JUDGMENT OF THE COURT

28 March 2000 *

In Case C-158/97,

REFERENCE to the Court under Article 177 of the EC Treaty (now Article 234 EC) by the Staatsgerichtshof des Landes Hessen, Germany, for a preliminary ruling in the proceedings for a review of legality on an application by

Georg Badeck and Others,

interveners:

Hessischer Ministerpräsident

and

Landesanwalt beim Staatsgerichtshof des Landes Hessen,

on the interpretation of 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

* Language of the case: German.

men and women as regards access to employment, vocational training and promotion, and working conditions (OJ 1976 L 39, p. 40),

THE COURT,

composed of: G.C. Rodríguez Iglesias, President, J.C. Moitinho de Almeida, R. Schintgen (Presidents of Chambers), P.J.G. Kapteyn (Rapporteur), C. Gulmann, J.-P. Puissochet, G. Hirsch, P. Jann and M. Wathelet, Judges,

Advocate General: A. Saggio,
Registrar: H.A. Rühl, Principal Administrator,

after considering the written observations submitted on behalf of:

— Mr Badeck and Others, by Professor M. Sachs, University of Düsseldorf,

— the Hessischer Ministerpräsident, by Professor E. Denninger and Professor S. Simitis, University of Frankfurt am Main, acting as Agents,

— the Landesanwalt beim Staatsgerichtshof des Landes Hessen, by K. Apel, Landesanwalt,

— the Netherlands Government, by A. Bos, Legal Adviser in the Ministry of Foreign Affairs, acting as Agent,

— the Finnish Government, by H. Rotkirch, Ambassador, Head of the Legal Department of the Ministry of Foreign Affairs, acting as Agent,

— the Commission of the European Communities, by J. Grunwald, Legal Adviser, and M. Wolfcarius, of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Mr Badeck and Others, represented by M. Sachs, the Hessischer Ministerpräsident, represented by E. Denninger and S. Simitis, the Landesanwalt beim Staatsgerichtshof des Landes Hessen, K. Apel, the Netherlands Government, represented by J.S. van den Oosterkamp, Legal Adviser in the Ministry of Foreign Affairs, acting as Agent, the Finnish Government, represented by T. Pynnä, Legislative Adviser in the Ministry of

Foreign Affairs, acting as Agent, and the Commission, represented by J. Grunwald and M. Wolfcarius, at the hearing on 13 October 1998,

after hearing the Opinion of the Advocate General at the sitting on 10 June 1999,

gives the following

Judgment

1 By order of 16 April 1997, received at the Court on 24 April 1997, the Staatsgerichtshof des Landes Hessen (State Constitutional Court of the *Land* of Hesse) referred to the Court for a preliminary ruling under Article 177 of the EC Treaty (now Article 234 EC) a question on the interpretation of 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 (OJ 1976 L 39, p. 40, hereinafter 'the Directive').

2 That question was raised in proceedings for a review of legality ('Normenkontrollverfahren') on an application by Mr Badeck and Others, the Hessischer Ministerpräsident (Prime Minister of the *Land* of Hesse, hereinafter 'the Prime Minister') and the Landesanwalt beim Staatsgerichtshof des Landes Hessen (*Land* Attorney at the Staatsgerichtshof des Landes Hessen, hereinafter 'the *Land* Attorney') intervening.

Legal background

A — *Community provisions*

3 Article 2(1) and (4) of the Directive provides:

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

...

4. 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 in the areas referred to in Article 1(1).'

4 According to the third recital in the preamble to Council Recommendation 84/635/EEC of 13 December 1984 on the promotion of positive action for women (OJ 1984 L 331, p. 34), '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'. Referring expressly to Article 2(4) of the Directive, the Council recommended that the Member States:

'1. ... adopt a positive action policy designed to eliminate existing inequalities affecting women in working life and to promote a better balance between the sexes in employment, comprising appropriate general and specific measures, within the framework of national policies and practices, while fully respecting the spheres of competence of the two sides of industry, in order:

(a) to eliminate or counteract the prejudicial effects on women in employment or seeking employment which arise from existing attitudes, behaviour and structures based on the idea of a traditional division of roles in society between men and women;

(b) to encourage the participation of women in various occupations in those sectors of working life where they are at present under-represented, particularly in the sectors of the future, and at higher levels of responsibility in order to achieve better use of all human resources.

...'

5 Since the entry into force of the Treaty of Amsterdam on 1 May 1999, Article 141(1) and (4) EC states:

'1. 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.

...

4. 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.'

6 Declaration No 28 on Article 141(4) (formerly Article 119(4)) of the Treaty establishing the European Community, annexed to the Treaty of Amsterdam, states:

'When adopting measures referred to in Article 141(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.'

B — *National provisions*

7 The Hessisches Gesetz über die Gleichberechtigung von Frauen und Männern und zum Abbau von Diskriminierungen von Frauen in der öffentlichen Verwaltung (Law of the *Land* of Hesse on equal rights for women and men and the removal of discrimination against women in the public administration, hereinafter 'the HGlG') was adopted on 21 December 1993 (GBVBl. I, p. 729). It is valid for 13 years from its entry into force on 31 December 1993.

8 Paragraph 1 of the HGlG states that its aim is equal access of women and men to posts in the public service, by the adoption of advancement plans relating to conditions of access and promotion for women and their working conditions, with binding targets.

9 It appears from the order for reference that the other provisions of the HGlG which are relevant for the main proceedings are the following:

'Paragraph 3 — Principles

1. Departments shall be obliged, by means of women's advancement plans (Paragraphs 4 to 6) and other advancement measures (Paragraphs 7 to 14), to work towards equality of women and men in the public service and the

elimination of under-representation of women and to eliminate discrimination on grounds of sex and family status.

2. Women are under-represented if, within the scope of a women's advancement plan (Paragraph 4), fewer women than men are employed in a pay, remuneration or salary bracket in a career group. In initial posts in career groups, women are deemed to be under-represented if fewer women than men are employed in the whole career group. The second sentence applies by analogy to initial 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.

3. Women and men may not be discriminated against because of their sex or family status ...

Paragraph 5 — Content of the women's advancement plan

...

3. 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 defining the targets, the particular features of the sectors and departments concerned shall be decisive.

4. 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. If it is convincingly demonstrated that not enough women with the necessary qualifications are available, a correspondingly smaller number of posts may be designated for filling by women. 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. The third sentence shall apply by analogy. 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.

...

7. Posts in the academic service which are filled for a fixed term under Paragraph 57a in conjunction with point 1 or 3 of Paragraph 57b(2) of 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 discipline 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 discipline 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 discipline in question.

Paragraph 7 — Allocation of training places

1. In trained occupations 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. The first sentence shall not apply to training procedures in which the State exclusively provides training.

2. Suitable measures are to be taken to draw women's attention to vacant training places in occupations within the meaning of the first sentence of subparagraph 1 and to induce them to apply. If despite such measures there are not enough applications from women, more than half of the training places may be filled with men, contrary to the first sentence of subparagraph 1.

Paragraph 9 — Interviews

1. In sectors in which women are under-represented, at least as many women as men, or all the women applicants, shall be called to interview, if interviews are carried out, if they satisfy the conditions laid down by law or otherwise for appointment to the post or the office to be conferred.

...

Paragraph 10 — Selection decisions

1. In order to ensure equal rights for women and men in connection with appointment and promotion and to ensure fulfilment of the women's advancement plans, 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.

2. 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.

3. 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 assessment in service and not adversely affect progress in employment. That does not involve the regular equation of periods of leave with employment.

4. If the targets of the women's advancement plan for each two years are not fulfilled, until they are fulfilled every further appointment or promotion of a man in a sector in which women are under-represented shall require the approval of the body which has approved the women's advancement plan, and, within the

scope of the women's advancement plans drawn up in ministries, the State chancellery and the *Land* staff office, the approval of the *Land* Government. ... The first sentence shall not apply in cases within Article 127(3) of the Hesse Constitution.

5. Until a women's advancement plan has been drawn up, no appointments or promotions may be made in sectors in which women are under-represented. If the women's advancement plan is not yet in force because of a procedure under Paragraph 70 or 71 of the Hesse Personalvertretungsgesetz (Law on staff representation), no appointments or promotions may be made which contravene the women's advancement plan which has already been drawn up.

...

Paragraph 14 — Collective bodies

In making appointments to commissions, advisory boards, boards of directors and supervisory boards and other collective bodies, at least half the members should be women.'

The main proceedings

10 On 28 November 1994, 46 members of the Landtag of Hesse applied to the Staatsgerichtshof for a review of the legality of the HGlG, in particular Paragraphs 3, 5, 7, 8 to 11, 14, 16 and 18 thereof, which they consider to be incompatible with the Constitution of the *Land* of Hesse.

11 The applicants in the main proceedings consider that the HGlG is contrary, first, to the constitutional principle of 'choosing the best', in that candidates are given preference not because of their merits but because of their sex, and, second, to the principle of equal treatment, which not only prohibits giving privileged treatment to a specific group but also confers a fundamental right on all individuals, a right which guarantees citizens equal opportunities at the start rather than ensuring final results which are advantageous for a specific category of persons. They consider, moreover, that the HGlG is also contrary to the Directive, as interpreted by the Court in Case C-450/93 *Kalanke* v *Bremen* [1995] ECR I-3051.

The question referred for a preliminary ruling

12 In those circumstances, the Staatsgerichtshof des Landes Hessen stayed the proceedings and referred the following question to the Court for a preliminary ruling:

'Does 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 (OJ 1976 L 39, p. 40) preclude national rules under which

1. in cases of under-representation under Paragraph 3(1) and (2) of the 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 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, first sentence), holders of higher degrees (subparagraph 7, second sentence) or students (subparagraph 7, third sentence) in the discipline in question;

3. in trained occupations 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 procedures 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 collective bodies, under Paragraph 14 of the HGlG at least half the members should be women?'

Preliminary observations

13 The Court observes, to begin with, that the question referred relates to the compatibility with Article 2(1) and (4) of the Directive of various positive action measures in favour of women enacted by the legislature of the *Land* of Hesse.

14 The interpretation of Article 141(4) EC, which concerns such measures, is therefore material to the outcome of the dispute in the main proceedings only if the Court considers that Article 2 precludes national legislation such as that at issue in the main proceedings.

15 The Court observes, next, that according to Article 1(1) of the Directive its purpose is to put into effect in the Member States the principle of equal treatment for men and women as regards *inter alia* access to employment, including promotion, and to training. That principle of equal treatment means that 'there shall be no discrimination whatsoever on grounds of sex either directly or indirectly'.

16 According to Article 2(4), the Directive is to be 'without prejudice to measures to promote equal opportunity for men and women, in particular by removing existing inequalities which affect women's opportunities in the areas referred to in Article 1(1)'.

17 The Court held in *Kalanke*, paragraph 16, that a national rule to the effect that where equally qualified men and women are candidates for the same promotion, in sectors where there are fewer women than men at the level of the relevant post, women are automatically to be given priority involves discrimination on grounds of sex.

18 In Case C-409/95 *Marschall* v *Land Nordrhein-Westfalen* [1997] ECR I-6363 the Court had to rule on whether a national rule containing a clause to the effect that women are not to be given priority in promotion if reasons specific to an

individual male candidate tilt the balance in his favour ('Öffnungsklausel', hereinafter 'saving clause') is designed to promote equal opportunity for men and women within the meaning of Article 2(4) of the Directive.

19 The Court noted, first, that since Article 2(4) is specifically and exclusively designed to authorise 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, it authorises national measures relating to access to employment, including promotion, which give a specific advantage to women with a view to improving their ability to compete on the labour market and to pursue a career on an equal footing with men (*Marschall*, paragraphs 26 and 27).

20 It then referred to the third recital in the preamble to Recommendation 84/635, mentioned in paragraph 4 above (*Marschall*, paragraph 28).

21 The Court observed, finally, that even where candidates are equally qualified, male candidates tend to be promoted in preference to female candidates particularly because of prejudices and stereotypes concerning the role and capacities of women in working life, so that the mere fact that a male candidate and a female candidate are equally qualified does not mean that they have the same chances (*Marschall*, paragraphs 29 and 30).

22 In the light of those considerations, the Court held, in paragraph 33 of *Marschall*, that, unlike the rules at issue in *Kalanke*, a national rule which contains a saving clause does not exceed the limits of the exception in Article 2(4) of the Directive if, in each individual case, it provides for male candidates who are 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 individual candidates and will override the priority accorded to female candidates

where one or more of those criteria tilt the balance in favour of a male candidate.

23 It follows that a measure which is intended to give priority in promotion to women in sectors of the public service where they are under-represented must be regarded as compatible with Community law if

— it does not automatically and unconditionally give priority to women when women and men are equally qualified, and

— the candidatures are the subject of an objective assessment which takes account of the specific personal situations of all candidates.

24 It is for the national court to determine whether those conditions are fulfilled on the basis of an examination of the scope of the provision at issue.

25 However, under the case-law the Court has jurisdiction to supply the national court with an interpretation of Community law on all such points as may enable that court to determine that issue of compatibility for the purposes of the case before it (see, *inter alia*, Case 223/78 *Grosoli* [1979] ECR 2621, paragraph 3, and Joined Cases C-304/94, C-330/94, C-342/94 and C-224/95 *Tombesi and Others* [1997] ECR I-3561, paragraph 36).

The first part of the question

26 By the first part of its question, the Staatsgerichtshof essentially asks whether Article 2(1) and (4) of the Directive precludes a national rule which, in sectors of the public service where women are under-represented, gives priority, where male and female candidates for selection have equal qualifications, to female candidates where that proves necessary for complying with the binding targets in the women's advancement plan, if no reasons of greater legal weight are opposed.

27 The applicants in the main proceedings and the *Land* Attorney consider that Article 2(1) and (4) of the Directive precludes a national rule which gives priority to women where it is absolute and unconditional.

28 On this point, it appears from the order for reference that the legislature of the *Land* of Hesse opted for what is generally known as a 'flexible result quota' ('flexible Ergebnisquote'). The characteristics of that system are, first, that the HGlG does not determine quotas uniformly for all the sectors and departments concerned, but states that the characteristics of those sectors and departments are to be decisive for fixing the binding targets. Second, the HGlG does not necessarily determine from the outset — automatically — that the outcome of each selection procedure must, in a 'stalemate' situation where the candidates have equal qualifications, necessarily favour the woman candidate.

29 According to the order for reference, the system introduced by the HGlG ensures that a candidate's sex is never decisive for the purposes of a selection procedure where that is not necessary in the particular case. That is so in particular where the initial evidence that a situation is unfavourable to women, based on the fact that they are under-represented, is disproved.

30 To give a proper answer to the national court, it must be noted that, under Paragraph 10(1) to (3) of the HGlG, the selection procedure for candidates starts by assessing the candidates' suitability, capability and professional performance (qualifications) with respect to the requirements of the post to be filled or the office to be conferred.

31 For the purposes of that assessment, certain positive and negative criteria are taken into account. Thus capabilities and experience which have been acquired by carrying out family work are to be taken into account in so far as they are of importance for the suitability, performance and capability of candidates, whereas seniority, age and the date of last promotion are to be taken into account only in so far as they are of importance in that respect. Similarly, the family status or income of the partner is immaterial, and part-time work, leave and delays in completing training as a result of looking after children or dependants in need of care must not have a negative effect.

32 Such criteria, although formulated in terms which are neutral as regards sex and thus capable of benefiting men too, in general favour women. They are manifestly intended to lead to an equality which is substantive rather than formal, by reducing the inequalities which may occur in practice in social life. Their legitimacy is not challenged in the main proceedings.

33 As the national court points out, it is only if a female candidate and a male candidate cannot be distinguished on the basis of their qualifications that the woman must be chosen where that proves necessary for complying with the objectives of the advancement plan in question and no reasons of greater legal weight are opposed.

34 It appears from the Prime Minister's answer to a written question put by the Court that those reasons of greater legal weight concern various rules of law, governed partly by statute and partly by decree, which make no reference to sex

and are often described as 'social aspects'. These social factors are based, from a constitutional point of view, partly on the principle of the social State (Articles 20(1) and 28(1) of the Basic Law) and partly on the fundamental right of protection of marriage and the family (Article 6 of the Basic Law).

35 The Prime Minister observes that there are five groups of rules which justify overriding the rule of advancement of women. These are, first, the preferential treatment given to former employees in the public service who have left the service because of family work within the meaning of Paragraph 10(1) of the HGlG, or who, for the same reason, have not been able to apply for definitive engagement in the public service after their preparatory service. Priority over new appointments is given, second, to persons who for reasons of family work worked on a part-time basis and now wish to resume full-time employment. The third group is former temporary soldiers, that is, those who voluntarily served for a limited period longer than compulsory military service (with a minimum of twelve years). Fourth, possibilities of advancement are more flexible for seriously disabled persons. The obligation to promote disabled persons takes precedence over that to promote women. Fifth, there is the possibility of ending a period of long-term unemployment by an appointment.

36 Contrary to the submissions of the applicants in the main proceedings and the *Land* Attorney, it follows that the priority rule introduced by the HGlG is not absolute and unconditional in the sense of paragraph 16 of *Kalanke*.

37 It is for the national court to assess, in the light of the above, whether the rule at issue in the main proceedings ensures that candidatures are the subject of an objective assessment which takes account of the specific personal situations of all candidates.

38 The answer must therefore be that Article 2(1) and (4) of the Directive does not preclude a national rule which, in sectors of the public service where women are under-represented, gives priority, where male and female candidates have equal qualifications, to female candidates where that proves necessary for ensuring compliance with the objectives of the women's advancement plan, if no reasons of greater legal weight are opposed, provided that that rule guarantees that candidatures are the subject of an objective assessment which takes account of the specific personal situations of all candidates.

The second part of the question

39 By the second part of its question, the Staatsgerichtshof essentially asks whether Article 2(1) and (4) of the Directive precludes a national rule which prescribes that the binding targets of the women's advancement plan for temporary posts in the academic service and for academic assistants must provide for a minimum percentage of women which is at least equal to the percentage of women among graduates, holders of higher degrees and students in each discipline.

40 The applicants in the main proceedings consider that Article 2(1) and (4) of the Directive precludes such a system, since its aim is to achieve a defined result as to the proportions in which the sexes are represented, rather than to remove certain obstacles to equality of opportunity for women. The *Land* Attorney also submits that the minimum quota system is contrary to the principle of equality of the sexes and equal opportunities for men and women, in that the measures in question have no individual purpose and are not linked to a specific disadvantage encountered by women in their working and social lives.

41 On this point, it appears from the order for reference that Paragraph 5(7) of the HGlG limits the application of the principle of 'choosing the best' in the same

way with respect to selection decisions as with respect to all the selection decisions which have to be made taking into account the targets of the women's advancement plan. In any event, Paragraph 5(7) can influence a selection decision only where the candidates have equal qualifications. In that respect the general considerations as regards the binding nature of a women's advancement plan also apply.

42 As the Advocate General observes in point 39 of his Opinion, the special system for the academic sector at issue in the main proceedings does not fix an absolute ceiling but fixes one by reference to the number of persons who have received appropriate training, which amounts to using an actual fact as a quantitative criterion for giving preference to women.

43 It follows that the existence of such a special system for the academic sector encounters no specific objection from the point of view of Community law.

44 The answer must therefore be that Article 2(1) and (4) of the Directive does not preclude a national rule which prescribes that the binding targets of the women's advancement plan for temporary posts in the academic service and for academic assistants must provide for a minimum percentage of women which is at least equal to the percentage of women among graduates, holders of higher degrees and students in each discipline.

The third part of the question

45 By the third part of its question, the Staatsgerichtshof essentially asks whether Article 2(1) and (4) of the Directive precludes a national rule for the public service which, in trained occupations in which women are under-represented and for which the State does not have a monopoly of training, allocates at least half the training places to women.

46 The applicants in the main proceedings consider that Article 2(1) and (4) of the Directive precludes rules such as those in Paragraph 7(1) of the HGlG. They submit that, like Paragraph 5(7) of the HGlG, Paragraph 7(1) clearly provides that the aim of the HGlG is not to remove certain obstacles to equal opportunities for women, but solely to ensure a specified result as regards the proportions in which the sexes are represented, which is prohibited by Community law, in particular the judgment in *Kalanke*. In their opinion, the HGlG is not designed to implement equality of opportunities at the start, but directly influences the result of allocating training places. It follows that the provision at issue constitutes direct discrimination within the meaning of Article 2(1) of the Directive which is not covered by the exception in Article 2(4).

47 According to the *Land* Attorney, measures intended to promote the implementation of equal opportunities for women must have an individual purpose and be linked to specific situations at or outside work which typically disadvantage or may disadvantage women. The minimum quota applicable to training places under Paragraph 7(1) of the HGlG is a predetermined quota, in that it fixes in binding fashion a minimum proportion of women in specified sectors. Such a minimum quota in favour of women cannot be regarded as a measure for promoting equal opportunity within the meaning of Article 2(4) of the Directive, in that it substitutes for promotion of equal opportunity the result which only the implementation of such equal opportunity could bring about.

48 On this point, the Staatsgerichtshof stated that formal training is a precondition for successful participation in the labour market. It drew the conclusion that the legal requirement of compensating for the less favourable situation of women in this field might therefore be justified by the requirement of equality.

49 It also appears from the order for reference that when the HGlG was adopted the legislature of the *Land* of Hesse considered that 'despite the requirement enshrined in the Basic Law of equal rights for women and men and the prohibition of discrimination on grounds of sex in Article 3 of the Basic Law, in social reality women continue to be disadvantaged compared with men' and that, despite formal legal equality, 'in particular in employment, [women] do not have equal access to qualified ... positions'. That was regarded by the legislature of Hesse as an intolerable injustice in the light of the recent but consistent development of the marked educational success of young women compared to young men.

50 As appears from the statement of reasons concerning Paragraph 7(1) of the HGlG, the Hesse legislature, by introducing a 'strict result quota' as regards professional training to facilitate such access, intended to establish a balanced allocation of training places at least in the public service.

51 That intention does not, however, necessarily entail total inflexibility. Paragraph 7(2) clearly provides that if, despite appropriate measures for drawing the attention of women to the training places available, there are not enough applications from women, it is possible for more than half of those places to be taken by men.

52 The provision at issue in the main proceedings forms part of a restricted concept of equality of opportunity. It is not places in employment which are reserved for women but places in training with a view to obtaining qualifications with the prospect of subsequent access to trained occupations in the public service.

53 Since the quota applies only to training places for which the State does not have a monopoly, and therefore concerns training for which places are also available in the private sector, no male candidate is definitively excluded from training. Taking an overall view of training (public and private sectors), the provision at issue therefore merely improves the chances of female candidates in the public sector.

54 The measures provided for are thus measures which are intended to eliminate the causes of women's reduced opportunities of access to employment and careers, and moreover consist of measures regarding vocational orientation and training. Such measures are therefore among the measures authorised by Article 2(4) of the Directive, which are intended to improve the ability of women to compete on the labour market and to pursue a career on an equal footing with men.

55 The answer must therefore be that Article 2(1) and (4) of the Directive does not preclude a national rule which, in so far as its objective is to eliminate under-representation of women, in trained occupations in which women are under-represented and for which the State does not have a monopoly of training, allocates at least half the training places to women, unless despite appropriate

measures for drawing the attention of women to the training places available there are not enough applications from women.

The fourth part of the question

56 By the fourth part of its question, the Staatsgerichtshof essentially asks whether Article 2(1) and (4) of the Directive precludes a national rule which guarantees, where male and female candidates have equal qualifications, that women who are qualified are called to interview, in sectors in which they are under-represented.

57 The provision at issue in the main proceedings provides for two different approaches. With the first, all the qualified female candidates who satisfy all the conditions required are called to interview. In that case the number of male candidates to be interviewed may be equal to or greater or lesser than the number of female candidates. With the second, only a limited number of qualified female candidates are called to interview. In that case no more than the same number of male candidates may be called to interview.

58 The applicants in the main proceedings consider that Article 2(1) and (4) of the Directive precludes such a rule. In their view, this is direct discrimination within the meaning of Article 2(1) of the Directive, which is not covered by the exception in Article 2(4).

59 The *Land* Attorney considers that the provision at issue in the main proceedings constitutes a strict quota, in that it concerns the number of women who are to be called to interview. In a case where not all the male and female candidates can be

called for interview, the provision prescribes that at least as many women as men must be. In those circumstances, men may be disadvantaged and hence discriminated against on grounds of their sex. In the *Land* Attorney's opinion, that is contrary to the principle of equality of the sexes and equal opportunities for men and women.

60 As the Advocate General observes in point 41 of his Opinion, the provision at issue in the main proceedings does not imply an attempt to achieve a final result — appointment or promotion — but affords women who are qualified additional opportunities to facilitate their entry into working life and their career.

61 Next, it appears from the order for reference that that provision, although laying down rules on the number of interviews to be given to women, also provides that a preliminary examination of the candidatures must be made and that only qualified candidates who satisfy all the conditions required or laid down are to be called to interview.

62 This is consequently a provision which, by guaranteeing, where candidates have equal qualifications, that women who are qualified are called to interview, is intended to promote equal opportunity for men and women within the meaning of Article 2(4) of the Directive.

63 The answer must therefore be that Article 2(1) and (4) of the Directive does not preclude a national rule which, where male and female candidates have equal qualifications, guarantees that qualified women who satisfy all the conditions required or laid down are called to interview, in sectors in which they are under-represented.

The fifth part of the question

64 By the fifth part of its question, the Staatsgerichtshof essentially asks whether Article 2(1) and (4) of the Directive precludes a national rule under which, when appointments are made to employees' representative bodies and administrative and supervisory bodies, at least half the members must be women.

65 It appears from the order for reference and from the statement of reasons that Paragraph 14 of the HGlG, which concerns the composition of collective bodies, is not compulsory, in that it is a non-mandatory provision which recognises that many bodies are established by legislative provisions and that full implementation of the requirement of equal membership of women on those bodies would in any event require an amendment to the relevant law. Moreover, it does not apply to offices for which elections are held. That would again require the relevant statutory bases to be amended. Finally, since the provision is not mandatory it permits, to some extent, other criteria to be taken into account.

66 The answer must therefore be that Article 2(1) and (4) of the Directive does not preclude a national rule relating to the composition of employees' representative bodies and administrative and supervisory bodies which recommends that the legislative provisions adopted for its implementation take into account the objective that at least half the members of those bodies must be women.

67 In view of the foregoing, there is no need to rule on the interpretation of Article 141(4) EC.

Costs

68 The costs incurred by the Netherlands and Finnish Governments and by the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT,

in answer to the question referred to it by the Staatsgerichtshof des Landes Hessen by order of 16 April 1997, hereby rules:

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 a national rule which

— in sectors of the public service where women are under-represented, gives priority, where male and female candidates have equal qualifications, to female candidates where that proves necessary for ensuring compliance with the objectives of the women's advancement plan, if no reasons of greater legal weight are opposed, provided that that rule guarantees that candidatures are the subject of an objective assessment which takes account of the specific personal situations of all candidates,

— prescribes that the binding targets of the women's advancement plan for temporary posts in the academic service and for academic assistants must provide for a minimum percentage of women which is at least equal to the percentage of women among graduates, holders of higher degrees and students in each discipline,

— in so far as its objective is to eliminate under-representation of women, in trained occupations in which women are under-represented and for which the State does not have a monopoly of training, allocates at least half the training places to women, unless despite appropriate measures for drawing the attention of women to the training places available there are not enough applications from women,

— where male and female candidates have equal qualifications, guarantees that qualified women who satisfy all the conditions required or laid down are called to interview, in sectors in which they are under-represented,

— relating to the composition of employees' representative bodies and administrative and supervisory bodies, recommends that the legislative provisions adopted for its implementation take into account the objective that at least half the members of those bodies must be women.

Rodríguez Iglesias Moitinho de Almeida

Schintgen Kapteyn Gulmann Puissochet

Hirsch Jann Wathelet

Delivered in open court in Luxembourg on 28 March 2000.

R. Grass G.C. Rodríguez Iglesias

Registrar President