OPINION OF ADVOCATE GENERAL SAGGIO
delivered on 10 June 1999 *

1. By the reference for a preliminary ruling from the Staatsgerichtshof des Landes Hessen (State Constitutional Court, Hesse) the Court is asked for the third time to interpret Article 2(1) and (4) of 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 and promotion, and working conditions (hereinafter 'the Directive') [1] in order to determine whether it is compatible with rules relating to a programme for the recruitment and promotion of women in the public administration. The question referred in the present case is in fact asking the Court to define, in the light of Community law in force, the concept and scope of positive action at national level to facilitate the full integration of women in working life.

The Community provisions

2. I note that the purpose of the Directive is to put into effect in the Member States 'the principle of equal treatment for men and women as regards access to employment, including promotion, and to vocational training and as regards working conditions and ... social security' (Article 1).

Article 2(1) of the Directive provides that that principle 'shall mean that there shall be no discrimination whatsoever on grounds of sex either directly or indirectly by reference in particular to marital or family status'.

Article 2(4) provides that the Directive shall be without prejudice to the right of Member States to adopt or maintain in force 'measures to promote equal opportunity for men and women, in particular by removing existing inequalities which affect women's opportunities in the areas referred to in Article 1(1)'.

3. Since the question was referred, the Treaty of Amsterdam has entered into force, amending the EC Treaty — for the purposes of the present analysis — as regards the implementation of the principle

* Original language: Italian.
1 — OJ 1976 L 39, p. 40.

of equal treatment for men and women. In particular, Articles 2 and 3 of the EC Treaty as amended provide that 'the Community shall have as its task ... to promote ... equality between men and women' and that 'the Community shall aim to eliminate inequalities, and to promote equality, between men and women'. In addition, Article 6a, which is also incorporated in the new Treaty, provides that 'the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may take appropriate action to combat discrimination based on sex ...'.

4. Article 119 of the EC Treaty (Articles 117 to 120 of the EC Treaty have been replaced by Articles 136 EC to 143 EC) as amended provides that 'each Member State shall ensure that the principle of equal pay for male and female workers for equal work or work of equal value is applied' (paragraph 1), that 'the Council, acting in accordance with the procedure referred to in Article 189b [now Article 251 EC], and after consulting the Economic and Social Committee, shall adopt measures to ensure the application of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation, including the principle of equal pay for equal work or work of equal value' (paragraph 3), and lastly that 'with a view to ensuring full equality in practice between men and women in working life, the principle of equal treatment shall not prevent any Member State from maintaining or adopting measures providing for specific advantages in order to make it easier for the under-represented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers' (paragraph 4).[2] The *Declaration on Article 119(4) of the Treaty establishing the European Community*, attached to the Treaty of Amsterdam, states that 'when adopting the measures referred to in Article 119(4) of the Treaty establishing the European Community, Member States should, in the first instance, aim at improving the situation of women in working life'.

5. Even before the Treaty was amended, the Community institutions had already adopted various acts relating to equal treatment for men and women. I draw your attention in particular to Council Recommendation 84/635/EEC of 13 December 1984 on the promotion of positive action for women,[3] which states that 'existing legal provisions on equal treatment, which are designed to afford rights to individuals, are inadequate for the elimination of all existing inequalities unless parallel action is taken by governments, both sides of industry and other bodies concerned, to counteract the prejudicial effects on women in employment which arise from social attitudes, behaviour and structures', and recommends the Member States, with express reference to Article 2(4) of the Directive, to adopt a positive action policy designed *inter alia* to 'encou-

2 — Prior to the amendments introduced under the Treaty of Amsterdam, Article 119 made no reference to positive action for the under-represented sex and only prohibited discrimination in respect of pay. Paragraph 1 of that article provided that 'each Member State shall during the first stage ensure and subsequently maintain the application of the principle that men and women should receive equal pay for equal work'.

3 — OJ 1984 L 331, p. 34.

rage women candidates and the recruitment and promotion of women in sectors and professions and at levels where they are under-represented, particularly as regards positions of responsibility'.

The national provisions

6. The purpose of the Hessisches Gleichberechtigungsgesetz (Hesse Equal Rights Law, hereinafter the 'HGlG'), adopted on 21 December 1993 and promulgated on 30 December 1993, is to promote equal access for women and men to public offices by improving the conditions of access and promotion for women and their working conditions, on the basis of women's advancement plans with binding targets (Paragraph 1).

7. Paragraph 3(1) of the HGlG provides that 'departments shall be obliged by means of women's advancement plans ... and other advancement measures ... to work towards equality of women and men in the public service and the elimination of the under-representation of women and to eliminate discrimination on grounds of sex and family status' and Paragraph 3(2) states that 'women are under-represented if, within the scope of a women's advancement plan ... fewer women than men are employed in a pay, remuneration or salary bracket in a career group. In initial grade posts in career groups, women are deemed to be under-represented if fewer women than men are employed in the whole career group. Sentence 2 applies by analogy to initial grade posts in the judicial service and public attorney's office. Within the scope of a women's advancement plan, each salary bracket of a career group, each pay bracket and each remuneration bracket shall form a sector. The office which draws up the women's advancement plan may make further subdivisions'.

8. Paragraph 5(3) states that 'the women's advancement plan shall contain binding targets, for two years at a time, with reference to the proportion of women in appointments and promotions, for increasing the proportion of women in sectors in which women are under-represented'. In addition, Paragraph 5(4) provides that 'in each women's advancement plan, more than half of the posts to be filled in a sector in which women are under-represented are to be designated for filling by women'. That shall not apply if 'a particular sex is an indispensable condition for an activity' or 'if it is convincingly demonstrated that not enough women with the necessary qualifications are available' or 'in the case of promotions without posts being filled in sectors in which women are under-

represented, a proportion of women is to be designated which corresponds at least to the proportion of women in the next lowest salary group in the sector. Sentence 3 shall apply by analogy'. Finally, 'if measures of personnel organisation are provided for which block or abolish posts, it must be ensured by means of the women's advancement plan that the proportion of women in the sectors affected remains at least the same'.

9. Paragraph 5(7) is concerned with 'posts in the academic service' which are filled for a fixed term under the Hochschulrahmengesetz (Framework law on universities and colleges). They must be filled with at least the same proportion of women as the proportion of women among the graduates or holders of higher degrees (as the case may be) in the faculty in question. The same principle applies to the employment of academic assistants without degrees: at least the same proportion of women must be considered as the proportion of women among the students in the faculty in question.

10. Paragraph 7 provides that, again in cases where women are under-represented, they are to be taken into account to the extent of at least one half in the allocation of places on training courses. Women's attention must also be drawn to vacant places on such courses and they must be induced to apply. If despite such encouragement there are not enough applications from women, more than half of the vacant places may be filled with men.

11. Under Paragraph 9(1), at least as many women as men, or all the women candidates, shall be called to interviews held in connection with the appointment of new staff, if they satisfy the conditions laid down by the law or otherwise and if women are under-represented in the sector in question.

12. Paragraph 10 provides that 'suitability, capability and professional performance (qualifications) are to be assessed in accordance with the requirements of the post to be filled or the office to be conferred. When qualifications are assessed, capabilities and experience which have been acquired by looking after children or persons requiring care in the domestic sector (family work) are to be taken into account, in so far as they are of importance for the suitability, performance and capability of applicants. That also applies where family work has been performed alongside employment .... The family status or income of the partner may not be taken into account. Part-time work, leave and delays in completing training as a result of looking after children

or dependants certified by a doctor as requiring care must not have a negative effect on official assessment and not adversely affect progress in employment .... Seniority, age and the date of last promotion may be taken into account only in so far as they are of importance for the suitability, performance and capability of applicants'.

13. Finally, Paragraph 14 provides that 'in making appointments to commissions, advisory boards, boards of directors and supervisory boards and other collegiate bodies, at least half the members should be women'.

14. As regards the duration of the advancement plan, Paragraph 5(3) provides that the binding targets for each plan shall be set for a period of two years, taking into account the particular features of the sectors and departments concerned. However, pursuant to Paragraph 10(4), if the targets of the women's advancement plan are not fulfilled within two years, every further appointment or promotion of a man in a sector in which women are under-represented shall, until they are fulfilled, require the approval of the body which has approved the plan. Moreover, until a women's advancement plan has been drawn up, no appointments or promotions may be effected in sectors in which women are under-represented (Paragraph 10(5)).

The national and Community procedures

15. The reference for a preliminary ruling was made by the Staatsgerichtshof des Landes Hessen in the context of proceedings for review of legislation instituted by 46 members of the Hessischer Landtag (Parliament of the *Land* of Hesse), seeking a declaration that the HGlG, in particular Paragraphs 3, 5, 7 to 11, 14, 16 and 18 thereof, is incompatible with the Constitution of the *Land* of Hesse.

16. According to the plaintiffs, the HGlG is inconsistent with the constitutional principle of 'choosing the best persons', in that it entails giving priority to candidates on grounds of sex rather than merit, and also with the principle of equal treatment, which not only prohibits giving priority to a specific group but confers a fundamental right on all individuals, a right which guarantees citizens equal opportunities with respect to starting-points, not advantages for a specific category of persons with

respect to points of arrival. In that sense, it is claimed that the rules in question are also contrary to the Directive as interpreted by the Court in its judgment in *Kalanke*.[4]

17. Before reviewing the legality of the German law in question, the Staatsgerichtshof des Landes Hessen stayed the proceedings and referred the following question to the Court for a preliminary ruling pursuant to Article 177 of the EC Treaty (now Article 234 EC):

'Does Article 2(1) and (4) of Council Directive 76/207/EEC preclude national rules under which:

1. in cases of under-representation under Paragraph 3(1) and (2) of the Hesse Equal Rights Law (HGlG) selection decisions under Paragraph 10 of the HGlG, where a woman and a man applicant have equal qualifications, must because of the binding nature of the targets in the women's advancement plan under Paragraph 5(3) and (4) of the HGlG be in favour of the woman applicant in the individual case, at least if that is necessary for fulfilling the targets and no reasons of greater legal weight are opposed;

2. the binding targets of the women's advancement plan for posts in the academic service to be filled for fixed terms and for academic assistants must, under Paragraph 5(7) of the HGlG, provide for at least the same proportion of women as the proportion of women among graduates (subparagraph 7, sentence 1), holders of higher degrees (subparagraph 7, sentence 2) or students (subparagraph 7, sentence 3) in the faculty in question;

4 — Case C-450/93 *Kalanke* [1995] ECR I-3051. According to the applicants, the abovementioned provisions are, first of all, contrary to Articles 1 and 134 of the Constitution of the *Land* of Hessen, inasmuch as they constitute forms of discrimination on grounds of sex. Paragraph 9(1) and the first sentence of Paragraph 10(3) of the HGlG are also, in their view, incompatible with the general principle of 'choosing the best persons', established in Article 33 of the Federal Constitution and repeated in Article 134 of the *Land* Constitution. They also consider that the HGlG is incompatible with Articles 135 and 29 of the Constitution, under which the legal circumstances of employees in the public administration must be shaped according to administrative requirements, and that it even exceeds the limits of the legislative competence of the *Land* under Articles 70, 72, 74(12) and 75(1) of the Federal Constitution, also incorporated in Article 153 of the *Land* Constitution.

3. in training-based professions in which women are under-represented, under Paragraph 7(1) of the HGlG women are to be taken into account to the extent of at least one half in allocating training places, except in the case of training courses in which the State exclusively provides training;

4. in sectors in which women are under-represented, under Paragraph 9(1) of the HGlG at least as many women as men, or all the women applicants, are to be called to interview if they satisfy the conditions laid down by law or otherwise for appointment to the post or the office to be conferred;

5. in making appointments to commissions, advisory boards, boards of directors and supervisory boards and other collegiate bodies, under Paragraph 14 of the HGlG at least half the members should be women?'

18. Written observations have been submitted by the Hessische Ministerpräsident (Prime Minister of Hesse), the Landesanwalt beim Staatsgerichtshof des Landes Hessen (*Land* Attorney at the Staatsgerichtshof des Landes Hessen), the Kingdom of the Netherlands, the Republic of Finland and the Commission. All the intervening parties attended the oral procedure.

Substance

I — *Positive action to promote equal opportunities for women in working life*

19. The problem in the present case is to define the scope of positive action to promote equality between men and women in the context of the Community legal order.

20. Positive action [5] may be regarded as any action, legislative or administrative, that provides instruments to secure equal

5 — As Advocate General Tesauro observed in his Opinion in *Kalanke*, delivered on 6 April 1995, 'affirmative action' received its name in the United States, where it was associated with action plans first for the benefit of the black population and then in favour of other ethnic minorities or weak strata of society, such as women. He adds that 'positive action may assume several forms. A first model aims to remove, not discrimination in the legal sense, but a condition of disadvantage which characterises women's presence on the employment market' by taking action with respect, among other things, to vocational guidance and training; 'a second model ... may be discerned in actions designed to foster balance between family and career responsibilities and a better distribution of those responsibilities between the two sexes', including measures 'relating to the arrangement of working hours, the development of child-care structures, the return to work of women who have devoted themselves to bringing up their children, and social security and fiscal offsetting policies which take account of family duties'; lastly, 'a third model of positive action is that of action as a remedy for the persistent effects of historical discrimination of legal significance', including 'preferential treatment in favour of disadvantaged categories ..., in particular through systems of quotas and goals'. The quotas are used to reserve a number of posts for the most disadvantaged categories; the system of goals, on the other hand, is used to give 'higher points to members of the category in question, but without compromising every candidate's entitlement to compete for all available posts' (points 8 and 9). The concept of positive action is currently found in both national and Community law, notably in the 1984 Council Recommendation on that very subject, 'the promotion of positive action for women'.

social opportunities for a specific, naturally or historically disadvantaged group. In the area at issue in the present case, that is to say in the area of equal opportunities for women and men in working life, positive action generally consists of programmes to encourage the appointment and promotion of women. Such provisions are certainly positive but they are inherently discriminatory, being designed to favour a particular category of persons, and as such are clearly contrary to the general principle of equality. It is well known that the principle of prohibiting discrimination on grounds of sex, which aims to secure equal treatment for men and women, confers a fundamental right on every individual and constitutes a cardinal rule not only of the Community legal order but also of national law. Broadly speaking, therefore, the legality of positive action depends on whether it is compatible with that general principle.

However, while Article 119(1) of the Treaty and Article 2(1) of the Directive, which are the subject of the question referred by the national court, prohibit any discrimination whatsoever on grounds of sex, Article 119(4) of the Treaty and Article 2(4) of the Directive recognise the right of Member States to take positive measures to promote equal opportunities for women in working life. States may therefore adopt provisions that are designed to achieve that objective even if they appear to be contrary to the general principle of non-discrimination and consequently even if they entail actual disadvantages for workers of the male sex. The central point of our analysis is therefore to establish how far and on what conditions positive action at national level such as the action at issue in this case may be regarded as compatible with the Community legal order.

21. The Court has already been asked to interpret Article 2(4) of the Directive [6] precisely with regard to the general principle of non-discrimination and, in two cases, to determine its scope in relation to positive action at national level. The questions referred to the Court in the past, like the question referred in the present case, concern the content of the power granted to States to take such action for women. I must observe straight away that the Court has held that the provision contained in the Directive, as an exception to the general principle of non-discrimination, must be interpreted strictly and, in particular, that women may not be guaranteed absolute and unconditional priority for appointment or promotion.

6 — The first ruling on Article 2(4) of the Directive is the judgment in Case 312/86 *Commission* v *France* [1988] ECR 6315, in which the Court held that the exception provided for in that article 'is specifically and exclusively designed to allow measures which, although discriminatory in appearance, are in fact intended to eliminate or reduce actual instances of inequality which may exist in the reality of social life' (paragraph 15). The issue to be determined in that case was whether France had failed to fulfil its obligations under the Treaty by failing to transpose Directive 76/207. In its defence, the French Government contended that in amending the Labour Code, the French legislature had expressly provided for the possibility of granting 'special rights to women' under the terms of contracts or collective agreements. The Court did not accept those arguments on the ground, *inter alia*, that a generalised preservation of special rights does not constitute positive action under Article 2(4) of the Directive and that provision cannot therefore constitute a legal basis for such rights.

22. I should like to dwell for a moment on two essential points in the case-law: (a) the possibility that positive action for women, and in particular action that sets a proportion — or quota — to be employed in each grade of a career group, may impose an obligation to recruit or promote female candidates, i.e. to achieve the result for which the instrument was adopted, and (b) the conditions on which a system ensuring that a certain proportion of women is employed may be regarded as lawful in the Community legal order.

23. (a) In the case of *Kalanke* in 1995 [7] — cited by the plaintiffs in the proceedings before the national court in support of their claims and mentioned by the national court in the question referred for preliminary ruling — the positive action had been decreed by a Bremen law which provided that 'in the case of an appointment (including establishment as a civil servant or judge) which is not made for training purposes, women who have the same qualifications as men applying for the same post are to be given priority in sectors where they are under-represented' and that 'qualifications are to be evaluated exclusively in accordance with the requirements of the occupation, post to be filled or career bracket'. The Court held that a rule that, *where candidates of different sexes short-listed for promotion are equally qualified, women are automatically to be given priority* in sectors where they are under-represented, is contrary to Article 2(1) of the Directive, inasmuch as it 'involves discrimination on grounds of sex' (paragraph 16), and cannot be included among the positive actions referred to in paragraph 4 of that article, inasmuch as 'national rules which guarantee women absolute and unconditional priority for appointment or promotion go beyond promoting equal opportunities and overstep the limits of the exception in Article 2(4) of the Directive' (paragraph 22). The Court added that 'in so far as it seeks to achieve equal representation of men and women in all grades and levels within a department, such a system substitutes for equality of opportunity as envisaged in Article 2(4) the result which is only to be arrived at by providing such equality of opportunity' (paragraph 23).

The Court thus agreed with the conclusions reached by the Advocate General, who held that 'giving equal opportunities can only mean putting people in a position to attain equal results and hence restoring conditions of equality as between members of the two sexes as regards starting points.... It seems to me to be all too obvious that the national legislation at issue in this case is not designed to guarantee equality as regards starting points. The very fact that two candidates of different sex have equivalent qualifications implies in fact by definition that the two candidates have had and continue to have equal opportunities: they are therefore on an equal footing at the starting block. By giving priority to women, the national legislation at issue therefore aims to achieve equality as

7 — Case C-450/93, cited above.

regards the result or, better, fair job distribution simply in numerical terms between men and women. This does not seem to me to fall within either the scope or the rationale of Article 2(4) of the Directive' (point 13). [8]

24. In its judgment in *Marschall* [9] in 1997 — delivered after the question was referred for preliminary ruling in the present case — the Court appeared to allow wider scope under Community law for positive action for women. In that judgment, although starting, on the basis of earlier case-law, from the premiss that if the means of promoting equal treatment are not radical — in other words, if the quotas of women employed are flexible — it may be possible to reconcile positive action with the principle of non-discrimination and so render ostensibly discriminatory measures lawful, the Court held that such a rule may 'counteract the prejudicial effects on female candidates of the attitudes and behaviour described above and thus reduce actual instances of inequality which may exist in the real world' (paragraph 31).

Allow me to recapitulate the facts of the case. The German law, whose compatibility with Article 2(1) and (4) of the Directive was at issue in that case, was the Law on Civil Servants of the *Land* of North Rhine-Westphalia, which provides that, where there are fewer women than men at the level of the relevant post in the career bracket, women are to be given priority for promotion in the event of equal suitability, competence and professional performance. The law adds a rider to the effect that the employer may refrain from complying with that provision if 'reasons specific to an individual male candidate tilt the balance in his favour'. On the basis of that 'saving clause', the Court held that the system was sufficiently flexible, that is to say it did not have the automatic character of the Bremen law at issue in *Kalanke*, and that the measures adopted by the *Land* of North Rhine-Westphalia were consequently not precluded by Directive 76/207 on equal opportunities. The operative part of the judgment states that 'a national rule which, in a case where there are fewer women than men at the level of the relevant post in a sector of the public service and both female and male candidates for the post are equally qualified in terms of their suitability, competence and professional performance, requires that priority be given to the promotion of female candidates unless reasons specific to an individual male

8 — In support of that view, the Advocate General points out that the Court held in *Commission* v *France*, cited above, that Article 2(4) of the Directive authorises treatment which is only *discriminatory in appearance*; this confirms that the objective is substantive equality but also 'that that objective may be pursued only through measures designed to achieve an actual situation of equal opportunities, with the result that the only inequalities authorised are those necessary to eliminate the obstacles or inequalities which prevent women from pursuing the same results as men on equal terms. Indeed, it is from that point of view that the measures specifically intended for women are only discriminatory in appearance, and it is only in this way that real and effective substantive equality will be achieved' (point 15). Consequently 'Article 2(4) of the Directive only enables existing inequalities affecting women to be eliminated, but certainly not through pure and simple reverse discrimination, that is to say, through measures not in fact designed to remove the obstacles preventing women from pursuing the same results on equal terms, but to confer the results on them directly or, in any event, to grant them priority in attaining those results *simply because they are women*' (point 22).

9 — Case C-409/95 *Marschall* [1997] ECR I-6363.

candidate tilt the balance in his favour is not precluded by Article 2(1) and (4) of the Directive ... , provided that: — in each individual case the rule provides for male candidates who are equally as qualified as the female candidates a guarantee that the candidatures will be the subject of an objective assessment which will take account of all criteria specific to the candidates and will override the priority accorded to female candidates where one or more of those criteria tilts the balance in favour of the male candidate, and — such criteria are not such as to discriminate against the female candidates'. [10]

25. Thus — as the plaintiffs in the main proceedings point out — the Court starts from the principles established in the earlier judgment and affirms that Article 2(4) of the Directive, which as you will recall allows Member States to adopt positive measures for women, includes national rules giving them priority for appointment and promotion, unless such priority is 'absolute and unconditional', since in that case it would automatically guarantee that the objective of the action — that is to say, the appointment or promotion — was achieved, with the result that it would cease to be an objective and would in the end become a substitute for the aim of the positive action.

26. That case-law prompts some general reflections on the present significance of the concept of equal opportunity, and more particularly positive action, in the context of Community law. As we know, it is a concept which may vary from one legal order to another and which is subject to constant change to meet social needs, with the result that it may in the course of time take on different meanings even within one and the same legal order.

Thus, if we look at the recent amendments to the part of the EC Treaty dealing with equal opportunity and positive action in particular (Article 119(4) now refers expressly to adopting measures at national level 'providing for specific advantages in order to make it easier for the under-represented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers') and if we consider the intention frequently

10 — Thus the judgment does not follow the interpretation of the Directive proposed by the Advocate General. In his view, 'it is clear from the wording of Article 2(4) and its interpretation by the Court [in *Kalanke*] that it concerns the promotion of equal opportunity and not the imposition of equal representation and that Member States retain the power to adopt apparently discriminatory measures designed to redress specific obstacles or disadvantages faced by women in the labour market with a view to promoting equal opportunity for men and women and hence better representation of women in the workplace. The principle of proportionality will, however, require any such measures to be both suitable and necessary for the achievement of its objective'. He adds: 'A gender-specific measure will not to my mind be proportionate to the aims of remedying specific inequalities faced by women in practice and promoting equal opportunity if the same result could be achieved by a gender-neutral provision' (points 42 and 43).

expressed by the Community institutions to achieve that objective, [11] we cannot but conclude that a strict interpretation of Article 2(4) of the Directive, which places excessive restrictions on the adoption of systems providing for quotas of women to be employed as one of the positive measures envisaged by that provision, is inconsistent with the development of Community law on the subject. In my view, bearing in mind the wording of those provisions on national measures to guarantee equal opportunities to persons who find themselves at a disadvantage by reason of their sex, and the present aim and objective of positive action for women in various national legal orders, we cannot in principle hold national provisions involving the actual recruitment or promotion of female candidates to be precluded by Community law.

Moreover, while, as I have already pointed out, it is true that the legality of such measures depends on whether the positive action can be reconciled with the general principle of non-discrimination, it is equally true, as various learned writers have often pointed out, that the principle of non-discrimination, designed — for the purposes of the present case — to ensure equal treatment for employees, and the principle of equal opportunity — on which positive action is based —, designed to ensure equality in the actual conditions of employees, or in other words the principles of formal and substantive equality, are not completely at odds: if substantive equality can be achieved by measures that are, by their very nature, discriminatory, then such measures are in fact pursuing the same objective as the first principle, but with the additional twist that the legislature finds itself obliged to remedy a situation where some sections of the population face a real difficulty which cannot be addressed by applying the general principle of non-discrimination. If we follow this line of reasoning, we may come to doubt whether substantive equality is the exception to the rule of formal equality or, in other words, whether the provisions on which positive action is based — in this case Article 119(4) of the EC Treaty and Article 2(4) of the Directive — are in the nature of exceptions and must therefore be interpreted strictly.

11 — In addition to the 1984 Council Recommendation referred to earlier in this Opinion, it will be remembered that, following the judgment in *Kalanke*, the Commission issued a Communication on the interpretation of that judgment which states: 'la Commission considère que la Cour n'a fait que condamner la caractéristique particulière de la législation de Brême qui consiste en une automaticité de la mesure et accorde aux femmes un droit absolu et inconditionnel en matière de recrutement ou de promotion. La Commission est donc d'avis que le seul type de régime de quotas qui soit illégal est le régime absolument rigide qui ne laisse aucune possibiljté de tenir compte de circonstances individuelles. Les États membres et les employeurs sont donc libres de recourir à toute autre forme d'actions positives, y compris des quotas flexibles.' [COM doc (96)88]. The Commission also proposed to replace Article 2(4) of the Directive with the following: 'This Directive shall be without prejudice to measures to promote equal opportunity for men and women, in particular by removing existing inequalities which affect the opportunities of the under-represented sex in the areas referred to in Article 1(1). Possible measures shall include the giving of preference as regards access to employment or promotion, to a member of the under-represented sex, provided that such measures do not preclude the assessment of the particular circumstances of an individual case' (OJ 1996 C 179, p. 8). Lastly, the European Parliament has stated, in the context of the resolution on the Commission's first three-year report on economic and social cohesion, that 'true equality between the sexes is an essential factor in economic and social cohesion; to that end, it invites the Commission to consider the advisability of drawing up a programme of Community action to identify, promote and test the detailed rules governing the programming and management of funds so as to overcome this divergence' (minutes of the meeting of 19 November 1997, EP document 264.019).

27. I therefore consider that there is nothing, at Community level, to prevent a national legislature from adopting positive measures that actually reinstate the group at which they are aimed in cases where the group in question, that is to say women, are in a particularly difficult situation and where the mere guarantee of equal treatment and observance of the (negative) principle of non-discrimination by the State authorities does not adequately protect their position. Such measures may therefore be designed not merely to guarantee women an equal opportunity at the starting-point by creating the conditions to enable them to compete on an equal footing for each particular post, but to have a real effect on their social integration by giving them actual priority in appointment and promotion.

28. Lastly, I should add that, if the need to reconcile the general principle of non-discrimination with positive action for women simply means that any positive action that seeks to achieve an actual result, such as appointment to a post, is unlawful, it would enormously reduce the scope of such action, depriving it of substance and according it the status of an auxiliary measure, which is not always effective in redressing social inequalities.

29. (b) I turn now to the second point I wish to consider, namely the conditions on which a measure which provides that priority must be given to female candidates and consequently sets a proportion — or quota — of women to be employed in certain sectors or grades in a career group may be regarded as lawful in the Community legal order. I must point out first that while, as I have just said, the two principles of formal and substantive equality are not antithetical but complementary, there are nevertheless contentious situations which the judicial authorities must examine and which, in principle, preclude as unlawful a positive measure — for a specific group — which is contrary to the general principle of non-discrimination. In my view, situations of real conflict arise essentially in two cases: when the corrective measure, in this case positive action for women, is arbitrary in its content, in that it impinges excessively on the rights of individuals not belonging to the group to which it is addressed, or when it is disproportionate in relation to the real needs of the disadvantaged group, that is to say when the social realities do not justify the adoption of the corrective instrument. It follows that the assessment of whether it is lawful must take account not only of the actual result of the action, that is to say the individual positions acquired by the group to which the provision is addressed, but also of the specific content of the measure adopted in relation to the actual need for such a measure: that, as the Netherlands Government rightly suggests, entails considering whether the effects of the action are proportionate to the actual situation of the group to which it is addressed.

30. I recall, in this connection, the criteria on which the Court based its assessments in

the case-law on positive action cited above. In its judgment in *Kalanke*, the Court held that the positive action of the City of Bremen was unlawful because the system of quotas it had introduced was, in the Court's view, 'automatic'. The law provided that where candidates are 'equally qualified' the woman must be promoted, that is to say women must be promoted *where candidates of different sexes are equally qualified*. In my view, under that system the sex of the candidate was not taken into account until the final stage of the selection, since the shortlist of candidates suitable for promotion was drawn up without regard to their sex. The system probably could not be described as completely automatic since, as we have seen, the shortlist was drawn up without regard to sex. [12] Nevertheless, the fact remains that the measure could have given female candidates an undue advantage inasmuch as the obligation to accord priority to women, expressed in such strict terms, could have made it extremely difficult for the employer to select a male candidate.

31. In its judgment in *Marschall*, however, the Court held that the system introduced by the Rhineland law was not automatic and was consequently lawful, inasmuch as it provided that the employer may disregard the obligation to give priority to women if 'reasons specific to an individual male candidate tilt the balance in his favour'. The Court therefore concluded that Community law does not preclude 'a national rule which, in a case where... both male and female candidates ... are equally qualified in terms of their suitability, competence and professional performance, requires that priority be given to the promotion of female candidates unless reasons specific to an individual male candidate tilt the balance in his favour'. That saving clause is subject to two conditions: (a) that 'in each individual case it provides for male candidates who are equally as qualified as the female candidates a guarantee that the candidatures will be the subject of an objective assessment which will take account of all criteria specific to the candidates and will override the priority accorded to female candidates where one or more of those criteria tilts the balance in favour of the male candidate', and (b) that 'such criteria are not such as to discriminate against the female candidates'. The Court therefore held that that clause requires the employer to undertake *an objective assessment of the candidatures*, that is to say an assessment which takes account of all facts pertaining to the candidates' personal and professional profiles. It follows that the clause leaves the employer free to select his candidates in terms of actual situations or, even better, allows him — notwithstanding the requirement to give priority to women — to consider in the case of female and male candidates alike particular interests or situations which are thus still important even where priority is given to women. The Court adds that the clause must not be

12 — I therefore agree with the Advocate General's observation in *Marschall* that 'the national rule at issue in *Kalanke* was not in fact absolute and unconditional: the Court noted the national court's point that the rule had to be interpreted "with the effect that, even if priority for promotion is to be given in principle to women, exceptions must be made in appropriate cases". That interpretation was prompted by a concern that the rule would otherwise be incompatible with Article 3(2) and 3(3) of the German Basic Law, which provided at the material time respectively that men and women should have equal rights and that discrimination on grounds of sex was prohibited. Since the Court in *Kalanke* recognised that the rule in issue in that case was subject to exceptions, the reference to "automatic" priority should be read in that light' (point 28 of the Opinion).

applied in a discriminatory manner, to the disadvantage of female candidates.

The Rhineland Government, on being asked in the course of the procedure to explain exactly what 'reasons specific to a male candidate' might cause such a candidate to be selected, said they included secondary criteria such as 'length of service and social reasons', for example the fact that the candidate had a family to support. [13] It follows from that reply that the factors to which the law refers may relate either to the candidates' 'qualifications' or professional profiles — factors such as length of service are already considered at the preliminary stage of drawing up the shortlist —, or to situations that have nothing to do with the candidate's ability to perform tasks in an employment relationship, that is to say to situations of disadvantage where special protection is required, such as the situations that have given rise to corrective action in favour of women.

In my view, what the Court has described as a 'saving clause' is of central importance in the context of the judgment: notwithstanding the requirement to give priority to female candidates, it allows other candidates to be considered and lessens the discriminatory effect of that requirement on those candidates. According to the Court, a system of quotas is sufficiently flexible and may therefore fall within the scope of Article 2(4) of the Directive if the positive action does not prevent the employer from disregarding the requirement to recruit an equally well qualified woman in the light of subjective and/or objective circumstances pertaining to the lives of the candidates, notably the male candidates. Reference to such circumstances must not however have discriminatory effects on the selection of women. [14] Thus, for example, the 'criterion of length of service', which is usually taken into consideration in assessing candidates' suitability, must not be applied in a manner that discriminates against female candidates.

32. On the basis of that case-law, it may in my view be concluded that an action for the promotion of women in working life, which requires priority to be given to female candidates and, to that end, sets quotas for women to be employed in the

13 — In this connection, see the Advocate General's Opinion delivered on 15 May 1997 in *Marschall*, cited above, in particular point 8.

14 — Here too, the Advocate General takes a different view from the Court, his conclusions being based not so much on a different interpretation of the Community rules at issue as on a different interpretation of the content of the saving clause. The Advocate General considers that, as the *Land* indicated, the saving clause allows the application in selection procedures of 'traditional secondary criteria' which, as the *Land* itself admits, have favoured male candidates. Consequently, where the clause is invoked the result will be that 'the post will be offered to the male candidate on the basis of criteria which it is accepted are discriminatory'. The Advocate General therefore concludes that 'if an absolute rule giving priority to women on the ground of their sex is unlawful, then a conditional rule which either gives priority to women on the ground of their sex or gives priority to men on the basis of admittedly discriminatory criteria must a fortiori be unlawful' (point 36).

public administration and in the private sector, is to be regarded as lawful from the point of view of the Community legal order if it allows the employer to select the candidate with the most suitable professional profile. In no case must such action affect the assessment of the merits and qualifications of male candidates. To that end, on the one hand sex may be an additional criterion in defining candidates' profiles, one of a number of criteria on which the overall assessment of candidates is usually based, and on the other the requirement to give priority to women must not mean that, in assessing candidates who are not the subject of positive action, due consideration is not accorded to particular personal circumstances which, although they have nothing to do with the assessment of the candidates' professional profiles, may indicate social situations that are just as difficult as those normally faced by women.

Furthermore, as I have already said, the whole situation that gave rise to the corrective measure must of necessity be taken into account in determining whether the measure is lawful. Any disproportion between the corrective measure and the social context in which it applies (I am thinking, for example, of an insignificant difference in the proportion of women and men employed in a company or in the public sector) may mean that the conditions for positive action, which are essentially bound up with actual circumstances, are no longer fulfilled. It is for the national court to determine whether those conditions are fulfilled in a case concerning a particular recruitment or promotion, where the requirement to give priority to women is challenged. If the subject at issue is the legality of the corrective measure as a whole, irrespective of its application to any particular case — I am thinking, for example, of the main proceedings in the present case — it will be for the Constitutional Court to determine, in abstract or general terms, the conditions on which corrective measures may be justified.

II — *The legislation of the* Land *of Hesse*

Having set out these general considerations on the admissibility in Community law of positive action to guarantee equality between men and women in working life, I propose to examine the Hesse legislation whose compatibility with Community law and in particular with Article 2(1) and (2) of the Directive has been challenged.

Point 1 of the question: the binding requirement to give priority to women and the criteria for assessing candidates

33. Point 1 of the question referred for preliminary ruling, which is central to the present case, raises two complementary aspects: first, the conditions on which the authorities are under an obligation to implement a women's advancement plan (Paragraph 3(1) and (2) of the HGlG) and the targets and content of that plan (Paragraph 5(3) and (4) of the HGlG) and, second, the procedure for the assessment of candidates (Paragraph 10 of the HGlG).

34. As regards the first aspect and in particular the conditions on which positive action must be adopted and implemented, it should be noted first that the law in question is generally speaking in line with the German provisions referred for preliminary ruling in the cases mentioned above. It follows from the combined provisions of Paragraph 3(1) and (2) that, whenever there are fewer women than men 'in a pay, remuneration or salary bracket in a career group', the authorities must adopt an advancement plan.

That plan applies for a maximum of two years (Paragraph 5(3)). If at the end of that time the targets of the plan are not fulfilled, every further appointment or promotion of a male candidate will be subject to the approval of the department that adopted the advancement plan until such time as there is an equal number of male and female employees in the context under consideration (Paragraph 10(4)). Despite the temporary nature of the advancement plan, it is therefore clear that the requirement to give priority to women does not lapse after two years but only when women represent 50% of the employees in every sector and grade in a career group.

35. Where there is a situation of inequality, Paragraph 3(1) requires the authorities to adopt women's advancement plans and other advancement measures to guarantee equality between men and women in the public administration, to eliminate the under-representation of women and discrimination on grounds of sex and family circumstances. In addition, Paragraph 5(4) of the law provides that, in each women's advancement plan, more than half of the posts to be filled must be reserved for female candidates. That obligation on the authorities does not apply in certain circumstances expressly specified in the law, namely (a) if a particular sex is an indispensable condition for an activity, (b) if it is convincingly demonstrated that not enough women are available, and (c) in the case of promotions without posts being filled in sectors in which women are under-represented, where a proportion of women must be designated which corresponds at least to the proportion of women in the next lowest salary group in the sector. That Paragraph also provides that 'if measures of personnel organisation are provided for which block or abolish posts, it must be ensured by means of the women's advancement plan that the proportion of women in the sectors affected remains at least the same'.

As regards the second aspect, that is to say the criteria for assessing candidates, Paragraph 10(1) to (3) of the law provides that 'suitability, capability and professional performance (qualifications) are to be assessed in accordance with the requirements of the post to be filled or the office to be conferred' and that, in making that assessment, the authorities must employ specific criteria: first, 'capabilities and experience

which have been acquired by looking after children or persons requiring care in the domestic sector, ... also ... where family work has been performed alongside employment'; second, 'seniority, age and the date of last promotion may be taken into account only in so far as they are of importance for the suitability, performance and capability of applicants'; third, 'the family status or income of the partner may not be taken into account'; and lastly, 'part-time work, leave and delays in completing training as a result of looking after children or dependants certified by a doctor as requiring care' must not have a negative effect on the assessment of candidates.

36. All the intervening parties, with the exception of the plaintiffs in the main proceedings and the Landesanwalt bei dem Staatsgerichtshof des Landes Hessen, interpret the German law as meaning that, unlike the Bremen law at issue in *Kalanke*, it does not introduce a strict system of quotas for women and they therefore consider that the national rules at issue in this case are compatible with Directive 76/207 and are among the measures referred to in Article 2(4).

In the order for reference and particularly in the wording of point 1 of the question referred for preliminary ruling, the national court interprets the German law as meaning that the requirement to give priority to women is subordinate, in particular, to the principle of 'choosing the best persons' enshrined in the Federal Constitution and applies only if 'no reasons of greater legal weight are opposed', that is to say only if there is no breach of constitutional principles. The *Land* Government too, in reply to a question from the Court about the meaning of the expression '[no] reasons of greater legal weight are opposed', emphasised that the priority accorded to female candidates is a secondary selection criterion in the sense that it is subordinate to another criterion that also has priority under the *Land* constitution, according to which the most suitable candidate must in any case be chosen. In other words, the criterion of sex comes into play only if there are a number of candidates who are considered to be equally suitable in terms of professional capability. The *Land* Government therefore concludes that the programme for the promotion of women merely provides general guidelines and does not impose an obligation on the authorities to give priority to women purely on grounds of sex. In its view, the only occasion on which the requirement to give priority to female candidates applies is the 'extreme case' where the authorities fail to fulfil the obligation to reach the target of 50% for women employees and the advancement plan is consequently not completed. Thus, according to the *Land* Government, there is no obligation — except in specific and probably very rare cases — to give effect to the positive action. The advancement plan does not confer any right on individuals but merely provides a general indication for the administrative authorities.

37. That interpretation does not seem to me to cover the full meaning of the German law. According to the letter of the law — as interpreted in the order for reference — the authorities are required, in the event of under-representation, not only to adopt an advancement plan for women (Paragraph 3(1) of the law) and not to make any appointments until it has been adopted (Paragraph 10(5)), but also to reserve more than half of the posts to be filled for them (Paragraph 5(4)) until the proportion of women employed is equal to that of men. I should also point out that, unlike the law considered in the judgment in *Marschall*, the law at issue in the present case contains no saving clause, that is to say it does not provide that the obligation to accord priority to women may be disregarded on 'more important grounds'. The law in question merely provides some exceptions of limited scope, which may apply in cases where a particular sex is an indispensable condition for an activity, where not enough women are available, and lastly where promotions are made without posts being filled.

However — as the national court and the German Government point out — there is no specific requirement to give priority to female candidates inasmuch as the law does not stipulate that the authorities must always appoint or promote female candidates, or must do so whenever the candidates are equally well qualified. Paragraph 10 explicitly requires priority to be given to the best qualified and most suitable candidate. That does not prevent priority being given to a male candidate if he is the most suitable for the post to be filled, nor does it perpetuate the fiction that the requirement to accord priority to women applies only in cases where candidates are equally qualified. The system merely provides a mechanism to facilitate the integration of women and further their careers by ensuring, in particular, that they are not penalised as a result of the work they have done within the family. That mechanism is set out in the provisions of Paragraph 10 of the HGlG, which lays down specific criteria for the assessment of female candidates, on the one hand providing that, in assessing candidates, experience acquired in the course of domestic duties must be taken into account in so far as it is relevant to the tasks pertaining to the post to be filled but that absence from work for family reasons must not be taken into account, and on the other hand limiting the effect of seniority, which male employees can usually acquire more easily.

38. In the light of the foregoing observations on the admissibility in Community

law of positive action at national level, I therefore consider that positive action at national level such as the action in the present case, which is characterised by an obligation on the authorities to adopt a women's advancement plan to correct a situation of under-representation in particular sectors and grades in a career group and which imposes a requirement to encourage the recruitment and promote the careers of female employees, may be regarded as compatible with Community law provided that such a measure does not preclude male candidates from competing for any post and does not require a fixed quota of female candidates to be employed regardless of candidates' suitability for the specific post to be filled.

Point 2 of the question: the academic sector

39. The second aspect of the German law on which the national court seeks a ruling from the Court concerns the compatibility with Article 2(2) and (4) of the Directive of Paragraph 5(7) of the HGlG, under which the binding targets of the women's advancement plan for posts in the academic service to be filled for fixed terms and for academic assistants must provide for at least the same proportion of women as the proportion of women among graduates, holders of higher degrees and students in the faculty in question. To be more precise, Paragraph 5(7) states that 'posts in the academic service which are filled for a fixed term under ... the Hochschulrahmengesetz (Framework law on universities and colleges) are to be filled with at least the same proportion of women as the proportion of women among the graduates in the faculty in question. Posts in the academic service which are filled for a fixed term under Paragraph 48 of the Hochschulrahmengesetz are to be filled with at least the same proportion of women as the proportion of women among the holders of higher degrees in the faculty in question. The means applied for the employment of academic assistants without degrees must be applied at least to the same proportion of women as the proportion of women among the students in the faculty in question'.

The *Land* Government has observed that women are particularly under-represented in this area because posts are usually filled for a fixed term and also because advancement in this career group depends upon the acquisition of further degrees. According to the *Land* Government, the aim of the plan is to facilitate access for women already employed in the sector to permanent posts in higher education.

It is clear from the wording of Paragraph 5(7) that the target for the proportion of women to be employed in the academic sector may even be less than 50%, that is to say less than the target set for all other sectors, since the target in the academic sector is defined in a different way, i.e. in terms of the number of individuals who

have had an appropriate professional training. The provision specifies that the proportion must be the same as the proportion of graduates, holders of higher degrees or simply students following courses at the university. Clearly, if the general system, which is intended to ensure that women represent 50% of the workforce employed in a given sector, is regarded as compatible with Community law, then it must *a fortiori* be admitted that the special system under consideration is also lawful.

Any other interpretation, which claimed that the target of 50% applied to the academic sector too, would deprive the special system of all practical effect. It must however be borne in mind that the inconsistency between the general system and the system for the academic sector is in fact only an apparent one, since the graduates seeking to obtain posts in the academic sector will have received an appropriate training, so providing for the recruitment of a given number of women corresponding to the number who have received the necessary training means taking an actual figure as a parameter for introducing priority for women within that figure.

It should be noted that the terms in which the requirement to give priority to women in the academic sector is couched (Paragraph 5(7)) are different from those used in the general provision (Paragraph 5(4)). Thus, posts in the academic service 'are to be filled' by women, whereas posts in the other sectors of the administration 'are to be designated for filling' by women. The referring court has pointed out in this connection that the provision does not have 'independent meaning', that is to say it does not directly affect appointment decisions. The difference between the general provision and the special one is therefore purely terminological. It would be completely unjustified and consequently inconsistent to interpret the rule contained in Paragraph 5(7) as being intended to exclude the academic sector from the general system for the selection of candidates set out in Paragraph 10 of the law. However, if it were to be supposed that Paragraph 5(7) specifies a set proportion of employment contracts to be awarded to women irrespective of the assessment of all the employees concerned, then the provision would be initiating positive action which — as I have already observed — would be contrary to the system of Article 119(4) of the EC Treaty and Article 2(4) of the Directive.

Point 3 of the question: training programmes

40. The third aspect of the law to be considered arises from the provision contained in Paragraph 7 of the HGlG, to the effect that in training programmes in which women are under-represented they are to be taken into account to the extent of at least one half in the allocation of training places. Women's attention must also be drawn to

vacant training places and they must be induced to apply. If, despite that invitation, there are not enough applications from women, more than half of the training places may be filled with men.

The aim of the rule, like that of the corrective measure, differs from that of the general system: it is clearly intended to achieve a result in numerical terms, a result very different from that sought by the general system, since in this case women are to be taken into account not in filling posts but in the allocation of training places with a view to subsequent access to qualified professions. As to the means of achieving that objective, departments are required to take steps to draw women's attention to vacant training places and induce them to apply. The rule provides that, if there are not enough candidates, the places originally reserved for women may be filled with men.

Obviously, the provision in question reflects a narrower concept of equal opportunity. Thus the proposed measures are among those which are designed to remove the causes accounting for the fact that there are fewer career and work opportunities for women and which also include vocational guidance and training. There can be no doubt that measures of this kind are to be included among those admitted under Community law.

Point 4 of the question: interviews in connection with the appointment of new staff

41. The fourth aspect of the German law, on which the national court expresses doubts as to its compatibility with Community law, is that of interviews for appointment to posts. The provision in question is Paragraph 9, under which 'at least as many women as men, or all the women candidates, shall be called to interview ... if they satisfy the conditions laid down by law or otherwise for appointment to the post to be filled or the office to be conferred'.

That rule too, like the rule on training programmes, does not imply an attempt to achieve a final result — appointment or promotion — but affords women additional opportunities to encourage their entry into working life and a career. Moreover, as the order for reference points out, although Paragraph 9 provides that a certain proportion of women must be called to interview, it makes it clear that applications will be examined first and that interviews will be granted only to candidates who meet the conditions laid down by law or otherwise for appointment to the post to be filled or the office to be conferred. Thus the provision is concerned with interviews following an initial selection involving all the persons concerned. It follows that any employee may compete for

selection and as a result be shortlisted on the basis of the assessment criteria which, it is presumed, are the criteria specified for the general system or, to be precise, the criteria set out in Paragraph 10(1) to (3) of the law.

I therefore take the view that the provision on interviews for appointments is likewise not incompatible with Community law.

Point 5 of the question: appointment to collegiate bodies

42. The last point concerns appointment to bodies representing employees, boards of directors and supervisory boards. According to Paragraph 14 of the German law, 'in making appointments to commissions, advisory boards, boards of directors and supervisory boards and other collegiate bodies, at least half the members should be women'.

The rule states clearly that half of the members of internal administrative bodies must be women. Thus Paragraph 14 provides that there must be a definite proportion of women, irrespective of their suitability. So, while it is true that the German law — as I have already pointed out — appears to have the aim of setting out a general programme to facilitate the recruitment and promotion of women in the public administration, it nevertheless appears from the terms in which the provision on appointment to internal bodies is couched that, in that respect at least, it allows no exceptions.

Therefore, in the light of the foregoing observations on the conditions in which positive action may be regarded as compatible with Community law and having regard in particular to the recognised principle that all employees must be able to compete for any position connected with the employment relationship, I take the view that a provision with the content of the provision of the German law under consideration is, generally speaking, incompatible with employees' right to equal treatment, since it clearly exceeds the limits on the adoption of measures to promote equal opportunities for women. In the light of these considerations, I therefore take the view that the measure provided in Paragraph 14 of the HGlG is contrary to Article 2(1) of the Directive and cannot be included among the positive measures referred to in Article 2(4) thereof.

Conclusion

43. In the light of the foregoing considerations, I therefore propose that the Court give the following answer to the questions referred by the Staatsgerichtshof:

(1) Article 2(1) and (4) of 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 and promotion, and working conditions does not preclude national rules such as those contained in the Hesse law of 30 December 1993 on equal rights and the removal of discrimination against women in the public administration, which provides that, where women are under-represented in any sector or career group in the public administration, the authorities are required:

(a) with a view to gradually eliminating such inequalities, to adopt advancement plans and other measures to ensure equal opportunities for men and women in the public administration, and in implementing such plans progressively to designate more than half of the posts to be filled for filling by women, on the understanding however that such national rules may not give automatic

priority to female candidates and must guarantee that all candidates, male and female, are always the subject of an objective assessment of their professional and personal profiles, even in cases where that assessment is based on criteria such as those given in the German law in question, which are designed to favour female candidates;

(b) to designate for filling by women a proportion of posts in the academic sector, depending on the proportion of women among graduates, holders of higher degrees, and students, on the understanding that that proportion may not be more than half of the number of posts to be filled and that automatic priority is not given to female candidates within the meaning referred to under (a);

(c) to reserve half of the places on training courses for women;

(d) to invite to interviews for the selection of staff for appointments, an equal number of female and male candidates or only female candidates if they are suitable for the post, provided that the assessment of candidates bears in mind the profile of all the persons competing for the post, within the meaning referred to under (a).

(2) Article 2(1) and (4) of Directive 76/207/EEC precludes national rules under which half of the members of the internal bodies of the public administration must be women.