# OPINION OF ADVOCATE GENERAL JACOBS
delivered on 15 May 1997 *

1. Does Article 2(1) and (4) of Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions ('the Equal Treatment Directive') [1] preclude a rule of national law which provides that, in official sectors in which fewer women than men are employed in the relevant higher grade post in a career group, women must be given priority where male and female candidates for promotion are equally qualified (in terms of suitability, competence and professional performance) unless reasons specific to a male candidate predominate? That is the question which has been referred to this Court by the Verwaltungsgericht (Administrative Court), Gelsenkirchen.

## The Equal Treatment Directive

2. Article 1(1) of the Equal Treatment Directive provides:

'The purpose of this Directive is to put into effect in the Member States the principle of equal treatment for men and women as regards access to employment, including promotion, and to vocational training and as regards working conditions ... This principle is hereinafter referred to as "the principle of equal treatment".'

3. Article 2, in so far as is relevant, provides:

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

...

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

* Original language: English.

1 — OJ 1976 L 39, p. 40.

4. Article 3(1) provides:

'Application of the principle of equal treatment means that there shall be no discrimination whatsoever on grounds of sex in the conditions, including selection criteria, for access to all jobs or posts, whatever the sector or branch of activity, and to all levels of the occupational hierarchy.'

5. Article 6 provides:

'Member States shall introduce into their national legal systems such measures as are necessary to enable all persons who consider themselves wronged by failure to apply to them the principle of equal treatment within the meaning of Articles 3, 4 and 5 to pursue their claims by judicial process after possible recourse to other competent authorities.'

## The facts and the national legislation

6. The Law on Officials of the *Land* of North Rhine-Westphalia provides:

'Where in the sector of the authority responsible for promotion there are fewer women than men in the particular higher grade post in the career bracket, women are to be given priority for promotion in the event of equal suitability, competence and professional performance, unless reasons specific to another candidate predominate.' [2]

7. According to the observations of the *Land*, the national rule is intended to counteract the structural discrimination which women would otherwise encounter by reason of traditional secondary criteria: a man would tend to be appointed over an equally qualified woman (a) because he is likely to be older and to have had longer service, attributable to fewer career breaks, and (b) for 'reasons of a social nature' — a tendency to award a job to a male earner with dependants rather than to a male earner's wife. The national rule in effect introduces an additional criterion, namely being a woman, which in general must override the traditional secondary criteria.

8. The rule is however subject to the proviso 'unless reasons specific to another candidate predominate'. The precise scope of the proviso is not immediately apparent. That is

2 — The first half of the second sentence of paragraph 25(5) of the Beamtengesetz für das Land Nordrhein-Westfalen in the version set out in the notice of 1 May 1981 (Gesetz- und Verordnungsblatt Nordrhein-Westfalen (GV. NW), p. 234), as last amended by Paragraph 1 of the Siebtes Gesetz zur Änderung dienstrechtlicher Vorschriften of 7 February 1995 (GV. NW, p. 102).

perhaps not accidental: according to the written observations of the *Land*, the legislature, in referring to 'reasons specific to another candidate', deliberately chose an imprecise legal term in order to ensure sufficient flexibility and in particular to leave the administration scope for taking into account all sorts of reasons specific to the other candidate. It appears, however, from the *Land*'s written and oral observations that those reasons at least include the abovementioned traditional secondary criteria of length of service and 'social reasons'. That in itself raises doubts — to which I shall return below — as to whether the proviso might itself be discriminatory and hence unlawful.

9. Mr Marschall, a teacher, applied for a higher position. He was informed that a woman candidate was to be appointed to the position: the two candidates were equally suitable and since fewer women than men were employed in the relevant pay and career bracket the woman candidate had to be promoted by virtue of the legislation set out above. Mr Marschall brought legal proceedings seeking an order that the defendant authority assign the post at issue to him. The Verwaltungsgericht Gelsenkirchen, doubting whether the legislation was compatible with Article 2(1) and (4) of the Equal Treatment Directive, stayed the proceedings and referred the question set out above to the Court for a preliminary ruling.

10. Written observations were submitted by the *Land* of North Rhine-Westphalia, the Austrian, Finnish, French, Norwegian, [3] Spanish, Swedish and United Kingdom Governments and the Commission. The *Land* of North Rhine-Westphalia, the Finnish, Netherlands, Swedish and United Kingdom Governments and the Commission were represented at the hearing.

## The case-law of the Court

11. It is important to note at the outset that, as is apparent from the terms of the question referred, the Court is not being asked — nor would it be appropriate for it to be asked — to rule on the desirability of positive discrimination or affirmative action [4] generally: the national court's question concerns the conformity of the national rule at issue with two specific provisions of the Equal Treatment Directive. Similarly the Court in its recent decision in *Kalanke* [5] relating to a similar national rule was focusing solely — notwithstanding the tenor of some of the

3 — Pursuant to Article 20 of the Statute of the Court of Justice of the EC, as amended in the light of the Declaration by the European Community on the rights for the EFTA States before the EC Court of Justice, annexed to the Final Act adopting the Agreement on the European Economic Area, OJ 1994 L 1, p. 523.

4 — For a note as to this terminology, see the Opinion of Advocate General Tesauro in Case C-450/93 *Kalanke* v *Bremen* [1995] ECR I-3051, in particular paragraph 8. See also the Communication from the Commission to the European Parliament and the Council on the interpretation of the judgment of the Court of Justice of 17 October 1995 in Case C-450/93 *Kalanke* v *Freie Hansestadt Bremen*, COM(96) 88 final, p. 3.

5 — Cited in note 4. The judgment has been the subject of numerous articles and commentaries. Extensive reference to the German writings is made in the observations of the *Land*.

academic reaction to the case [6] — on the compatibility of that rule with those provisions. I shall return to the broader issue of the Court's proper role in matters of policy.

12. Before turning to *Kalanke*, I will briefly consider the two previous cases in which guidance has been given as to the scope of Article 2(4), the crucial provision in the present case.

13. *Hofmann* [7] concerned the compatibility with the Equal Treatment Directive of a national rule restricting to mothers the grant of paid leave after the birth of a child. The Court did not base its ruling on Article 2(4), relying instead on Article 2(3) which provides that the Directive is without prejudice to provisions concerning the protection of women, particularly as regards pregnancy and maternity. Advocate General Darmon, however, considered Article 2(4), and concluded:

'Thus, it is apparent from the scheme of the directive that the exceptions in paragraphs (2) to (4) of Article 2 indicate the precise limits placed on the principle laid down by Article 2(1). That arrangement alone reveals the importance which the Community legislature attached to those exceptions, as an examination of them will confirm.

The exception set out in Article 2(4) is in a category of its own. The provision opens the way for national measures "to promote equal opportunity for men and women, in particular by removing existing inequalities". It merely appears to make an exception to the principle: in aiming to compensate for existing discrimination it seeks to re-establish equality and not to prejudice it. In other words, since it presupposes that there is an inequality which must be removed, the exception must be broadly construed.' [8]

14. The second case, *Commission* v *France*, [9] concerned the compatibility with the Equal Treatment Directive of a derogation from a national equal treatment law. That derogation sought to exempt from the prohibition of discrimination terms of contracts of employment or collective agreements grant-

6 — See, for example, Eva Brems' comment in her case-note in 2 *Columbia Journal of European Law* 172 (1995/96), p. 177: 'Yet instead of concluding that all three models of positive action need to be combined, Tesauro then turns to the text of the directive' and Anne Peters' statement in 'The Many Meanings of Equality and Positive Action in Favour of Women under European Community Law — A Conceptual Analysis', 2 *European Law Journal* 177 (1996), p. 190, that the decision 'illustrates the Court's lacking readiness to acknowledge the tensions arising from the multiplicity of paradigms'.

7 — Case 184/83 *Hofmann* v *Barmer Ersatzkasse* [1984] ECR 3047.

8 — Paragraph 9 of the Opinion.

9 — Case 312/86 [1988] ECR 6315.

ing certain special rights to women. Such special rights included the reduction of working time for women over 59 years of age or engaged in certain occupations such as typing and computer operating, the advancement of retiring age, time off for the adoption of a child, leave for sick children, a day off on the first day of the school term, some hours off on Mothers' Day, payments to help mothers meet the cost of nurseries or childminders, the extension of maternity leave, the granting of additional days of annual leave in respect of each child, and the granting of extra points for pension rights in respect of the second and subsequent children. [10]

15. The Court held that the measures could not be justified under Article 2(4) and ruled:

'The 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.' [11]

16. The most recent case, and the most relevant to the case presently before the Court, in which Article 2(4) was considered by the Court is *Kalanke*. [12] The rule at issue in *Kalanke* provided that women who had the same qualifications as men applying for the same post were to be given priority in sectors where they were under-represented and that there was under-representation if women did not make up at least half of the staff in the relevant pay bracket in the relevant personnel group within a department. [13] There was no exception built into the provision; according to the national court in that case, however, the provision had to be interpreted in accordance with the Grundgesetz (German Basic Law) with the effect that, even if priority for promotion was to be given in principle to women, exceptions had to be made in appropriate cases. [14]

10 — See paragraph 8 of the judgment and the Opinion of Advocate General Sir Gordon Slynn at p. 6327.

11 — Paragraph 15 of the judgment. The phrase 'actual instances of inequality' in the English text of the judgment is perhaps preferable to the English text of Article 2(4) of the Directive, which refers to 'existing inequalities'. It is also closer to the other language versions of Article 2(4). Advocate General Slynn considered that the measures in issue could not be justified under Article 2(4) since the rights concerned had never been enjoyed by men and there were therefore no existing inequalities in favour of men which affected women's opportunities. That view however seems to be based on a somewhat literal reading of the English text of Article 2(4).

12 — Cited in note 4.

13 — See paragraph 3 of the judgment.

14 — Paragraph 9 of the Court's judgment.

17. Mr Kalanke and Ms Glißmann were shortlisted for promotion. It was accepted that they were equally qualified for the post and that women were under-represented in the relevant sector; the national rule accordingly required the post to be offered to Ms Glißmann. Mr Kalanke brought proceedings in which, *inter alia*, he challenged the validity of the national rule as a matter of German law. The Bundesarbeitsgericht (Federal Labour Court), although of the view that the rule was compatible with the domestic provisions relied on by Mr Kalanke, entertained doubts as to its compatibility with the Equal Treatment Directive, and referred to the Court questions on the scope of Article 2(1) and (4).

18. The Court's starting point was the proposition that a national rule providing that, where men and women who were candidates for the same promotion were equally qualified, women were automatically to be given priority in sectors where they were under-represented, involved discrimination on grounds of sex. [15] Since the purpose of the Equal Treatment Directive was to put into effect in the Member States the principle of equal treatment for men and women as regards, *inter alia*, access to employment, including promotion, and since Article 2(1) stated that the principle of equal treatment meant that 'there shall be no discrimination whatsoever on grounds of sex either directly or indirectly', there was a clear prima facie infringement of that principle.

19. The Court then considered whether such a rule was permissible under Article 2(4). Echoing the judgment in *Commission* v *France*, [16] the Court described that provision as specifically and exclusively designed to allow measures which, although discriminatory in appearance, were in fact intended to eliminate or reduce actual instances of inequality which may exist in the reality of social life. It thus permitted national measures relating to access to employment, including promotion, which gave a specific advantage to women with a view to improving their ability to compete on the labour market and to pursue a career on an equal footing with men. [17]

20. The Court next endorsed the statement, made in a Recommendation of the Council on the promotion of positive action for women, [18] that 'existing legal provisions on equal treatment, which are designed to afford rights to individuals, are inadequate for the elimination of all existing inequalities unless parallel action is taken by governments, both sides of industry and other bodies concerned, to counteract the prejudicial effects on women in employment which arise from social attitudes, behaviour and structures'. [19] The Court continued by stating that never-

15 — Paragraph 16 of the judgment.

16 — Cited in note 9.

17 — Paragraphs 18 and 19.

18 — Council Recommendation 84/635/EEC of 13 December 1984, OJ 1984 L 331, p. 34.

19 — Third recital in the preamble.

theless, as a derogation from an individual right laid down in the Directive, Article 2(4) must be interpreted strictly. [20]

21. The Court concluded that national rules which guaranteed women absolute and unconditional priority for appointment or promotion went beyond promoting equal opportunities and overstepped the limits of the exception in Article 2(4) of the Directive. [21] It added that, in so far as it sought to achieve equal representation of men and women in all grades and levels within a department, such a system substituted for equality of opportunity as envisaged by Article 2(4) the result which was only to be arrived at by providing such equality of opportunity. [22] The answer to the national court's questions was accordingly that the Directive precluded national rules such as that at issue which, where candidates of different sexes shortlisted for promotion were equally qualified, automatically gave priority to women in sectors where they were under-represented as defined by that rule. [23]

20 — Paragraphs 20 and 21.

21 — Paragraph 22.

22 — Paragraph 23.

23 — Paragraph 24 and operative part. For the relevant definition of 'under-representation', see paragraph 16 above.

22. Having found the national rule to be prohibited by the Directive, the Court had no need to consider the question of proportionality; the criticisms directed at the Court by some commentators [24] on that ground cannot, therefore, be regarded as well-founded. Other commentators wrongly assume that the Court found the rule disproportionate and for that reason unlawful. [25]

**Application of the ruling in *Kalanke* to the present case**

23. The Court's starting point in *Kalanke*, it will be recalled, was that a national rule providing that, where men and women who were candidates for the same promotion were equally qualified, women were automatically to be given priority in sectors where they were under-represented involved discrimination on grounds of sex and was hence in principle contrary to the Directive. To my mind, it is clear that the national rule at issue in the present case is similarly discriminatory and hence contrary to the Directive unless it can be regarded as permitted by

24 — See, for example, Louis Charpentier, 'L'arrêt *Kalanke*, expression du discours dualiste de l'égalité', 32 *Revue trimestrielle de droit européen* 281 (1996), p. 288; Anne Peters, 'The Many Meanings of Equality', cited in note 6, pp. 192 to 193.

25 — See, for example, Jean-Louis Clergerie's case-note in [1996] *Recueil Dalloz Sirey (Jurisprudence)* 221, p. 223; Eva Brems' case-note, cited in note 6, pp. 174 to 175; Linda Senden, 'Positive Action in the EU Put to the Test. A Negative Score?', 3 *Maastricht Journal of European and Comparative Law* 146 (1996), pp. 151 to 152.

virtue of Article 2(4). Although it is true that the national rule at issue in the present case is not expressed in terms of automatic promotion of a woman in the circumstances in which it applies, the crux of that rule is none the less that, otherwise than in exceptional cases, a woman is to be promoted because she is a woman, and that is clearly prima facie contrary to the principle of equal treatment laid down by the Directive. I would refer in particular to Article 3(1), [26] which provides that application of that principle means that there shall be no discrimination whatsoever on grounds of sex in the conditions, *including selection criteria*, for, *inter alia*, promotion.

24. The essential question is whether the national rule at issue in the present case falls within the scope of Article 2(4) and is hence compatible with the Directive. The national court was prompted to make a reference to the Court in this case because of the difference between the national rule at issue in the main proceedings and that which had been in issue in *Kalanke*. It points in particular to the Court's conclusion in *Kalanke* that 'national rules which guarantee women *absolute and unconditional* priority for appointment or promotion' were outside the scope of Article 2(4), [27] and raises the question whether the effect of the proviso to the national rule before it is to make the rule compatible with the Directive.

25. The French and United Kingdom Governments submit that the national rule, notwithstanding the proviso, is contrary to the Directive. The principal argument of those Governments is that, since the rule seeks to impose equality of representation rather than to promote equality of opportunity, the Court's reasoning in *Kalanke* applies.

26. The *Land* of North Rhine-Westphalia, the Austrian, Finnish, Norwegian, Spanish and Swedish Governments and the Commission [28] take the opposite view. They submit in effect that the flexibility of the national rule in the present case — namely the existence of the proviso — is sufficient ground to distinguish the ruling in *Kalanke*: there is in the present case no guarantee of absolute and unconditional priority. [29]

27. There are in my view a number of flaws in that argument.

26 — Set out in paragraph 4.

27 — Paragraph 22 of the judgment; emphasis added.

28 — See also the Communication, cited in note 4, p. 9.

29 — It may be noted that the Federal Labour Court which requested the preliminary ruling in *Kalanke* was, when adjudicating on the case in the light of the Court's ruling, also of the view that the critical feature of the national rule before it was the absence of a specific proviso such as that at issue in this case: see Sacha Prechal's note on *Kalanke*, 33 *Common Market Law Review* 1245 (1996), p. 1256, and Linda Senden, 'Positive Action in the EU Put to the Test', cited in note 25, p. 157.

28. First, the national rule at issue in *Kalanke* was not in fact absolute and unconditional: the Court noted the national court's point that the rule had to be interpreted 'with the effect that, even if priority for promotion is to be given in principle to women, exceptions must be made in appropriate cases'. [30] That interpretation was prompted by a concern that the rule would otherwise be incompatible with Article 3(2) and 3(3) of the German Basic Law, which provided at the material time respectively that men and women should have equal rights and that discrimination on grounds of sex was prohibited. [31] Since the Court in *Kalanke* recognized that the rule in issue in that case was subject to exceptions, the reference to 'automatic' priority should be read in that light.

29. Moreover, the reasoning in *Kalanke* suggests that the present rule is unlawful. In paragraph 23 of the judgment, the Court stated that the national rule, 'in so far as it seeks to achieve equal representation of men and women ..., 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'. That phrase has been criticized by some commentators as unclear. [32] In my view, however, its meaning is clear. Article 2(4) by its terms concerns measures 'to promote equal opportunity'. In the words of Advocate General Tesauro in his Opinion in *Kalanke*:

> 'To my mind, giving equal opportunities can only mean putting people in a position to attain equal results and hence restoring conditions of equality as between members of the two sexes as regards starting points. ... It seems to me all too obvious that the national legislation at issue in this case is not designed to guarantee equality as regards starting points. The very fact that two candidates of different sex have equivalent qualifications implies in fact by definition that the two candidates have had and continue to have equal opportunities: they are therefore on an equal footing at the starting block. By giving priority to women, the national legislation at issue therefore aims to achieve equality as regards the result or, better, fair job distribution simply in numerical terms between men and women. This does not seem to me to fall within either the scope or the rationale of Article 2(4) of the directive.' [33]

30 — Paragraph 9 of the judgment.

31 — See further Linda Senden, 'Positive Action in the EU Put to the Test', cited in note 25, p. 149. A new 'State aims' provision has since been added to Article 3(2) to the effect that the State 'promotes the enforcement of factual equality of men and women and aims at reducing existing disadvantages.' See further Gilbert H. Gornig and Sven Reckewerth, 'The Revision of the German Basic Law. Current Perspectives and Problems in German Constitutional Law' [1997] *Public Law* 137, pp. 147 to 149.

32 — See, for example, Georges Friden's case-note in [1995] *Annales du droit luxembourgeois* 483, pp. 488 to 490; Olivier De Schutter and Bernadette Renauld, 'Egalité de traitement — L'action affirmative devant la Cour de Justice des Communautés Européennes à propos de l'arrêt *Kalanke* du 17 octobre 1995' [1996] *Journaux des tribunaux du travail* 125, p. 126.

33 — Paragraph 13.

30. Admittedly, the fact that two candidates have equivalent qualifications does not necessarily mean that they previously had equal opportunities, since one of the two might quite simply have acquired equivalent qualifications in the face of more difficult circumstances than the other or pursuant to a training programme designed to help overcome such circumstances. (It appears in fact to be assumed by the *Land* that, where a man and a woman are equally qualified for promotion, the woman will frequently be younger or have shorter service. It may be thought that in such circumstances the woman would thereby have shown herself more capable than her competitor and be the natural choice.) However, that does not seem to me to be relevant to the issue before the Court: since the national rule applies only where candidates are equally qualified, the fact remains that, whenever it is applied, there will be equally qualified candidates who, in the absence of a discriminatory selection procedure, have by definition an equal opportunity to be promoted.

31. In his Opinion, Advocate General Tesauro further developed his explanation of the distinction between measures permitted under Article 2(4), namely those 'designed to remove the obstacles preventing women from pursuing the same results on equal terms', and measures not so permitted, namely those designed 'to confer the results on them directly, or, in any event, to grant them priority in attaining those results *simply because they are women*'. [34] It is clear to me that that is the distinction which lies behind the proposition of the Court in paragraph 23 of its judgment in *Kalanke*. Whether it is expressed in terms of removing obstacles rather than imposing results, or ensuring equality at starting points rather than at points of arrival, or guaranteeing equality of opportunity rather than equality of result, the distinction is conceptually clear, and it will in my view normally be apparent on which side of the line a given measure falls.

32. It seems to me therefore that the effect of the ruling in *Kalanke* is that any rule which goes beyond the promotion of equal opportunities by seeking to impose instead the desired result of equal representation is similarly outside the scope of Article 2(4) of the Directive and hence contrary to the principle of equal treatment as enshrined in Article 2(1) and, in the present state of Community law, unlawful. That approach is to my mind entirely consistent with the scheme of the Directive. It is axiomatic that there is no equal opportunity for men and women in an individual case if, where all else is equal, one is appointed or promoted in preference to the other solely by virtue of his or her sex. That the Directive is concerned with the protection of individual rights is clear from

34 — Paragraph 22.

Article 6, [35] which requires Member States to ensure proper remedies for 'all persons who consider themselves wronged by failure to apply to them the principle of equal treatment within the meaning of Articles 3, 4 and 5'. If the national rule at issue in *Kalanke* had been held to be lawful, men in sectors to which it applied would always be denied equal treatment and equal opportunity in such circumstances. Whatever the perceived scope of Article 2(4), such a result can hardly be regarded as consistent with the principle of equal treatment enshrined in Article 2(1) or the promotion of equal opportunity required of measures under Article 2(4).

33. In my view, the proviso to the national rule at issue in the present case does not affect the conclusion that that rule is unlawful for the following reasons.

34. First, as the national court and the United Kingdom Government point out, if the proviso operates it merely displaces the rule giving priority to women in a particular case: it does not alter the discriminatory nature of the rule in general.

35. Furthermore, as the French Government points out, the scope of the proviso at issue in the present case is (and was apparently [36] intended to be) unclear. It is settled law that the principles of legal certainty and the protection of individuals require, in areas covered by Community law, that the Member States' legal rules should be worded unequivocally so as to give the persons concerned a clear and precise understanding of their rights and obligations and enable national courts to ensure that those rights and obligations are observed. [37]

36. In any event, even if the existence of a proviso might in principle render such a rule compatible with the Directive, it could do so only if the proviso itself were unobjectionable. That does not appear to be the case here. In addition to the points made in the preceding paragraphs, there is a further issue relating to the operation of the proviso. The *Land* of North Rhine-Westphalia has indicated that the national rule at issue in this case is intended to displace the application in selection procedures of 'traditional secondary criteria' which it regards — no doubt correctly [38] — as discriminatory. The proviso however appears to envisage that precisely those criteria may none the less be used where it is invoked, with the result that the post will be offered to the male candidate on the basis of criteria which it is accepted are

35 — Set out in paragraph 5 above.

36 — See paragraph 8 above.

37 — See, for example, Case 257/86 *Commission* v *Italy* [1988] ECR 3249, paragraph 12 of the judgment.

38 — I return to this point in paragraph 40.

discriminatory. [39] If an absolute rule giving priority to women on the ground of their sex is unlawful, then a conditional rule which either gives priority to women on the ground of their sex or gives priority to men on the basis of admittedly discriminatory criteria must *a fortiori* be unlawful.

37. I accordingly conclude that, notwithstanding the proviso, the national rule at issue in the present case is, in the light of the judgment of the Court in *Kalanke*, unlawful. I would add as a general point that in my view any temptation to distinguish *Kalanke* on narrow technical grounds should be resisted. As explained above, the reasons which led the Court to reach its decision in that case are clear and apply equally to the present case. Straining to differentiate similar cases on the grounds of nuances in the contested legislation is likely to lead to confusion as to the law and a proliferation of litigation with arbitrary results.

38. It may be objected [40] that the effect of invalidating the national rule would be a return to the criteria which it was designed to displace and which are acknowledged by the *Land* of North Rhine-Westphalia to be discriminatory, and that that could hardly be said to 'put into effect ... the principle of equal treatment for men and women as regards access to employment'. [41]

39. It does not however follow from the fact that the national rules at issue in the present case and in *Kalanke* are contrary to Community law that it is lawful for a public authority to apply the so-called traditional secondary selection criteria which are allegedly applied in the absence of such rules. [42] It seems clear in fact that such criteria are both applied and regarded by some as acceptable: Mr Kalanke, for example, reportedly argued before the national courts that, even on the assumption that Ms Glißmann was equally qualified, he should have been promoted on social grounds (namely, that he was married, his wife did not work and he had two children). [43] It seems equally clear that the application of such criteria in a selection procedure is itself a violation of the Equal

39 — It was reportedly pointed out by the Federal Labour Court which requested the preliminary ruling in *Kalanke* that the legislature in Bremen, which enacted the rule at issue in that case, deliberately omitted such a broadly formulated exception as that at issue in this case, since it considered that there was too great a risk that application of such an exception would lead to indirect discrimination: see Sacha Prechal's case-note, cited in note 29, p. 1257. Moreover in the present case it was stated by the *Land* at the hearing that the clause, referred to as a sword of Damocles, was rarely invoked because of fears that its application would lead to legal action.

40 — See, for example, Dr Dagmar Schiek, 'Positive Action in Community Law', 25 *Industrial Law Journal* 239 (1996), p. 241.

41 — Article 1(1) of the Directive.

42 — See paragraph 7 above.

43 — See Dr Dagmar Schiek, 'Positive Action in Community Law', cited in note 40, p. 240; Linda Senden, 'Positive Action in the EU Put to the Test', cited in note 25, pp. 147 to 148, and Sacha Prechal's case-note, cited in note 29, p. 1246.

Treatment Directive: Article 2(1), it will be recalled, provides that 'there shall be no discrimination whatsoever on grounds of sex either directly or indirectly by reference in particular to marital or family status', and Article 3(1) explicitly prohibits such discrimination 'in the conditions, including selection criteria, for access to all jobs or posts'. A Member State which permits the application of such discriminatory criteria is in breach of its obligations under the Equal Treatment Directive and under Articles 5 and 189 of the Treaty, as is a Member State which has failed to ensure that all persons who consider themselves wronged by discrimination are able 'to pursue their claims by judicial process' in accordance with Article 6 of the Directive. [44]

**The scope of Article 2(4)**

40. I have for the reasons given above reached the conclusion that Article 2(1) and (4) of the Equal Treatment Directive precludes a rule of national law which provides that, in official sectors in which fewer women than men are employed in the relevant higher grade post in a career group, women must, unless reasons specific to a male candidate predominate, be given priority where male and female candidates for promotion are equally qualified (in terms of suitability, competence and professional performance).

41. It may be useful to add some observations on the types of measure which in my view do and do not fall within Article 2(4), which, it will be recalled, provides that the Directive is to be 'without prejudice to measures to promote equal opportunity for men and women, in particular by removing existing inequalities which affect women's opportunities in the areas referred to in Article 1(1)', namely access to employment, including promotion, vocational training and working conditions.

42. It is clear from the wording of Article 2(4) and its interpretation by the Court that it concerns the promotion of equal opportunity and not the imposition of equal representation and that Member States retain the power to adopt apparently discriminatory measures designed to redress specific obstacles or disadvantages faced by women in the labour market with a view to promoting equal opportunity for men and women and hence better representation of women in the workplace. The principle of proportionality will, however, require any such measures to be both suitable and necessary for the achievement of its objective.

43. A gender-specific measure will not to my mind be proportionate to the aims of remedying specific inequalities faced by women in practice and promoting equal opportunity if the same result could be achieved by a

44 — See Case 14/83 *Von Colson and Kamann* v *Land Nordrhein-Westfalen* [1984] ECR 1891, paragraph 18 of the judgment. See also Case C-180/95 *Draehmpaehl* v *Urania Immobilienservice*, judgment of 22 April 1997, paragraphs 24 to 27.

gender-neutral provision. [45] As an example of such a provision, Community institutions when recruiting commonly provide for the extension of the age-limit which would otherwise apply for the benefit of 'candidates who for at least one year have not pursued an occupational activity in order to look after a young child living in their home'. [46]

44. Even though couched in gender-neutral terms, such a provision is likely in practice to work to the benefit of significantly more women than men. Notwithstanding this indirectly discriminatory effect, such a provision will to my mind be lawful by virtue of Article 2(4).

45. There may, however, be measures designed to remedy specific disadvantages faced by women in the labour market which will better achieve their aims if expressly framed so as to benefit women alone. Such measures would to my mind equally fall within the scope of Article 2(4). That approach reflects the statement of the Court in *Kalanke* that Article 2(4) 'permits national measures relating to access to employment, including promotion, which give a specific advantage to women with a view to improving their ability to compete on the labour market and to pursue a career on an equal footing with men'. [47] Permissible directly discriminatory measures under Article 2(4) 'must therefore be directed at removing the obstacles preventing women from having equal opportunities by tackling, for example, educational guidance and vocational training'. [48]

## The question of policy

46. In endorsing an interpretation of Article 2(4) which excludes measures giving direct preference to the promotion or appointment of women in sectors where they are underrepresented, I am not expressing any view as to the desirability of such measures as a matter of principle. It is unquestionable that — as submitted by the United Kingdom in *Kalanke* [49] — unequal representation of women is the result of a cocktail of factors, and it may be that such preferential treatment of women is a method of improving one of the ingredients (although it may be

45 — Indeed restricting to women the benefit of measures concerning child care in particular may even be seen as running counter to the goal of treating men and women as equal participants in the workforce since it reinforces the assumption that women should have primary responsibility for child care: see Ursula A. O'Hare, 'Positive Action Before the European Court of Justice: Case C-450/93 *Kalanke* v *Freie Hansestadt Bremen*' [1996] *Web Journal of Current Legal Issues*, and Sacha Prechal's case-note, cited in note 29, p. 1253.

46 — See, for example, Notice of Open Competition CJ/LA/18, OJ 1996 C 268 A, p. 8, paragraph 3(c) (recruitment of lawyer-linguists by the Court of Justice); Notice of Open Competition CC/A/6/96, OJ 1997 C 84 A, p. 5, paragraph 1(b) (recruitment of statisticians by the Court of Auditors).

47 — Paragraph 19 of the judgment.

48 — Paragraph 19 of the Opinion of Advocate General Tesauro in *Kalanke*.

49 — Quoted by Ursula A. O'Hare, 'Positive Action Before the European Court of Justice', cited in note 45.

noted that the rules at issue in *Kalanke* and in this case appear to have had remarkably little impact, [50] which is perhaps hardly surprising given that the grounds for derogation appear to be substantially the same as the grounds which would be applied in the absence of the rule purportedly derogated from). Whether or not such a policy is desirable or appropriate is however a matter for the legislature, not for this Court, [51] whose role in this case, as in *Kalanke*, is to interpret the existing legislation. Any temptation for the Court to tailor the result to policy, however attractive it may seem, should be resisted. As was stated by an industrial tribunal in the United Kingdom in the analogous context of the lawfulness of all-women shortlists for the selection of Labour Party candidates in certain constituencies:

'It may well be that many would regard [redressing the imbalance between the sexes in the House of Commons] as a laudable motive but that is of no relevance to the issue of whether the arrangement as applied to the facts before us results in direct unlawful sex discrimination against the two male applicants.' [52]

47. It is clear to my mind that the decision in *Kalanke* — notwithstanding much misconceived criticism [53] — was in accordance with the text of the Directive. Admittedly, the legislation was drafted two decades ago, and social developments since then may mean that a provision whose intention and scope were apposite when adopted is now in need of review. Revision of Community legislation is however also a matter for the legislature and not for this Court. It is interesting to note that there are currently two parallel initiatives seeking in different ways to provide for certain forms of affirmative action.

48. In 1996, prompted by the judgment in *Kalanke*, the Commission proposed an amendment to Article 2(4). [54] That provision, as amended by the proposal, would read as follows:

'This Directive shall be without prejudice to measures to promote equal opportunity for men and women, in particular by removing existing inequalities which affect the opportunities of the under-represented sex in the areas referred to in Article 1(1). Possible measures shall include the giving of preference, as regards access to employment or promotion, to a member of the under-

50 — Observations of the *Land* in this case; Dr Dagmar Schiek, 'Positive Action', cited in note 40, p. 244. See generally Josephine Shaw, 'Positive Action for Women in Germany: The Use of Legally Binding Quota Systems' in Bob Hepple and Erika Szyszczak, eds, *Discrimination: The Limits of Law* (London and New York: Mansell Publishing Ltd, 1992), p. 386.

51 — Notwithstanding the view to the contrary expressed by some commentators: see, for example, Eva Brems' case-note, cited in note 6, p. 178.

52 — *Jepson* v *The Labour Party* [1996] Industrial Relations Law Reports 116, at p. 117.

53 — See, for example, Titia Loenen and Albertine Veldman, 'Preferential Treatment in the Labour Market after *Kalanke*: Some Comparative Perspectives', 12 *International Journal of Comparative Labour Law and Industrial Relations* 43 (1996), p. 43: 'The fundamental attack on preferential treatment which the decision in *Kalanke* seems to imply ...'.

54 — Proposal for a Council Directive amending 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, OJ 1996 C 179, p. 8.

-represented sex, provided that such measures do not preclude the assessment of the particular circumstances of an individual case.' [55]

49. The Commission considers that its proposed amendment does not alter the scope of the Equal Treatment Directive but is merely 'interpretative', 'declaratory' and 'clarifying', on the basis of its view that the ruling in *Kalanke* is limited to affirmative action measures of the precise type at issue in that case. [56] For the reasons I have given, I do not accept that view; to my mind, the proposed amendment is accordingly more innovatory than the Commission suggests. It is moreover lacking in clarity. [57] If it is considered desirable to establish the principle that certain types of affirmative action are to be lawful, then it is essential that the precise scope of that principle should be unequivocally defined (although it may be appropriate, given the disparate views on policy and changing economic and social circumstances, to leave Member States some margin of discretion as to whether and to what extent they make use of any such derogation).

50. The second initiative is a proposal to amend the Treaty which is being made in the context of the Intergovernmental Conference. It appears that the proposed amendment would make it clear that it would not be contrary to the principle of equal treatment and equal opportunity for a Member State to provide for certain forms of affirmative action. The precise terms and political fate of that proposal remain to be seen. It seems likely that the proposed amendment is intended to complement Article 6(3) of Protocol 14 to the Treaty, on social policy (the 'social chapter'). That provision states that Article 6 (which, in almost identical terms to Article 119 of the Treaty, enshrines the principle of equal pay) 'shall not prevent any Member State from maintaining or adopting measures providing for specific advantages in order to make it easier for women to pursue a vocational activity or to prevent or compensate for disadvantages in their professional careers.' Since it is restricted to equal pay, Article 6(3), although briefly referred to by the Commission, is of no assistance in the present case.

## The relevance of international instruments

51. Reference is made in several of the written observations submitted to the Court [58] to international conventions which, it is argued, support the view that Article 2(4) of the Equal Treatment Directive should be interpreted sufficiently widely to encompass

55 — Article 1 of the proposed amending directive.

56 — See the Explanatory Memorandum, COM(96) 93 final, pp. 3, 4 and 7.

57 — See further the Economic and Social Committee's well-articulated critique of the proposed amendment in its Opinion of 25 September 1996, OJ 1997 C 30, p. 57, in particular paragraphs 3.1 and 3.2.

58 — See also the Commission's Communication cited in note 4, pp. 7 to 8.

within its field of permitted action preferential measures such as the national rule at issue in this case.

52. The *Land* of North Rhine-Westphalia and the Commission refer to the International Labour Organization Convention on discrimination, [59] ratified by all the Member States with the exception of Ireland, Luxembourg and the United Kingdom. Article 5 provides:

'1. Special measures of protection or assistance provided for in other Conventions or Recommendations adopted by the International Labour Conference shall not be deemed to be discrimination.

2. Any Member may, after consultation with representative employers' and workers' organisations, where such exist, determine that other special measures designed to meet the particular requirements of persons who, for reasons such as sex, age, disablement, family responsibilities or social or cultural status, are generally recognized to require special protection or assistance, shall not be deemed to be discrimination.'

53. The *Land* of North Rhine-Westphalia, the Austrian, Finnish and Norwegian Governments and the Commission refer to the United Nations Convention on the Elimination of All Forms of Discrimination Against Women, ratified by all Member States of the European Community, [60] and in particular Article 4(1) which provides:

'Adoption by States Parties of temporary special measures aimed at accelerating *de facto* equality between men and women shall not be considered discrimination as defined in the present Convention, but shall in no way entail as a consequence the maintenance of unequal or separate standards; these measures shall be discontinued when the objectives of equality of opportunity and treatment have been achieved.'

54. Both Conventions permit 'special measures', even if prima facie discriminatory, by way of derogation from the basic prohibition of discrimination which they contain. The parties relying on the Conventions argue, either expressly or by implication, that the national rule at issue is not contrary to those Conventions and that Article 2(4) of the Directive should be interpreted so as to be consistent with the Conventions.

59 — Convention No. 111 of 25 June 1958 concerning discrimination in respect of employment and occupation, *United Nations Treaty Series*, Vol. 362, p. 31.

60 — General Assembly Resolution 34/180 adopted on 18 December 1979.

55. The provisions of the Conventions which have been invoked are undeniably vague: it is not at all clear that they encompass preferential action of the type imposed by the national rule at issue in this case. To that extent, therefore, the Conventions are unhelpful as an aid to interpreting the more specific provisions of Article 2(4).

56. The terms of the Conventions at issue are moreover clearly permissive rather than mandatory. The interpretation of Article 2(4) of the Directive which I am advocating does not therefore give rise to a direct conflict with the Conventions, such as would be the case if, for example, they explicitly required States to take affirmative action of the type at issue in this case. It is therefore unnecessary to consider what the position would be if there were a conflict. That would raise a number of difficult issues concerning the direct effect of the Conventions and the scope of Article 234 of the EC Treaty. [61]

57. On the more general question, however, of the scope of Article 2(4) of the Directive, the types of measure which in my view are permitted by Article 2(4) are in any event the types of measure which the Conventions seem intended to facilitate.

## Conclusion

58. Accordingly, the question referred by the Verwaltungsgericht, Gelsenkirchen, should in my opinion be answered as follows:

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 precludes a rule of national law which provides that, in official sectors in which fewer women than men are employed in the relevant higher grade post in a career group, women must, unless reasons specific to a male candidate predominate, be given priority where male and female candidates for promotion are equally qualified (in terms of suitability, competence and professional performance).

61 — See most recently Case C-124/95 *The Queen* v *HM Treasury and The Bank of England*, ex parte *Centro-Com*, judgment of 14 January 1997, paragraphs 55 to 60.