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COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND THE COUNCIL

on the interpretation of the judgment of the Court of Justice on 17 October 1995 in Case C-450/93, Kalanke v Freie Hansestadt Bremen

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1. Introduction

On 17 October 1995, the Court of Justice of the European Communities delivered its judgment in Case C-450/93, (Eckhard Kalanke v Freie Hansestadt Bremen)[1], which has given rise to a great deal of controversy throughout Europe. This controversy was caused by the uncertainty created by the judgment with regard to the legitimacy of quotas and other forms of positive action aimed at increasing the numbers of women in certain sectors or levels of employment.

The Kalanke judgment is of great significance because it comes at a time when it is increasingly recognized that the anti-discrimination laws which were adopted twenty years ago are not now sufficient to achieve equality for women as regards their access to employment and promotion. Despite some real progress made during the past decade in this field, the rate of unemployment amongst women is higher than amongst men in most parts of the Community. Women still account for the majority of the long-term unemployed, they often have low-skilled, poorly paid and insecure jobs and there are still gaps in pay between men and women. There are also still not enough women to whom decision-making posts and a full share in political and economic life are open.

Equal treatment between men and women at work constitutes a fundamental right, as has been acknowledged by the Court of Justice in its judgment of 15 June 1978 in Case 149/77, Defrenne III[2]. In particular, as regards the existence of a general principle prohibiting discrimination based on sex in respect of employment and working conditions, the Court stated the case that the elimination of such discrimination formed part of the fundamental rights which constitute one of the principles of Community law and that the Court had a duty to ensure its observance. The principle that fundamental rights should be respected has since been enshrined in the Treaty on European Union (Article F(2)).

The Commission considers that, at a time when equality of opportunity for women has been recognized at the highest level (Essen, Cannes and Madrid European Councils) to be a task of paramount importance - together with the fight against unemployment - it is crucial to reaffirm the need to use, where appropriate, "positive action" measures to promote equal opportunities for women and men, in particular by removing existing factors of inequality which affect women's opportunities in the employment area.

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(1) [1995] ECR I-3051.
(2) [1978] ECR 1365.

There is no official definition of "positive action" at Community level. There is, however, widespread agreement across the Community that the concept of positive action embraces all measures which aim to counter the effects of past discrimination, to eliminate existing discrimination and to promote equality of opportunity between women and men, particularly in relation to types or levels of jobs where members of one sex are significantly under-represented. It is increasingly recognized to be not only a question of equity but also of efficiency in the management of human resources.

Positive action can take different forms: a first model consists of measures intended to remedy the disadvantageous situations which are characteristic of women's presence in the labour market. The objective is to eliminate the causes underlying the lesser employment or career opportunities still affecting women's work by intervening, in particular, at the level of professional orientation and vocational training. A second model of positive action can be traced in actions favouring the attainment of a certain balance between family and work responsibilities and a more efficient distribution of these responsibilities between the two sexes. In this case, priority is given to measures concerning the organization of working time, the development of childcare infrastructure, and the reintegration of workers in the labour market after a career-break.

A third model is based on the idea that positive action should aim to make up for past discrimination. As a consequence, preferential treatment is prescribed in favour of certain categories of persons. This may take the form of quota systems or targets. Quotas may be more or less rigid. Rigid quotas are deemed to be those determining a certain threshold to be reached without taking into account the qualifications and merits of persons concerned, or those fixing minimum requirements to be fulfilled without any possibility of having regard to the particular circumstances of a case. Less rigid or flexible quotas are, on the contrary, those establishing preferential treatment in favour of a certain category provided that qualifications are of equal value in relation to the job to be done and that exceptional circumstances may be taken into account.

2. The Community's approach to "positive action"

The Commission has always adopted a very favourable attitude towards positive action. In 1984, it put forward a proposal for a recommendation on the promotion of positive action[3], which was adopted by the Council.

The recommendation invites Member States to adopt a positive action policy designed to eliminate existing inequalities affecting women in working life and to promote a better balance between the sexes in employment in order to eliminate or counteract the prejudicial effects on women in employment or seeking employment which arise from existing attitudes, behaviour and structures based on the idea of a traditional division of roles in society between men and women. Member States are also invited to encourage the participation of women in various occupations in those sectors of working life where they are at present under-represented, particularly in the sectors of the future, and at higher levels of responsibility in order to achieve better use of all human resources. The recommendation also advises that Member States should take steps to ensure that positive action includes, inter alia,

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[3] Council Recommendation 84/635/EEC of 13 December 1984 on the promotion of positive action for women (OJ No L 331, 19.12.1984, p. 34).

as far as possible, actions encouraging women candidates as well as the recruitment and promotion of women in sectors and professions and at levels where they are under-represented, particularly as regards positions of responsibility.

It is also important to recall that in the Third Medium-Term Action Programme on Equal Opportunities (1991-1995), which has been approved by the Council Resolution of 21 May 1991[4], the Commission underlined the need for positive action and organized a number of programmes specifically aimed at promoting women's integration into the labour market and the improvement in the quality of their work. In the Fourth Action Programme (1996-2000) approved by Council Decision 95/593/EC[5], sex desegregation of the labour market is one of the objectives to be pursued, inter alia, through positive action.

Within the Commission itself, a second positive action programme for female staff (1992-1996), has been adopted, in order to redress the balance as regards the number of women in the categories and positions where they are under-represented and to promote their career development and to provide flanking measures making it possible for civil servants to reconcile professional and family commitments. Several operations are envisaged as part of a coherent strategy to eliminate de facto inequalities. In particular, services are encouraged to give priority to women candidates in the event of equal qualifications and merits for recruitment, promotion and appointment to managerial posts, as long as women are under-represented in a given grade or category. To this end, targets are set and implementation plans are established covering a qualitative and quantitative analysis of the evolving situation, a set of consistent measures designed to achieve a better balance between male and female staff and periodical evaluations.

3. The facts of Kalanke

In the Kalanke case, the issue was whether a German law on positive action was compatible with Directive 76/207/EEC[6] or whether it exceeded the exception for positive action laid down in Article 2(4) thereof[7]. The law of the Land of Bremen on equal opportunities in the public sector provides that, as regards both recruitment and promotion in sectors where women are under-represented, namely if they do not represent 50% of the personnel in the different grades of the category concerned, a woman having the same qualifications as a male applicant must be given preference over him.

Mr Kalanke, having failed to gain a particular promotion as a result of this rule, challenged its validity before the German courts. The national court found that the promotion was legal under German law including constitutional law, but the question of its conformity with Directive 76/207/EEC was referred to the Court of Justice.

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(4) OJ No C 142, 31.5.1991, p. 1.

(5) OJ No L 335, 30.12.1995, p. 37.

(6) Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions (OJ No L 39, 14.2.1976, p. 40).

(7) Article 2(4) reads 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 women's opportunities in the areas referred to in Article 1(1)."

The relevant provisions of the Bremen Law on Equal Treatment for Men and Women in the Public Service read as follows:

"Appointment, assignment to an official post and promotion.

> In the case of an appointment (including establishment as a civil servant or judge) which is not made for training purposes, women who have the same qualifications as men applying for the same post are to be given priority in sectors where they are under-represented
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> .....
>
> There is under-representation if women do not make up at least half of the staff in the individual pay, remuneration and salary brackets in the relevant personnel group within a department. This also applies to the function levels provided for in the organization chart."

4. The judgment

In its judgment, the Court of Justice points out that:

- the purpose of the Directive is, as stated in Article 1(1) 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. This principle of equal treatment implies, according to Article 2(1), that "there shall be no discrimination whatsoever on grounds of sex either directly or indirectly";

- a national rule whereby, when women and men who are candidates for the same promotion are equally qualified, women are automatically to be given priority in sectors where they are under-represented, involves discrimination on grounds of sex.

However, the Court considers that it is important to examine whether such a national rule is allowed by Article 2(4) of the Directive. In this respect, the Court states that this provision:

- is 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;

- 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 in the labour market and to pursue a career on an equal footing with men;

- as a derogation from an individual right laid down in the Directive, must be interpreted strictly.

Finally, the Court makes it clear that:

- national rules which guarantee women absolute and unconditional priority for appointment or promotion go beyond promoting equal opportunities and overstep the limits of the exception in Article 2(4) of the Directive.

The Court concludes that the answer to be given to the national court's question is that Article 2(1) and (4) of Directive 76/207/EEC precludes national rules such as those in the case discussed which, where candidates of different sexes shortlisted for promotion are equally qualified, automatically give priority to women in sectors where they are under-represented, under representation being deemed to exist when women do not make up at least half of the staff in the individual pay brackets in the relevant personnel group or in the function levels provided for in the organization chart.

5. Questions raised by the judgment

It appears that the Court's negative attitude towards the legality of the Bremen law is based exclusively on the interpretation which should be given to Article 2(4) of Directive 76/207/EEC. It is clear from the judgment that this provision does not cover the type of quota system under which women are given automatic preference over men in the assignment of posts or promotion. However, a number of questions may still be asked concerning Article 2(4). Is this a provision limited to safeguarding positive actions in favour of women at work only as regards measures such as special assistance for vocational training, leave for family reasons, etc, or does it also allow positive discrimination in the field of recruitment/promotion by giving preference to women under certain conditions? In the latter case, should a distinction be made between positive actions which take account of considerations of necessity/proportionality and those which do not?

5a. The US Supreme Court approach to "affirmative action"

In this context, it is interesting to recall the case-law of the Supreme Court of the United States on "affirmative action" which demonstrates that the issues involved are extremely complex. The term "affirmative action" is used either to refer to action to identify and replace discrimination in employment or to measures aimed at increasing the participation in the workforce of protected groups, i.e. minorities and women. There is a difference between the public standard (under the Equal Protection Clause of the US Constitution) and the private standard (under title VII of the Civil Rights Act 1964).

Affirmative action imposed by law or administrative action must be assessed according to a "strict scrutiny" standard, which requires the existence of a "compelling government interest" and action "narrowly tailored" to serve that interest, i.e. a requirement of proportionality. In the private sector, the Supreme Court approach to voluntary affirmative action by employers is more flexible than the strict scrutiny standard since it concentrates only on the basic elements of the "narrowly-tailored" test.

The only gender case, Johnson[8], concerns voluntary affirmative action by private employers. In this case, an affirmative action plan was applied in order to increase the representation of women in a job category historically occupied by men. A woman applicant was selected for the position over a male colleague, despite the fact that her test score was marginally lower than the man's.

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[8] Johnson v Transportation Agency, 480 US 616 (1987).

This action was found to be consistent with the prohibition of discrimination in employment imposed under title VII of the Civil Rights Act 1964 on the grounds, inter alia, that consideration of the sex of the applicant was justified by the existence of a manifest imbalance which reflected under-representation of women in "traditionally segregated job categories".

The Supreme Court has not decided any gender case concerning the public sector. However, it is interesting to recall the recent Adarand[9] case which concerned positive measures aimed at improving racial balance in the domain of public procurement. In this case, the Supreme Court for the first time applied strict judicial scrutiny to affirmative action programmes adopted by the federal government. Although the particular measure under examination was deemed not to be sufficiently "narrowly tailored" to meet the required aim, it is important to note that seven out of the nine members of the Supreme Court specifically reaffirmed, as a matter of principle, the legitimacy of results-oriented preferential treatment of disadvantaged groups, subject always of course to the strict scrutiny requirements.

5b. International Human Rights Law

Discrimination based on sex is also prohibited by international law. However, the international instruments of the United Nations and of the Council of Europe tend to recognize the legitimacy of certain "special measures" designed to establish de facto equality in favour of certain disadvantaged groups. The United Nations Convention of 18 December 1979 on the elimination of all forms of discrimination against women recognizes in Article 4 that, even if women are given de jure equality, this does not automatically guarantee that they will in reality be treated equally. To accelerate women's de facto equality in society and in the workplace, States are permitted to use special remedial measures for as long as inequalities continue to exist.

In 1988, the United Nations Committee on the Elimination of Discrimination against women adopted its general recommendation No 5 whereby the Committee recommended that States make more use of temporary special measures such as positive action, preferential treatment or quota systems to advance women's integration into education, the economy, politics and employment. These special measures should be used simply to speed up the achievement of de facto equality for women and should not create separate standards for women and men. The appropriateness of such measures should be evaluated with regard to the actual existence of discriminatory practices.

Consequently, once the objectives of equality of opportunity and treatment are reached, those measures are no longer needed and should be discontinued.

ILO Convention No 111 of 4 June 1958 concerning discrimination in respect of employment and occupation refers to both equality of opportunity and treatment by stating in Article 2 that each member for which this Convention is in force undertakes to declare and pursue a national policy designed to promote, by methods appropriate to national conditions and practice, equality of opportunity and treatment in respect of employment and occupation, with a view to eliminating any discrimination in respect thereof.

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[9] Adarand Constructors Inc v Peña, Secretary of Transportation, 63 USLW 4523 (1995).

Article 5 of the ILO Convention is of particular importance in the present case as it states the following:

"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' organizations, 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."

The principle of equality of opportunity and treatment for all workers is also enshrined in the declaration on equality of opportunity and treatment for women workers adopted by the ILO on 25 June 1975. Article 1 precludes all forms of discrimination on grounds of sex which deny or restrict such equality and also provides that positive special treatment during a transitional period which aims at effective equality between the sexes shall not be regarded as discriminatory.

Part II of the additional protocol to the European Social Charter of 5 May 1988 provides, in Article 1, that the contracting parties undertake to recognize the right to equal opportunity and treatment in the field of employment without any discrimination based on sex, and to take the appropriate measures in order to ensure or encourage its implementation in various sectors, including those of professional career and promotion. This provision is specifically stated not to impede the adoption of specific measures intended to remedy de facto inequalities.

The discussion is still going on in the international human rights law context as to whether, and to what extent, rules giving women automatic priority as regards appointment or promotion are permitted or not. At the same time it is clear that international human rights law does not rule out - and may in some instances even require - distinctions between men and women with the objective of accelerating women's de facto equality in society. Such distinctions, on the other hand, should be based on objective and reasonable criteria and should not be aimed at maintaining on a permanent basis unequal or separate standards.

6. How to interpret Kalanke

As has already been mentioned above, there are various types of positive action. One of them may take the form of quota systems or targets, as in the case examined by the Court of Justice. The Court had to decide whether it was lawful, by applying such a system, to give women preference over male candidates in the event of a promotion in sectors where they were under-represented, provided that their qualifications were the same.

The Court's answer to that question could be interpreted in two ways:

- either the Court dismissed the possibility of justifying any quota system, even one containing a safeguard clause which allows the particular circumstances of a case to be taken into account,

- or the Court restricted itself to the "rigid" quotas provided for in the Bremen law and applied to Mr Kalanke, that is in an automatic manner.

The Commission considers that the Court has only condemned the automatic quota system of the Land of Bremen. This interpretation is based upon the wording of the judgment itself whereby the Court makes it clear that national rules which guarantee women absolute and unconditional priority for appointment or promotion overstep the limits of the positive action exception laid down in Article 2(4) of Directive 76/207/EEC (see paragraph 22 of the judgment).

It is true that, in paragraph 23, the Court refers to the problem of "substituting for equality of opportunity .... the result which is only to be arrived at by providing such equality of opportunity". However, this paragraph is clearly added as a rider to the main idea of the Court, contained in paragraph 22, that it is the "absolute and unconditional" nature of the preference given to women which makes the Bremen system unlawful. The Court's remarks in paragraph 23 are clearly based on the assumption that it is discussing a rigid, unconditional quota system. Moreover, this paragraph appears to be aimed mainly at criticising the over-ambitious elements of the particular scheme which was at issue in Kalanke, i.e. the aim of achieving a 50/50 distribution of men and women "in all grades and levels". Finally, it is clear that the Court was only called upon to pronounce upon systems having the characteristics of the Bremen system, and the operative part of the judgment is naturally limited to pronouncing upon the legality of such systems. It is also to be noted that the Court clearly recognized the need for measures going beyond the classic rules against discrimination if equality was to be achieved in practice (paragraph 20).

The Commission therefore takes the view that quota systems which fall short of the degree of rigidity and automaticity provided for by the Bremen law have not been touched by the Court's judgment and are, in consequence, to be regarded as lawful.

In this context, the Commission considers that the following positive action measures are examples of the types of action which remain untouched by the Kalanke judgment, subject of course, to the choice which Member States may make as to the measures to be adopted by them:

- quotas linked to the qualifications required for the job, as long as they allow account to be taken of particular circumstances which might, in a given case, justify an exception to the principle of giving preference to the under-represented sex;

- plans for promoting women, prescribing the proportions and the time-limits within which the number of women should be increased but without imposing an automatic preference rule when individual decisions on recruitment and promotion are taken;

- an obligation of principle for an employer to recruit or promote by preference a person belonging to the under-represented sex; in such a case, no individual right to be preferred is conferred on any person;

- reductions of social security contributions which are granted to firms when they recruit women who return to the labour market, to perform tasks in sectors where women are under-represented;

- State subventions granted to employers who recruit women in sectors where they are under-represented;

- other positive action measures focusing on training, professional orientation, the reorganization of working time, child-care and so on.

In respect of the positive action programme implemented by the Commission in favour of its female staff, it should be noted that this is not prejudiced by the Kalanke judgment as it does not provide for women to be given automatic preference (this is rather a principle to be observed in the case of equal qualifications).

Conclusions

The Commission considers that the Court has only condemned the special feature of the Bremen law which consists in the automaticity of the measure, giving women an absolute and unconditional right to appointment or promotion. Therefore, the Commission takes the position that the only type of quota system which is unlawful is one which is completely rigid and does not leave any possibility of taking account of individual circumstances. Member States and employers are thus free to have recourse to all other forms of positive action, including flexible quotas.

The Commission is anxious that the controversy to which the Kalanke case has given rise should be ended definitively. Therefore, notwithstanding the limited nature of the impact of this judgment as properly construed, the Commission believes that it would be helpful if the wording of Article 2(4) of Directive 76/207/EEC were amended so that the text of the provision would specifically permit the kinds of positive action which remain untouched by Kalanke. Such an interpretative amendment would make it clear that positive action measures short of rigid quotas are permitted by Community law and would ensure that the text of the Directive more clearly reflects the true legal position as it results from the judgment of the Court.

The Commission is therefore putting forward a proposal for the amendment of Article 2(4) of Directive 76/207/EEC which would specify that the measures envisaged by this provision include actions favouring the recruitment or promotion of one sex in circumstances where the latter is under-represented, on condition that the employer always has the possibility of taking account of the particular circumstances of a given case.