OPINION OF ADVOCATE GENERAL SAGGIO

delivered on 16 November 1999 *

The purpose of the reference for a preliminary ruling

1. In the case under discussion, the Överklagandenämnden för högskolan (Universities Appeals Board) asks the Court to determine the compatibility with Community law of national legislation to encourage the appointment of women in institutes of higher education and universities. A feature of the national legislation is that the authorities may — and in some cases must — appoint a candidate of the underrepresented sex even if that candidate is not the most suitable in terms of merit and qualifications.

The Community provisions

2. I note that the purpose 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] set out in Article 1 thereof, 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 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)'.

* Original language: Italian.

1 — OJ 1976 L 39, p. 40.

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 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 Treaty have been replaced by Articles 136 EC to 143 EC) 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 251 (formerly Article 189b), 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 [now Article 141] (4) of the Treaty establishing the European Community*, annexed to the Treaty of Amsterdam, states that '[w]hen adopting 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 preju-

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.

dicial 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 'encourage 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. Under Article 9 in Part 11 of the Swedish Constitution, in making appointments to public posts, regard is to be had only to objective factors such as 'merit' and 'competence'. [4] In the same way, the Law on Public Employment (1994:260) requires candidates to be selected on the basis of competence unless there are 'particular reasons' for employing other criteria.

7. The Swedish Law on equality between men and women (1991:433) allows measures for positive discrimination to be adopted. Point 2 in the second paragraph of Article 16 specifically states that there is no discrimination between the sexes if 'the decision forms part of the effort to promote equality between men and women in working life'.

8. The university teaching sector, which is the subject of the question referred by the national court in the case under discussion, is governed by Regulation 1993:100. [5]

Article 15 of that Regulation, in the version which came into force on 1 January 1999, provides that:

'Appointments to teaching posts must be based on merits of a scientific, artistic, pedagogical, administrative or other nature relating to the discipline covered by the post in question and its nature in general. Account must also be taken of the candidate's ability in reporting on his or her research and development work.

Account must also be taken, when an appointment is made, of objective reasons consistent with the general aims of policies

4 — It is apparent from the *travaux préparatoires* that 'merit' essentially means experience acquired in the course of previous service, while 'competence' includes aptitude resulting from theoretical or practical training or from work experience.

5 — As last amended by the Regulation of 1 January 1999.

relating to the labour market, equality, social matters and employment'.

Article 15a further provides that:

'The following provisions shall apply in cases where an institute of higher education has decided to exercise positive discrimination in filling a post as part of a programme of measures to promote equality between the sexes in working life.

When filling the post, a person belonging to the under-represented sex who has sufficient merits of the kind specified in the first paragraph of Article 15 may be appointed in preference to a candidate of the other sex who would otherwise have been appointed.

Positive discrimination may not be exercised however, if the difference in qualifications is so great that to exercise such discrimination would be contrary to the requirement of objectivity in filling posts'.

9. On the basis of the general programme referred to in Article 15a, Regulation 1995:936 concerning certain professors' and research assistants' posts created with a view to promoting equality provides for the adoption of specific positive measures. [6] The first three articles of the Regulation read as follows:

'This regulation concerns the posts of professor and research assistant created and filled under special appropriations during the budgetary year 1995/96 in certain universities and institutes of higher education of the State in the context of efforts to promote equality in professional life.' (Article 1)

'The universities and institutes of higher education which are granted such appropriations must create and fill such posts in accordance with the Regulation on Universities (1993:100), taking account of the derogations provided for in Articles 3 to 5 et seq. of this regulation. Those derogations shall apply, however, only to the first appointments to such posts.' (Article 2)

'When appointments are made, the provisions of Article 15a of Chapter 4 (of

6 — Government Decree dnr/91 of 14 March 1996, issued on the basis of that Regulation, earmarked special funds for 30 professorships.

Regulation 1993:100) shall be replaced by the following provisions:

A candidate belonging to an under-represented sex who possesses sufficient qualifications in accordance with the first paragraph of Article 15 of Chapter 4 of [Regulation 1993:100] must be granted preference over a candidate of the opposite sex who would otherwise have been chosen ("positive discrimination") where it proves necessary to do so in order for a candidate of the under-represented sex to be appointed.

Positive discrimination must, however, not be applied where the difference between the candidates' qualifications is so great that such application would give rise to a breach of the requirement of objectivity in the making of appointments.' (Article 3)

Facts and questions

10. On 3 June 1996, the University of Göteborg announced a competition for a post of professor of hydrospheric science, in particular physical and biogeochemical processes in natural waters. The announcement stated that the appointment was intended to form part of the University programme to promote equal opportunities pursuant to Regulation 1995:936.

11. The applicants for the post included Katarina Abrahamsson, Leif Anderson, Georgia Destouni and Elisabet Fogelqvist. The board interviewing the applicants decided to take two separate votes. The first was solely on scientific merit within the meaning of Part 4 of the Regulation on Universities. On the results of that vote, Leif Anderson was placed first with five votes against three for Georgia Destouni. The second vote, on the other hand, took account of the criteria prescribed for the purpose of promoting measures to secure equal opportunities (within the meaning of the aforesaid 1995 Regulation); in that vote, Georgia Destouni was placed first.

The board therefore proposed that Georgia Destouni be appointed. However, she withdrew from the competition and the Rector of the University decided to refer the matter back to the selection board.

The board stated that a majority of its members considered that the difference in qualifications between Leif Anderson and Elisabet Fogelqvist, who had been placed second and third respectively, was considerable and they therefore had doubts about the requirement to give priority to the female applicant, Elisabet Fogelqvist.

On 18 November 1997, however, the Rector decided to appoint Elisabet Fogelqvist on the ground that the difference between her qualifications and those of Leif Anderson was not so great as to render positive

action contrary to the criterion of objectivity in the selection of applicants.

12. An appeal against that decision was lodged with the Appeals Board by Katarina Abrahamsson and Leif Anderson. The latter claimed in particular that the appointment of Elisabet Fogelqvist was contrary to Article 3 of Regulation 1995:936 and the rules of Community law as interpreted in the 1995 judgment in *Kalanke*.[7]

13. In the context of that appeal, the Appeals Board decided to refer the following questions to the Court for a preliminary ruling:

'1. Do Articles 2(1) and 2(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 preclude national legislation under which an applicant of the under-represented sex possessing sufficient qualifications for a public post is to be selected in priority over an applicant of the opposite sex who would otherwise have been selected ("positive special treatment") if there is a need for an applicant of the under-represented sex to be selected and under which positive special treatment is not to be applied only if the difference between the applicants' qualifications is so great that such treatment would be contrary to the requirement of objectivity in the making of appointments?

2. If the answer to Question 1 is in the affirmative, is positive special treatment impermissible in such a case even where application of the national legislation is restricted to appointments to either a limited number of pre-determined posts (as under Regulation 1995:936) or posts created as part of a special programme adopted by an individual university under which positive special treatment may be applied (as under Article 15a of Part 4 of Högskoleförordningen)?

3. If the answer to Question 2 means that treatment like positive special treatment is in some respect unlawful, can the rule, based on Swedish administrative practice and the second paragraph of Article 15 of Part 4 of Högskoleförordningen — approved by the Appeals Board — that an applicant belonging to the under-represented sex must be given priority over a fellow applicant of the opposite sex, provided that the

7 — Case C-450/93 *Kalanke* [1995] ECR I-3051.

applicants can be regarded as equal or nearly equal in terms of merit, be regarded as being in some respect contrary to Directive 76/207/EEC?

4. Does it make any difference in determining the questions set out above whether the legislation concerns lower-grade recruitment posts in an authority's sphere of activity or the highest posts in that sphere?'

The admissibility of the reference for a preliminary ruling

14. The body which referred the questions in the case under discussion is the Universities Appeals Board (Överklagandenämden för högskolan), that is to say an administrative body, and it must therefore be determined whether it is a 'court or tribunal of a Member State' within the meaning and for the purposes of Article 177 of the EC Treaty (now Article 234 EC).

15. I note in this connection that the concept of a referring court is an independent concept in the sense that it is not always and in every case coterminous with the title conferred on the body in the legal orders of the Member States. In fact the concept of a 'court or tribunal' as interpreted in the case-law of the Court, far from being dependent on the *nomen iuris* of the referring body, is associated with the presence of a number of factors which are fundamental to the right to refer questions for preliminary ruling pursuant to Article 177, namely whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is *inter partes*, whether it applies rules of law and whether it is impartial and independent. [8]

16. In the order for reference, the Appeals Board states that it is an administrative authority but asserts in general, I should say vague, terms that in the present case all the requirements are fulfilled for it to be regarded as a court or tribunal within the meaning of Article 177, that is to say it is established by law, it is permanent, its jurisdiction is compulsory, its procedure is *inter partes* and, lastly, it applies rules of law.

The Swedish Government supports that interpretation, referring — likewise in general terms — to the applicable legislation. It points out that the Swedish Constitution distinguishes between judicial and administrative bodies and that, under Swedish law, the Appeals Board falls into the latter

8 — See *inter alia* judgments in Case 61/65 *Vaassen* [1966] ECR 261; Case 43/71 *Politi* [1971] ECR 1039; Case 14/86 *Pretore di Salò* v *X* [1987] ECR 2545, paragraph 7; Case C-24/92 *Corbiau* [1993] ECR I-1277, paragraph 15; Case C-111/94 *Job Centre* [1995] ECR I-3361, paragraph 9; Joined Cases C-74/95 and C-129/95 *Criminal proceedings against X* [1996] ECR I-6609, paragraph 18; Case C-54/96 *Dorsch Consult* [1997] ECR I-4961, paragraph 23; Joined Cases C-9/97 and C-118/97 *Jokela and Pitkäranta* [1998] ECR I-6267; Case C-134/97 *Victoria Film* [1998] ECR I-7023, paragraph 14; and Case C-416/96 *El-Yassini* [1999] ECR I-1209, paragraph 17.

category. It was established by the Law on Higher Education (1992:1434) and is subject to the Regulation laying down instructions applicable to the Universities Appeals Board (1992:404). Under those rules, the Appeals Board must consist of eight members appointed by the government, the chairman and vice-chairman must be judges and three of the other members must be lawyers. The Swedish Government adds that under the Law on Administrative Management (1993:223), which governs the procedure before the Appeals Board, parties have the right to submit oral or written observations and to have access to any information available to the authorities. Under Article 1 of Chapter 5 of the Law on Higher Education (1992:1434), the Board's decision is binding and is not open to appeal. Lastly, it claims that the Board is independent of other State bodies and is therefore covered by Article 7 of Chapter 11 of the Constitution, which prohibits any interference in the activities of administrative bodies by other agencies of the executive and even by parliament.

17. It is clear from the legislation cited by the Swedish Government that the referring body is established by law, that it is permanent, that its jurisdiction is compulsory (see Article 1(1) and (2) of Chapter 5 of Law 1992:1434) and, lastly, that there is no provision allowing it to rule equitably rather than in accordance with rules of law.

However, an examination of the national rules leaves some doubt about two of the factors mentioned above, which must be present for the administrative body to be regarded as a court or tribunal within the meaning of Article 177 and for the present reference for a preliminary ruling to be declared admissible, namely whether the procedure before the Appeals Board is *inter partes* and whether the members of the Board are really independent and irremovable.

18. (a) Let us start with the first factor. It is true that, as I have already observed in my Opinion in Joined Cases C-110/98 to C-147/98 *Gabalfrisa and Others* delivered on 7 October 1999, it would appear in the light of recent judgments handed down by the Court that the fact that the procedure is not *inter partes* is not, in itself, a conclusive reason for deciding that the referring body cannot be described as a court or tribunal; however, when the Court has accepted references for a preliminary ruling in summary proceedings where the defendant was not present, it has taken care to ensure that that deficiency was offset by a high level of

impartiality and independence in the adjudicating body.[9] In my view, there can therefore be no doubt that the referring body must have those characteristics if its reference is to be considered admissible.

In the case under discussion, the Government assumes and the referring authority does not deny that the procedure before the Appeals Board is not governed by the Swedish Law on Administrative Procedure (1971:291), which applies only to proceedings before the administrative courts, but by the Law on Administrative Management, which is concerned in particular with the adoption of administrative acts (1986:223).[10] That law does not expressly deal with the parties' right to have their claims settled *inter partes*. It merely provides in Article 17 that the authorities must communicate to the interested parties any documents that concern them and must give them an opportunity to submit observations.

In addition, Article 14 of that law states that the parties may submit oral observations.

Thus the adversarial character of the procedure, which, I repeat, is governed by the legislation on the adoption of administrative acts, arises from the rules under which individuals have the right to have access to any documents taken into consideration by the authorities. Clearly, the purpose of those rules is not to require that claims be settled *inter partes* but to ensure that the body is absolutely transparent and to give citizens the right to submit observations or produce new evidence. However, in my view, given the specific remit of the referring body in the present case, namely to review the legality of acts of the education and university authorities, there may be grounds for considering that Article 14 and especially Article 17 of the Law on Administrative Management guarantee the interested parties' right to have their claims settled *inter partes*. On the basis of Article 17, in particular, individuals who challenge a decision of the authorities before the Appeals Board are in any case entitled to submit their observations on any further evidence produced by third parties and, by the same token, individuals whose appointment or promotion is contested are informed of the appeal and are likewise entitled to submit their own observations.

I therefore take the view that, although this form of *inter partes* procedure is 'atypical',

9 — In my Opinion in *Gabalfrisa*, I referred in particular to the judgment in *Dorsch Consult*, cited above, in which the Court, in dismissing the Commission's submission that 'according to the [referring body]'s own evidence, procedure before that body is not *inter partes*', merely stated that 'the requirement that the procedure before the hearing body concerned must be *inter partes* is not an absolute criterion'. That statement, which was not explained with respect to the case in question, gives rise to some perplexity if we consider that the Court had previously accepted references for a preliminary ruling in cases where the procedure, although not *inter partes* at the time, would (or in some cases might) be so later (see judgments in *Politi* and *Pretore di Salò* v X, cited above, and Case 70/77 *Simmenthal* [1978] ECR 1453 and Case 338/85 *Pardini* [1988] ECR 2041.

10 — There is support for that interpretation in academic writing on the subject. See, in particular, Hans Ragnemalm, Administrative justice, Juristförlaget, Stockholm 1991, p. 210, and Strömberg Håkan, Allmän förvaltningsrät, Liber Ekonomi, 19th ed., Lund 1998, in particular p. 80.

there are grounds for considering that the Appeals Board does meet the requirement in that respect, which must be fulfilled if the reference for a preliminary ruling is to be admissible under Community law.

19. (b) As regards the second factor, the independence of the members of the Appeals Board, I would repeat what I have already said on other occasions, namely that the requirement that the adjudicators of an administrative body be independent is of central importance in determining whether it is to be recognised as a 'court or tribunal' within the meaning and for the purposes of Article 177 of the Treaty and it is essential to proceed with the greatest care in assessing whether national rules meet the requirement of independence appropriate to a body regarded — albeit in a specific context and for certain purposes — as a court or tribunal.

In the present case, it appears that the members of the Board are appointed by the government and serve for a limited period (Article 9 of the Regulation on instructions applicable to the Board). The laws and regulations relating to the Board do not specify the period for which members serve or the circumstances in which the authorities may terminate the appointment. It can in any case be assumed that the term of office is mentioned in the appointment document and that can be regarded as providing a sufficient guarantee of the permanence and stability of the body.

On the other hand, the fact that there are no specific rules on the conditions and detailed arrangements for terminating members' appointments raises doubts about the body's actual independence. I wonder whether that characteristic really can, as the Swedish Government supposes, be extrapolated from the constitutional rule enshrining the principle that all national authorities are independent (Article 7 of Chapter 11). I note that the Constitution gives an exhaustive list of all the circumstances in which judges may be removed from office but that rule applies only to judges, not to administrative bodies and consequently not to the members of the Appeals Board (Article 5).

20. In the Swedish legal order, apart from the abovementioned constitutional rule enshrining the principle that administrative bodies are independent as regards the adoption of their decisions, the Law on Administrative Management contains a list of the circumstances in which the administrative authorities may object to members of administrative bodies and requires members of such bodies to inform the authorities of anything that could constitute grounds for objection (Articles 11 and 12).

However, according to the Court's recent judgment in *Köllensperger*,[11] quoted by the Swedish Government, the combined provisions of the rule on challenges to, or withdrawals by, members of a body and

11 — Case C-103/97 *Köllensperger* [1999] ECR I-551.

the rule prohibiting interference by other State bodies permit the conclusion that the necessary conditions are fulfilled for the administrative body to be recognised as a 'court or tribunal' within the meaning and for the purposes of Article 177 of the Treaty. The Court stated in that judgment that 'it is not for the Court to infer that such a provision is applied in a manner contrary to the [national] constitution and the principles of a State governed by the rule of law'.

It follows from that judgment that, if the combined provisions of those two rules apply, the instrument of removing members of administrative authorities from office cannot possibly constitute a form of interference with the freedom and independence enjoyed by members of the Board. In other words, it follows that, in that legislative context, the right to remove members from office cannot serve as an instrument to undermine the independence of the Board. However, I consider that to be an excessively generous view in that, on that interpretation, assessment of the independence of the referring body does not depend solely on whether there are grounds equal or similar to those that may justify the removal of judges from office but also on whether there is a general duty not to interfere in the activities of State administrative bodies associated with the right to object to the members of individual authorities and the duty of those members to abstain. In my view, such a duty is in any case insufficient to guarantee the absolute independence of the Appeals Board because such an essential requirement as independence must be guaranteed by clear rules, primarily in the interests of those seeking justice who must be able to refer to them, should the need arise, without engaging in complex interpretative operations to identify and prove their right to be assessed by independent bodies. The independence of the courts protects a general interest and represents a value that is essential to the relations between the courts and those who have recourse to them. [12]

21. In the light of the foregoing considerations, I propose that the Court hold the present reference for a preliminary ruling to be inadmissible.

Substance

22. In examining the substance of the case, I propose to take the first and third questions together and then the second and fourth questions. The first pair are concerned with the general rules on positive action with regard to appointments in institutes of higher education and universities, while the second pair concern the

12 — I doubt therefore whether the presumption that the actions of State bodies are lawful, referred to in the judgment in *Köllensperger*, provides a sufficient guarantee because an administrative authority adjudicates in full and complete independence. The independence of the 'referring court' does not depend on whether the acts of such bodies are lawful but on the content of the rules on which those acts are based.

applicability of those rules to limited areas of the public education system.

The first and third questions

23. By the first and third questions, the Appeals Board seeks to ascertain whether the positive measures referred to in Article 2(4) of the Directive include national rules such as the Swedish rules which provide for the appointment of candidates of the under-represented sex to university teaching posts, even if they are not placed first, provided that they are deemed suitable on the basis of their merits and qualifications to perform the functions pertaining to the post to be filled and that the difference between the candidates placed first and second respectively is not such as to entail, should the latter be selected, a breach of the duty of objectivity in the making of appointments laid down in the Law on Public Employment (1994:260).

Should the answer to that question be in the negative, the Court is asked whether such rules may nevertheless be regarded as lawful in the light of administrative practice whereby a candidate belonging to the under-represented sex may be given priority only if that candidate is equal (or nearly equal) in terms of merit and qualifications to the candidate who was placed first.

24. The questions therefore raise once again a problem which I addressed in my Opinion delivered on 10 June 1999 in Case C-158/97 *Badeck*, to which I refer you for general observations on the scope of positive national action and the limits imposed on such action by Community law. I draw attention, in this connection, to the guidelines on the subject laid down in the Court's judgments in *Kalanke*, cited above, and *Marschall*. [13]

25. In the judgment in Case C-450/93 *Kalanke* in 1995 — cited by the claimants in the proceedings before the national court in support of their claims and mentioned by the national court in the order for reference — 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 exclu-

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

sively 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).

In the case of *Marschall*, the German law, whose compatibility with Article 2(1) and (4) of the Directive was contested, 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'. [14] 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 such a rule 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

14 — The Government of North Rhine-Westphalia, 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. 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.

criteria tilts the balance in favour of the male candidate' and provided that 'such criteria are not such as to discriminate against the female candidates'.

26. In my observations on the *Badeck* case, I noted that on the basis of that case-law it may be concluded that 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 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 must 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 significant as those normally faced by women. [15]

27. The Swedish rules under discussion have two characteristics: they allow — and in some cases require — the authorities to give priority to a candidate of the under-represented sex even if that candidate is inferior in terms of merit and qualifications to the candidate who was placed first; [16] and — according to the legislative sources cited by the referring body — they do not allow the authorities, when making the selection, to give due consideration to the particular personal circumstances of candidates who are not the subject of positive action.

In view of these two characteristics, it seems to me that there can be no doubt

15 — I added that 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.

16 — Under Article 15a of Regulation 1993:100 on Universities, a candidate belonging to the under-represented sex who is suitable for the post to be filled may be appointed in preference to a candidate who would otherwise have been appointed on the basis of merit and competence. Under Article 3 of Regulation 1995:936 concerning certain professors' and research assistants' posts, including the post at issue in the main proceedings, the authorities are required to give priority to candidates of the under-represented sex if the conditions laid down in Article 15a of Regulation 1993:100 are fulfilled.

that those rules are incompatible with the Directive and cannot be included among the positive actions referred to in Article 2(4) thereof.

28. As I have already pointed out, in Community law positive action to give priority to women in working life is considered to be compatible with the principle of non-discrimination if the requirement to give priority applies only where the shortlisted candidates are equal in terms of qualifications and merits. While — as I have already pointed out in my Opinion in *Badeck* — such equality is a fiction in that it is impossible or extremely difficult for two or more candidates to be on an equal footing, it does nevertheless modify the requirement to give priority. To allow or require the candidate belonging to the under-represented sex to be appointed even if there is a difference in qualifications and merits would, in my view, give rise to a system according absolute and unconditional priority and consequently reserving posts for women. That would have the further consequence of rendering the selection process meaningless, since the criterion would not be a comparison of the candidates but the ability of those with priority to perform the functions pertaining to the post to be filled.

In my view, the absolute and unconditional nature of the priority given to persons belonging to the under-represented sex (in this case women) is not weakened where — as in the Swedish legal order — it is specified that the right to an appointment may arise only if there is no significant difference between the candidate who is selected and the one who is rejected, since the process of comparing candidates and deciding which to appoint is in any case subject to the requirement to give priority to the candidate of the under-represented sex, with the obvious result that the selection process is completely distorted.

That consideration is not refuted by the Appeals Board's remarks about the scope of the 'requirement of objectivity' which the authorities must in any case observe in assessing candidates for the purposes of selection. According to the referring body, 'the requirement of objectivity [laid down in the Swedish Constitution and mentioned in the *travaux préparatoires* for Regulation 1995:936 concerning certain professors' and research assistants' posts created for the purpose of promoting equal opportunities] should mean that positive special treatment is not to be applied where it would involve a risk of an obvious loss of effectiveness in those sectors if the most qualified candidates were not selected'. [17]

17 — See p. 7 of the order for reference (English version).

I would add that, even in cases where candidates are equally qualified, the fact that some have priority makes it difficult to determine whether a candidate of the over-represented sex has suffered discrimination beyond what was necessary for the positive action to be effective. That difficulty is clearly exacerbated [18] in cases where it is admitted that there is a difference, albeit a slight one, between them.

Positive action of this kind is therefore incompatible with the Directive which, according to the Court's interpretation, does not allow any form of absolute priority to be given to candidates belonging to the under-represented sex, since that type of active discrimination is in any case disproportionate to the aim pursued.

29. In its third question, the referring body states that, in accordance with Swedish administrative practice pursuant to Article 15a of the Regulation on Universities (Regulation 1993:100), priority is given to candidates belonging to the under-represented sex only where candidates can be regarded as equal or nearly equal in terms of qualifications. The referring body observes in this connection that the proposal for Regulation 1995:936 states that 'although the promotion of equal opportunities is an objective factor within the meaning of the Constitution, the provision should have the effect of imposing a limit on how great the difference in qualifications may be in the case of positive special treatment'. [19] It is quite clear that Swedish administrative practice is to apply the legislation in line with the traditional model of positive action developed in Community law. However, it is not for the Court but for the national court to determine the weight attaching to administrative practice in the national legal order and its effect on the content of the national legislation.

30. In any case, as I have already pointed out, for positive action to be regarded as compatible with Community law, the rules must also allow the authorities, when making the selection, to give due consideration to particular personal circumstances of candidates who are not the subject of positive action which may indicate social situations that are just as significant as those normally faced by women. It does not appear from what the referring body and the Swedish Government say that the legislation instituting the positive action at issue and the administrative practice in that connection provide for any such derogation. However, it is for

18 — In response to a question from the Court on the interpretation of Article 15a of Chapter 4 of Regulation 1993:100, the Swedish Government said that, out of 21 appointments to posts in institutes of higher education, five women had been appointed under the programme for the promotion of women. Three of those five appointments had been contested before the Appeals Board. In two cases, the Board had held that the appointment of the female candidate was contrary to the requirement of objectivity and had consequently declared the appointments void.

19 — See p. 7 of the order for reference (English version).

the national court to determine whether such an obligation is imposed under other legislation requiring the authorities to give special treatment in certain circumstances where the person concerned has difficulty in entering working life.

31. In the light of the foregoing considerations, I take the view that Community law, in particular Article 2(1) and (4) of Directive 76/207/EEC, does not allow a Member State to adopt rules on appointments whereby a candidate of the under-represented sex who has sufficient qualifications must be appointed in preference to a candidate of the other sex shortlisted on the basis of merit and competence, even if such positive action is not applied in cases where the difference between the candidates in terms of qualifications is so great that the measure would be contrary to the principle of objectivity which the authorities are required to observe in making appointments.

On the other hand, Community law does not preclude an administrative practice whereby a candidate belonging to the under-represented sex may be given priority over a candidate of the opposite sex as long as they are equal or nearly equal in terms of qualifications, provided that the national legislation requires the authorities, in assessing candidates who are not the subject of positive action, to give due consideration to particular personal circumstances which may indicate social situations that are just as significant as those normally faced by women.

The second and fourth questions

32. By the second and fourth questions, the Appeals Board seeks to ascertain whether the Swedish rules contained in the abovementioned legislation are still unlawful even if the programme to promote equal opportunities is restricted to 'a limited number of pre-determined posts', as under the Regulation concerning certain professors' and research assistants' posts created for the purpose of promoting equal opportunities (1995:936) or appointments made by an individual institute of higher education or university on the basis of Article 15a of Chapter 4 of Regulation 1993:100 (second question); or if the same rules apply only to lower or higher grade posts (fourth question).

The question is essentially whether positive action which is inherently unlawful may be

regarded as compatible with Community law if it is limited in scope.

33. In my view, the scope of positive action is irrelevant for the purpose of deciding whether it is compatible with Community law, since that decision is based principally on the interpretation of the rules governing the exercise of the authorities' duty or option to give priority to candidates belonging to the under -represented sex and in certain circumstances on the need for such action in the light of the actual social circumstances of the persons to be given priority. The decision is not concerned with the scope of the rules or their effects. That is to say, it is not concerned with the extent of any social repercussions they may have. To judge the lawfulness of positive action by the extent of its social consequences would be tantamount to treating it in the same way as any other form of discrimination between the sexes.

As I have already pointed out in *Badeck*, however, while 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 that the principle of non-discrimination and the principle of equal opportunity — on which positive action is based — 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 dimension that the legislature is taking upon itself 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. [20]

34. I therefore take the view that Directive 76/207/EEC does not allow a Member State to adopt a programme of positive action which is inherently unlawful, even if such action is restricted under the national legislation to a limited number of predetermined posts or to posts created as part of a special programme adopted by an individual institute of higher education. Such rules remain incompatible with the Directive, whether the legislation in question applies to lower or higher grade posts.

20 — See point 26.

Conclusion

35. In the light of the foregoing considerations, I propose that the Court declare the questions referred by the Överklagandenämnden för högskolan to be inadmissible on the ground that that body is not a court or tribunal within the meaning of Article 177 of the Treaty.

In the alternative, I propose that the Court give the following answer:

(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 do not allow a Member State to adopt rules on appointments whereby a candidate of the under-represented sex who has sufficient qualifications must be appointed in preference to a candidate of the other sex who is judged more suitable in terms of merit and competence, even if the requirement to give priority is waived in cases where the difference between the applicants in terms of qualifications is so great that the measure would be contrary to the principle of objectivity which the authorities are required to observe in making appointments.

(2) On the other hand, Article 2(1) and (4) of Directive 76/207/EEC do not preclude an administrative practice whereby a candidate belonging to the under-represented sex may be given priority over a candidate of the opposite sex as long as they are equal or nearly equal in terms of qualifications, provided that the national legislation requires the authorities, in assessing candidates who are not the subject of positive action, to give due

consideration to particular personal circumstances which may indicate social situations that are just as significant as those normally faced by women.

(3) Article 2(1) and (4) of Directive 76/207/EEC do not allow a Member State to adopt the rules on appointments referred to under 1, even if the positive action is restricted under the national legislation to a limited number of predetermined posts or to posts created as part of a special programme adopted by an individual institute of higher education. Such rules remain incompatible with the Directive, whether the legislation in question applies to lower or higher grade posts.