Government refers to a Danish example. Denmark practised this provision in 1987 by allowing the Copenhagen Business School to introduce a quota for male students in the deaf interpreter training programme, wherein the overwhelming majority of students were women, to ensure that users of deaf interpreters would be able to choose a male interpreter if they wished. See the Danish *Ligestillingsradets årsberetning 1987*, at page 77 (In English: The Council for Gender Equality in Denmark, annual report 1987).

must be interpreted strictly, as it constitutes a derogation from an individual right laid down by the Directive. In the Government's view, this basic assumption ought to be modified in light of later legal developments.

82. In *Marschall*, the Court of Justice of the European Communities accepted the principle of moderate favour of women, i.e. that women - in sectors of public service where they are under-represented - may be given priority where male and female candidates are equally qualified for employment, provided that such favour takes place on the basis of an objective assessment which takes into account the specific personal situations of the candidates. Accordingly, automatic and unconditional priority to women will be incompatible with Community law, as further confirmed in *Badeck* and *Lommers*. In *Abrahamsson*, it was held that a national scheme of so-called radical favour of women - i.e. that women were given priority in the appointment to professorships over better-qualified men - was incompatible with the principles outlined above.

83. The Government of Norway summarizes that, if the above-mentioned criteria for the application of Article 2(4) are met, the Court of Justice of the European Communities has stated that measures giving priority to women must satisfy the proportionality test in order to fall within the scope of the Article, i.e. not exceed what is appropriate and necessary to achieve the objective.

84. In the Government's view, the Court of Justice of the European Communities has not yet been called upon to rule on whether earmarking of specific posts for women may fall within the scope of Article 2(4) of the Directive.

85. The facts of the *Badeck* case, concerning a German quota scheme for women, are considered very similar to earmarking schemes of the Government of Norway, as they both imply a certain element of automatic priority. Moreover, the German scheme applied to training positions, and is therefore directly comparable to the Norwegian post-doctoral posts. The Government specifically quotes paragraphs 39 and 55 of the *Badeck* judgment.

86. In light of the current manifest gender imbalance in Norwegian academia it is highly unlikely that the Norwegian earmarking scheme will bring the proportion of women in the career groups concerned anywhere near the proportion of women in the groups from which they are recruited. Further, the fact that the proportion of women in higher career brackets does not correspond to that in the group from which they are recruited may be an indication that an ostensibly gender-neutral recruitment procedure does not in fact prevent indirect gender discrimination.

87. Further, in the Government of Norway's view, the Court of Justice of the European Communities' case law rejecting measures giving automatic and unconditional priority to women cannot be construed too literally. Once quotas are considered compatible with Article 2(4), as the Court of Justice of the

European Communities does in *Badeck*, a point is likely to be reached where the male employment quota has been filled and where all subsequent employments accordingly will lawfully be allocated to women, even if there are male applicants who are better qualified (or have the balance tilted in their favour due to specific personal factors).<sup>49</sup>

88. Under the Norwegian scheme, the earmarked post-doctoral and professorship posts at the University of Oslo are new posts and therefore constitute a real extension of the total number of posts available. Therefore, male applicants are not in a more difficult career advancement position than they would be without the earmarked posts; rather to the contrary as some of their potential female competitors will be appointed to the earmarked posts.

89. According to the Government of Norway, the legal relevance of the fact that, even when priority is given to women, there exists access to the same type of benefit for men is also emphasised in *Lommers* (concerning nursery places, not academic posts).<sup>50</sup> Whereas *Lommers* concerned all the employer's nursery places, the Government notes that the Norwegian gender quota scheme only applies to a limited number of academic positions at the University of Oslo. There are many similar positions to those covered by the earmarking scheme, both in the University of Oslo as well as in other academic institutions covered by the University Act. There will, accordingly, be ample opportunity to take special account of a male applicant.

90. The Government of Norway further maintains that automatic priority to one sex is in accordance with Article 2(4), when the purpose is to counterbalance an actual disadvantage.

91. It refers to *Schnorbus*, concerning the automatic precedence accorded male candidates who had completed compulsory military or civilian service, for (all) legal adviser positions in Hessen, Germany.<sup>51</sup> Judged on the basis of the principle of proportionality, the preference accorded to men did not go beyond what was necessary to compensate for the disadvantages entailed by compulsory military or community service.

92. Beyond the preference accorded men who had completed compulsory military or civilian service, there was a possibility of taking particular hardship into account. According to the Government, this must be viewed in connection with the fact that the measure concerned all positions as legal adviser in Hessen - a material circumstance that distinguishes that case from the Norwegian earmarking scheme.

---

<sup>49</sup> See *Badeck*, paragraph 53.

<sup>50</sup> See *Lommers*, paragraph 44.

<sup>51</sup> The Government quotes the 4<sup>th</sup> question submitted by the German court and the answer given by the Court of Justice of the European Communities, particularly at paragraphs 39, 44 and 45.

93. In the opinion of the Government of Norway, *Schnorbus* strongly supports Norway's position in the present case. The Court of Justice of the European Communities here accepted preference being automatically accorded to persons who had completed compulsory military or civilian service, even though this constitutes indirect discrimination against women. The purpose of the preferential treatment was to compensate for a disadvantage in fact, namely the delay in education due to military service. Similarly, the sole purpose of the Norwegian earmarking scheme is to compensate for an actually disadvantageous situation, namely the strong under-representation of women in high academic posts.

94. In particular, with reference to *Badeck* and *Schnorbus*, the Government of Norway concludes that the contested earmarking of post-doctoral and professorship posts at the University of Oslo pursuant to section 30(3) of the University Act falls within the scope of Article 2(4) of the Directive.

95. Further, the Government of Norway submits that the earmarking in question satisfies the proportionality test.

96. The general principle underlying the Court of Justice of the European Communities case law on positive action is that the principle of proportionality shall be observed. This means that any special measure in favour of one sex shall serve a lawful purpose, it shall be appropriate and necessary for the attainment of its goal, and it must not exceed what is necessary to attain it. In the assessment of the principle of proportionality, the Court should take into account relevant international agreements and Article 141(4) EC.

97. The Government of Norway quotes the case *Commission v France*, being thus far the only infringement procedure concerning positive action that has been brought before the Court of Justice of the European Communities.<sup>52</sup> In comparison with this case, the Norwegian provisions at issue are considered specific and narrow by the Government, and limited both in scope and duration.

98. Post-doctoral posts are temporary appointments with a maximum duration of three years. The professorships set up and earmarked for women will lapse at the latest when such professor retires. The earmarking of post-doctoral grants aims at qualifying women for further careers in research, more specifically, for appointment to permanent senior academic posts. It will, however, take time for this to result in an increased number of women professors. Thus, the earmarking of professorships aims at kick-starting the desired development, by increasing the number of women professors today, until the desired proportion of women in academia is achieved.

---

<sup>52</sup> Case 312/86 *Commission v France* [1988] ECR 6315. The Court of Justice of the European Communities' objection to the French provision at issue was that it was general and applied for an indefinite period (see in particular paragraphs 14 and 22). Thus, France had gone beyond what was necessary and violated the principle of proportionality.

99. Further, the earmarked posts represent only a minor part of all new appointments to post-doctoral and professor posts at the University of Oslo. In the opinion of the Government, the numbers mentioned above are of significant importance when assessing proportionality.

100. Moreover, the types of academic post subjected to earmarking are limited to those types considered material, in various research reports including ETAN, to alleviate existing gender imbalances in senior academic posts and thus plug the “leaky pipeline” in academia.

101. The Government of Norway further maintains that the measures in question take into account the interests of qualified men. It refers to *Abrahamsson*, concerning Swedish legislation giving automatic priority to applicants of the under-represented sex who possess sufficient qualifications for a professorship over applicants of the opposite sex who are clearly better qualified, provided only that the difference between the respective merits of the candidates is not so great as to give rise to a breach of the requirement of objectivity in making the appointment.

102. The Court of Justice of the European Communities did not find this measure of radical favour of women to be justified pursuant to Article 2(4) of the Equal Treatment Directive or to Article 141(4) EC. The grounds for regarding the Swedish measure as incompatible with Article 141(4) EC illustrate the importance of the principle of proportionality in assessing the lawfulness of positive action.<sup>53</sup>

103. The measure at issue in *Abrahamsson* differed significantly from the Norwegian earmarking scheme and was, in the opinion of the Government, significantly more disadvantageous to the sex that was not given priority.

104. The Swedish selection method entailed that a clearly less qualified woman could be given preference over a better-qualified man. This would suggest that the Swedish method could be regarded as a quality-reduction method. This cannot be said of the Norwegian earmarking scheme. It is at least neutral as regards quality, and as such, appropriate for attracting highly qualified women who would not otherwise have applied, or for motivating women to improve their qualifications. In fact, earmarking may be deemed to promote the professional quality of the universities, as the large proportion of women lost from the academic career path implies a permanent loss to the universities of valuable academic resources.

105. The Swedish method was further particularly disadvantageous for the sex that was not given priority. A great deal of work is involved in writing an application for a professorship and compiling documentation of research qualifications. Applying for a professorship and being rejected is also likely to

---

<sup>53</sup> See *Abrahamsson*, paragraph 55.

have an adverse effect on a researcher's reputation, especially as he or she is not likely to be particularly young.

106. According to the Government of Norway, the Norwegian earmarking scheme, therefore, is much more considerate to men than the Swedish selection method. The Norwegian arrangement merely entails the loss of an opportunity to apply and will not involve any waste of effort or loss of reputation.

107. The Norwegian earmarking scheme only applies to a small number of the academic positions in Norway and does not by any means prevent men from pursuing an academic career. Men have many other opportunities to obtain academic positions than the relatively few they lose because of the earmarking scheme at the University of Oslo.

108. The Government of Norway further maintains that less invasive measures are not available to alleviate the current under-representation of women in high academic positions. It refers to measures that are less restrictive than the earmarking mentioned earlier, that have been employed by the Norwegian universities in order to increase the proportion of women in academia. According to the Government, the statistics alone offer sufficient proof that these measures, some of which have been employed for decades, have not had any significant effect on raising this proportion to a level that can be considered satisfactory, even by the most conservative estimates. The only years when any discernible increase in the very slow growth rate for women professors can be seen, is when earmarking of posts for women has taken place, as in the personal advancement procedure of the mid-80s.

109. The Government of Norway concludes that earmarking of academic posts, as practised by the University of Oslo and giving rise to the case at hand, is proportional to the legitimate aim pursued, namely the promotion of gender equality in academia. This measure is temporary in nature, both for professors and post-doctors, and is employed only for a very limited number of the total appointments that take place at the University of Oslo. Other less invasive measures have been tried, throughout the university sector, in an attempt to raise the proportion of women in academic posts and plug “the leaky pipeline,” but without discernible effect.

110. Finally, the Government of Norway recalls that the infringement proceedings in the case at hand have been raised pursuant to Article 31 of the Surveillance and Court Agreement. It follows from long-standing case law of the Court of Justice of the European Communities that the Commission and, accordingly, the EFTA Surveillance Authority have the burden of proof to establish that the Government is in breach of the EEA Agreement. The Government refers to Case C-159/94, *Commission v France*.<sup>54</sup>

---

<sup>54</sup> Case C-159/94 *Commission v France* [1997] ECR I-5815, in particular at paragraph 102.

111. The only part of the procedure where the burden of proof lies with the Government of Norway is the establishment of a possible justification. However, regarding the proportionality test in that assessment, the burden of proof lies again with the EFTA Surveillance Authority.<sup>55</sup> The Government refers to paragraph 44 of the application, where the EFTA Surveillance Authority notes that the scope of any derogation from the provision concerning positive action must be determined in accordance with the principle of proportionality. The EFTA Surveillance Authority then, wrongfully in the view of the Government, submits that the Government has failed to show that the aim in question cannot be achieved by less invasive measures.

112. In the opinion of the Government of Norway, it follows from the case law of the Court of Justice of the European Communities, which, according to Article 3(2) of the Surveillance and Court Agreement, is relevant in the interpretation of Article 31 of the same Agreement, that the EFTA Surveillance Authority has to show that the aim in question can be achieved by less invasive measures. Accordingly, in the case at hand the EFTA Surveillance Authority has not fulfilled its obligation under Article 31 of the Surveillance and Court Agreement.

113. In its *rejoinder*, the Government of Norway once more addresses the question of unconditional priority and proportionality and contests that the Court of Justice of the European Communities' case law concerning the limits of the use of positive action is as consistent as the Commission implies in its observations. The Government again refers to *Schnorbus*, where the Court of Justice of the European Communities took a different approach to establishing the limits for the application of positive action under the Directive and did not apply the *Badeck* tests of whether a positive action measure is unconditional or absolute in the priority given to one sex. According to the Government, *Schnorbus* cannot be considered irrelevant, since the issue is not the area where positive action is applied, but the test that the Court of Justice of the European Communities applies when it considers whether a measure is compatible with Article 2(4) of the Directive. Further, both *Schnorbus* and the case at hand concern factual disadvantages that are general in nature, respectively a career delay that affect men as a group, and an academic career obstacle that affect women as a group. Should the Court find that the contested Act is contrary to Article 2(1) of the Directive, it is necessary to examine whether such discrimination may be justified before ruling on the compatibility with Article 2(4) or with Article 141(4) EC in accordance with *Schnorbus*.

114. Contrary to the EFTA Surveillance Authority's and the Commission's submissions, the criteria of unconditional and automatic priority formulated by the Court of Justice of the European Communities do not effectively exhaust the question of proportionality in these cases.

---

<sup>55</sup> In *Commission v France*, the Court of Justice of the European Communities discussed the Commission duty to assess a possible justification under article 90(2) EC (now Article 86(2) EC). The Government refers to paragraph 100 of this judgment.

115. Further, the Government of Norway reiterates its view that the fact that Norway has tried applying other measures to address the under-representation of women in academia and that these measures have been unsuccessful, is of relevance with regards to the proportionality test in the present case.

116. With regard to the application of Article 141(4) EC in the present case, providing for a larger margin of discretion in the application of positive action measures as compared to Article 2(4) of the Directive, the Government of Norway refers again to the new Community legislation replacing Article 2(4) of the Directive with Article 141(4) EC, in particular to paragraphs 11 and 14 of the Commission's Explanatory Memorandum on the amendment of Directive 76/207/EEC. The Government infers from the statements quoted that the modifications of *Kalanke* established in subsequent rulings of the Court of Justice of the European Communities on the issue of positive action were not sufficient to meet the Member States' need for flexibility with regard to positive action measures. Furthermore, it shows that Article 141(4) EC is not limited to the moderate forms of positive action accepted by the Court of Justice of the European Communities under Article 2(4), i.e. preference of women in cases of equal qualifications, but has a wider scope. The Government further refers to Declaration 28 of the Amsterdam Treaty, supporting the conclusion that the scope of positive action measures favouring women shall be greater than those favouring men.

117. Finally, the Government of Norway points to the Court of Justice of the European Communities' case law on the discretion of Member States in determining social policy objectives<sup>56</sup> and the principle of subsidiarity. The Government recalls that its earmarking policy, having been a central and defining feature of the social policy of successive Norwegian governments for more than twenty years, is part of a broad policy framework aimed at achieving gender equality in the area of employment.

### **The Commission of the European Communities**

118. The Commission of the European Communities observes that men are, according to the Norwegian law in question, completely excluded from the selection procedure for certain post-doctoral posts at the University of Oslo. The Commission considers the key issue in the case to be whether such treatment may nevertheless fall within the scope of the exception in Article 2(4).

119. According to the consistent case law of the Court of Justice of the European Communities, Article 2(4) of the Directive is specifically designed to allow measures that, although discriminatory in appearance, are in fact intended to eliminate or reduce actual instances of inequality that may exist in the reality of social life. In principle, it may therefore permit a national measure relating to

---

<sup>56</sup> See Case C-226/98 *Jørgensen* [2000] ECR I-2447, paragraph 41; and Case C-167/97 *Seymour Smith* [1999] ECR I-623, paragraph 74.

access to employment which gives a specific advantage to women with a view to improving their ability to compete on the labour market or pursue their careers on an equal footing with men.<sup>57</sup>

120. However, as an exception to the fundamental principle of equal treatment, the derogation in Article 2(4) must be strictly interpreted. The Commission refers to *Kalanke*, where the Court of Justice of the European Communities held that a law giving automatic priority to a female candidate over an equally qualified male applicant in a sector where women were under-represented fell outside its proper scope. As was emphasized at paragraphs 21-22 of the judgment, national rules that guarantee women "*absolute and unconditional priority*" for appointment or promotion go beyond promoting equal opportunities, and the permitted limits of the exception.

121. A series of subsequent cases has further developed the principles that apply in assessing compatibility with Article 2(4) of the Directive. In *Marschall*, a regional German law provided that in sectors of the civil service where fewer women than men were employed in the higher grade post in a given career bracket, women were to be given priority for promotion in the event of equal suitability, competence and professional performance, *unless* reasons specific to an individual male candidate tilted the balance in his favour. In other words, unlike the rule at issue in *Kalanke*, this provided for a form of "savings" clause. The Court of Justice of the European Communities accepted that even where male and female candidates are equally qualified, this might not mean that they have the same chances (because of e.g. stereotypes concerning the role of women in working life, etc.). A rule designed to counteract such instances of inequality could fall within the scope of the exception in Article 2(4), but (as a derogation to the right to equal treatment) only if equally qualified male candidates were subject to an objective assessment taking account of all criteria specific to each individual candidate, and if the priority accorded to female candidates was overridden if one of those criteria favoured a male candidate.<sup>58</sup>

122. In the Commission's view, it is quite clear from the above that in order to fall within the permitted limits of the exception, a measure designed to address under-representation of women in a given sector must comply with at least two basic conditions. Firstly, it must not give automatic and unconditional priority to women where male and female candidates have equal qualifications, and secondly, the candidates must be subject to an objective assessment that takes account of the specific personal situations of all candidates. This approach was further confirmed in *Badeck*<sup>59</sup> and *Abrahamsson*, where the selection procedure in question was found to fail this test by giving automatic preference to a candidate of the under-represented sex who was not equally qualified but merely

---

<sup>57</sup> See for example *Kalanke*, paragraphs 18-19 and *Marschall*, paragraphs 26-27.

<sup>58</sup> See *Kalanke*, especially paragraph 33.

<sup>59</sup> See *Badeck*, at paragraph 23.

“sufficiently” qualified.<sup>60</sup> According to the Commission, similar reasoning also appears to underlie *Lommers*, where the system of reserving a number of subsidised nursery places for female officials working at the Dutch Ministry of Agriculture was found to be compatible with the Directive only because male officials who in fact took care of their children could be granted access to the scheme on the same conditions as female officials.

123. The Norwegian rule in the present case guarantees women absolute and unconditional priority in the most extreme sense, since men are completely excluded from the selection procedure for the reserved posts from the outset. In other words, there is no question of any form of objective assessment of a male candidate's application because it cannot be taken into consideration at all. Further, since Article 2(4) of the Directive does not permit even a rule which grants automatic priority to a member of the under-represented sex in the case of their being equally qualified, it follows necessarily that a rule such as Article 30(3) of the 1995 Act relating to Universities and Colleges granting such priority without any reference to the circumstances of male candidates is clearly beyond its proper scope.

124. As to the Government's arguments put forward in the course of the administrative procedure, the Commission firstly suggests that Article 141(4) EC, as introduced by the Treaty of Amsterdam, explicitly promotes actions to "*ensure full equality in practice between men and women in working life,*" and that Article 2(4) of the Directive must be interpreted accordingly. Article 141(4) was of course introduced *after* the entry into force of the EEA Agreement, and has not been expressly incorporated into the EEA provisions on equal treatment.<sup>61</sup> In any event, it seems clear that by analogy with paragraphs 54-56 of *Abrahamsson*, Article 141(4) could not operate in such a way as to legitimise the rule in question here. Just as the measure granting automatic priority (without objective assessment) to a sufficiently qualified candidate of the under-represented sex was found to be incompatible with Article 2(4) of the Directive, so too could it not be justified by Article 141(4) on the grounds of its being disproportionate. In the Commission's view, similar reasoning would necessarily apply in this case (where *all* male candidates are *a priori* excluded from the selection process) with the result that Article 141(4) EC could not be used to alter the assessment of the Norwegian measure in the context of Article 2(4).

125. The Commission further points to a series of arguments essentially linked to the issue of proportionality, which were put forward by the Government. In the replies to the letter of formal notice and the reasoned opinion, it is argued that national measures are admissible under Article 2(4) provided that they are proportionate. This is not disputed. As the Court of Justice of the European

---

<sup>60</sup> See *Abrahamsson*, in particular paragraphs 52 and 53.

<sup>61</sup> On extending the scope of the EEA Agreement by such means, see *Einarsson*, paragraph 45.

Communities noted in Case C-273/97 *Sirdar*,<sup>62</sup> “*in determining the scope of any derogation from an individual right such as the equal treatment of men and women, the principle of proportionality, one of the general principles of Community law, must also be observed.*” However, in the Commission's opinion, the key point here is rather that the principles developed by the Court of Justice of the European Communities' case law on Article 2(4) are themselves an expression of the proportionality test. It is precisely for this reason that a discriminatory measure intended to eliminate or reduce inequality that, as here, guarantees automatic and unconditional priority to female candidates without any objective assessment of the circumstances of male candidates, will fall beyond the permitted scope of Article 2(4).

126. With regard to the fact that the disputed rule relates only to temporary post-doctoral posts (with a maximum duration of 4 years) which form part of a special programme for women, the Commission, leaving aside the fact that it appears that full-time academic posts may also be affected under the University's 2000-2004 Equal Treatment Plan, deduces from the *Abrahamsson* case that a restriction of this kind is insufficient to counter-balance the absolute and disproportionate nature of the rule itself.<sup>63</sup>

127. As for the Court of Justice of the European Communities' decision in *Schnorbus*, examining the German system of offering preferential admission to practical legal training for applicants who had *inter alia* completed compulsory military service (a possibility only affecting male applicants), the Commission is of the opinion that there is a fundamental distinction between that case and the present one: the measure in *Schnorbus* was limited to offering a form of compensation for a specific time disadvantage and, unlike the Norwegian rule at issue in the present case, did not seek to address a general case of under-representation of a particular group. Finally, it is emphasised that Articles 1, 6, 102 and 105 of the EEA Agreement are designed to ensure the homogeneous interpretation and application of the legal acts incorporated in the Agreement (via its Annexes) in both the EFTA States and the EC Member States. The Commission similarly underlines the importance of this principle, and in the light of its discussion of the interpretation of Article 2(4) above, would suggest that this serves precisely to reinforce the view that the rule at issue goes beyond the permitted limits of that derogation.

128. For all these reasons, the Commission concludes that Article 30(3) of the 1995 Act, as applied by the University of Oslo, does not fall within the scope of the exception in Article 2(4) of the Directive and that the contested measures are in breach of EEA law.

---

<sup>62</sup> The Commission quotes Case C-273/97 *Sirdar*, cited above, paragraph 26; and Case 222/84 *Johnston*, cited above, paragraph 38.

<sup>63</sup> See *Abrahamsson*, in particular paragraphs 58-59.

Carl Baudenbacher  
Judge-Rapporteur