

B. EFTA Court

Case E-1/02, *EFTA Surveillance Authority v. Norway*, judgment of 24 January 2003 (nyr)

1. Introduction

On 24 January 2003, the EFTA Court in Luxembourg¹ handed down its first sex equality decision, on a case that happened to involve positive action in favour of women in academia. In its ruling, the Court found the practice to reserve a certain number of university posts exclusively for women to be in breach of EEA law. Due to the homogeneity principle that underlies EEA law, the EFTA Court's ruling is based on EC case law on positive action. At the same time, the judgment contains certain elements that indicate a wish on the side of the EFTA Court for a different approach by the ECJ in the future, based in particular on the changes brought about in EC sex equality law through the Amsterdam Treaty revision. Given the fact that these changes are not even part of EEA law, the case under discussion represents a particularly interesting step in the dialogue between the EFTA Court and the ECJ on the interpretation of EEA/EC law. The case is also interesting because it concerns Norway, a country that appears to have been critical about ECJ case law on positive action from the beginning. For instance, in her comments on the famous ECJ ruling in the *Kalanke*² case Gro Harlem Brundtland (then Norwegian prime minister and generally considered as an EU-enthusiast) seems to have implied that this judgment should not be followed in Norway.³

1. The EFTA Court handles actions brought in relation to the EFTA States that participate in the EEA Agreement (Iceland, Norway and the Liechtenstein but not Switzerland); see e.g. Christiansen, "The EFTA Court", 22 *EL Rev.* (1997), 539–553. More generally on the EEA Agreement, see Norberg, "The Agreement on a European Economic Area", 29 *CML Rev.* (1992), 1171–1198, and Toledano Laredo, "The EEA Agreement: an overall view", 29 *CML Rev.* (1992), 1199–1213.

2. Case C-450/93, *Eckhard Kalanke v. Freie und Hansestadt Bremen*, [1995] ECR I-3051.

3. See Sejersted, "Between Sovereignty and Above nationalism in the EEA Context – on the Legal Dynamics of the EEA Agreement", in Müller-Graff and Selvig (Eds.), *The European Economic Area – Norway's Basic Status in the Legal Construction of Europe* (Berlin: Arno Spitz and Oslo: Tano Aschehoug, 1997), pp. 43–73, at 53. See also the references to Ms Brundtland's comments as reported in the Norwegian daily paper *Aftenposten* of 18 Oct. 1995, morning edition (with thanks to Claus Isakson for helping me to find it).

In the meantime, the relevant EC case law reflects an important development that goes well beyond the narrow approach of *Kalanke*. The case now decided by the EFTA Court therefore also raises the question how much room is left (or should be left) for positive action.

2. Facts and legal background

The action in the case under discussion was brought by the EFTA Surveillance Authority (henceforth: ESA) against Norway in the framework of enforcement proceedings based on Article 31(2) of the Surveillance and Court Agreement⁴ (SCA). ESA, which in many ways is the equivalent to the Commission under EC law (and by whom it was supported in the present case), sought a declaration that by maintaining in force a rule allowing for the reservation of academic posts exclusively for women, Norway failed to fulfil its obligations under EEA law.

According to ESA, Norway infringed Articles 7 and 70 EEA as well as a number of specific sex equality law provisions. Article 7 EEA provides that acts referred to or contained in the Annexes to the Agreement or in decisions of the EEA Joint Committee are binding on the Contracting Parties. Article 70 EEA obliges the Contracting Parties to promote the principle of equal treatment for men and women by implementing the provisions specified in Annex XVIII to the Agreement.⁵ Point 18 of this Annex mentions the Second Equal Treatment Directive in its original version.⁶ At the material time, the revised version⁷ had not yet⁸ been made part of EEA law. According to ESA, Norway infringed Articles 2(1), (2)(4) and 3(1) of the Directive (in the original version). Article 2(1) prohibits direct and indirect discrimination on grounds of sex within the Directive's field of application (essentially, employment matters other than pay and social security). Article 3(1) repeats this

4. Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice, text available at www.eftacourt.lu/esacourt-agreement.asp.

5. The only substantive sex equality provision that can be found in the EEA Agreement itself is Art. 69 EEA, concerning equal pay for men and women. Its wording corresponds to the former Art. 119 EC (pre-Amsterdam version).

6. Directive 76/207/EEC 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, O.J. 1976, L 39/40.

7. Directive 2002/73/EC amending Council Directive 76/297/EEC 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, O.J. 2002, L 269/15.

8. In the Official Journal, where the amending Directive is published, it is explicitly noted that this is a text with EEA relevance. Making it part of that legal order is essentially a matter of time.

prohibition specifically with respect to access to jobs or posts, whatever the sector or branch of activity and whatever the level of the occupational hierarchy. According to Article 2(4), the 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”.

ESA’s complaint in the case under discussion related to one particular aspect of Norway’s sex equality policy. This policy included a variety of measures, among them target measures for new professorship posts, priority in allocation of positions in fields with less than 10 percent female academics and in fields with a high proportion of female students and graduates. These elements were not considered unlawful and, accordingly, not challenged by ESA (a fact that is emphasized by the EFTA Court in its decision, para 54). ESA’s criticism related solely to national legislation concerning universities and colleges that made it possible to advertise academic posts as open only to members of the underrepresented sex. Based on this legislation, the University of Oslo earmarked a number of permanent positions and of post-doctoral research grants for women. In the year 1998, the latter included 20 grants allocated to the university by the Norwegian Government. These posts were created specifically in order to improve the recruitment base for high-level academic positions and they were explicitly targeted at fields where the recruitment of women needed to be strengthened. During the years 1998 to 2001, the University of Oslo earmarked another 29 (out of a total of 179) post-doctoral appointments and 4 (out of a total of 227) permanent academic positions for women. ESA looked into the matter after having received a complaint on this practice. It informed the Norwegian Government that according to ECJ case law, measures promoting women could be regarded as compatible with EEA law only if they did not automatically and unconditionally give priority to women, if men and women are equally qualified and if the candidates are subject to an objective assessment that takes into account their specific personal situations. Since this was not so in the case at hand, ESA considered that Norway infringed EEA law. The Norwegian Government did not agree with this assessment. Whilst admitting that by allowing academic positions to be earmarked for women, the national law provided for an automatic and unconditional preference for one sex, the Government argued that there was nevertheless no breach of EEA law (the arguments brought forward in that context are discussed in the following section of this case note). Faced with the Norwegian Government’s opposition, ESA brought the case to the EFTA Court.

3. The Court's ruling

The Court's final conclusion was that Norway had failed to fulfil its obligations under EEA law in the area of sex equality law (para 59). This finding is due to the Court's strict adherence to the homogeneity objective underlying EEA, an objective that is recalled at the very beginning of the considerations where the Court mentioned Article 6 EEA and Article 3(2) ESA/Court Agreement according to which "the case law of the Court of Justice of the European Communities is relevant for the EFTA Court when interpreting the Directive" (para 36). Thereafter, the Court dealt with two distinct issues, namely positive action (which made up the bulk of the judgment) and genuine occupational requirements (which took up one paragraph only). In the latter context, Norway argued that Article 2(2) of the Directive is applicable in the case at hand, since the allocation of earmarked positions within the University of Oslo is premised on a need for female members of faculty that are able to meet the students' legitimate needs. The Court simply observed that there is no support either in the wording of the law nor in ECJ case law, where Article 2(2) has primarily been applied in the context of public security regarding policing and military activities (para 46).

In the relation to positive action, the Court began by pointing out the most important elements of the ECJ case law from which it concluded (in para 43, referring to *Lommers*⁹):

"As the case law outlined above shows, the Court of Justice of the European Communities has accepted as legitimate certain measures that promote substantive equality under Article 2(4) of the Directive. In determining the scope of a derogation from an individual right, such as the right to equal treatment of men and women laid down by the Directive, regard must, however, be had to the principle of proportionality, which requires that derogations remain within the limits of what is appropriate and necessary in order to achieve the aim in view and that the principle of equal treatment be reconciled as far as possible with the requirements of the aim pursued"

In the following assessment of the specific case at hand, the Court refuted both the factual and the legal arguments brought forward by Norway in defence to ESA's allegations. In this case note, the *factual arguments* will only be mentioned, but not further discussed. First, Norway argued that there was in fact no disadvantage of men because the research positions in question were new posts constituting an extension of the total number of available posts. The Court (para 52) found it unlikely that the earmarking scheme does

9. Case C-476/99, *H. Lommers v. Minister van Landbouw, Natuurbeheer en Visserij*, [2002] ECR I-2891.

not influence the number of future vacancies open to men. It added that Norway had not even alleged that the situation could be different in the specific case at hand (which seems to indicate that the argument might have force if better underpinned). The Court was even briefer regarding the argument that the posts in question are of a temporary nature because they will lapse at the latest when the professor retires. This the Court simply refused to accept (para 53).

Norway's *legal arguments* can be divided into three groups, the first of which is based on a comparison of the specific measures at issue with those mentioned in existing ECJ case law. The EFTA Court disagreed with the view that the Norwegian case goes less far than *Lommers* which involved a reservation of all rather than only of some places for women, as in the Norwegian case. According to the Court, *Lommers* differed in that it was characterized by a flexibility clause, an element that was missing in the Norwegian case (para 47). The Court also denied that the contested measures are significantly less disadvantageous to men than those at issue in *Abrahamsson*¹⁰ in so far as men are not exposed to the adverse effect of a rejection on their reputation as researchers. According to the EFTA Court, the case at hand actually goes further in that it does not provide for a selection procedure involving an assessment of all candidates (para 51). The Court further refused the argument that the present case is very similar to *Badeck*¹¹ as far as training is concerned, by noting that the measure at issue in that earlier case did not provide for a totally inflexible system (paras. 49 and 50). Finally, the Court observed that *Schnorbus* concerned a special constellation which is why the ECJ's findings in that case are not applicable in the present circumstances (para 48).

A second group of legal arguments brought forward by Norway relates to the conceptual level. First, Norway emphasized the importance of proportionality, arguing that since the measures in question are temporary and form part of a special programme favouring women in a last attempt to achieve a more balanced representation of the sexes (all other measures had failed), they have to be considered proportionate. According to Norway, even discriminatory effects of such measures can be counterbalanced by an objective fact, such as the under-representation of women, as long as the measures do not exceed what is necessary. In particular, the extremely limited number of all new temporary and permanent appointments is of importance when assessing proportionality. In its decision, the EFTA Court only mentioned, but

10. Case C-407/98, *Katarina Abrahamsson and Leif Anderson v. Elisabet Fogelqvist*, [2000] ECR I-5539.

11. Case C-158/97, *Georg Badeck and Others v. Landesanwalt beim Staatsgerichtshof des Landes Hessen*, [2000] ECR I-1875.

did not elaborate on, the issue of proportionality. Instead, it emphasized the following three elements in particular: first, the requirement that, as a matter of principle, there must be a possibility that the best-qualified candidate obtains the post (para 45), further and in the same context, the importance of the criteria for assessing the qualifications of candidates (including the importance of female life experience in that context; para 57) and, finally, the requirement that positive action measures must provide for a certain degree of flexibility in that they must not give absolute and unconditional priority to female candidates (paras. 45 and 54).

Another conceptual argument brought forward by Norway was that positive action in favour of women should be seen as a positive aspect of equality. In that context, the Norwegian Government invited the EFTA Court to adopt an alternative to the interpretation of the Directive developed by the Court of Justice under which positive action measures are legally defined as derogations from the prohibition of discrimination. Instead, such measures should be interpreted as aimed at sex equality in practice or as an intrinsic dimension of the prohibition of sex discrimination. The EFTA Court declared itself unable to accept that invitation, due to the homogeneity objective underlying the EEA Agreement (para 45).

As a third conceptual argument, Norway maintained that Article 141(4) EC and the amending provisions to the Directive should be applied by analogy. In that regard, the Court simply observed that these provisions have not been part of EEA law and therefore cannot apply (para 55). The Court nevertheless remarked that the important changes in EC sex equality law through the Amsterdam revision should have consequences for the interpretation of law (para 56).

Finally, the Norwegian Government also referred to various provisions of public international law relating to positive action, including in particular Article 4 of the United Nation's Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). In that regard, the Court observed that the contested measures cannot be justified under public international law because the relevant provisions are permissive rather than mandatory. As far as CEDAW is concerned, the Court pointed out that it was already in force in the EU Member States when the ECJ rendered its positive action judgments (para 58).

4. Comments

In the following comment on the judgment, I will focus on five issues. I will begin with some remarks on Norway's argument relating to Article 2(2) of the Directive (which, in my opinion, was not taken sufficiently seriously by

the Court). In relation to positive action, I will first address temporary special measures under CEDAW (which, I will argue, may be compulsory in certain circumstances). In the context of EC law, I will recall some important lessons from ECJ case law (which, I believe, now puts a particular emphasis on the requirement of proportionality), then turn to the plea for a redefinition of the concept of discrimination (often found in academic writing) and, finally, make some comments on the homogeneity principle and the dialogue between the EFTA Court and the Court of Justice.

4.1. *Occupational requirements (Article 2(2) of the Directive)*

To my knowledge, Article 2(2) of the Directive (in its original version)¹² has never been evoked before the Court of Justice as relevant in the context of positive action measures. Norway's argument that the earmarking of academic positions for women is premised on a need for female members of faculty that are able to meet the students' legitimate needs therefore appears to be a new feature in the EC/EEA case law. It recalls the argument of diversity, often heard in the U.S. American discourse on positive action at universities, in particular in relation to the admission of students. There, the argument is that diversity of the *student* body is required in the interest of the students. In the case under discussion, the same argument relates to the *teaching* body but still in the context of the students' interest. It should be noted that, as such, the argument relates to the *environment* in which the professors' work is to be carried out rather than to the work itself. Given that Article 2(2) of the Directive refers to occupational activities and training "for which, by reason of their nature *or the context in which they are carried out*, the sex of the worker constitutes a determining factor" (emphasis added), it is submitted that the Court should have looked at this argument more closely, rather than simply dismissing it with a few general remarks. Obviously, the fact that the cases so far decided by the ECJ in this context primarily related to public security regarding policing and military matters does not mean that this is the only possible context in which the provision can be important. In addition, I would argue that the ECJ's decision in *Sirdar*¹³ was in fact based on a wide rather than a narrow interpretation of Article 2(2) of the Directive and that, again, this does not necessarily have to apply only in the context of public security.

12. In the amended Directive (see *supra* note 7), this is now Art. 2(7).

13. Case C-273/97, *Sirdar v. The Army Board, Secretary of State for Defence*, [1999] ECR I-7403.

4.2. *Temporary special measures under the CEDAW*

As far as positive action under public international law is concerned, I would like to raise an issue relating to the one Convention that specifically addresses discrimination against women, namely CEDAW.¹⁴ According to the Court, that Convention is of no help in the present case for two reasons. First, it was already in force when the ECJ handed down its positive action decisions. This is essentially a homogeneity argument, based on the thought that the ECJ never found an infringement of the CEDAW and this is, therefore, binding on the EFTA Court. In fact, the ECJ never even mentioned the Convention in its positive action case law. Consequently, arguments relating to CEDAW are a novelty at the level of the EEA and EC law. As such, they presented the EFTA Court with the possibility to be the first of the two Courts to rule on the matter. However, the substantive remark made by the Court in that regard does not promise much good for such an assessment: according to the Court, the positive action provisions in public international law are clearly permissive rather than mandatory. It is submitted that this is too simple an assessment, in particular as far as CEDAW is concerned. In Article 4(1), that Convention contains a provision that specifically addresses what it terms temporary special measures (TSM). It states that a TSM “aimed at accelerating de facto equality between men and women shall not be considered discrimination as defined in the present Convention”. The Committee on the Elimination of Discrimination against Women is presently preparing a General Recommendation relating to the meaning and the reach of this provision. This Recommendation, once adopted, may well reflect an approach that is different from that reflected in the EFTA Court’s considerations. This is apparent from the building blocks for a General Recommendation on Article 4(1) that were developed by an expert meeting held in October 2002 at the University of Maastricht.¹⁵ In their conclusions, the experts emphasize the mandatory (rather than only permissive) role nature of TSMs. They explain:¹⁶ “The mandatory nature of TSMs flows from the combined reading of Articles 1/5 and 24 in which States are required to take all appropriate and necessary measures to effectively put an end to all forms of

14. For the text of and explanations on the Convention, see www.un.org/womenwatch/daw/cedaw.

15. The text of the meeting’s conclusion is printed in full in the Dutch Journal for women and law, *Nemesis*, together with an introduction by the rapporteur, Rikki Holtmaat (2003) *Nemesis*, katern, 35–42. The proceedings have since been published: Boerefijn, Coomans, Goldschmidt, Holtmaat, Wolleswinkel (Eds.), *Temporary Special Measures – Accelerating de facto Equality of Women Under Article 4(1) UN Convention on the Elimination of All Forms of Discrimination Against Women* (Intersentia, Antwerpen, 2003).

16. Holtmaat, *idem*, at 40.

discrimination against women. The mandatory nature of TSMs is also expressed in the Articles (6–16) that require that States *shall* take all *appropriate* measures. TSMs can provide the appropriate and necessary mechanisms to accelerate the improvement of the *de facto* position of women. In so far as they can bring about this result *and* this result cannot be achieved otherwise, i.e. is *necessary*, they are also mandatory.” The experts agree that Article 4(1) by itself does not impose a positive duty on the States that are signatories to the Convention. They argue that Article 4(1) is explanatory in nature in that it states that TSMs do not constitute discrimination (hence my aversion to the term “positive discrimination” which I consider a contradiction in terms in the present context). By contrast, the legality of TSMs cannot be judged on the basis of this provision alone which has to be seen in the broader context of the Signatory States’ obligations under the Convention to improve the position of women. In my opinion, this reasoning is both convincing and appropriate. It is therefore unfortunate that it is not reflected in the EFTA Court’s considerations.

4.3. *Important lessons from ECJ case law on positive action*

Turning from public international law to EC law on positive action, I do not find it necessary to discuss the EFTA Court’s interpretation of the existing EC case law in detail as I believe that, on the whole, it is correct.¹⁷ In my analysis, the decisive elements in order to assess whether a given measure can be regarded as lawful positive action in favour of women are still those indicated in the *Badeck*¹⁸ ruling (para 23), namely:

“[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”.

This test is indeed reflected in the EFTA Court’s remarks on the existing ECJ case law on positive action. Nevertheless, three points merit special attention. The first relates to the guiding principles for the interpretation of Ar-

17. In particular, I agree that the *Schnorbus* case is not relevant for the present purposes because of its very special constellation. It is in fact not clear whether the Court’s final finding in this case is based on the concept of objective justification (relevant in the context of indirect discrimination), on positive action under Art. 2(4) of the Second Equal Treatment Directive or on a lack of comparability (which concerns an earlier level of the analysis).

18. See note 11 *supra*.

ticle 2(4) of the Directive. In its most recent decision on positive action, *Lommers*,¹⁹ the ECJ confirmed that it sees Article 2(4) as an exception to the individual right to equal treatment, an approach that has been long criticized both from within the Court (namely by a number of advocates general) and in numerous academic comments on the Court's case law. However, whilst in *Kalanke* the conclusion drawn by the Court from this starting point had been that Article 2(4) must be interpreted narrowly, it should be noted that this latter element is no longer present in *Lommers*. The Court now puts the emphasis on the principle of proportionality instead. As I have argued elsewhere,²⁰ this is a different approach which is to be welcomed. Against this background, Norway's insistence on the importance of the requirement of proportionality was very appropriate. The EFTA Court, however, whilst mentioning the ECJ's statement in *Lommers* on the importance of the principle of proportionality, does not observe that this is now the decisive test, rather than narrow interpretation (para 43). In my opinion, this point would have deserved more emphasis given that it is potentially far-reaching for judging the legality of positive action measures under EC/EEA law. The second point that is worth noting concerns the fact that the Norwegian measures involved not only permanent academic positions but also post-doctoral appointments. As these can be seen as training positions, the ECJ ruling in the case *Badeck*²¹ is of particular interest. The EFTA Court observes in that regard that "even for training positions, the law requires a system that is not totally inflexible" (para 50). According to Arndt,²² the EFTA Court in saying so departed from ECJ case law. The author concludes that the Court did not make use of its full potential under the existing EC/EEA law when assessing the Norwegian measure. I would submit that this analysis is not correct. In *Badeck*, the ECJ accepted a national measure that aimed to introduce strict result quotas that were handled independent of the candidates' qualification. In so far, this is indeed the most far-reaching decision on acceptable positive action that has come from the ECJ so far. However, it should be noted that according to the ECJ even a strict result quota of the type at issue in *Badeck* is not necessarily totally inflexible. The Court in this context noted that if there were not enough applications from women it was possible under the contested rules for more than half of the places to be taken by men, and that further the rule applied only to training places for which the State did not

19. See note 9 *supra*.

20. Tobler, "Positive action under the revised second equal treatment directive", in AFFJ & EWLA (Ed.), *L'Egalité entre femmes et homes et la vie professionnelle. Le point sur les développements actuels en Europe* (Paris: Editions Dalloz 2003), pp. 59–92, at 72.

21. See note 11 *supra*.

22. Arndt, "Frauenquoten an der Universität Oslo und die Gleichbehandlungsrichtlinie", (2003) *European Law Reporter*, 138–144, at 142.

have a monopoly (meaning that no male candidate was definitively excluded from training). In other words, the ECJ did not find the *Badeck* measure totally inflexible. It is true that the term “flexibility” may appear puzzling in this context because it concerns a different kind of flexibility than that provided by the traditional saving clauses characterizing the measures in, for instance, *Marschall*²³ and *Lommers*.²⁴ However, *Badeck* simply serves to show that the Court, depending on the circumstances, may be willing to accept different types of flexibility. This appears also to be the interpretation by the EFTA (see also para 41) which therefore should not be understood as a departure by the EFTA Court from ECJ case law. It is my impression that the potential in practice of such a broad understanding is yet to be discovered.

4.4 Redefining non-discrimination in EC/EEA law

Within the existing legal framework as described so far, the Court’s finding of a breach of EEA sex equality law appears to be inevitable, in particular because the Norwegian measure did not provide for an individual assessment of the candidates and because it did not provide for any type of flexibility. This is, of course, not to say that the existing legal framework is satisfactory as such. After all, the grave under-representation of women in academia continues to exist, in the case of Norway even in spite of other positive action measures some of which had been in force for twenty years. Prof. Jutta Limbach, formerly the president of the German Constitutional Court, once called the university “the most retarded of all provinces”.²⁵ This might well lead to a situation where CEDAW requires truly effective measure to be taken. The fact that then such measures might run counter to EC/EEA law is, of course, disturbing. In the case under discussion, the feeling that the existing regional law is unsatisfactory is reflected in the argument by the Norwegian Government that the Court should adopt an alternative approach to the interpretation of the Second Equal Treatment Directive, namely one where positive action is not seen as a derogation from the principle of equal treatment but rather as an intrinsic dimension of the very prohibition of discrimination. In conceptual terms, this relates to the concept of substantive

23. Case C-409/95, *Hellmut Marschall v. Land Nordrhein-Westfalen*, [1997] ECR I-6363.

24. See note 9 *supra*.

25. Limbach, “Die zurückgebliebenste aller Provinzen ist die Universität. Der unaufhaltsame Aufstieg der Frauen in der Wissenschaft und die weibliche Dürre bei den Professoren”, in *Frankfurter Rundschau* of 8 Nov. 1994, p. 11; also Limbach, “Juristinnen im Wissenschaftsbetrieb – Feminisierung der Jurisprudenz?”, in Rust (Ed.), *Juristinnen an den Hochschulen – Frauenrecht in Lehre und Forschung* (Baden-Baden: Nomos 1997), at pp. 15–29, at 16.

equality, according to which equality may require appropriate *different* rather than same treatment, namely where two situations are not comparable. To my knowledge it is for the first time that this argument is made in such a broad²⁶ sense before the ECJ or the EFTA Court. Whilst it is possible to perceive elements reflecting a substantive equality in ECJ sex equality case law, these concern specific and isolated issues only, rather than the general nature of the equality approach under EC law in a very broad sense.²⁷ In the case under discussion and in the specific context of positive action, the EFTA Court tries to make the best of these sparse elements by generally referring to substantive equality in the context of positive action (para 43). However, the limits to that approach are immediately made clear by its reference to the homogeneity objective underlying the EEA Agreement which, according to the Court, obliges it to adhere to the derogation construction mentioned earlier. In that sense, both EC and EEA law are still far away from a truly substantive equality approach. It is against that background that it is argued in academic writing that the Amsterdam Treaty revision brought about a change of paradigm in the area of sex equality.²⁸ Possibly, the EFTA Court is thinking in the same direction when it points to these changes and states that, “[I]nvariably, the interpretation of the Directive will reflect both the evolving legal and societal context in which it operates” (para 56). This seems to be a gentle hint to the ECJ to change its case law on positive action. It is all the more interesting in view of the fact that none of the new provisions (which include important changes in Arts. 2, 3 and 141 EC as well as the new Art. 13 EC)²⁹ is part of EEA law. Nevertheless, at least Article 141(4) EC³⁰ will

26. When certain advocates general (beginning with A.G. Tesouro in his Opinion on Case C-421/92, *Habermann-Beltermann*, [1994] ECR I-1657) advocated substantive equality in earlier cases, this always related to the “derogations” of Arts. 2(2) to (4) of the Directive only, rather than to the meaning of equality as relevant in all areas of EC law (or at least of EC social law).

27. Examples are provided by the Court’s explicit statements on substantive equality in relation to maternity (Case C-136/95, *Caisse nationale d’assurance vieillesse des travailleurs salariés (CNAVTS) v. Evelyne Thibault*, [1998] ECR I-2011) and concerning the criteria used to evaluate qualifications of a candidate for a particular job (*Badeck*, *supra* note 12, and *Abrahamsson*, *supra* note 11); on this latter issue see also *infra* under section 4.5, *Homogeneity and the dialogue of the two Courts*.

28. E.g. Barnard and Hepple, “Substantive Equality”, (2000) *Cambridge Law Journal*, 562–585; Tobler, “Sex Equality Law under the Treaty of Amsterdam”, (2000) *European Journal of Law Reform*, 135–153; Koukoulis-Spiliotopoulos, *From Formal to Substantive Gender Equality. The Proposed Amendment of Directive 76/207. Comments and Suggestions* (Athens/Komotini: Ant. N. Sakkoulas Publishers and Brussels: Bruylant 2001).

29. See Tobler, *op. cit. supra* note 28.

30. Art. 141(4) EC states: “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

eventually be relevant in that framework, albeit only in an indirect manner, namely once Article 2(8) of the revised Directive³¹ is part of EEA law. In so far, the EFTA Court in making its remark about the importance of the changes in EC law appears to act *pro futuro* as far as the legal order which it is called to interpret and apply in its judgments is concerned. This is a new and particularly interesting constellation in the ongoing dialogue between the EFTA Court and the Court of Justice.

4.5. Homogeneity and the dialogue of the two Courts

As was noted earlier, the Court's finding in the case under discussion can be explained by the homogeneity principle: given the existing ECJ case law, the outcome was inevitable. It should nevertheless be added that strictly speaking Article 6 EEA and Article 3(1) SCA require that the provisions of the EEA Agreement, in so far as they are identical in substance to corresponding rules of the EC and ECSC law, "shall, in their implementation and application, be interpreted in conformity with the relevant rulings of the Court of the Justice of the European Communities given *prior to the date of signature of this Agreement*" (emphasis added). In fact, all important ECJ case law on positive action dates from after 2 May 1992.³² If the EFTA Court nevertheless relies on this case law, it is because it takes the additional obligation of paying "due account" to ECJ case law dating from after 2 May 1992 (Article 3(1) SCA) very seriously. As Carl Baudenbacher,³³ now president of the EFTA Court, remarks in one of his articles on this issue, "homogeneity must be aspired to irrespective of whether an ECJ ruling was given before or after 2 May 1992." The same writer³⁴ also observes that the homogeneity provi-

make it easier for the under-represented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers."

31. Art. 2(8) provides: "Member States may maintain or adopt measures within the meaning of Article 141(4) of the Treaty with a view to ensuring full equality in practice between men and women."

32. From the time before that date there are only two statements of a very general nature with no actual cases relating to them. In Case 184/83, *Ulrich Hofmann v. Barmer Ersatzkasse*, [1984] ECR 3047 (para 20), the Court explained that paras. 2 to 4 of Art. 2 "indicate, in various respects, the limits of the principle of equal treatment laid down by the Directive". In Case 312/86, *Commission v. France*, [1988] ECR 6315 (para 15), the Court remarked that "[t]he exception provided for in Article 2(4) is specifically and exclusively designed to allow measures which, although discriminatory in appearance, are in fact intended to eliminate or reduce actual instances of inequality which may exist in the reality of social life".

33. Baudenbacher, "The Contribution of the EFTA Court to the homogenous development of the law in the European Economic Area", (1997) *European Business Law Review*, 239–247 and 254–258, 240.

34. Baudenbacher, "Ist die Rechtsprechung des EFTA-Gerichtshofs für Österreich relevant?", in Baudenbacher, Mayer and Torggler (Eds.), *Ein Leben in Praxis und Wissenschaft*.

sions in the EEA Agreement are based on the assumption that a given legal question is first decided by the ECJ whilst this is in reality not always the case. In fact, in most cases the EFTA Court is faced with questions that have not yet been addressed by the ECJ. As was already noted, in some respects this is also true in the case under discussion. As for the EFTA Court's remarks relating to the Amsterdam changes, it seems that the Court hopes to influence the ECJ in its future interpretation of the relevant law. This is all the more interesting in view of the fact that there is already case law decided on the basis of Article 141(4) EC (if together with Art. 2(4) of the Directive; *Abrahamsson*,³⁵ *Lommers*³⁶). Apparently, the fact that this case law does not really differ from that decided only on the basis of the Directive in its original version, does not seem satisfying in the eyes of the EFTA Court which therefore would like to see a change. The ECJ is under no explicit legal obligation to follow the EFTA Court's case law but Baudenbacher argues that such a duty nevertheless follows from the context of the EEA Agreement.³⁷ It will therefore be interesting to see the ECJ's approach in its future decisions on positive action.

The same also applies in relation to another statement in the EFTA Court's decision which reflects a wish on the side of the EFTA Court to further develop the existing ECJ case law. This concerns the emphasis put by the Court on the importance of female life experience in relation to candidates' qualifications. The Court rightly observes that under the present state of the law (which requires an objective assessment of the candidates and preference of the best), the criteria for assessing the qualifications of candidates are essential. The Court in that context points to the danger that in such an assessment factors are considered that, on empirical experience, tend to place female candidates at a disadvantage in comparison with male candidates (this was, precisely, the concern behind the positive action measure that was at the basis of the Swedish case *Abrahamsson*). Against this background, the Court is certainly right when stating that directing awareness to such factors could re-

Festschrift Walter Barfuss zum 65. Geburtstag (Wien, Manzsche Verlags- und Universitätsbuchhandlung 2002), pp. 9–28, at 14, with further references.

35. See note 10 *supra*.

36. See note 9 *supra*.

37. The ECJ does occasionally refer to the case law of the EFTA Court. An interesting example is provided by the case law on the precautionary principle according to which the Member States – without having to wait until the reality and seriousness of those risks are fully demonstrated – may take protective measures in relation to products if scientific uncertainty persists as regards the existence or extent of real risks to human health. For examples, see Case C-236/01, *Monsanto Agricoltura Italia SpA and Others v. Presidenza del Consiglio dei Ministri and Others*, judgment of 9 Sept. 2003, nyr, para 106; also Case 192/01, *Commission v. Denmark*, judgment of 23 Sept. 2003, nyr, paras. 49 and 50.

duce actual instances of gender inequality. The Court adds (para 57): “Furthermore, giving weight to the possibility that in numerous academic disciplines female life experience may be relevant to the determination of the suitability and capability for, and performance in, higher academic positions, could enhance the equality of men and women, which concern lies at the core of the Directive.” This is a very important statement which, again, is new in this general form. The Court of Justice had taken initial steps in this direction in *Badeck*,³⁸ in relation to the requirement under national law that 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. The ECJ noted that these criteria, which in general favour women, “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” (para 32). With its statement about female life experience as a potentially important factor of qualification, the EFTA Court goes a step further.³⁹ From a practical perspective, the assessment of qualifications is particularly important because it concerns a point in the analysis that is earlier than that of positive action. Given the fact that under the existing law positive action can be an issue only in the case of equal qualifications, given also Norway’s longstanding and rather unsuccessful attempts in the context of positive action, the EFTA Courts is quite right in drawing the attention to that earlier level. Indeed, if (part of) the problem of underrepresentation could be solved on that level, positive action would be much less of an issue. It is therefore to be hoped that the ECJ will follow the direction indicated by the EFTA Court in that regard.

5. Concluding remarks

When the internet news service “*EUobserver*” reported the case under discussion, it gave a heading: “EFTA Court: No to positive discrimination”.⁴⁰ The above comments show that, quite apart from the problematic terminology used by the service, this is far too simple. First, the EFTA Court said “no” to one very specific type of positive action only, namely the earmarking of academic positions for women without an assessment of male candidates and without any element of flexibility. All other measures practised by Nor-

38. See note 11 *supra*; this was later repeated in *Abrahamsson* (para 47).

39. It could even be argued that in doing so the Court in fact accepts a milder version of the arguments brought forward in the context of Art. 2(2) of the Directive.

40. www.euobserver.com/index.phtml?aid=9139 (last accessed on 30 Sept. 2003).

way were uncontested. Second, the outcome is explained by the homogeneity principle which obliges the EFTA Court to respect existing ECJ case law. However, the considerations show that the EFTA Court did its very best to emphasize the positive aspects of that case law, in addition to pointing to a better approach for the future (though the Court may yet have to discover the potential of CEDAW in this context). Possibly, the Court's good will in that regard is also reflected in the fact that *ESA v. Norway*, the first EFTA case on positive action and on sex equality more general, is also the first case where a female judge sat on the bench – though Ms Dóra Guðmundsdóttir acted ad hoc only. On the institutional level, both the EFTA Court and the ECJ are in need of a more balanced approach.⁴¹

Christa Tobler*

41. This is essentially an issue of justice and of democratic representativity of the institution. As is well known, the presence of women on the bench does not automatically guarantee a woman-friendly perspective on the side of the female judge.

* University of Basel; University of Leiden.