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Kalanke v. Freie Hansestadt Bremen: The Significance of the Kalanke Decision on Future Positive Action Programs in the European Union

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NOTES

Kalanke v. Freie Hansestadt Bremen: The Significance of the *Kalanke* Decision on Future Positive Action Programs in the European Union

ABSTRACT

In the landmark case Kalanke v. Freie Hansestadt Bremen, the European Court of Justice held that a German state law giving women an "absolute and unconditional priority" in the labor market was inconsistent with the European Equal Treatment Directive. Although many Europeans vehemently criticized the Kalanke decision initially, the furor now appears to have subsided. As a result of this decision, however, the European Union is currently re-examining equal treatment policies and will likely provide further guidance to Member States attempting to formulate positive action programs.

This Note first discusses the institutions of the European Union as they relate to its legal processes. Second, the Note summarizes the social policy directives on which the holdings of the European Court of Justice were based. Finally, this Note analyzes the significance of the holding with regard to equal treatment of men and women in the labor market and addresses the implications of the ruling on future positive action programs in the European Union.

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I. INTRODUCTION

On October 17, 1995, the European Court of Justice (hereinafter ECJ) held in *Kalanke v. Freie Hansestadt Bremen*¹ that a German state law guaranteeing women automatic priority over men in the labor market was contrary to the European Equal Treatment Directive² that prohibits sex-based discrimination. The ruling provoked a strong reaction throughout the European community. Several Member States and European women's organizations criticized the ruling as an impediment to women's progress toward achieving equality in the workplace.³ To other Member States and to some members of the European legal community, however, the decision represented an accurate interpretation of current European Union (hereinafter EU) law, which provides that discrimination of any kind shall not be tolerated.⁴

1. Case C-450/93, Eckhard Kalanke v. Freie Hansestadt Bremen, 1995 E.C.R. I-3051.

2. Council Directive 76/207/Eec, 1976 O.J. (L 39) 40.

3. For example, the European Women's Lobby, a coalition of European national women's groups, announced its disappointment in the ECJ's ruling. *Women Lose Court Fight for Jobs, Promotions*, CALGARY HERALD, Oct. 18, 1995, at A5, available in LEXIS, News Library, CALHER File.

4. See Council Directive, *supra* note 2, at 40.

Germany is not the only Member State to implement national measures promoting "positive action," a principle similar to "affirmative action," designed to eradicate inequalities imposed on citizens on the basis of race, sex, or ethnicity. Other states, such as the United Kingdom, Belgium, the Netherlands, and France have enacted similar programs that provide preferential treatment toward women.⁵ In fact, many Member States initiated such measures because of pressure from the European Commission (hereinafter Commission). The Commission had asserted that positive action programs not only promoted equal opportunity, but also increased public awareness and improved the range of educational and occupational opportunities available to women.⁶

Although the *Kalanke* decision raises doubts about the future of such positive action programs, much of the concern appears to be unjustified. Although the ruling prohibits positive action programs that provide automatic preferences on the basis of sex, measures targeting the means to the result (*i.e.*, equal representation) rather than the result itself may still be implemented. In fact, the ECJ's decision may be more favorable toward securing equality for women than initially assumed. The ruling not only increases Member States' awareness of women's role in the workplace but also illustrates the deficiencies in the European Equal Treatment Directive. As a result, the Social Affairs Council is currently considering an amendment to the Directive to clarify some of its poorly drafted provisions.⁷ A revision of the current Directive could expand the spectrum of positive action measures that may be implemented by Member States and increase the range of opportunities currently afforded European women.

II. HISTORICAL PERSPECTIVE

The EU, formerly known as the European Community (hereinafter EC),⁸ is an institutional framework initially created to

5. See Attie De Jong & Bettina Bock, *Positive Action in Organizations within the European Union*, in *WOMEN AND THE EUROPEAN LABOUR MARKETS* 185 (Anneke van Doorne-Huiskes et al. eds., 1995).

6. *Id.* at 185. See generally *id.* at 182-200 (discussing the role of the Commission in promoting equal opportunities for women and providing examples of positive action in the Member States).

7. *EU: EU/Social Affairs - Major Topical Issues*, Agence Europe, Apr. 17, 1997, available in LEXIS, World Library, TXLNE File.

8. In 1991, the Maastricht Treaty renamed the "European Economic Community" the "European Union." See *infra* note 29 and accompanying text. This Note refers to the European Economic Community as the "European

unite the nations of Europe as an economic entity. The concept of European unity originated in the post-World War Two recovery period, during which European leaders were presented with an opportunity for wide restructuring of Europe's economic and political institutions.⁹ World War Two and a succession of prior wars had plagued and devastated Europe and its peoples.¹⁰ The fear of future aggression instilled a desire for peace among the European nations and initiated a renewed commitment toward cooperation between previously adversarial nations.¹¹

Moreover, the resurgence of Germany's war industries continued to concern several nations, particularly France, whose historic relationship with Germany had been tenuous.¹² Wary of Germany's potential ability to regain a position of power among the European nations, the French government proposed the formation of a European Coal and Steel Community (hereinafter ECSC) to regulate the coal and steel industries, two essential elements of economic and military revitalization.¹³

Community" for dates prior to the Maastricht Treaty and as the "European Union" for dates subsequent to the Maastricht Treaty.

9. NEILL NUGENT, *THE GOVERNMENT AND POLITICS OF THE EUROPEAN COMMUNITY* 14-20 (2d ed. 1991). The post-war division of Europe, as well as a desire for European political and economic cooperation, combined to bring about fundamental changes in the post-war balance of power. *Id.* Winston Churchill pioneered the idea of European unity in his famous Zurich speech in 1946 by encouraging the construction of a United States of Europe. D. M. HARRISON, *THE ORGANISATION OF EUROPE: THE DEVELOPMENT OF A CONTINENTAL MARKET ORDER* 6 (1995). In particular, Churchill urged a partnership between France and Germany, hoping this alliance would provide an impetus for European unity. *See id.* at 20. In 1950, German Chancellor Konrad Adenauer further promoted the concept of European integration by proposing a complete political and economic union between France and Germany. *Id.* at 6.

10. MARK A. KAUFMANN, *THE EUROPEAN COMMUNITY: AN ESSENTIAL GUIDE TOWARD KNOWING AND UNDERSTANDING THE EC* 17 (1993).

11. *See id.*

12. Germany was aware of France's concerns. German Chancellor Adenauer wrote:

The fear persisted in France of being once again attacked by a revived Germany, and it was conceivable that similar ideas circulated in Germany. Any rearmament would first involve an increase in production of coal, iron, and steel. If an organisation as envisaged was created that would allow the two participating countries to detect the signs of such a development that new possibility would contribute to an immense sense of relief in France.

HARRISON, *supra* note 9, at 7-8 (quoting JEAN MONNET, *MEMOIRES* 438 (1976)).

13. KAUFFMAN, *supra* note 10, at 37-38. Jean Monnet, a French Foreign Minister, was the architect and primary supporter of the ECSC. *Id.* The ECSC was originally known as the Schuman Declaration, after its author, Robert Schuman, the French Foreign Minister from 1948 to 1953. *Id.* *See also* HARRISON, *supra* note 9, at 3, 7.

In 1951, the ECSC was established by the Treaty of Paris, one of the first major treaties of West European integration.¹⁴ France, Germany, Italy, Belgium, the Netherlands, and Luxembourg signed the Treaty of Paris.¹⁵ The treaty defined the four fundamental institutional decision-making bodies of the ECSC: the Council of Ministers, the High Authority, the Court of Justice, and the Parliamentary Assembly.¹⁶

In 1957, the six signatories of the Treaty of Paris strengthened their relationship by ratifying the Treaty Establishing the European Economic Community (hereinafter EEC Treaty).¹⁷ The EEC Treaty, commonly known as the Treaty of Rome, is considered the foundation of today's EU. Broader in scope than the Treaty of Paris, the EEC Treaty has been referred to as the "constitutional charter of a Community based on the rule of law."¹⁸ A primary goal of the EEC is the establishment of a common market.¹⁹ This objective is embodied in the treaty's preamble, which describes as the treaty's main purpose "to establish the foundations of an ever-closer union among the European peoples . . . [and] by common action [to] eliminate[] the barriers which divide Europe."²⁰

The EEC Treaty was initially signed by only the six signatories of the Treaty of Paris. These six founding members considered the EEC Treaty an instrumental step toward further economic, social, and political unification of Europe.²¹ The

14. See NUGENT, *supra* note 9, at 35. The ECSC would not have been established had it not offered to its members the opportunity for both economic growth and influence in a nascent European Union. *Id.* at 34-35. France and Germany particularly benefited from the ECSC. France's fears were assuaged by Germany's containment, and Germany was presented with an opportunity to reintegrate into Western Europe. *See id.* at 27.

15. *Id.* at 35. The Treaty of Paris will expire toward the end of the year 2002. TREATY ESTABLISHING THE EUROPEAN COAL AND STEEL COMMUNITY, Apr. 18, 1951, art. 97, 261 U.N.T.S. 140 [hereinafter ECSC TREATY].

16. KAUFFMAN, *supra* note 10, at 38. Although these four institutions originated in the Treaty of Paris, the Treaty referred to the European Commission as the High Authority and the European Parliament as the Common Assembly. *See ECSC TREATY* tit. 2, art. 7.

17. *See KAUFFMAN, supra* note 10, at 40. In addition to the EEC Treaty, a parallel treaty was signed in Rome in March 1957, which created the European Atomic Energy Community [hereinafter Euratom]. *See HARRISON, supra* note 9, at 32. Euratom was established to further develop the nuclear energy sector. *Id.*

18. Case 294/83, Parti Ecologiste 'Les Verts' v. European Parliament, 1986 E.C.R. 1339, 1365.

19. *See KAUFFMAN, supra* note 10, at 40. The objectives of the EEC Treaty include the "Four Freedoms": the free movement of goods, workers, services, and capital. THOMAS C. FISCHER, *THE EUROPEANIZATION OF AMERICA* 46 (1995).

20. TREATY ESTABLISHING THE EUROPEAN ECONOMIC COMMUNITY, Mar. 25, 1957, 298 U.N.T.S. 11, 14 [hereinafter EEC TREATY].

21. KAUFFMAN, *supra* note 10, at 40.

United Kingdom (hereinafter U.K.), however, did not share these aspirations; rather, it desired a "looser economic community" and one without political or social constraints.²² Significantly, the U.K., one of the strongest and most influential countries in Europe, was neither a member of the ECSC nor one of the original signatories of the EEC Treaty.²³ The U.K.'s refusal to participate in the ECSC stemmed primarily from an underlying apprehension that unification would result not only in economic free trade, but also in social and political integration among the Member States.²⁴ In 1962, however, cognizant of the EC's economic success and troubled by its faltering domestic economy and deteriorating political stature, the U.K. applied for membership in the Community.²⁵ The U.K. application was not accepted until 1973, after the resignation of French President Charles de Gaulle, who had been unwilling to compromise France's prominent

22. HARRISON, *supra* note 9, at 33. Although Churchill alluded to the concept of a United States of Europe in his 1946 Zurich speech, it is unclear whether he intended for Britain to be a leader in such an alliance. Conscious of the precarious nature of Franco-German relations, Churchill recounted in his memoirs:

To me the aim of ending the thousand-year strife between France and Germany seemed a supreme object It seemed to me that the supreme interest of the British people in Europe lay in the assuagement of the Franco-German feud, and that they had no other interest comparable or contrary to that. That is still my view today.

Id. (quoting 1 WINSTON CHURCHILL, *THE SECOND WORLD WAR* 26 (1965)).

23. KAUFFMAN, *supra* note 10, at 41. At the time of the ECSC's formation, the U.K. was concerned about the expansion of the Soviet Union and wanted to maintain its independence to ally with the United States if necessary. HARRISON, *supra* note 9, at 21. In a 1955 policy paper, the U.K. enunciated four reasons for not joining the Community: (1) membership would weaken its ties to the Commonwealth; (2) European economic integration was contrary to worldwide free trade; (3) the prospect of economic integration would eventually incorporate an unacceptable degree of political integration; and (4) membership would remove the protection of the U.K. industry against European competition. *Id.* at 33.

24. See KAUFFMAN, *supra* note 10, at 41-42. The U.K. led Denmark, Austria, Sweden, Switzerland, Norway, and Portugal on May 3, 1960 to form the European Free Trade Association (hereinafter EFTA), which solely endorsed the concept of economic integration. EUROPEAN COMMISSION DELEGATION, *THE EUROPEAN UNION AND THE UNITED STATES IN THE 1990'S* 6 (1996). Today, EFTA comprises Austria, Iceland, Norway, Sweden, Switzerland, Finland and Liechtenstein, all of which have subsequently applied for membership in the EU except Ireland and Liechtenstein. *Id.*

25. See KAUFFMAN, *supra* note 10, at 45-47. Each of the following events or situations contributed to the U.K.'s decision to apply for membership in the EU: the Suez affair; ongoing U.S.-U.S.S.R. bilateral discussions; and the EU's prospering political and economic status. NUGENT, *supra* note 9, at 50. *Id.* at 45. The Member States of the EU were outperforming the U.K. in several key economic areas, including growth in trade, investment, and gross national product. *Id.* at 51.

position in the Community.²⁶ Accompanying the admission of the U.K. in 1973 were the admissions of Ireland and Denmark, two countries with strong economic and cultural ties to the U.K.²⁷ In 1981, Greece became the tenth Member State; Spain and Portugal joined in 1986; and Austria, Finland, and Sweden joined the EU on January 1, 1995, increasing the membership to fifteen states.²⁸

In the slow but steady progress toward complete unification, European leaders drafted a new treaty in November 1991, amending the foundational EEC Treaty.²⁹ The Treaty on European Union (hereinafter TEU) was signed at Maastricht, Netherlands, on February 7, 1992, and entered into force on November 1, 1993.³⁰ It renamed the "European Economic Community" the "European Union."³¹ The TEU, commonly known as the Maastricht Treaty, notably instituted a detailed timetable toward the completion of an Economic and Monetary Union, which included the creation of a common currency. It also provided provisions for implementing a Common Foreign and Security Policy (hereinafter CFSP) and a Justice and Home Affairs Policy.³² Moreover, the Maastricht Treaty affirmed the EU commitment to integration by requiring a review of the Maastricht Treaty at the 1996 Intergovernmental Conference.³³ The Maastricht Treaty augmented but did not supersede the EEC

26. NUGENT, *supra* note 9, at 50. De Gaulle vetoed the membership of the U.K. both in 1961 and 1967. *Id.* Several reasons have been cited for De Gaulle's reluctance to admit the U.K. into the Community. De Gaulle not only feared that the U.K. would preempt France's prominent role there but also that the U.K. would attempt to overturn the recently established alliance between France and Germany. *Id.* Moreover, De Gaulle was suspicious of the U.K.'s ties to the United States and was wary of U.S. involvement in European affairs. *See id.*

27. *Id.* at 51. When the U.K. applied for membership both in 1961 and 1967, Ireland, Denmark, and Norway attached their own applications to the U.K.'s application. *Id.* In 1973, Norway again applied for membership but was forced to revoke its application after 53% of the Norwegian voting population rejected Norway's membership. KAUFFMAN, *supra* note 10, at 47.

28. EUROPEAN COMMISSION DELEGATION, *supra* note 24, at 6.

29. *See generally* TREATY ON EUROPEAN UNION, Feb. 7, 1992, O.J. (C 224) 1 (1992) [hereinafter MAASTRICHT TREATY].

30. *Id.*

31. *Id.* tit. 1, art. A.

32. Sari K. M. Laitinen-Rawana, *Creating a Unified Europe: Maastricht and Beyond*, 28 INT'L LAW. 973 (1994). These provisions are referred to as the three pillars of the European Union: (1) a common currency; (2) a common foreign and security policy; and (3) a common justice and internal policy. George Soros, *Can Europe Work?: A Plan to Rescue the Union*, FOR. AFF., Sept./Oct. 1996, at 8. In addition, the Maastricht Treaty addressed the possibility of expanding the EU to include qualifying eastern European nations. *Id.*

33. *See generally* MAASTRICHT TREATY tit. VII, arts. 110-11.

Treaty, which remained the primary governing document of the EU.³⁴

III. THE PRIMARY INSTITUTIONS OF THE EUROPEAN UNION

The EEC Treaty defines and empowers the four institutional decision-making bodies of the EU: the European Commission, the Council of the European Union, the European Parliament, and the European Court of Justice.³⁵ Based on partnership and cooperation, the substantial interaction among these four primary institutions restricts the potential for domination or subordination of any one interest or Member State.³⁶

A. *The European Commission*

The European Commission is the heart and principal decision-making body of the EU. The Commission is empowered with initiating legislative proposals, implementing EU legislation, ensuring compliance of treaty provisions and EU policies by Member States, and managing international trade relationships.³⁷ The current Commission (1995-2000) comprises twenty Commissioners³⁸ who act in an executive capacity over their institutional counterparts.³⁹ Although Commissioners are appointed by their representative governments, they are obliged to act independently and only in the interests of the EU. Thus, while in theory the Commission is deemed an impartial body, it is not entirely apolitical, due to the nature of appointments.⁴⁰ In

34. See FISCHER, *supra* note 19, at 22; see generally Laitinen-Rawana, *supra* note 32 (describing the Maastricht Treaty and its basic principles).

35. See generally EEC TREATY arts. 137-92.

36. KAUFFMAN, *supra* note 10, at 55.

37. See Ellie Roelofs, *The European Equal Opportunities Policy, in WOMEN AND THE EUROPEAN LABOUR MARKETS*, *supra* note 5, at 122, 126.

38. EUROPEAN COMMISSION DELEGATION, *supra* note 24, at 11. The 20 Commissioners include the President of the Commission, who is elected by the Commissioners for a two-year term. JULIET LODGE, *THE EUROPEAN COMMUNITY AND THE CHALLENGE OF THE FUTURE* 7 (1993). In practice, however, this term is often renewed to more closely parallel the five-year term of the Commissioners. *Id.*

39. *Id.* The larger Member States (France, Italy, Germany, Spain, and the U.K.) each elect two Commissioners, while the smaller Member States only elect one. *Id.* at 6.

40. See *id.* at 7. The political nature of the Commissioners' appointments is illustrated by U.K. Prime Minister Thatcher's refusal to nominate Lord Cockfield for a second term due to his deviance from her policies regarding the internal market. *Id.*

fact, Commissioners often compete for portfolios pertaining to domestic issues of their respective nations.⁴¹

In addition, the Commission is assisted by an extensive bureaucracy that is subdivided into directorates-general (hereinafter DGs). Each of the more than twenty-five DG sections is responsible for a separate policy area, such as External Relations, Agriculture, and Energy.⁴² The DGs are the Community's civil service and supply Commissioners with the expertise necessary for wise decision-making in their respective policy areas.⁴³

B. *The Council of the European Union*

The Council of the European Union (hereinafter Council), commonly known as the Council of Ministers, consists of one representative from each Member State.⁴⁴ The Council meets at least twice a year, toward the end of each Member State's six-month presidency.⁴⁵ It is responsible for voting on legislative proposals submitted by the Commission, setting political objectives, coordinating national policies, and promoting intergovernmental cooperation.⁴⁶ Unlike members of the other institutions, members of the Council are not permanent representatives.⁴⁷ Instead, different ministers attend Council

41. *Id.* at 8. The President of the Commission distributes the portfolios to the representatives of the Member States. *Id.* In this respect, Member States vie for presidential favor. Traditionally, however, the Big Four (France, Germany, Italy, and the U.K.) are given preference over the other Member States. *Id.*

42. *Id.* at 6.

43. KAUFFMAN, *supra* note 10, at 67.

44. See EEC TREATY art. 146. The Council is composed of either a president or a high ranking minister from each state. Hon. John P. Flaherty & Maureen E. Lally-Green, *The European Union: Where is it Now?*, 34 DUG. L. REV. 923, 934 (1996). The President of the Council changes every six months, rotating through the Member States in alphabetical order according to their mother language, i.e. Belgie (Dutch) or Belgique (French), Danmark, Deutschland, Ellas (Hellas), Espana, France, Ireland, Italia, Luxembourg, Nederland, Portugal, and the U.K. KAUFFMAN, *supra* note 10, at 64; however, to prevent each country from always assuming the presidency during the same half of the year, and thus from controlling the same seasonal agenda, pairs of presidents switch terms until 1998. *Id.* at 65.

45. EUROPEAN COMMISSION DELEGATION, *supra* note 24, at 9.

46. See generally FISCHER, *supra* note 19, at 51-54.

47. KAUFFMAN, *supra* note 10, at 60. Each Member State, however, does have a permanent member who resides in Brussels and maintains constant interaction with the other institutions. These permanent members are often senior diplomats and constitute the Committee of Permanent Representatives (hereinafter COREPER). COREPER is responsible for resolving on a ministerial level many of the most difficult and sensitive issues for providing assistance to the Council members, and for collaborating with the Commission in preparing and submitting proposals to the Council. *Id.* at 62.

meetings according to the issues on the agenda.⁴⁸

Unlike the Commissioners, members of the Council directly represent their national governments and are authorized to act on behalf of their Member States.⁴⁹ Most decisions are made by qualified majority voting,⁵⁰ while unanimity is required for policy in areas such as amendments to treaties, taxation, new common policies, or the admission of new Member States.⁵¹ This requirement of unanimity, however, has often resulted in political gridlock, delaying policy initiatives, particularly those involving social policies.⁵² To alleviate this problem, the European Council or "European Summit" was formed in 1974 to act as a final arbiter when such instances arise.⁵³ The Summit consists of the heads of state or government of each Member State, who meet at least twice a year, and has evolved into one of the most powerful institutions in the Union.⁵⁴ It is responsible not only for resolving contentious issues that pose difficulties for the Council of Ministers, but also for providing political direction and leadership in the unification process.⁵⁵

The Council of Ministers enacts legislation primarily through regulations and directives.⁵⁶ Article 189 of the EEC Treaty provides that regulations be directly applicable to all Member States and immediately binding on all Member States even in the absence of national legislation.⁵⁷ Usually regulations are specific

48. *Id.* at 60. For example, the Ministers of Social Affairs preside over women's issues; the Ministers of Finance preside over tax issues. *Id.*

49. See Flaherty & Lally-Green, *supra* note 44, at 960.

50. Qualified majority voting requires 62 out of a total 87 votes for a proposal to be adopted. EUROPEAN COMMISSION DELEGATION, *supra* note 24, at 11. The number of votes per Council member is determined according to his or her nation's population. *Id.* Currently, the U.K., Italy, Germany, and France each have 10 votes; Spain has eight votes; Belgium, Greece, Netherlands, and Portugal each have five votes; Austria and Sweden each have four votes; Ireland, Denmark, and Finland each have three votes; and Luxembourg has two votes. *Id.*

51. *Id.*

52. See Roelofs, *supra* note 37, at 125.

53. FISCHER, *supra* note 19, at 51-52.

54. See *id.*

55. See *id.*

56. NUGENT, *supra* note 9, at 170. The Council also enacts legislation by issuing decisions or recommendations and opinions. See *id.* at 170. A decision is binding in its entirety to whomever it is addressed, such as any or all Member States, firms, or individuals. *Id.* at 171. Examples of decisions include the institution of a pilot action program, the authorization of grants, or the exemption of Member States from certain EU provisions. *Id.* In contrast, recommendations and opinions are not binding and therefore are not considered a source of legal authority. *Id.* See also KAUFFMAN, *supra* note 10, at 57.

57. Article 189 provides the type of legislation each of the institutions may adopt and expressly states that "[r]egulations shall have a general application. They shall be binding in every respect and directly applicable in each Member State." EEC TREATY art. 189.

and narrowly constructed, providing little discretion to Member States in their implementation.⁵⁸ Directives, on the other hand, state compulsory objectives that Member States are obliged to incorporate into their national legislation within a mandatory time period.⁵⁹ Article 189 describes a directive as binding "as to the result to be achieved, while leaving to domestic agencies . . . [the] form and means."⁶⁰ Directives are less detailed than regulations and are concerned more with setting forth policy principles for Member States than with the uniform application of policy.⁶¹ A directive, therefore, merely serves as a foundation on which Member States must implement the required legislation. Thus, national governments are afforded some, although limited, participation in the legislative procedure.⁶²

To ensure the implementation of directives by each Member State, the Commission is authorized to institute infringement procedures against non-compliant Member States. This procedure is initiated and effectuated primarily through judicial action that often continues for several years before national acquiescence.⁶³ In addition, directives are particularly significant in the context of equal opportunities because legislation in this area is enacted primarily in the form of directives.⁶⁴

C. The European Parliament

The European Parliament is directly elected by the citizens of all Member States and is therefore the true democratic voice of the peoples of Europe.⁶⁵ The Parliament is viewed as the guardian of European interests and is responsible for responding to the complaints of European citizens who have a right of petition to the Parliament.⁶⁶ Elected every five years, Parliament members total 626 and are organized by political party rather

58. See FISCHER, *supra* note 19, at 73.

59. See NUGENT, *supra* note 9, at 169; see also KAUFFMAN, *supra* note 10, at 57.

60. EEC TREATY art. 189. Article 100 provides that directives require unanimous adoption by the Council of Ministers. EEC TREATY art. 100.

61. NUGENT, *supra* note 9, at 169.

62. FISCHER, *supra* note 19, at 74. Through a process called "transposition," Member States transpose EU law into national law. *Id.*

63. See Tineke van Vleuten, *Legal Instruments at the EU Level, in WOMEN AND THE EUROPEAN LABOUR MARKETS*, *supra* note 5, at 143, 145.

64. See EVELYN ELLIS, EUROPEAN COMMUNITY SEX EQUALITY LAW 5 (1991).

65. See Roelofs, *supra* note 37, at 126.

66. Laitinen-Rawana, *supra* note 32, at 991. The Parliament also appoints an Ombudsman, who is responsible for investigating complaints received by citizens. *Id.*

than by nationality.⁶⁷ Each Member State's population roughly determines its number of representatives.⁶⁸

Although the Parliament primarily serves as a supervisor and political advisor to the other EU institutions, its responsibilities have been expanded by subsequent treaties since its origination in the Treaty of Paris.⁶⁹ The Parliament is currently a co-decisionmaker with the Council in several policy areas, including free movement of workers, education, health, and, most importantly, the budget, which it can amend or reject.⁷⁰ In addition, the Parliament has "consultation powers," requiring it to submit to the Commission an opinion on all legislative proposals before the Council adopts them.⁷¹ The Parliament is further granted "cooperation powers" that allow it to amend Commission proposals in a number of areas, such as the environment, research, and overseas development.⁷²

Moreover, the Parliament maintains considerable influence in its supervisory capacity not only by addressing and raising awareness of current issues but also by questioning proposals submitted by the Commission. In particular, the Parliament has indicated its interest in equal opportunities policy through the creation of a parliamentary committee on the rights of women.⁷³ This committee investigates the impact of EU policies on women and presents its findings to the other institutions.⁷⁴

67. EUROPEAN COMMISSION DELEGATION, *supra* note 24, at 9. Due to the organization of the Parliament, Parliament members often act according to their political and party interests rather than their national interests. Flaherty & Lally-Green, *supra* note 44, at 934.

68. KAUFFMAN, *supra* note 10, at 72.

69. *Id.* at 71-78. In particular, the Single European Act (hereinafter SEA) and the Maastricht Treaty significantly expanded the role of the Parliament by providing the Parliament with consultation, cooperation, and co-decision powers; however, Parliament members still contend that a "democratic deficit" (*i.e.* limited legislative powers) remains. *Id.* at 75-76.

70. See Roelofs, *supra* note 37, at 126.

71. OFFICE FOR OFFICIAL PUBLICATIONS OF THE EUROPEAN COMMUNITIES, SERVING THE EUROPEAN UNION: A CITIZEN'S GUIDE TO THE INSTITUTIONS OF THE EUROPEAN UNION 6 (1996) [hereinafter CITIZEN'S GUIDE].

72. *Id.* See also Laitinen-Rawana, *supra* note 32, at 980-81 (providing a general overview of the Parliament's powers).

73. See Roelofs, *supra* note 37, at 126.

74. *Id.* The Parliament has been the primary instigator of social policy among the EU institutions. *Id.* In fact, the Parliament requested that the Council enact legislation pertaining to equal pay for equal work several years before the adoption of the Equal Pay Directive. *Id.*

D. *The European Court of Justice*

The ECJ is composed of fifteen judges, who are assisted by nine advocates-general.⁷⁵ All are appointed by mutual agreement of the Member States for six-year terms.⁷⁶ Although the judges consider themselves European judges, at least one judge represents each Member State.⁷⁷ The ECJ's decisions are by majority vote, with no published dissenting opinions.⁷⁸ Significantly, debate has recently developed among many Member States, some of whom believe the judges should have longer terms and be denied reappointment to avoid inherent national bias.⁷⁹ Others have suggested that the judges be allowed to publish dissenting opinions.⁸⁰

Advocates-general act merely as *amicus curiae* for the ECJ. They are required to act with impartiality and independence in making reasoned opinions on cases brought before the ECJ.⁸¹ The advocates-general contribute to the judicial process by examining the issues in a case, stating the parties' arguments, providing their own conclusions, and suggesting solutions. These opinions are similar to separate concurrences or dissents and often influence future decisions of the ECJ even when not initially

75. CITIZENS' GUIDE, *supra* note 71, at 18.

76. EEC TREATY art. 167. Article 167 of the EEC Treaty states that judges are to be appointed "from among persons of indisputable independence who fulfil[] the conditions required for the holding of the highest judicial office in their respective countries or who are jurists of a recognised competence." *Id.*

77. See JURGEN SCHWARZE, *THE ROLE OF THE EUROPEAN COURT OF JUSTICE IN THE INTERPRETATION OF UNIFORM LAW AMONG THE MEMBER STATES OF THE EUROPEAN COMMUNITIES* 14 (1988). Although the EEC Treaty does not explicitly address the issue of the nationality of judges or advocates-general, Member States have sought to maintain an equal representation among the different nationalities. See David Stoelting, *The Jurisdictional Framework of the European Court of Justice*, 29 COLUM. J. TRANSNAT'L L. 193, 196 (1991).

78. See HENRY G. SCHERMERES & DENIS F. WAELBROECK, *JUDICIAL PROTECTION IN THE EUROPEAN COMMUNITIES* 496 (1992). Several reasons have been posited as to why dissenting opinions are not published: (1) The EU needs unequivocal rulings to form a strong basis for future development; (2) the absence of dissenting opinions promotes compromises among the judges, thereby promoting the assimilation of all the national legal orders into Community law; and (3) because judges are only appointed for six years, the independence of judges might be put at risk if their personal viewpoints were published. See *id.* at 497.

79. See *Ever More Complicated Union*, ECONOMIST, Mar. 30, 1996, at 48.

80. See *id.*

81. See SCHWARZE, *supra* note 77, at 14. Article 166 of the EEC Treaty provides that, to assist the Court of Justice in its duties, "[t]he duty of the advocate-general shall be to present publicly, with complete impartiality and independence, reasoned conclusions on cases submitted to the Court of Justice. . . ." EEC TREATY art. 166.

followed by it.⁸² Although the opinions of the advocates-general are not binding on the ECJ, they are considered extremely persuasive.⁸³ Moreover, the opinions often provide additional insight into the ECJ's reasoning or its interpretation of a particular case.⁸⁴

In 1989, to assist the ECJ with its increasing caseload, the Council created the Court of First Instance.⁸⁵ The Court of First Instance provides a second tier of judicial authority, allowing the ECJ additional resources and time for its fundamental task: ensuring the uniform interpretation of Community law.

The Court of First Instance, comprising twelve judges, has jurisdiction in disputes between the Community and its staff, actions brought against the Commission under the ECSC Treaty, and certain actions regarding competition laws.⁸⁶ These decisions are subject to a right of appeal to the Court of Justice on points of law only.⁸⁷ An appeal to the ECJ from the Court of First Instance may be based on one of three grounds: (1) lack of competence of the Court of First Instance; (2) failure to follow proper procedure; or (3) infringement of EU law by the Court of First Instance.⁸⁸

1. Derivation of Authority

The ECJ performs a dual function in the Community by ensuring compliance with the economic and social purposes of the EU and by providing uniform interpretation and application of EU law.⁸⁹ It derives its authority from Article 164 of the EEC Treaty, which assigns to the ECJ the responsibility to "ensure observance of law and justice in the interpretation and application of this Treaty."⁹⁰ The ECJ has taken advantage of the broad scope of responsibility implied by this statement to define through its own rulings the extent of the authority of EU law and, consequently, the extent of the ECJ's own authority.⁹¹ Even by

82. See JOXERRAMON BENGOETXEA, *THE LEGAL REASONING OF THE EUROPEAN COURT OF JUSTICE* 13 (1993).

83. See JANET DINE ET AL., *PROCEDURE AND THE EUROPEAN COURT* 4 (1991). Advocates-general opinions may be invoked as persuasive authority in subsequent cases. See *id.*

84. See *id.*

85. See Flaherty & Lally-Green, *supra* note 44, at 965. The Court of First Instance was established by Article 11 of the SEA. See *Single European Act, 1987 O.J. (L 169) 1, 6.*

86. NUGENT, *supra* note 9, at 189.

87. See DINE ET AL., *supra* note 83, at 41.

88. See *id.* In general, appeals must be brought within two months of the Court of First Instance's decision. See *id.*

89. See van Vleuten, *supra* note 63, at 145.

90. EEC TREATY art. 164.

91. See SCHWARZE, *supra* note 77, at 26.

the 1960s, the ECJ's rulings brought into existence two fundamentally inter-related doctrines that have become known as the "doctrine of direct effect" and the "doctrine of supremacy."

a. The Doctrine of Direct Effect

In 1962, the ECJ in *Van Gend en Loos v. Nederlandse Administratie Der Belastingen* (hereinafter *Van Gend en Loos*)⁹² established the doctrine of direct effect, which establishes the principle that Community law may confer on individuals enforceable rights that national courts are bound to apply and enforce.⁹³ The ECJ held that "the Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member States but also their nationals."⁹⁴ This principle thus provides individuals with the rights accorded by Community law in their national courts and compels national courts to comply with ECJ rulings.

Provisions individuals may directly enforce in national courts are considered "directly effective" or "directly applicable."⁹⁵ As stipulated by the ECJ in *Van Gend en Loos* and clarified by subsequent case law, a provision must possess four characteristics to be directly effective.⁹⁶ The provision must be clear, unconditional, non-discretionary, and final, such that further legislation is not required to render it effective.⁹⁷ A

92. Case 26/62, *Van Gend en Loos v. Nederlandse Administratie Der Belastingen*, 1963 E.C.R. 1. In *Van Gend en Loos*, the ECJ responded to a Dutch request for a preliminary ruling regarding whether individuals could rely on treaty provisions before their national courts. See *id.* at 6. In particular, the issue presented to the Court was whether Article 12 of the EEC Treaty had a direct effect such that it allowed corporations to enforce the provisions of the article in national courts. See *id.*

93. See *id.* at 12-13; see also NUGENT, *supra* note 9, at 177.

94. *Van Gend en Loos*, 1963 E.C.R. at 12. The ECJ further contended:

Independently of the legislation of Member States, Community law therefore not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage. These rights arise not only where they are expressly granted by the Treaty, but also by reason of obligations which the Treaty imposes in a clearly defined way upon individuals as well as upon the Member States and upon the institutions of the Community.

Id.

95. See ELLIS, *supra* note 64, at 14. International lawyers often use the phrase "self-executing" to refer to those provisions individuals may directly enforce in their national courts. *Id.*

96. See *id.*

97. *Id.* See also Case 8/81, *Becker v. Finanzamt Münster-Innenstadt*, 1982 E.C.R. 53, 70-71 (discussing the effect of directives in general). Today,

provision is considered "clear" when its terms are not so vague as to frustrate its application by national courts, allowing national courts to understand and interpret the legal issues.⁹⁸ Provisions are "unconditional" when they do not depend on further judgment either by a Community institution or by a Member State.⁹⁹ Similarly, a "non-discretionary" provision does not leave to a national court any discretion in implementation.¹⁰⁰ Succinctly, a law has a direct effect if there is "no need for any national measures to be taken in order for the law to have a binding force within member states."¹⁰¹ The determination of whether a provision has a direct effect is decided by the ECJ and resolved on a case-by-case basis.¹⁰²

According to this definition of direct effect, regulations are considered directly effective.¹⁰³ Directives, however, present difficulty primarily because they cannot be implemented without national legislation. It is impractical for individuals to be able to enforce directives when, by their very definition, they do not become law until the Member State chooses.¹⁰⁴ The fact that Member States are allowed to determine when and how to implement directives, however, does not automatically make directives incapable of having a direct effect.¹⁰⁵ The ECJ has held directives directly effective if they conform to the four characteristics denoted above, so that no discretion is left to the national courts in implementing the applicable provision.¹⁰⁶

A significant justification for holding directives directly effective is that Member States are often slow to implement EU law. Although infringement procedures may be implemented by the Commission against a defaulting Member State, in practice, the primary inducements for compliance are political

provisions are often considered directly effective if they are "unconditional and sufficiently precise." SACHA PRECHAL & NOREEN BURROWS, *GENDER DISCRIMINATION LAW OF THE EUROPEAN COMMUNITY* 28 (1990).

98. See PRECHAL & BURROWS, *supra* note 97, at 28.

99. See *id.*

100. See ELLIS, *supra* note 64, at 14. See also Joined Cases C-6/90 & C-9/90, *Francovich v. Italian Republic*, 1991 E.C.R. I-5357, I-5407-13 (expanding the EU's ability to enforce directives).

101. NUGENT, *supra* note 9, at 177.

102. See Gina L. Ziccolella, Comment, *Marshall II: Enhancing The Remedy Available to Individuals For Gender Discrimination In The EC*, 18 *FORDHAM INT'L L.J.* 641, 657 (1994).

103. See ELLIS, *supra* note 64, at 15.

104. See *id.*

105. See PRECHAL & BURROWS, *supra* note 97, at 29-30.

106. See *id.* at 30; see also Case 8/81, *Becker v. Finanzamt Münster-Innenstadt*, 1982 E.C.R. 53, 71 (stating that whenever a directive appears to be unconditional and sufficiently precise, the provisions may be relied upon against any incompatible provision).

embarrassment and a recognition that the success of the EU depends on cooperation by all Member States.¹⁰⁷ Moreover, the ECJ has held that once the time limit for implementation of a directive has elapsed, a Member State may not escape its obligations to an individual by claiming its own failure to implement the directive.¹⁰⁸

A distinction is often made between provisions that are enforceable against a Member State and thus have a "vertical direct effect,"¹⁰⁹ and provisions that are enforceable by one individual against another and thus have a "horizontal direct effect."¹¹⁰ Significantly, directives do not have a horizontal direct effect.¹¹¹ Although the ECJ in *Defrenne v. Belgium*¹¹² held that Article 119 of the EEC Treaty, which addresses equal treatment of men and women with regard to pay, had a direct effect, the ECJ denied a horizontal effect to the Equal Treatment Directive.¹¹³ In *Marshall v. Southampton and South West Hampshire Area Health Authority*,¹¹⁴ the ECJ held as follows:

[T]he possibility of relying on the directive before a national court[] exists only in relation to "each Member state to which it is addressed." It follows that a directive may not of itself impose obligations on an individual and that a provision of a directive may not be relied upon as such against such a person.¹¹⁵

107. See ELLIS, *supra* note 64, at 16.

108. See PRECHAL & BURROWS, *supra* note 97, at 30; Case C-221/88, *European Coal & Steel Community v. Acclaierie e Ferriere Busseni SpA*, 1990 E.C.R. I-495, I-525 (stating that, where a directive so requires, Member States have a duty to adopt the specified course of action and may not plead against individuals the state's failure to perform the obligations set forth in the directive).

109. The ECJ established the principle of "vertical direct effect" in *Van Gend en Loos*. See Ziccolella, *supra* note 102, at 651-52 (stating that for a law to have vertical direct effect, the provisions must be clear and unconditional and the individual's claim must be brought against the Member State).

110. See PRECHAL & BURROWS, *supra* note 97, at 30.

111. See *id.*

112. Case 80/70, *Defrenne v. Belgium*, 1971 E.C.R. 445.

113. See PRECHAL & BURROWS, *supra* note 97, at 30.

114. Case 152/84, *Marshall v. Southampton & S.W. Hampshire Area Health Auth.*, 1986 E.C.R. 723. In *Marshall*, the plaintiff challenged whether a compulsory retirement age violated Article 5 of the Equal Treatment Directive. See *id.* at 743. The plaintiff was an employee of the Health Authority, which required individuals to retire at the age at which they were able to receive state pension funds (age 65 for men and age 60 for women). See *id.* at 725. The ECJ held that the policy discriminated on the basis of sex and was therefore contrary to the Equal Treatment Directive. See *id.* at 746.

115. *Id.* at 749.

The ECJ further noted that although a directive may not impose obligations on an individual, an individual may rely on a directive against a state, whether as an employer or a public authority.¹¹⁶

The *Marshall* decision has been criticized as yielding contradictory results, however. For example, after this decision, a state employee may rely on the Equal Treatment Directive in a discrimination suit against his or her employer, although a private employee is denied such a right.¹¹⁷ The ECJ has responded to this criticism by stating that this contradiction could easily be avoided by Member States' correct implementation of the Directive.¹¹⁸

b. The Doctrine of Supremacy

The doctrine of supremacy establishes the primacy of Community law over national law, but curiously is omitted from the provisions of the EU founding treaties. The principle of supremacy is crucial to the nature and effective operation of the EU because it gives precedence to Community law.¹¹⁹ In the absence of a uniform legal order, Community law is rendered futile.¹²⁰ Thus the ECJ established this principle in the landmark cases *Costa v. ENEL* and *Amministrazione delle Finanze dello Stato v. Simmenthal S.p.A.*¹²¹

In *Costa v. ENEL*, the ECJ stated, "The transfer by the States from their domestic legal system to the Community legal system of the rights and obligations arising under the Treaty carries with it a permanent limitation of their sovereign rights, against which a subsequent unilateral act incompatible with the concept of the Community cannot prevail."¹²² The ECJ expanded this principle in *Simmenthal* by holding Community law superior to national law, irrespective of whether the national law was effective prior or

116. See *id.* The ECJ specifically held that Article 5(1) of the Equal Treatment Directive was unconditional and sufficiently precise to be relied on by an individual against a State and could be applied by national courts. See *id.* at 750.

117. See PRECHAL & BURROWS, *supra* note 97, at 30.

118. See *Marshall*, 1986 E.C.R. at 749.

119. See PRECHAL & BURROWS, *supra* note 97, at 32. Community law prevails irrespective of whether the national law was enacted first. See *id.*

120. NUGENT, *supra* note 9, at 178. In fact, the ECJ stated in *Foto-Frost v. Hauptzollamt Lübeck-Ost* that "[d]ivergences between courts in the Member States as to the validity of Community acts would be liable to place in jeopardy the very unity of the Community legal order and detract from the fundamental requirement of legal certainty." Case 314/85, *Foto-Frost v. Hauptzollamt Lübeck-Ost*, 1987 E.C.R. 4199, 4231.

121. Case 106/77, *Amministrazione delle Finanze v. Simmenthal S.p.A.*, 1978 E.C.R. 629.

122. Case 6/64, *Costa v. ENEL*, 1964 E.C.R. 585, 594.

subsequent to the enactment of Community law.¹²³ Thus, both cases establish the exclusive power of the ECJ to interpret Community law.

The ECJ has articulated several justifications for the supremacy of Community law. The most significant justification is simply that Member States limited their sovereignty on accession into the Union.¹²⁴ A similar justification is the "doctrine of useful effect," which posits that the foundations of the EU would be undermined if national laws took precedence over EU law.¹²⁵ Moreover, the 1993 Maastricht Treaty states that Member States are permitted to apply more stringent laws in areas such as the environment, consumer protection, and social policy as long as these laws are not contrary to or inconsistent with EU law.¹²⁶ Although some Member States initially resented the supremacy doctrine, the doctrine has now gained general acceptance, even if only out of respect for the success and continuation of the EU.¹²⁷

2. Preliminary Rulings

The doctrine of direct effect and the doctrine of supremacy were developed within the framework of Article 177 of the EEC Treaty, which ensures uniformity and consistency in the application of EU law by the national courts.¹²⁸ Because EU law is primarily implemented by national governments, national courts are often required to interpret and apply EU law. Without guidance from the ECJ, courts may not always reach similar conclusions in their interpretation of EU law. Thus, national courts are empowered under Article 177 to request "preliminary rulings" from the ECJ regarding issues of Community law.¹²⁹ This procedure facilitates legal uniformity among the Member

123. The ECJ in *Simmenthal* expanded its supremacy by stating, "Every national court must, in a case within its jurisdiction, apply Community law in its entirety and protect rights which the latter confers on individuals and must accordingly set aside any provision of national law which may conflict with it, whether prior or subsequent to the Community rule." *Simmenthal*, 1978 E.C.R. at 644.

124. See ELLIS, *supra* note 64, at 9.

125. See *id.*

126. MAASTRICHT TREATY tit. XI, art. 129a(1)(3); tit. XVI, art. 130(f); tit. VIII, art. 118(a)(3).

127. See ELLIS, *supra* note 64, at 9. In particular, Italy, France, and West Germany were initially hesitant to accept such a doctrine. See *id.* at 9 n.21.

128. See PRECHAL & BURROWS, *supra* note 97, at 39.

129. See *id.*

States and promotes consistent interpretation of EU law throughout the Community.¹³⁰

The ECJ derives its jurisdiction to provide preliminary rulings on the interpretation of the EEC Treaty and on the validity and interpretation of secondary Community law from Article 177.¹³¹ When such questions arise in a national court, the national court has the discretion under paragraph 2 of Article 177 to request a preliminary ruling from the ECJ if it "considers that its judgment depends on a preliminary decision on this question."¹³² Alternatively, the national court may choose to set aside the national law and apply Community law in conformity with the doctrine of supremacy.

If such issues are raised before a court of last instance in a Member State, however, Article 177(c) obliges that court to seek a preliminary ruling from the ECJ on all relevant issues.¹³³ A court of last instance is generally the highest court in a Member State and has been defined by the ECJ as "a national court or tribunal

130. See *id.* The ECJ stated in *Rheinmühlen-Düsseldorf v. Einfuhr-und Vorratsstelle für Getreide*:

Article 177 is essential for the preservation of the Community character of the law established by the Treaty and has the object of ensuring that in all circumstances the law is the same in all States of the Community. Whilst it thus aims to avoid divergences in the interpretation of Community law which the national courts have to apply, it likewise tends to ensure this application by making available to the national judge a means of eliminating difficulties which may be occasioned by the requirement of giving Community law its full effect within the framework of the judicial systems of the Member States.

Case 166/73, *Rheinmühlen-Düsseldorf v. Einfuhr-und Vorratsstelle für Getreide*, 1974 E.C.R. 33, 38. See also Case 283/81, *C.I.L.F.I.T. v. Ministry of Health*, 1982 E.C.R. 3415, 3428 ("Article 177 seeks to prevent the occurrence within the Community of divergences in judicial decisions on questions of Community law").

131. Article 177 of the EEC Treaty provides:

The Court of Justice shall be competent to make a preliminary decision concerning:

- (a) the interpretation of this Treaty;
- (b) the validity and interpretation of acts of the institutions of the Community; and
- (c) the interpretation of the statutes of any bodies set up by an act of the Council, where such statutes so provide.

EEC TREATY art. 177.

132. *Id.* at art. 177, ¶ 2. See also Carl Otto Lenz & Gerhard Grill, *The Preliminary Ruling Procedure And The United Kingdom*, 19 FORDHAM INT'L L. J. 844, 846 (1996).

133. See EEC TREATY art. 177, ¶ 3; see also PRECHAL & BURROWS, *supra* note 97, at 39 (stating that the highest court must request the ECJ to provide a preliminary ruling regarding the validity and meaning of Community Law).

against whose decisions there is no judicial remedy under national law."¹³⁴

In fact, the courts of last instance have an obligation to refer issues of EU law to the ECJ, except in two instances. The first exception is referred to as *acte éclairé* and applies when the ECJ has previously entered a preliminary ruling in a similar case and therefore has already addressed and interpreted the EU law in question.¹³⁵ The second exception is referred to as *acte clair* and applies when a national court considers the law clear enough to render an accurate judgment without referral.¹³⁶ The ECJ specifically upheld the latter exception in *C.I.L.F.I.T. v. Ministry of Health*,¹³⁷ holding:

[T]he correct application of Community law may be so obvious as to leave no scope for any reasonable doubt as to the manner in which the question raised is to be resolved. Before it comes to the conclusion that such is the case, the national court or tribunal must be convinced that the matter is equally obvious to the courts of the other Member states and to the Court of Justice.¹³⁸

The ECJ further noted, however, that conflicting legal traditions as well as language differences between Member States often make such conclusions difficult.¹³⁹ Thus, while acknowledging the *acte clair* doctrine, the ECJ significantly constrained its application.¹⁴⁰

Although these exceptions may invite abuse from Member States unwilling to defer judgment to the ECJ, the Commission is authorized to institute sanctions against Member States for failure to request a preliminary ruling.¹⁴¹ In practice, however, sanctions are rarely imposed.¹⁴² Initially, courts rarely requested preliminary rulings before rendering national judgments (either as a result of ignorance or national pride), but such requests now constitute a considerable portion of the ECJ's caseload.¹⁴³

134. *C.I.L.F.I.T.*, 1982 E.C.R. at 3428.

135. See *C.I.L.F.I.T.*, 1982 E.C.R. at 3429; PRECHAL & BURROWS, *supra* note 97, at 39.

136. PRECHAL & BURROWS, *supra* note 97, at 39; see *C.I.L.F.I.T.*, 1982 E.C.R. at 3429-30.

137. *C.I.L.F.I.T.*, 1982 E.C.R. 3415.

138. *Id.* at 3430. In fact, the ECJ addressed three exceptions in its ruling. It held that no judicial remedy under national law is required when (1) the issue is irrelevant; (2) the ECJ has already addressed the question; or (3) the correct application of Community law is obvious. See *id.* at 3431.

139. See *id.*

140. See DINE ET AL., *supra* note 83, at 9.

141. The Commission has the authority to implement infringement proceedings under Article 169. EEC TREATY art. 169.

142. See Lenz & Grill, *supra* note 132, at 852.

143. See *id.* at 847. Approximately 11 preliminary references per year were filed with the ECJ between 1961 and 1970. Between 1971 and 1980,

Preliminary rulings may be requested only by the appropriate national court or tribunal.¹⁴⁴ Parties are neither afforded the authority to insist on a reference nor to oppose one that has already commenced.¹⁴⁵ Because parties may not compel a reference, they often urge the court, implicitly or explicitly, to make a reference.¹⁴⁶ Thus, parties seeking recourse in the ECJ may be forced to appeal within their national system on other grounds until a reference is made to the ECJ by a Member State court.¹⁴⁷ Moreover, although the ECJ is required to respond to a request for a preliminary ruling, it is obliged to rule only on those issues relevant to the underlying dispute and may not decide the case on its merits.¹⁴⁸ Any questions referred to the ECJ under the pretense of a preliminary ruling, but actually requested solely to challenge a national law's validity, will not be addressed.¹⁴⁹ In practice, however, the ECJ rarely dismisses cases for lack of a genuine dispute.¹⁵⁰

Thus, the ECJ interprets EU law only within the context of the case, without applying extraneous EU law or national law.¹⁵¹ Thereafter, the national court is obliged to apply the law, as interpreted by the ECJ, on the dispute before it.¹⁵² Although generally not binding except on the parties involved in the particular dispute, the ECJ's decisions indicate how it would rule in similar cases.¹⁵³ As a result, the ECJ's decisions are considered to have an authoritative legal effect.¹⁵⁴ If the ECJ

approximately 73 preliminary references were filed, and approximately 189 between 1991 and 1994. In 1995, approximately 196 references were filed. *Id.* at 848.

144. See PRECHAL & BURROWS, *supra* note 97, at 39.

145. The Court in *C.I.L.L.F.I.T.* noted that "Article 177 does not constitute a means of redress available to the parties to a case pending before a national court or tribunal." Case 283/81, *C.I.L.L.F.I.T. v. Ministry of Health*, 1982 E.C.R. 3415, 3428.

146. Carl O. Lenz, *The Role and Mechanism of the Preliminary Ruling Procedure*, 18 *FORDHAM INT'L L.J.* 388, 394 (1994).

147. See *id.*

148. See Stoelting, *supra* note 77, at 211.

149. See Lenz, *supra* note 146, at 396-97; see also SCHWARZE, *supra* note 77, at 22.

150. See Lenz, *supra* note 146, at 397.

151. PRECHAL & BURROWS, *supra* note 97, at 40.

152. See van Vleuten, *supra* note 63, at 145-46. Thus, the ECJ ruling does not actually decide the case but instead provides direction for national courts. FISCHER, *supra* note 19, at 78.

153. See SCHWARZE, *supra* note 77, at 31. The ECJ is not modeled on the principles of common law, and the common law doctrine of precedent does not apply to ECJ decisions. Instead, the ECJ is governed by the principle of *res judicata*, which provides that a judgment is binding only if there is an identity of parties, causes, and subject matter. See *id.*

154. See *id.* at 32.

declares an act or EU law invalid, all Member States should regard this ruling as applicable throughout the Union.¹⁵⁵ Thus, preliminary rulings not only ensure accurate application of EU law but also secure the principles of the supremacy doctrine.¹⁵⁶

3. Jurisdiction

The ECJ has jurisdiction over two types of cases. The first are requests for preliminary rulings in cases that both originate and terminate in a national court. The second are those cases originating and terminating before the ECJ and requiring an application of EU law.¹⁵⁷ The ECJ has full jurisdiction over the latter cases, which are considered "direct actions."¹⁵⁸ Direct actions may be brought before the ECJ in several ways, such as proceedings for failure of a Member State to fulfill an obligation, proceedings for the annulment of all or part of a section of Community legislation, proceedings for failure to act by a Community institution, actions for damages caused by Community institutions, and appeals, on points of law only, against judgments entered by the Court of First Instance.¹⁵⁹

IV. EVOLUTION OF SOCIAL POLICY

Article 2 of the EEC Treaty states that the primary objectives of the European Union are "to promote throughout the Community, a harmonious development of economic activities, a continuous and balanced expansion, an increased stability and an accelerated raising of the standard of living and closer relations between its Member States."¹⁶⁰ As implied by Article 2, the process of European integration focuses primarily on economic issues. As a consequence, social integration has substantially lagged behind economic integration. In fact, the

155. See Stoelting, *supra* note 77, at 212.

156. See *id.*

157. See BENGOTXEA, *supra* note 82, at 14.

158. See *id.*

159. See *id.* at 14-15.

160. Article 2 states in full:

It shall be the aim of the Community, by establishing a Common Market and progressively approximating the economic policies of Member States, to promote throughout the Community a harmonious development of economic activities, a continuous and balanced expansion, an increased stability, an accelerated raising of the standard of living and closer relations between its Member States.

original signatories of the founding treaties appeared to have been concerned with social integration only as a component of economic integration.¹⁶¹

The six original signatory members of the EEC Treaty shared relatively common social policies, and as a result, social policies were not a high priority;¹⁶² however, the EEC Treaty does contain several provisions pertaining to social policy.¹⁶³ In particular, Article 119 mandates equal pay for equal work, regardless of the market gender.¹⁶⁴ It is the only provision promoting equal opportunities and one of the few provisions expressly stating a basic human right.¹⁶⁵ Although Article 119 addresses a social issue, its insertion was based on economic considerations.¹⁶⁶ In fact, because requirements relating to equal pay for equal work

161. Roelofs, *supra* note 37, at 123. See Odile Quintin, *The Policies of the European Communities with Special Reference to the Labour Market*, in *WOMEN, EQUALITY AND EUROPE 71* (Mary Buckley & Malcolm Anderson eds., 1988).

162. See Commissioner Pdraig Flynn, *Will Europe Work* (television broadcast, July 22, 1996). Commissioner Flynn indicated that between 1957 and the first enlargement of the EU in 1973, only two major social policy issues were addressed by the Member States: the free movement of workers and equal opportunities. Both of these social issues were largely based on economic principles. See *id.*

163. EEC TREATY arts. 117-22. Articles 117, 118, and 119 are the main provisions pertaining to social policy. *Id.* art. 117-119. Article 117 pertains to the improvement of living and working conditions; Article 118 proposes collaboration between Member States on issues arising in the social arena; Article 119 pertains to equal pay for equal work. *Id.*

164. Article 119 states:

[E]ach Member State shall in the course of the first stage ensure and subsequently maintain the application of the principle of equal remuneration for equal work as between men and women workers. For purposes of this Article, remuneration shall mean the ordinary basic or minimum wage or salary and any additional emoluments whatsoever payable directly or indirectly, whether in cash or in kind, by the employer to the worker and arising out of the workers' employment. Equal remuneration without discrimination based on sex means: (a) that remuneration for the same work at piece-rates shall be calculated on the basis of the same unit of measurement; and (b) that remuneration for work at time-rates shall be the same for the same job.

EEC TREATY art. 119.

165. Roger J. Goebel, *Employee Rights in the European Community: A Panorama From the 1974 Social Action Program to the Social Charter of 1989*, 17 *HASTINGS INT'L & COMP. L. REV.* 1, 30 (1993). Professor Goebel noted two additional significant characteristics of Article 119. First, the article is more specific in asserting a social goal in contrast to the broader language provided in Article 117, which pertains to working conditions and the standard of living for workers. Second, although Article 119 provides a broad definition of the term "pay," it is narrow in that it limits the goal of equality to "equal pay" as opposed to encompassing working conditions in general. See *id.*; see also Roelofs, *supra* note 37, at 131.

166. See Roelofs, *supra* note 37, at 131.

had already been implemented in France, the French government insisted on the inclusion of Article 119 to prevent economic activity from being diverted to other countries where employers could exploit gender-based wage discrimination.¹⁶⁷

Despite Article 119, many Member States initially did not adhere to the principle of equal pay, and the broad disparity between men and women's wages remained.¹⁶⁸ Reflecting the emerging realization that social policy was an important component in a diversified and expanding Europe, the Council of Ministers in 1974 adopted the first Social Action Program, proposing a more aggressive social policy.¹⁶⁹

To implement the Social Action Program, the Council enacted a series of directives: the Equal Pay Directive in 1975, the Equal Treatment Directive in 1976, and the Directive on Equality in Social Security in 1978.¹⁷⁰ The Equal Pay Directive attempted to clarify Article 119 by defining the phrase "equal pay for equal work" as equal pay for work of equal value.¹⁷¹ Significantly, however, the Equal Pay Directive failed to address women's inadequate access to the labor market. Primarily employed in lower-paying positions, women required equal opportunity to compete and advance in the workplace.¹⁷² Recognizing the absence of a provision promoting equal access to employment, the

167. *Id.*

168. *Id.* Pursuant to Article 119, Member States were required to implement the principle of equal pay by 1961. Sara P. Crovitz, *Equal Pay in the European Community: Practical and Philosophical Goals*, 1992 U. CHI. LEGAL F. 477, 479. The Member States, however, did not adhere to this schedule and thus implemented their own timetable, which expired in 1964. The Member States again failed to adhere to the schedule. Thus, the Commission passed the Equal Pay Directive to reinstate and clarify Member States' obligations to the principle of equal pay for equal work. *See id.*

169. *See* Tanya M. Shively, *Sexual Harassment In The European Union: King Rex Meets Potiphar's Wife*, 55 LA. L. REV. 1087, 1107 (1995). The primary objectives of the Social Action Program were to strengthen employment at community, national, and regional levels, to improve living and working conditions, and to increase the involvement of management and labor in regard to social policies. *See id.* Three subsequent social programs have been implemented to further strengthen women's position in the workplace. Respectively entitled the Second, Third, and Fourth Social Action Programs, these programs were implemented between the years 1982-85, 1986-90, and 1991-95. *See* ELLIS, *supra* note 64, at 40; *see generally* Goebel, *supra* note 165 (discussing the development and implementation of social policies between 1974 and 1989).

170. Roelofs, *supra* note 37, at 131-32. While the Social Action Programs promoted social policy through legislative action, the directives provided a basis for implementation of such policies. *See* Shively, *supra* note 169, at 1107.

171. *See* Crovitz, *supra* note 168, at 479.

172. Elena Noel, *Prevention of Gender Discrimination Within the European Union*, 9 N.Y. INT'L L. REV. 77, 83-84 (1996).

Council responded by adopting the Equal Treatment Directive (hereinafter Directive).¹⁷³

Article 1 of the Directive states that the purpose of the Directive is "to put into effect in the Member States the principle of equal treatment for men and women as regards access to employment" ¹⁷⁴ The main objective of the Directive is to prohibit sex discrimination, as enunciated in Article 2, paragraph 1 (Article 2(1)), which defines the principle of equal treatment. This provision states, "there shall be no discrimination whatsoever on the grounds of sex either directly or indirectly" ¹⁷⁵

The Directive, however, failed to define the concepts of "direct" and "indirect" discrimination. As a result, Member States have had little guidance in their attempts to interpret what constitutes discrimination.¹⁷⁶ The more concrete a definition of discrimination, the easier it is to establish that discrimination against an individual or a group has occurred. Thus, it should have been apparent that the absence of a coherent definition could lead to restrictive interpretations by both legislative and judicial institutions.¹⁷⁷ In fact, guidelines may still be necessary from EU institutions, in particular the ECJ, to achieve a uniform application of the Directive by all Member States.¹⁷⁸ Realistically,

173. See *id.* at 84-85; see also Jill Andrews, Comment, *National and International Sources of Women's Right to Equal Employment Opportunities: Equality in Law Versus Equality in Fact*, 14 NW. J. INT'L L. & B. 413, 422 (1994) (discussing the Equal Treatment Directive's purpose and requirements).

174. Council Directive, *supra* note 2, at art. 1(1). The Preamble of the Equal Treatment Directive states:

Whereas Community action to achieve the principle of equal treatment for men and women in respect of access to employment and vocational training and promotion and in respect of other working conditions also appears to be necessary; whereas, equal treatment for male and female workers constitutes one of the objectives of the Community, in so far as the harmonization of living and working conditions while maintaining their improvement are *inter alia* to be furthered

Id. at 40.

175. Article 2(1) states in full, "[f]or 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." Council Directive, *supra* note 2, at art. 2(1). The insertion of the phrase "by reference" suggests that marriage and family status are merely two examples of discrimination. See ELLIS, *supra* note 64, at 136-37.

176. PRECHAL & BURROWS, *supra* note 97, at 106.

177. See *id.*

178. See *id.*

however, some room will always exist for national interpretation and judicial maneuvering.¹⁷⁹

Traditionally, direct discrimination is understood as meaning unequal treatment on the basis of sex or on the basis of features distinctly related to gender.¹⁸⁰ Direct discrimination is forbidden within the EU, except for a few legal exemptions.¹⁸¹ Indirect discrimination occurs when unequal treatment is imposed on persons on the basis of a criterion other than sex, resulting in a disadvantage to persons of only one sex.¹⁸² Regardless of whether any intention to discriminate exists, indirect discrimination occurs when the actual effect is discriminatory.¹⁸³ In general, direct discrimination is easier to counter through legal measures than is indirect discrimination, which often results in ambiguous discrepancies in determining which individuals or groups have been the targets of discrimination.¹⁸⁴

Although direct discrimination is specifically prohibited, three justified exceptions exist. Article 2, paragraph 2 (hereinafter Article 2(2)) authorizes a distinction on the basis of sex in instances in which gender is a determining factor in the nature of an occupation or in the ability of individuals to perform certain occupational activities.¹⁸⁵ Two examples of the former include

179. See *id.*

180. See *id.* For instance, criterion based on characteristics common to one sex, such as pregnancy, are considered examples of direct discrimination. See *id.* at 107.

181. See van Vleuten, *supra* note 63, at 151.

182. See *id.* The Commission defined the term indirect discrimination "as referring to hidden discrimination which might in practice affect workers of one sex as a result of marital or family status being taken into account in determining the rights covered by the two Directives." MARIA J. GONZALEZ, COMMUNITY LAW AND WOMEN 36 (1986) (discussing Directives 76/207 and 79/7). One example of indirect discrimination is imposing a maximum age limit for entering an occupation with the effect that women who rear children during their 20s or 30s are excluded from the field. PRECHAL & BURROWS, *supra* note 97, at 108. Another example is providing full-time workers with more legal benefits than part-time workers. See *id.* Again, women may be at a disadvantage because more women than men work part-time because of domestic responsibilities. See *id.*

183. See PRECHAL & BURROWS, *supra* note 97, at 106-07. Objective justifications for discriminatory practices may be accepted, however, when an employer can demonstrate (generally through statistical data) the adverse effect of a particular criterion that would require differential treatment. See van Vleuten, *supra* note 63, at 156-57. Determining what constitutes an objective justification is often difficult. *Id.* at 151. Courts should take care in constructing a definition, however, because a definition that is too broad may otherwise contradict the prohibition against discrimination. *Id.* See Case 170/84, *Bilka v. Weber Von Hartz*, 1986 E.C.R. 1607, 1628 (specifying the criteria for objective justification).

184. See van Vleuten, *supra* note 63, at 153.

185. See PRECHAL & BURROWS, *supra* note 97, at 110. This distinction is based on the nature of the job versus the context of the work. See *id.* Article 2(2) states:

occupations such as actress/actor or soprano/bass singer. Some examples of the latter include occupations such as firemen, civilian employees in military security departments, supervisors in educational boarding school establishments, and certain sectors of the police department.¹⁸⁶ Often, the distinctions implicit in the latter category are influenced by stereotypes and inherent biases defining occupations traditionally associated with only one sex.¹⁸⁷ The allowance of such distinctions has been criticized by the Commission, which supports their elimination.¹⁸⁸

Article 2, paragraph 3 (hereinafter Article 2(3)) specifically permits protective measures benefiting women in pregnancy and maternity.¹⁸⁹ The ECJ stated in *Hofmann v. Barmer Ersatzkasse* that Article 2(3) recognizes that "it is legitimate to ensure the protection of a woman's biological condition during pregnancy . . . [and] . . . to protect the special relationship between a woman and her child over the period which follows pregnancy and childbirth."¹⁹⁰

Finally, Article 2, paragraph 4 (hereinafter Article 2(4)) authorizes the implementation of measures directed toward eliminating existing inequalities that affect women's opportunities in the workplace. Article 2(4) states, "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)."¹⁹¹ Accordingly, Article 2(4) expressly allows for the

This Directive shall be without prejudice to the right of Member States to exclude from its field of application those occupational activities and, where appropriate, the training leading thereto, 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.

Council Directive, *supra* note 2, at art. 2(2).

186. See PRECHAL & BURROWS, *supra* note 97, at 109-10.

187. See *id.* The distinctions have been attributed to such factors as safety, unpleasant working conditions, or religious, moral, or social reasons. See *id.* There is a vast difference between Member States as to the number of occupations excluded from the principle of non-discrimination; some Member States have relatively few exclusions while others have many. Because exclusions pertaining to the nature of the work are often a result of historical or social biases, it may be necessary for the EU to implement a list of permissible occupational activities that may be excluded. See *id.*

188. See van Vleuten, *supra* note 63, at 156.

189. Council Directive, *supra* note 2, at art. 2(3).

190. Case 184/83, *Hofmann v. Barmer Ersatzkasse*, 1984 E.C.R. 3047, 3075.

191. Council Directive, *supra* note 2, at art. 2(4).

possibility of preferential treatment and concomitantly positive action programs.¹⁹²

Positive action is a vehicle for achieving *equal opportunities* and provides preferential treatment to members of a disadvantaged group by granting them a temporarily advantageous position.¹⁹³ Because the principle of equal treatment mandates that law be gender-neutral, Member States must be careful not to implement programs that are contrary to this principle.¹⁹⁴ Depending on the depth and nature of positive action programs, however, the results can be both extensive and effective in combatting the inequities women face in the labor market.

In fact, the Commission has recently formulated several positive action policies and, in concert with the Council, has encouraged Member States to recruit and promote women in both private and public sectors in which they are under-represented.¹⁹⁵ Some of the Commission's policies include distributing informational materials designed to raise awareness in matters of equality, diversifying the occupational opportunities for women, and adopting a more expansive range of educational and vocational choices.¹⁹⁶

192. The Advocate-General commented in *Hofmann v. Barmer Ersatzkasse*:

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.

Hofmann, 1984 E.C.R. at 3082.

193. See van Vleuten, *supra* note 63, at 156. Advocate General Tesaro summarized that positive action "marks a transition from the individual vision to the collective vision of equality." Case C-450/93, *Eckhard Kalanke v. Freie Hansestadt Bremen*, 1995 E.C.R. I-3051, I-3058.

194. See van Vleuten, *supra* note 63, at 156.

195. See Jong & Bock, *supra* note 5, at 185.

196. *Id.* The term "positive action" was initially defined more broadly in the EU than in the United States. *Id.* Eventually, the Commission used the term to refer to measures solely related to the position of women in employment. In *Positive Action Manual*, published in 1988 by the Commission, "positive action" was defined as follows:

[A]ims to complement legislation regarding equal treatment and comprises any measure contributing to the elimination of inequalities in practice. A positive action programme will allow an organization to track down and eliminate every form of discrimination in its employment policy and to neutralize the effects of past discrimination. A positive action programme is a comprehensive planning process which an employer chooses to

The Commission contended that such policies are significant not only socially, but also economically, as the participation of women in the labor force continues to increase.¹⁹⁷ In fact, the Council stated in the Recommendation on the Promotion of Positive Action for Women in 1984:

[E]xisting 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.¹⁹⁸

In an effort to counteract the existing prejudicial effects on women and to encourage increased participation of women in occupations in which they are under-represented, the Council recommended that all Member States adopt positive action policies to eliminate such inequalities.¹⁹⁹ Both the Commission and the Council have been instrumental in establishing the four social action programs.²⁰⁰ In addition, the Commission recently began reporting on the results of positive action programs in the various Member States, thereby providing an impetus for further action.²⁰¹

Many Member States have adopted positive action programs in accordance with the EU's provisos. For instance, the U.K., recognized for its progressive policies on women's issues, implemented positive action programs for women and minorities in 1985.²⁰² Similarly, the French have introduced a variety of

undertake in order to try and achieve a more balanced representation of women and men throughout the work force and thus making possible a more efficient use of the available skills and talents in the work force.

Id. at 186 (quoting COMMISSION OF THE EUROPEAN COMMUNITIES, Positive Action Manual 10 (1988)).

197. *Id.* at 185.

198. Council Recommendation on the Promotion of Positive Action for Women 84/635, 1984 O.J. (L 331) 34.

199. *See id.* The Council listed several steps to help ensure the implementation of positive action measures, including: increasing awareness of the need to promote equality of opportunity for working women; providing studies on women's position in the labor market; diversifying vocational choices; adapting working conditions to better accommodate the needs of women; and encouraging measures that increase the participation and responsibility of women in the workforce. *See id.* at 35. Member States are thus encouraged to recruit and promote women in the labor market.

200. Jong & Bock, *supra* note 5, at 187. *See also supra* note 166.

201. Jong & Bock, *supra* note 5, at 187.

202. *Id.* Initially, the positive action programs were specifically confined to training and education. For instance, employers were permitted to organize special courses for both women and men in sectors in which they were underrepresented. *Id.* In 1985, however, the Equal Opportunities Commission's

measures designed to achieve equal treatment, such as renouncing the practice of rejecting women for occupational positions solely out of fear that family obligations may interfere.²⁰³ The Netherlands has implemented plans that provide employment targets for women in certain occupational positions, and Belgium has mandated positive action for all public sector organizations.²⁰⁴ Significantly, Germany has also enacted legislation providing preferential treatment for women, particularly in appointments to government positions.²⁰⁵

While Article 2(4) clearly encourages the creation of positive action programs, Article 2(1) prohibits any discrimination whatsoever, presumably including reverse discrimination. Whether measures promoting equality, even in sectors in which women are structurally under-represented, are considered discriminatory has been deferred to the judiciary. Only recently, in the *Kalanke* case, has the issue been presented to the ECJ for adjudication.

On October 17, 1995, in the case of *Kalanke v. Freie Hansestadt Bremen* (City of Bremen), the ECJ issued a preliminary ruling declaring a German state law contrary to the Equal Treatment Directive.²⁰⁶ The plaintiff, Mr. Eckhard Kalanke, a German civil servant, was denied a promotion to a managerial position.²⁰⁷ Instead, the Bremen Parks Department chose his equally qualified female counterpart.²⁰⁸ In accordance with the *Landesgleichstellungsgesetz* (Bremen local law on equal treatment for Men and Women in the Public Service), a woman with the same qualifications as a man who is applying for the same position must be given priority if women are under-represented.²⁰⁹ The Bremen law stipulated that under-

Code of Practice initiated guidelines for implementing positive action programs.
Id.

203. *Id.* The French have employed equal protection measures since 1982.
Id.

204. *Id.*

205. *Id.* at 188. Most Member States have implemented publicity campaigns designed to increase women's awareness of their position in the labor market. These campaigns include research on the position of working women and publication of the results, positive action programs, guidelines for employers, and brochures and films. *Id.*

206. *Kalanke*, 1995 E.C.R. I- 3051.

207. *Id.* at I-3073.

208. *Id.* Kalanke held a diploma in horticulture and landscape gardening and had worked for the Parks Department since 1973 as permanent assistant to the Section Manager. The woman who received the promotion had held a diploma in landscape gardening since 1983 and had worked for the Parks Department as a horticultural employee since 1975. *Id.*

209. *Id.* at I-3072. Paragraph four of the Bremen law provides that "in the case of an appointment . . . which is not made for training purposes, women who

representation is deemed to exist when women do not constitute "at least half of the staff in the individual pay, remuneration and salary brackets in the relevant personnel group within a department."²¹⁰

Although the Parks Department management recommended the plaintiff for the position, the Staff Committee rejected this recommendation.²¹¹ The matter was referred to arbitration and then to a conciliation board. The board held that the two candidates were equally qualified and that, because women were under-represented in the Parks Department, Bremen law required the position be given to the woman.²¹²

The plaintiff appealed to the Arbeitsgericht (Local Labour Court), contending that he was better qualified and that the Bremen law was contrary to German Basic Law and to provisions of the German Civil Code.²¹³ The Arbeitsgericht dismissed the case, however, and the plaintiff was unsuccessful on appeal to the Landesarbeitsgericht (Regional Labour Court).²¹⁴ The plaintiff then appealed to the Bundesarbeitsgericht (Federal Labour Court) on points of law.²¹⁵ While the Federal Labour Court held the Bremen law compatible with German constitutional and statutory provisions, the court was uncertain whether the Bremen law was consistent with the European Equal Treatment Directive. Thus, the court referred the issue to the ECJ, requesting a preliminary ruling on the interpretation of Articles 2(1) and 2(4) of the Directive.²¹⁶ The federal court questioned whether these two provisions precluded national rules, similar to Bremen's, that automatically gave priority to equally qualified women in sectors in which they were under-represented.²¹⁷

The ECJ, after almost twelve months of deliberation,²¹⁸ invalidated the Bremen law, holding it inconsistent with the

have the same qualifications as men applying for the same post are to be given priority in sectors where they are under-represented." *Id.*

210. *See id.*

211. *See id.*

212. *See id.*

213. *See id.* at I-3073-74.

214. *Id.* at I-3074.

215. *See id.*

216. *See id.* In its request for a preliminary ruling, the German court noted that Bremen implemented its law in response to disadvantages women faced there; the court cited figures showing the low proportion of women in higher career positions among Bremen city employees. *Id.*

217. *Id.* at I-3076.

218. *See* Gerard O'Dwyer, *Norway Defies Europe's Gender Ruling; Ministers Say European Court Directive is 'Inferior,'* MONTREAL GAZETTE, Feb. 12, 1996, at E2, available in 1996 WL 4170091.

intention of the Equal Treatment Directive.²¹⁹ Interpreting Article 2(1), which defines equal treatment as "no discrimination whatsoever on grounds of sex either directly or indirectly . . . ," the ECJ concluded that the Bremen law was discriminatory.²²⁰ The ECJ contended that "[a] national rule that, where men and women 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."²²¹ The ECJ did not further address Article 2(1) or explain the reasoning behind its interpretation. Simply stated, however, discrimination occurs when there is a difference in treatment or favor of a class in disregard of individual merit. This case presented such an example.

The ECJ continued its analysis by referring to Article 2(4), which specifically provides one of the exceptions to the basic principle of equal treatment stated in Article 2(1). Article 2(4) provides for the implementation of measures which, regardless of their discriminatory nature, promote equal opportunities for men and women by removing instances of existing inequalities relating to women's opportunities.²²² Article 2(4), therefore, broadens the confines of Article 2(1) by approving positive action programs designed to improve women's access to employment opportunities and to increase their competitive advantage in the labor market. In fact, the ECJ explicitly stated that measures relating to access to employment, including promotion, are permissible.²²³ For this proposition, the ECJ cited *Commission v. France*,²²⁴ the only case prior to *Kalanke* in which it ruled on the interpretation of Article 2(4).

In *Commission v. France*, the ECJ held that the exception allowed positive action measures that, although discriminatory in appearance, were in fact intended to eliminate existing inequalities.²²⁵ In addition, the ECJ in *Kalanke* quoted the preamble of the Council Recommendation on the Promotion of

219. See *Kalanke*, 1995 E.C.R. at I-3078. Advocate General G. Tesaurò delivered a similar Opinion at the sitting of the Full Court on April 6, 1995. See *id.* at I-3067-68.

220. Council Directive, *supra* note 2, at art. 2(1); *Kalanke*, 1995 E.C.R. at I-3076-77.

221. *Kalanke*, 1995 E.C.R. at I-3077.

222. Council Directive, *supra* note 2, at art. 2(4).

223. *Kalanke*, 1995 E.C.R. at I-3077 (citing Case 312/86, *Commission v. France*, 1988 E.C.R. 6315).

224. Case 312/86, *Commission v. France*, 1988 E.C.R. 6315.

225. *Id.* at 6336. Following this interpretation, the ECJ contended that Article 2(4) did not allow the implementation of special rights for women, such as shorter working hours, leaves of absence when children are ill, or additional compensation for child care. *Id.* at 6336-37.

Positive Action for Women (hereinafter Council Recommendation), which promotes the enactment of national measures designed to eliminate existing inequalities in the workplace.²²⁶ The ECJ's reference to the Council Recommendation, at a minimum, reflects its awareness of the need for measures to be implemented on a national level.

Nevertheless, the ECJ contended that the derogation allowed by Article 2(4) "must be interpreted strictly."²²⁷ With this preface, the ECJ continued to hold that providing *absolute* priorities to women is inconsistent with the objectives of Article 2(4).²²⁸ The ECJ specifically asserted that such measures that guarantee women absolute and unconditional priority for appointment "go beyond promoting equal opportunities and overstep the limits of the exception in Article 2(4)."²²⁹ To provide further guidance both to the German courts and to courts in other Member States, the ECJ clarified this statement by distinguishing between "equal representation" (as prescribed by automatic preferences) and "equal access." The ECJ concluded that the German law substituted the end for the means, and that, although the Directive permits measures promoting equal opportunity, it does not permit automatic preferences.²³⁰

Although the ECJ concluded that the Bremen law overstepped the limits of Article 2(4), it did not indicate what those limits were.²³¹ Although little may be gleaned from the ECJ's ruling regarding the permissible scope of positive action programs, some insight can be obtained from the opinion submitted by Advocate General Tesauero.²³² Tesauero's opinion emphasizes the distinction between removing obstacles that

226. See *Kalanke*, 1995 E.C.R. at I-3077

227. *Id.* at I-3078 (citing Case 222/84, *Johnston v. Chief Constable of the Royal Ulster Constabulary*, 1986 E.C.R. 1651, ¶ 36).

228. *Id.*

229. *Id.*

230. *Id.* The Advocate General reasoned that the Bremen positive action program was disproportionate to the objective of Article 2(4) "since that aim remains that of achieving equal opportunities for men and women and not of guaranteeing women the result where conditions are equal." *Id.* at I-3066.

231. Possibly this is a result of disagreement among the judges, who must unanimously agree on a judgment and may not publish dissenting opinions. As one former ECJ law clerk noted, "Sometimes you can see the disagreement in the wording of the final judgment." See James Pressley & Brian Coleman, *Ruling Class: EU Court Discovers There's More to Law Than Coal and Steel: Justices Exert New Authority Over States and Business; Challenge to Power Arises: An Enlightened Old Boys Club?*, WALL ST. J. (Europe), Dec. 19, 1995, at 9, available in 1995 WL-WSJE 12634910. That the *Kalanke* opinion only contained two paragraphs of reasoning, the clerk noted, "was a sign to me that the judges could not reach an agreement." *Id.*

232. *Kalanke*, 1995 E.C.R. at I-3058.

prevent women from achieving the same results as men and bestowing the results directly on women simply because they are women. While his conclusion that the Bremen law oversteps the provisions of the Directive is legally justifiable, his analysis is based primarily on his own personal viewpoints regarding reverse discrimination. Nevertheless, it is a welcome contrast to the ECJ's sparse justification for its own holding.

Tesauro's report provides additional insight into the ECJ's distinction between equal access and equal representation. In distinguishing these principles, Tesauro noted that positive action measures may be structured according to three theoretical models of equality,²³³ two of which are relevant here. The first model emphasizes the means to the end and seeks to remove existing barriers that impede women's ability to participate and advance in the labor market. Remedial measures might include vocational training, improved working conditions, or encouraging women's active participation in fields in which they are under-represented.²³⁴

The second model seeks to remove inequalities through quotas or goals and defines equality through quantitative figures.²³⁵ This model forces results rather than eliminating causes and legitimizes quotas and goals as a means of removing inequalities. Tesauro's opinion implies that measures promoting "substantive equality" are consistent with the Directive, while those promoting "formal equality" are not.²³⁶

Therefore, while the Directive allows positive action directed toward providing equal opportunities, it does not mandate equal results. Tesauro contends that Kalanke and his female counterpart's presumably equivalent qualifications were evidence that neither had been disadvantaged regarding employment opportunities. The Bremen law, by providing automatic preferences to women, thus serves as a means of attaining formal equality as opposed to substantive equality.

Whether or not the Advocate-General's opinion reflects the ECJ's reasoning in *Kalanke*, the ECJ's holding may result in future litigation by other individuals in positions similar to

233. *Id.*

234. *Id.*

235. *Id.*

236. Advocate General Tesauro defiantly stated, "Formal, numerical equality is an objective which may save some consciences, but it will remain illusory and devoid of all substance unless it is [sic] goes together with measures which are genuinely destined to achieve equality, which was not the case in this instance" *Id.* at I-3067.

Kalanke's.²³⁷ Moreover, it is probable that the ECJ will receive an increase in requests for preliminary rulings by Member States struggling to formulate policies that comport with *Kalanke* yet promote women's access to job opportunities. Finally, *Kalanke* poses the problem that the decision may invite discrimination by limiting the realm of acceptable policies Members States can implement in attempting to "promote equal opportunities for men and women" as the Directive requires.

V. THE EUROPEAN RESPONSE

In response to the Court's ruling in *Kalanke*, criticism arose throughout the EU's Member States as well as within EU institutions. The Commission, which had previously implemented positive action programs within its own department, quickly denounced the decision.²³⁸ Commissioner of Social Affairs Pdraig Flynn contended *Kalanke* could have sweeping implications for all positive action programs in the Community and stated that the Commission would attempt to constrain the ruling's impact.²³⁹ In particular, Flynn warned of conflicts between *Kalanke* and the Commission's recommendation that states implement positive action programs—a recommendation passed by Member States in 1984.²⁴⁰ In fact, most EU states have already implemented positive action programs. For example, Italy has more than fifty programs in effect within the corporate sector,²⁴¹ and other Member States, such as the U.K., France, Netherlands, and Belgium, have implemented several programs in both public and private sectors.²⁴² Reflecting concern surrounding the judgment, Flynn's spokesperson commented that

237. For example, the case of *Marschall v. Nordrhein-Westfalen* (Case 409/95), in which a man was denied a promotion in favor of a woman due to the under-representation of women in that position, has been referred to the Court for a preliminary ruling. Advocate-General Jacobs has recommended that the reasoning used in *Kalanke* apply to this case. See *Advocate-General Upholds Kalanke Ruling*, EUR. REP., May 17, 1997, available in LEXIS, News Library, EURRPT File.

238. See Frances Gibb & Charles Bremner, *Euro Court Outlaws 'Jobs For Women' Programmes*, TIMES (London), Oct. 18, 1995.

239. *Red Faces at Commission, As Court Outlaws Affirmative Action*, Agence France-Presse, Oct. 17, 1995, available in 1995 WL 7868961.

240. See Gibb & Bremner, *supra* note 238.

241. Robert Rice et al., *Women Job Quota 'Unlawful'*, FIN. TIMES, Oct. 18, 1995, at 20. See also *supra* notes 200-05 and accompanying text.

242. See generally Jong & Bock, *supra* note 5.

the Commission was "afraid that the psychological damage of this court judgment could be big."²⁴³

Advocates of women's rights alleged that the ruling would impede, if not reverse, women's progress toward achieving equality in the workplace.²⁴⁴ The European Women's Lobby²⁴⁵ stated it was "shocked and disappointed" by the ruling,²⁴⁶ and Norway denounced the ruling, stating its intention to maintain its current gender laws, considered the most progressive of any Western nation.²⁴⁷ Although Norway is not one of the fifteen members of the EU,²⁴⁸ it is obligated to adhere to ECJ rulings as a member of the European Economic Area, created in 1994 to further promote trade throughout Europe and the rest of the world.²⁴⁹ The premier of Norway's Labor government, Gro Harlem Brundtland, stated that Norway would not upset years of hard work by implementing this rule.²⁵⁰ Brundtland further criticized the Directive as "behind the times," predicting that no other Scandinavian country²⁵¹ would adjust its laws to comport with the ruling.²⁵²

243. See Regine Wosnitza, *Court Ruling Casts Doubt on Fate of Europe's Affirmative Action Programs*, DALLAS MORNING NEWS, Dec. 9, 1995, at 42A, available in LEXIS, News Library, DALNWS File.

244. *Women Lose Court Fight for Jobs, Promotions*, *supra* note 3, at A5.

245. The European Women's Lobby is a coalition of EU national women's groups. *Id.*

246. *Id.*

247. O'Dwyer, *supra* note 218, at E2.

248. In 1972, when Denmark, Ireland, and the U.K. decided to join the EU, Norway was presented with the same opportunity. Norway's voting population rejected Norwegian membership in the Union, however, out of concern for Norwegian fisheries, oil supplies, environmental policies, and progressive social programs. FISCHER, *supra* note 19, at 251. Even when Austria, Finland, and Sweden voted to join the EU in 1995, Norwegians again voted "no," by a 52% to 48% margin. *Id.* See also *supra* note 25.

249. *Id.* In 1994, the 15 Member States of the EU and all of the EFTA countries except Switzerland created the European Economic Area (hereinafter EEA) to promote trade. The EEA is the world's largest integrated market and constitutes more than two-fifths of all world trade. HARRISON, *supra* note 9, at 160.

250. O'Dwyer, *supra* note 218, at E2.

251. In fact, most of the 48% of Swedes who rejected Sweden's decision to join the EU were women. Wosnitza, *supra* note 245, at 42A. The *Kalanke* ruling further delays Swedish women's acceptance of the EU and its policies. The assistant secretary at the Swedish Ministry of Social Affairs stated, "We want to have the freedom to use affirmative action if we find that it is a good method to use." *Id.* The Swedish government began discussing with women's groups, unions, and management how best to respond to this ruling. *Id.*

252. In 1976, Norway enacted the Gender Equality Act, which required employers to favor women in employment if they have the same qualifications as their male counterparts. O'Dwyer, *supra* note 218, at E2. Certain professions have implemented their own quota systems, including the nation's parliament, which has a quota requirement of 40% for either sex. *Id.* Although Norway has

Perhaps the strongest reaction came from those immediately affected by the ruling. Bremen's Senator for Women, Christine Wischer, stated that the ruling would compel Germany to re-examine its acceptance of European institutions.²⁵³ Throughout Germany, politicians petitioned the government to address the issue at the 1996 Intergovernmental Conference.²⁵⁴ In fact, German delegate Lissy Groener, spokeswoman for the Social Democratic Women in the European Parliament, denounced the ruling, stating, "The verdict shows that there is a considerable gap in equal rights on the European level," and noted that "a tendency is visible here, that, regarding affirmative action, the icy wind is again blowing from the front."²⁵⁵

However, the U.K.'s response differed dramatically from the responses of other Member States. In Britain, both the Equal Opportunities Commission (hereinafter EOC) and the Confederation of British Industry applauded and welcomed the ECJ's ruling.²⁵⁶ The ruling confirmed the U.K.'s current legislation prohibiting positive discrimination while permitting special gender-based training initiatives.²⁵⁷ In particular, the EOC expressed its opposition to positive discrimination on the ground that it appoints women to occupational positions because of their sex and not their merit.²⁵⁸

Throughout the European Community, members of the legal community joined ranks with the U.K., claiming that the ruling is simply a blunt reminder of the Directive's language. One of the judges of the ECJ, Judge David A. O. Edward, aptly asked, "Has the court done any more than say there comes a point at which 'positive discrimination' is discrimination?"²⁵⁹ In fact, the International Labour Organization urged governments not to overreact to the ruling and reminded them that this judgment did not prohibit positive action programs *per se* but only invalidated the Bremen law on the ground that it went too far.²⁶⁰ More than invalidating a positive action program, however, the ruling

refused to comply with the ECJ's ruling, the ECJ does not intend to petition Norway to adhere to its ruling. *Id.* Generally, countries that refuse to abide by ECJ directions either appeal the ruling or enact new statutes to safeguard its national laws. *Id.*

253. Rice et al., *supra* note 241, at 20.

254. *Id.*

255. Wosnitza, *supra* note 243, at 42A.

256. Rice et al., *supra* note 241, at 20.

257. *Id.*

258. *Id.*

259. James Pressley, *Rules of the Game: Sex-Discrimination Case Shows Anomaly in EU Law*, WALL ST. J. (Europe), Oct. 31, 1995, at 4, available in 1995 WL-WSJE 9090973.

260. Rice et al., *supra* note 241, at 20.

illustrated that the Equal Treatment Directive was poorly drafted.²⁶¹

Some scholars' criticism of the ECJ's opinion may reflect their objections to the Directive itself, rather than to *Kalanke's* reasoning. Although the decision is consistent with the Directive, some now find the Directive inadequate.²⁶² Although Article 119 of the EEC Treaty provides equal work for equal pay, no analogous article addressing hiring practices exists.²⁶³ The Equal Treatment Directive, adopted to placate such criticism, has not provided the results envisioned by many members of the EU. One reason for this may be that many EU laws are neither precise nor complete.²⁶⁴ Several factors may account for such poor drafting, including the novelty of the EU, the difficulties in compromising among the Member States, and the inability of the EU to overcome bureaucratic constraints in responding to EU concerns.²⁶⁵

Many who believe the Directive should be changed urged their governments to address the issue and redraft provisions of the Directive at the 1996 Intergovernmental Conference (IGC).²⁶⁶ In fact, in March 1996, the Commission, anxious to end the controversy surrounding the *Kalanke* case, issued a draft proposal to amend Article 2(4). The draft proposal, which seeks to reflect the ECJ's judgment, states:

[T]his 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-represented sex, provided that such measures do not preclude the assessment of the particular circumstances of an individual case.²⁶⁷

261. Pressley, *supra* note 231, at 6-7.

262. It should be emphasized that the ECJ's role is not to make social policy, but instead to provide judicial insurance that EU law is interpreted uniformly.

263. Wosnitza, *supra* note 243, at 42A.

264. NUGENT, *supra* note 9, at 175.

265. *Id.*

266. Wosnitza, *supra* note 243, at 42A. The IGC was convened in March 1996 to revise the Maastricht Treaty and to prepare the Union for further enlargement.

267. Commission of the European Communities, *Equal Treatment Between Women and Men: European Commission Clarifies the Kalanke Ruling*, RAPID, Mar. 27, 1996, available in LEXIS, News Library, RAPID File. The Commission listed examples of permissible positive action, including devising plans for promoting women; prescribing proportions in which women should be represented but avoiding automatic preferences; obligating employers to recruit persons of the

The draft proposal also provides examples of positive action programs that are permissible and consistent with *Kalanke*.²⁶⁸

In April 1996, following the Commission's plan for an amendment of the Directive, the Parliament, at its public hearing on equal opportunities, agreed that the issue needed to be addressed at the IGC.²⁶⁹ An amendment to such a Directive, however, would require unanimous consent of the Council of Ministers.²⁷⁰

As of December 1996, a rift remained among Council members as to whether to amend the Directive.²⁷¹ Although Spain and Italy supported the Commission's proposal, the Council's Legal Service did not consider an amendment necessary, but contended that a Commission Recommendation would be a sufficient response to the *Kalanke* ruling.²⁷² This suggestion, however, was discarded by Commissioner Flynn, who continued to support a revision in the Directive.²⁷³ Apparently, the rift among Council members resulted because most Member States did not believe an amendment was warranted, primarily because the ECJ did not specifically invalidate the Directive in its ruling.²⁷⁴

In April 1997, the Social Affairs Council convened to discuss, among other issues, the Commission's 1996 draft proposal clarifying the Directive,²⁷⁵ however, the Social Affairs Ministers shelved the proposal pending the conclusion of the IGC, to avoid possible conflict with the provisions of the revised treaty.²⁷⁶ Their

under-represented sex; and granting state subsidies to employers who recruit women in sectors in which they are under-represented. *Id.*

268. *Id.*

269. *Social Policy: Experts Call for EU Treaty to Address Equal Opportunities*, EUR. REP., May 7, 1996, available in LEXIS, News Library, EURRPT File. Ulrike Hauffe, the head of Bremen's Equal Opportunities Board, spoke at the hearing, expressed her dissatisfaction with the *Kalanke* ruling and reiterated her support for women's quota in the labor market. *Id.*

270. *Social Affairs Council: Employment and Social Security Dominate December 2 Sitting*, EUR. REP., Nov. 30, 1996, available in LEXIS, News Library, EURRPT File.

271. *Social Affairs Council: Broad Agreement on Burden of Proof Directive*, EUR. REP., Dec. 4, 1996, available in LEXIS, News Library, EURRPT File (hereinafter *Broad Agreement*).

272. *Id.*

273. *Recommendation on Equal Opportunities in Decision-Making Bodies*, EUR. SOC. POL'Y, Dec. 8, 1995, available in LEXIS, News Library, EURSOC File. Commissioner Flynn contends that the revised Directive should permit positive action programs that do not result in systematic favoring of one sex in hiring or promotion. *Id.*

274. *Broad Agreement*, *supra* note 272.

275. *EU: EU/Social Affairs - Major Topical Issues*, Agence Europe, Apr. 17, 1997, available in LEXIS, World Library, TXTLNE File.

276. *Id.*

reluctance to adopt the proposal may indicate that support for the amendment is waning. In fact, only Spain, Ireland, and Italy continue to show strong support for the proposal.²⁷⁷

The IGC, which concluded in June 1997, drafted the Treaty of Amsterdam (hereinafter Draft Treaty), which is a modification of the EU legal texts.²⁷⁸ Although primarily focused on EU enlargement and the implementation of the Economic Monetary Union, the Draft Treaty does include provisions addressing nondiscrimination and equality between men and women.²⁷⁹ In particular, the Draft Treaty includes a new article requiring the Community to take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age, or sexual orientation.²⁸⁰ In reference to equality between men and women, the drafters added paragraphs supplementing Title II, Articles 2 and 3 of the Maastricht Treaty. Significantly, the supplement to Article 3 reads, "In all activities referred to in this Article, the Community shall aim to eliminate inequalities, and to promote equality, between men and women."²⁸¹

The Draft Treaty will be finalized and ready for signature by October 1997, after which Member States will begin ratification proceedings.²⁸² Although the principles stated therein do not conflict with the draft amendment to the Directive, the Social Affairs Council will likely continue to delay its enactment because Member States have failed to support the revision. The furor *Kalanke* originally generated seems to have subsided.

VI. CONCLUSION

Although a revision of the Directive has been postponed, the *Kalanke* decision provides a concise and simple standard with which Member States should comply in formulating positive action programs. Positive action programs that provide automatic

277. *Equal Opportunities: Agreement On Burden Of Proof Directive In The Offing*, EUR. REP., Apr. 16, 1997, available in LEXIS, News Library, EURRPT File.

278. *European Council: Agreement On A New Treaty*, EURO-EAST, June 30, 1997, available in LEXIS, News Library, EUREAS File.

279. *Draft Treaty of Amsterdam*, § 1 (visited Oct. 7, 1997), <<http://www.bz.minbuza.nl/english/treaties/tradam.html>>.

280. *Id.* at art. 6(a).

281. *Id.* at art. 3.

282. *European Council, June 16/17, 1997: Summit Sees EU Stumble Onwards In Amsterdam*, EUR. REP., June 18, 1997, available in LEXIS, News Library, EURRPT File. The treaty should be signed by the Heads of State and Government on October 1, 1997 in Amsterdam. *Id.* The treaty will then have to be ratified by national parliaments as well as the European Parliament. If this schedule is followed, the treaty should come into force on January 1, 1999. *Id.*

preferences to one sex, even in areas where the candidates' qualifications are equal, are discriminatory under *Kalanke* and thus inconsistent with EU law. Succinctly, the *Kalanke* decision holds that discrimination on the basis of sex is unlawful in the EU. For many European citizens, particularly citizens of EU Member States, however, this concept may not only be new but contrary to many of their strongly embedded national laws.

Member States that oppose *Kalanke* will be confronted with a dilemma that transcends national differences regarding the desirability of positive action programs: that is, if Member States insist on pursuing national social policies rather than adhering to EU policy, they will undermine their political unity. Regardless of their individual objections to *Kalanke*, the States must not disregard it. Accession to the EU requires not only an acceptance of EU laws, but also of EU interpretation of those laws. To protect the underlying foundations of the EU, Member States must concede some judicial independence. The concept of a "union" implies not only solidarity but also compromise. Member States must resist notions of secession in the face of conflict, but instead respect the Union they joined and the precepts on which it is based. Ultimately, the significance of the *Kalanke* decision may not be its resolution of the positive action question, but the willingness of Member States to abide by this opinion.

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