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Aiming High – Falling Short?

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INTRODUCTION: AIMING HIGH – FALLING SHORT?

Ann Numhauser-Henning

1 INTRODUCTION

This publication is based on a conference held at the Law Faculty of Lund University in Lund on the 2–3 December 2004. In arranging the conference, as well as in editing this anthology, I was assisted by research assistant Hanna Pettersson, LL.M., to whom I am grateful. Gathered there were some fifty people to compare knowledge and experiences regarding *Women in Academia and Equality Law*. The immediate background to the conference was my concerns as the pro-vice-chancellor of Lund University to report by the end of the year on the Swedish Government's recruitment targets for new women professors for the period 2001–2004. The target for Lund University was set to 20% and I knew that this was going to be hard to reach. (Later on, the target turned out to be failed, Lund University reaching only 17% women professors among those newly recruited and/or promoted during the indicated period. For the period 2005–2008 the target for Lund University is now set to 26%.) The explanation for this was, of course, manifold.¹ One of the reasons, I assume, was the fact that the European Court of Justice (ECJ) in the *Abrahamsson*² case had rejected important sections of the Swedish regulations on positive action in the area of higher education presented to the Swedish higher education institutions as an important means for reaching these targets when they were once introduced in 1997. Were these realistic targets in a European setting? I felt the need to see a fuller picture and gathered a number of colleagues from other European Union (EU) Member States – some of them, as myself, members of the European Commission's Network of Legal Experts on Equality between Men and Women. During two days we made presentations of domestic experiences and regulations and discussed the possibilities within Community Equality Law

1 Later on, 11–12 May 2005, another conference was held in Lund – *Jämt ut? Om att nå målet fler kvinnor i Akademien* (Outcome equal? How to reach the goal of more women into Academia) – with the purpose to explore in a broader perspective hitherto research and experiences as regard women in Academia and what it will take to meet this challenge for the future.

2 Case C-407/98 *Abrahamsson v. Fogelqvist* [2000] ECR I-5539.

along the lines of this introduction: *Is there really any scope for positive action in Community Equality Law?*, *The motives for promoting women in Academia – are they compatible with Community Equality Law?*, *Recruitment targets for women professors – how do we get from here to there?* and *Community Equality Law and education and research policies in an enlarged Europe – what will be the impact on women in Academia?*

This anthology contains reports from eight countries: Denmark (Lynn Roseberry), France (Anne-Marie Daune-Richard), Germany (Dagmar Schiek and Almut Kirschbaum), Hungary (Csilla Kollonay Lehoczky), Italy (Elena Urso), the Netherlands (Susanne Burri), Sweden (Ann Numhauser-Henning) and the UK (Christopher McCrudden). The reader will find that the reports differ somewhat in length and character, among other things due to fact that the authors in some cases are social scientists and not legal scholars but also to the characteristics of the country at stake. Despite this disparity, we have found it useful to gather the information thus compiled in this volume of the Bulletin of Comparative Labour Relations. The countries' reports cover the issues of public policies and their results regarding women's representation in Academia, equal opportunities and positive action regulations (if any) in the area of higher education as well as information regarding positive action measures in practice. The purpose of this introduction is to link the contents of the different countries' reports to the overarching questions of the conference and to give the readers an idea of the stimulating discussions they provoked. It also contains some personal reflections, of course, as to the questions discussed. Needless to say, I am myself entirely responsible for this introduction and the views and conclusions expressed here.

A common denominator for all the countries' reports is not only Community Equality Law but also European Higher Education Policies in general, to be presented more closely below in Section 5. Here it might be sufficient to say that in the 1990s there was a growing awareness in all Member States and also within the Community institutions of the fact that women were under-represented in the scientific community and that something would have to be done about it. As a result of the hitherto efforts there is now a full set of indicators measuring women in science and Academia throughout the EU (see further Section 5 below), which gives us the following picture of women's representation within the different strata of Academia.

Figure 1

Men and women among academic staff by grade 2002 (per cent). Source: European Commission – Research: Women & Science and Indicators, Table 10. http://europa.eu.int/comm/research/science-society/women/wssi/downindi_en.html

<i>Sex</i>	<i>Grade D</i>	<i>Grade C</i>	<i>Grade B</i>	<i>Grade A</i>
Men	59	60	68	86
Women	41	40	32	14

Already the ETAN Report³ concluded that making change happen required a mix of equal treatment, positive action and gender mainstreaming. As we will see from the following and from the different reports, the opinions on how to go about differ in the Member States. Whereas some seems to be reluctant to use positive action measures proper, others have intrinsic programmes using both legal and economic positive action strategies. The actual proportion of women in Academia differs a lot throughout the EU. The Commission's data base gives us the following picture regarding the proportion of women full-professors in the different Member States in the year 2002.⁴

Figure 2

Women among academic staff Grade A by country 2002 (per cent). Source: European Commission – Research: Women & Science and Indicators, Table 10. http://europa.eu.int/comm/research/science-society/women/wssi/downindi_en.html

Malta	2	Greece	11	Finland	20
Austria	4	Lithuania	12	Portugal	20
Cyprus	6	Slovenia	12	Latvia	23
The Netherlands	7	Hungary	14		
Germany	8	Sweden	14		
Denmark	9	UK	14		
The Czech Republic	9	<i>EU 25</i>	<i>14</i>		
Slovakia	9	Italy	15		
		France	16		
		Belgium	16		
		Estonia	17		
		Spain	17		
		Poland	18		

As we can see from Figure 2 the proportion regarding EU as a whole was 14% in 2002. Only one country – Latvia – has a proportion of women professors well over 20%, followed by Finland and Portugal with 20%, respectively. In the span 15–19% we find Italy, France, Belgium, Estonia, Spain and Poland. Medium performers

3 *Science Policies in the European Union: Promoting Excellence through Mainstreaming Gender Equality*, November 1999. The report was the product of a group of experts set up by the Commission under the auspices of ETAN, the European Technology Assessment Network.

4 Since there is no one way to define the different categories when comparing different countries, the figures presented here may well differ somewhat if compared to the figures given in the respective country's report.

are Greece, Lithuania, Slovenia, Hungary, Sweden and the UK. There is also a group of countries where women represent less than 10%: Malta, Austria, Cyprus, the Netherlands, Germany, Denmark, the Czech Republic and Slovakia. As will become clear from reading the countries' reports, there is no simple inter-relation between the share of women in the highest academic positions and the equal opportunity policies of a given country, and even less so concerning the attitude towards positive action proper.

2 IS THERE REALLY ANY SCOPE FOR POSITIVE ACTION IN COMMUNITY EQUALITY LAW?

In the beginning there was only the principle of equal remuneration hosted in Article 119 of the original Treaty of Rome. Gradually, the principle of equal treatment between men and women has gained a more general standing within Community Law. Since the 1997 Treaty of Amsterdam, equality of opportunity is enshrined in Articles 2 and 3 EC. Especially the wording of Article 3(2) EC⁵ has been said to require a proactive approach in gender equality issues on behalf of the EU institutions. Moreover, since 1996 the Commission's strategic approach to the question of equal opportunities between men and women is 'mainstreaming', i.e. to integrate it into all major policy areas.⁶ It has also been one of the central pillars of the EC employment strategy since the Luxembourg Summit in December 1997. Furthermore, Article 141 EC now provides the specific legal basis for equality of treatment between men and women not only with regard to remuneration but in a broader and more general meaning.⁷ Article 141.4 also provides scope for positive action within the realm of Community Law. Throughout the history of Community law these provisions and their predecessors have given rise to a number of Directives etc. on equal treatment between men and women, the Equal Treatment Directive 76/207/EEC, recently amended by Directive 2002/73/EC, being the most central one. Against this background the ECJ has developed a comprehensive bulk of case law at the heart of Community Law.

This is not the place to give an extensive presentation of the ECJ's case law, not even regarding positive action. Only some overview information will be provided in order to back up the remarks given in the discussion. First, however, I will make some general comments on the concept of positive action as such.

5 'In all the activities referred to in this Article, the Community shall aim to eliminate inequalities, and to promote equality, between men and women.'

6 Incorporating equal opportunities for women and men into all Community policies and activities, COM(1998)122 final.

7 Art. 141.3: 'The Council ... shall adopt measures to ensure the application of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation, including the principle of equal pay ...'.

A proactive approach towards sex equality may include a wide range of actions promoting equality.⁸ Also the concept positive action may be used in this very broad sense. Positive action is the concept most frequently used in Community instruments and related Community case law and does indeed cover a variety of active measures. This anthology entails a focus on legal instruments and practices that imply what is frequently labelled ‘preferential treatment’, i.e. situations where one sex is given advantages such as priority regarding access to work. McCrudden identifies three types of positive action: outreach programmes (to attract the attention of under-represented groups or to provide specific training, etc.), the tie-break principle (accepting the granting of precedence to be given to a member of the under-represented sex at the point of hiring in a case where a number of competing applicants for employment meet the requirements of the job in question, i.e. are equally qualified), and accurate preferential treatment in employment (i.e. reverse discrimination of ‘the Swedish type’ in favour of members of the under-represented group upon hiring, etc.).⁹ There are also the concepts of ‘flexible’ or ‘strict’ quota systems, addressing the issue of whether there is a room for a ‘saving clause’ or not.

Before the Amsterdam Treaty, the scope for positive action was mainly regulated by Article 2.4 as compared to Article 2.1 of the Equal Treatment Directive.¹⁰ This is also the regulation scrutinised by the ECJ in most of the cases hitherto dealt with.¹¹ Now the scope of positive action is dealt with in Article 141.4 EC¹² and

8 In the ETAN report Professor Rees identified networks, quotas and targets, encouraging role models and mentors and earmarking chairs, budgets and research funds for women as key tools. *Science Policies in the European Union: Promoting Excellence through Mainstreaming Gender Equality*, November 1999.

9 McCrudden, *Public Procurement, Contract Compliance and Social Policy in the European Union*, 31 December 1996.

10 Article 2.1 articulates the principle of equal treatment, saying, ‘there shall be no discrimination whatsoever on grounds of sex either directly or indirectly by reference in particular to marital or family status’. However, according to the former Article 2.4: ‘This Directive shall be without prejudice to measures to promote equal opportunity for men and women, in particular by removing existing inequalities which affect women’s opportunities in the areas referred to in Article 1.1.’, inter alia, access to employment and promotion.

11 See Case 312/86 *The Commission v. France*, ECR 1988-6315, C-450/93 *Kalanke v. Freie Hansestadt Bremen* [1995] ECR I-3051, C-409/95 *Marschall v. Land Nordrhein-Westfalen* [1997] ECR I-6363, C-158/97 *Badeck et al v. Land Hessen* [2000] ECR I-1875, C-407/98 *Abrahamsson v. Fogelqvist* [2000] ECR I-5539, C-79/99 *Schnorbus v. Land Hessen* [2000] ECR I-10997, C-476/99 *Lommers v. Minister van Landbouw, Natuurbeheer en Visserij* [2002] ECR I-2891, C-186/01 *Dory v. Federal Republic of Germany* [2003] ECR I-0000, C-380/01 *Schneider v. Bundesminister der Justiz* and C-319/03 *Briheche v. Ministre de l’Intérieur et al* [2004]. See also the EFTA Court judgment 2003-01-24 in Case E-1/02 *The EFTA Surveillance Authority v. The Kingdom of Norway*.

12 ‘With a view to ensuring full equality in practice between men and women in working life, the principle of equal treatment shall not prevent any Member State from maintaining or adopting measures providing for specific advantages in order to make it easier for the under-represented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers.’ See also Article 23 in the EU Charter on Fundamental Rights 2000, now a part of the

the Equal Treatment Directive (ETD) has been amended. The former Article 2.4 ETD was replaced by an obligation for the Commission to adopt and publish a report establishing a comparative assessment of the positive measures adopted by the Member States pursuant to Article 141.4 EC every three years, on the basis of information provided by the Member States (Art. 2.8 ETD).

Undoubtedly, there is thus scope for positive action in Community Law interpreted on a number of occasions by the ECJ. The 1995 judgment in *Kalanke* caused something of a shock in various Member States, immediately launching a debate on its correct interpretation. Did the ECJ reject quotas in general or *only* a quota system of the ‘strict’ Bremen model?¹³ In *Marschall*, however, the ECJ gave us an answer to this question, and later on, in *Badeck*, the ECJ summarised positive action upon hiring as being compatible with Community law, if it does not automatically and unconditionally give priority to women when women and men are equally qualified, and if the candidatures are the subject of an objective assessment which takes into account the specific personal situation of all candidates.¹⁴ So far, the scope for positive action in Community Law clearly confirmed by the ECJ in the cases of *Marschall*, *Badeck* and *Abrahamsson* is based on what McCrudden depicts as ‘the tie-break principle’ and ‘flexible’ quotas. There is also the statement in *Badeck*, repeated in *Abrahamsson*, permitting the modification of assessment and selection criteria within the concept of indirect discrimination.¹⁵ However, at the heart of *Abrahamsson* we find the question as to whether Community Law provides scope for a flexible quota system not only when the competitors are equally qualified, but also when there is a considerable gap in qualifications. The Court seems to have answered this question in the negative, if one interprets the judgment as meaning that such a gap in qualifications should be bridged by specified criteria ‘transparent and amenable to review’. Whether this is necessary or not is a question

New Constitution. See the ECJ’s cases C-407/98 *Abrahamsson v. Fogelqvist* [2000] ECR I-5539, C-218/98 *Abdoulaye v. Régie nationale des usines Renault SA* [1999] ECR I-0000, *Schnorbus v. Land Hessen* [2000] ECR I-10997, C-476/99 *Lommers v. Minister van Landbouw, Natuurbeheer en Visserij* [2002] ECR I-2891, C-186/01 *Dory v. Federal Republic of Germany* [2003] ECR I-0000, C-380/01 *Schneider v. Bundesminister der Justiz*, C-366/99 *Griesmar v. Ministre de l’Économie, des Finances et de l’Industrie, Ministre de la Fonction publique, de la Réforme de l’État et de la Décentralisation* [2001] ECR I-000 and C-319/03 *Briheche v. Ministre de l’Intérieur et al* [2004].

13 See Communication by the Commission to the Council and the European Parliament on the Interpretation of the Judgment of the European Court of Justice on 17 October 1995 in case C-450/93, *Kalanke v. Freie Hansestadt Bremen*, COM (1996) 88 final. The European Commission submitted an interpretation of the ECJ judgment arguing the latter. Later on, a clarifying amendment proposal in respect of the Equal Treatment Directive was presented, OJ L 179/8. During the preparations of the Amsterdam Treaty, several possible redactions of a treaty rule on positive action were discussed.

14 Par. 23 of the judgment.

15 Ann Numhauser-Henning, *Legal Perspectives on Equal Treatment and Non-Discrimination*, The Hague 2001 p. 243.

I will address again below.¹⁶ The Court in *Abrahamsson* did, however, confirm that Swedish administrative practice, according to which the rule of preference for the under-represented sex is applied when candidates possess ‘equivalent or *substantially equivalent*’ (italics added) merits, is within Community Law. Later case law adds to this picture, of course, but has not dealt explicitly with hiring situations.

What about the scope for positive action, then? I, myself, chaired this session and the conference participants all agreed, of course, that Community Law provides room for positive action, though its boundaries are far from thoroughly investigated. Given the domestic situation, some were more satisfied with the contributions of Community Law in this respect than others.

The countries’ reports reveal that far from all countries make room for preferential treatment proper within their domestic legislation, and less so in the sector here at stake, i.e. the area of higher education normally implying public employment. This is the case for France and the UK. Thus, Christopher McCrudden pointed to the fact that the judgment in *Kalanke* – as first interpreted – reflected UK domestic legislation as it was and that current Community Law developments in the area of positive action look rather attractive from the UK point of view. In Denmark, preferential treatment in the employment process requires pre-approval from the relevant minister, and in a recent regulation addressing positive action measures without such an approval, preferential treatment of female job applicants is in principle ruled out.¹⁷

In other cases, such as Sweden, the Netherlands and Germany, the developments within Community Law have been somewhat disappointing. In Sweden, for instance, positive action (*positiv särbehandling*) has traditionally been understood to give preference to a candidate of the under-represented sex despite his or her being less qualified than a competitor. According to the 1979 Equal Opportunities Act, the ban on sex discrimination was constructed so as to apply only when there was a clear difference in merits. Although the wording of the current 1991 Equal Opportunities Act is now such as to be in compliance with Community Law, to give preference to the under-represented sex only when applicants are equally qualified it is still not spontaneously regarded as positive action in Sweden.^{18, 19}

16 Compare Lerwall, *Könsdiskriminering, En analys av nationell och internationell rätt*, Uppsala 2001, who seems to argue that it would be enough to apply these requirements to exemptions as such, pp. 386 and 390.

17 Compare the Danish report and Lynn Roseberry’s conclusion: ‘Instead of pushing for adoption of positive action measure, the Danish government waits for initiatives from the very institutions that contribute to the problem and have demonstrated their inability to engage in any self-criticism.’ However, a permit for preferential treatment was occasionally given regarding five positions announced by the Danish Research Agency.

18 See further the Swedish report.

19 The delicate relation between the scope for positive action and the construction of the ban on discrimination was also stressed in the conference discussions by the former Swedish Ombudsman of Equal Treatment between Women and Men, Lena Svenaeus, whereas Christopher McCrudden pointed to the fact that the less distinctive the ban on discrimination, the wider the scope for positive action and vice versa.

Thus, maybe my disappointment with Community Law, one of the background reasons for the conference, is first and foremost the reaction of a frustrated Swede. There is also the fact that the case of *Kalanke* has always been the starting point.

In the discussion slightly optimistic interpretations of Community case law were argued. Article 141.4 EC embodies an element of surprise, although it can hardly be said to give us a clear-cut expression of the scope for positive action after Amsterdam. Article 141.4 EC is significantly different from Article 2.4 in the Equal Treatment Directive, among other things with reference to the declared aim to ‘promote full equality in practice between men and women in working life’. Luckily, the much ‘slimmed’ argument in *Abrahamsson* in this regard does not seem to close all doors. However, the manifold declarations of positive action as an exemption from the equal-treatment principle are too many somewhat depressing. Here, Sacha Prechal, however, pointed to the ECJ’s judgment in *Lommers* where, for the first time, positive action under Article 2.4 of the Equal Treatment Directive was not argued in the terms of an exemption, later on confirmed also by the judgment in *Briheche*.²⁰ Lynn Roseberry pointed to recent developments in the US.²¹

However, to my perception, there was little acceptance among the conference participants – a part from some of the Swedish ones and maybe a few more – to actually give preference to the differently situated, i.e. less qualified. And, not even in Sweden, ‘reverse discrimination’ hitherto does seem to have been practised to any conceivable extent. One or two examples referring to the ‘Tham-positions’ are about the only ones. As Lena Svenaeus said ‘there is no real interest in using positive action – at least if not put to the use of men’. Nevertheless, there thus was a discussion on the closer limits of Community Law in relation to *Abrahamsson*. Lena Svenaeus and Lotta Lerwall, associate professor of Law from Uppsala University, argued an interpretation of the *Abrahamsson* case that makes room for this.²² Christopher McCrudden seemed to believe, too, in the possibility of the ECJ accepting preference for the under-represented sex also when there was a difference in merits: ‘The ECJ decides as it goes along, it all depends on the situation and how it is presented...’. Also the argument of the EFTA Court in the Norwegian case was referred to in this context: ‘there must, as a matter of principle, be a possibility that the best qualified candidate obtains the post’.²³

No doubt, there is a room for innovation as regards the merits-assessment process and thus what constitutes qualifications. Already in *Badeck* the ECJ thus addresses the question of assessment and selection criteria within a positive action setting.

20 ‘... in determining the scope of any derogation from an individual right such as the equal treatment of men and women laid down by the Directive (ETD, my remark), due regard must be had to the principle of proportionality, which requires that derogations must remain within the limits of what is appropriate and necessary in order to achieve the aim in view and that the principle of equal treatment be reconciled as far as possible with the requirements of the aim thus pursued’, *Lommers* p. 39 the judgment and *Briheche* p. 24 the judgment.

21 Compare the case *Grutter v. Bollinger et al.*, 539 U.S. 71 (2003) and further below.

22 See further Lerwall pp. 385 f.

23 EFTA Court case E-1/02, p. 45 the judgment of 2003-01-24.

From the point of view of the area of higher educations specifically, Dagmar Schiek drew our attention to the forceful, but theoretically weak, quantity argument: ‘why would three articles automatically render more merits than two – regardless of quality. There is an honouring of excessive input of labour and men tend to repeat themselves more than women...’. This ‘long hour’s culture’ was confirmed also from the UK point of view by Christopher McCrudden.²⁴ And, there is also the possibility to assess two candidates as equally qualified once they have reached a certain level. In addition, the merit-assessment is a thing for the domestic courts and no doubt merit-assessment cultures may vary considerably from one Member State to another.²⁵

In addition, there was a discussion on the possibility to justify direct discrimination with reference to the ‘role-model argument’, i.e. that for educational and human resource management reasons there is a requirement of a minimum of women teachers and researchers. Sacha Prechal seemed to reject the idea of this argument as a *bona fide occupational quality* (bfoq) defence, whereas Dagmar Schiek was more optimistic referring to the example of Lower-Saxony where positions were earmarked for women where there were no women at all among the staff to put on boards, etc. Lynn Roseberry, too, seemed to see a potential here and anew made reference to recent US case law where affirmative action had been referred to in terms of ‘a compelling state interest’.²⁶ In this context there was also a discussion about the *Schnorbus* case, regarding preference being given to certain posts for people who have undergone compulsory military service, in the German context applicable only to men. Despite being of the opinion that the situation at stake was ‘wrongly’ considered as indirect discrimination, Susanne Burri saw a potential for women in the fact that the ECJ could consider as indirect discrimination, and thus potentially justifiable, what otherwise should be labelled covert direct discrimination. Sacha Prechal, though, would have preferred the case to have been judged as direct discrimination assessed under the proportionality principle within the scope for positive action. ‘It is all about proportionality!’²⁷

Despite these speculations on the potential of Community Law concerning positive action, the key question is, of course, the one Christopher McCrudden posed to the participants of the conference: ‘Also if Community Law is open for positive action – how far do the Member States really want to go?’ And ‘the fact that Community

24 Compare also the Danish report.

25 Compare the German report.

26 See the case *Grutter v. Bollinger et al.*, 539 U.S. 71 (2003), where Michigan Law School’s narrowly tailored use of race in admissions decisions to further a compelling interest in obtaining the educational benefits that flow from a diverse student body was held not to be prohibited by the Equal Protection Clause in Title VI of the Civil Rights Act of 1964 and 42 U.S.C. § 1981. Compare, however, also *Gratz et al. v. Bollinger et al.*, 539 U.S. 71 (2003), where another admissions policy at Michigan University was indeed found to violate the Equal Protection Clause since it was not enough narrowly tailored to achieve the respondents’ (sic!) asserted interest in diversity.

27 Compare the citation from *Lommers* in note 20 above.

Law is unclear in this respect isn't it currently used as a camouflage by the Member States covering poor ambitions to further the position of women?'. Csilla Kollonay Lehoczky declared that this was precisely the situation in Hungary. In Sweden also, doubts about the implications of the ECJ's judgment in *Abrahamsson* as well as the structure of domestic law have led to a dead-lock situation which the government is seemingly unwilling to do anything about.²⁸ In my opinion, and this need was also pointed out by Sacha Prechal at the conference, it is necessary to fully and expressly integrate the Community Law approach to positive action into Swedish domestic law, implying that the rules fully apply also when two equally competent candidates are compared. Especially since the Community Law concept is one which benefits a focus on the merits-assessment process. It is at the interface between the assessment of qualifications as such and the acceptable 'equality interval' where much of the potential for positive action resides.

3 THE MOTIVES FOR PROMOTING WOMEN IN ACADEMIA – ARE THEY COMPATIBLE WITH COMMUNITY EQUALITY LAW?

Already when launching the Fifth Framework Programme for research and technological development, the Commission decided to include the equal opportunities dimension by promoting the participation of women in European research. Regarding the Fifth Framework Programme, an explicit goal was set, to achieve at least a 40% representation for women on various bodies. The aim was articulated so as to promote research 'by, for and on women'.

On earlier occasions²⁹ – and also here in the Swedish report – I have discussed the arguments for promoting women in society proceeding from some concepts drawn from representation theory.³⁰ One is *the argument of fair representation* which can be said to relate to participation rights in the sense of equal opportunities; but it also relates to a more substantial notion of participation, meaning equal (or at least more equal) distribution regarding access to employment, status and social

28 The judgment seems to disregard the facultative character of the national regulation at issue, it has been argued, probably owing to the way in which the *Överklagandenämnd* phrased its question. On closer scrutiny, the relevant national regulation does indeed allow for the kind of assessment stipulated by the Court, which takes into account the specific personal situations of all candidates – although not in the form of an express saving clause. See further the Swedish report.

29 See Numhauser-Henning 2001.

30 See further, for instance, Helga Hernes, *Welfare State and Woman Power: Essays in State Feminism*, Norwegian University Press, Oslo 1987 and Ann Phillips, *The Politics of Presence*, Clarendon Press, Oxford 1995. This theory and the relevant concepts were primarily developed in relation to the issues of democracy and fair representation, but in my opinion the concepts are also useful with regard to the area at issue here – inclusion in or exclusion from the social structures of remunerated positions in higher education and research/knowledge production. Compare the extension of democracy to include substantial democracy, i.e. social and economic rights.

and economic conditions.³¹ Another is *the conflict-of-interest argument* which concerns the right to have your own/your group's interests and needs satisfied within the development of activities. This line of argument is closely connected to the democracy discourse, but it is also fruitfully articulated in relation to working life and knowledge production. It is concerned with different preconditions (whether originally so or socially created) between the sexes and the (re-)formulation of underlying norms, whether with regard to working life or the concept of knowledge. There are the interests/needs of women with regard to working life as such, for example conditions connected to tenure tracks; and then there are the interests/needs of women concerning research and knowledge production – that is to say, the results of activities. Finally, there is *the resource argument* which focuses on the common interest ensuring that all kinds of resources are integrated/made of use in the development of social activities. This argument is of particular interest where knowledge production is concerned. It is therefore often referred to in terms of quality. When it come to quality, however, one must not forget the 'efficiency-quality argument'; assuming intelligence is equally distributed between the sexes – and that we succeed in recruiting the elite – it is a terrible waste of potential not to recruit the best women. – All of these arguments – the representation argument, the conflict-of-interest argument and the resource /quality argument – may also be said to incorporate the notion of social *legitimacy*.

If we now return to the EU policies, the 'by women approach' addresses the conflict-of-interest argument concerning managerial positions ('to ensure that research genuinely meets the needs of women'³²), and the representation argument as regards overall access for women workers as research workers. Also the 'for-women' approach obviously addresses the conflict-of-interest argument making sure account will be taken of a possible gender dimension in any problem addressed. The same goes for the 'on-women' approach. The resource argument can be said to be linked to all of these three approaches, something which is clearly reflected by a citation such as the following: 'A greater involvement of women is said to 'enrich European science, in terms of its methods, the subjects on which it focuses and the objectives assigned to scientific research'.³³ The legitimacy issue is also reflected in background motives such as democracy and citizen's service. An immediate motive is of course the actual gender situation in higher education and academic/research positions and the demands of academic women.³⁴

31 Compare quotas.

32 COM(1999)76 p. 11.

33 *Ibid.* p. 4.

34 'Indeed, the under-representation of women in science prevents its full realisation. First, because this represents an unacceptable and unaffordable waste of human resources. And second, because the under representation of women in science compared with their representation in society induces a distortion between science and society at a moment where it is of utmost importance to increase confidence in science', SEC(2001) 771 p. 3.

One can argue – and in the discussion, chaired by Christopher McCrudden, Dagmar Schiek actually did – that those lines of argument are purely policy arguments and have nothing to do with Community Equality Law and its application as such. I have, on another occasion argued extensively that the normative ‘bottom-line’ of the arguments only just referred to are likely/capable to have an impact on a proportionality assessment or the scope of an exemption.³⁵ Within a human rights discourse arguments like the representation argument and the conflict-of-interest argument may trigger a ‘balancing proportionality act’ evoking the rule. However, I do agree with Dagmar Schiek, that Community Law and the ECJ seem to be stuck with the more technical legal issues. Generally speaking, Community Law equal-treatment provisions are construed in the liberal legal tradition. Prohibitions against discrimination are articulated so as to elicit formal equal treatment in the individual case, implying a stipulation to the effect that a person’s sex is irrelevant. Both the conflict-of-interest argument and the resource argument, one may argue, are somehow contrary to this stipulation – they rather focus differences. The mere stipulation is, of course, not enough to actually achieve equality in practice, something which is made evident already by Community Law itself as it now stands. Coming to grips with discriminatory structures, especially those which can only be perceived at the aggregate level, calls for administrative measures – for instance in the form of positive action. Such measures have also been accepted by the ECJ. In *Marschall* the ECJ acknowledged that women – if not by nature be it for societal conditions – are differently situated than men. Awareness of conditions in ‘the real world’ led to the abandonment (within the limits of the saving clause and the principle of proportionality) of the stipulated irrelevance of sex and the acceptance of positive-action measures. This can all be said to have taken place within the normative concept of equal opportunities for the similarly situated, though.

The normative picture is quite different when an individual of the under-represented sex is to be given priority even when less qualified than the competitor. Here the element of ‘reversed discrimination’ is more obvious and the ECJ in *Abrahamsson* labelled such measures as being ‘disproportionate to the aim pursued’ whatever the circumstances.³⁶ One reason for this, so far rather cautious, application of the scope for positive action, is presumably the ‘human-rights character’ of the equal treatment principle as regards sex. Here, we may again refer to the ECJ, now in *Briheche*: ‘in determining the scope of any derogation from an individual right such as the equal treatment of men and women laid down by the Directive, due regard must be had to the principle of proportionality, which requires that derogations must remain within the limits of what is appropriate and necessary in order to achieve the aim in view and that the principle of equal treatment be reconciled as far as possible with the requirements of the aim thus pursued’.³⁷ However, the

35 Numhauser-Henning 2001.

36 See the judgment in *Abrahamsson* paragraph 55, and also paragraphs 58 and 64. Compare also *Briheche* p. 31 of the judgment.

37 *Briheche* p. 24 of the judgment. See also *Lommers* p. 39 of the judgment.

legal standing given to ‘the aim to eliminate inequalities and to promote equality’ (Article 3.2 EC) is not without interest here. Where the freedom of movement principle is concerned, the ECJ has gone a lot further in its application of the non-discrimination principle than is the case in Sex Equality Law. Any practice is tested from a more instrumental efficiency approach. One can argue for such a more instrumental approach also with regard to sex equality given the regulation in the Treaty post Amsterdam.³⁸

In a case where priority is to be given to a person less qualified than her (or his) competitor, normative patterns and arguments of a more distributive character such as the representation argument thus come to the fore. If we continuously proceed from the representation-theory concepts presented initially in this report, we get the following picture.

With regard to the conflict-of-interest argument it should be pointed out that the ECJ in *Badeck*, and repeatedly in *Abrahamsson*, has left a certain scope for a regulation of the selection procedure, so as to make it better able to meet the needs of women than traditional criteria. By doing so, the ECJ has created – through the back door, as it were – a certain scope for the values underlying the conflict-of-interest argument and some kind of distributive justice. It is an arrangement which takes into account the special needs of women. The indirect discrimination created by such a measure of positive action regarding the non-prioritised sex may thus be compatible with Community Law, according to the ECJ.³⁹ Furthermore, Article 2.7 of the amended Equal Treatment Directive offers scope for protective measures in the case of women, in conflict with the principle of equal treatment. This rule, too, has been strictly interpreted and is usually restricted to provisions that protect women’s biological needs and the mother-child relationship in the first months after birth.

The resource argument addresses other potential differences between the sexes than the ones involving different opportunities for access to employment, etc., such as the quality arguments with regard to research and also the role-model argument. The question whether these situations could possibly come within the express exemption from the equal-treatment principle in the form of so-called bfoq-defences has already been touched upon in Section 1.2 above.⁴⁰

The concept of direct discrimination is based on differentiation on the grounds of sex. The stipulation of a person’s sex as irrelevant, and men and women as equal, behind the prohibition of direct discrimination, has led to the rejection of any justification of direct discrimination outside the scope of Article 2 in the

38 Compare Lynn Roseberry in the Danish report, Section 7.

39 One should note, though, as was pointed out by Christopher McCrudden, that priorities related to family commitments may in the future be seen as sexual orientation discrimination. Also Kirsten Ketscher, professor of Social Law at Copenhagen University, pointed out the difficulties in applying positive action schemes generally with so many more groups in the non-discrimination arena.

40 Compare Article 2.6 of the amended Equal Treatment Directive.

Equal Treatment Directive. However, positive action falls within Article 2 ETD and now also within Article 141.4 EC and has thus on numerous occasions been accepted as justifiable by the ECJ. If such practices are no longer to be treated as exemptions (by nature to be interpreted restrictively), and, instead it's 'all about proportionality', to quote Sacha Prechal, we may be back in business. I thus argue that an extension of the normative basis of positive action can be admitted within the framework of the proportionality assessment, occasionally allowing for the justification of *direct* discrimination as well. And it is my conviction that within such a general proportionality assessment, balancing the individual's right to formal equal treatment against other interests, the legitimate scope for the resource argument and other considerations can be carefully addressed.

4 RECRUITMENT TARGETS FOR WOMEN PROFESSORS – HOW DO WE GET FROM HERE TO THERE?

The former Swedish Ombudsman for Equality between Women and Men, Lena Svenaeus, chaired this session and organised discussions along three main lines: what changes do we want, what is in the toolbox for achieving these goals, and, what strategy should be used?

In three of the 'leading cases' regarding EC Equality Law on positive action – *Kalanke*, *Marschall* and *Badeck* – quotas and/or targets played a central role. And, the Swedish Government's targets for new women professors may thus be said to have been the trigger of this whole conference. I feel confident in saying that there was a general consensus among the conference participants on *the importance of setting targets as a way forward* also for the future. As Lena Svenaeus put it: 'I think most of us want an equal percentage of professorships and other academic positions for women and men'. And, as Dagmar Schiek said: 'Targets do not necessarily imply preferential measures upon hiring. It is just a help to monitor equal treatment structures'.

Targets and funding crystallised as an important strategy for the future. Throughout the reports there are numerous examples of, so it seems, successful schemes offering funding openings especially for women, such as the Danish FREJA scheme, the German schemes 'the Berlin Programme' and 'the Dorothea Erxleben programme', the Dutch schemes ASPASIA and 'Impulse for Renewal' as well as recent UK strategies such as 'Partnership for Equality'. Not least the German report is of great interest in this respect. Compare also France, where there is a contract relationship between the State and universities containing the possibility of additional funds for 'promotion of gender equality'.

Generally speaking, as sex equality law now stands, there should not be any serious doubts regarding the legitimacy of such financial measures. The 'funding' is normally the expression of public education policies, or, part of the higher education institution's internal budgetary system and is thus not directly linked to the process

of employment. And, given the current situation of women in Academia, such extra funding should meet any proportionality test.⁴¹

However, there are other characteristics of the area of higher education which may make one doubt whether this is really a realistic way forward. Now, the sentence ‘competition is the name of the game’ is true also for higher education and research. Quality assessments, peer-review and ranking systems are increasingly important as the way to – often external – funding of higher education and research. We can expect it to be to an increasing extent ‘politically incorrect’ to reserve money for certain groups under other auspices. If it can be said that there has been a general reluctance within higher education institutions regarding policies to further women in Academia, recent general trends promise nothing to change this. Also the old conflict between governmental steering and academic autonomy or freedom is an argument against the success of ‘earmarked’ funding or more effective external or internal budgetary means to promote the situation of women in Academia, as was pointed out by Christopher McCrudden.

Throughout the conference, the moment of hiring was thus targeted as the critical one – both regarding the representation of women in Academia and regarding positive action. We have already addressed the issue of the merits-assessment process (see Section 1.2 above). One weakness with the current Community Law concept for positive action is the fact that we rarely have a situation with two candidates (of the opposite sex) ‘equally qualified’.⁴² Another problem is that the quality assessment normally made is far from gender neutral. Susanne Burri questioned whether or not the quality concept as such could be expected to be gender biased. No doubt, ‘the long hours culture’ and quantity as an equivalent for quality disfavours women who take on the larger part of family ‘work’. The importance of *making existing systems of defining and evaluating scientific excellence free of gender bias* has been given great deal of attention in recent EU research policies.⁴³ And, the Science in Society Forum 2005 sent the following key message: The assessment of scientific activities should also be sensitive to social and cultural factors related, for example, to ethnic background, gender, and childcare responsibilities.⁴⁴

However, not only the merit-assessment process as such but also the way to organise Academia is of great importance when it comes to equality between the sexes. The Italian report highlights the importance of a closer regulation of the hiring process – whether centralised or decentralised, whether open and transparent or informal and secret. No doubt, formality and transparency in the process are expected to favour the position of women whatever the criteria of selection. Gender neutral criteria of course help. A very weak point, however, is the fact that only a relatively small part of the scope for higher education positions comes within the

41 See further, for instance, the German report and the Dutch report.

42 Compare the German and Swedish reports.

43 See SEC(2005)370 and the Commissions report (2004) *Gender and Excellence in the Making*. See further Section 1.5 below.

44 <http://europa.eu.int/comm/research/society/society2005.html>.

realm of the meritocracy principle. The openings at higher education institutions are to an increasingly extent decided by strategic decisions – by governments, funding institutions or the higher education institutions themselves – when it comes to the discipline and area of research.⁴⁵ And the areas most frequented by women researchers are not the ones expanding the most – to say the least. However, the new mode of promoting associate professors to full professors without having to compete for an ‘opening’ introduced in various countries (for instance, Sweden and Norway) lately, can be presumed to further the position of women in Academia.

There is also *the issue of the more general organisation of career paths and higher education institutions as such*. It is claimed, both in the UK and the Netherlands’ report, that the extensive group of part-timers and fixed-term employees at the margin of the traditional academic career offers serious threats to young academics and especially so to women.^{46, 47} Dual systems, with research institutes in a separate sphere beside the traditional universities, points to considerable differences as regards the participation of women being clearly less well represented in the research institutes.

Having noticed this, one must ask – with Christopher McCrudden: Where do we want change to happen – on the supply side (i.e. women) or on the demand side. Progress within the given structures of Academia may not be the best way forward. *Human resource management and ‘process change’* was mentioned by him as *important strategies* in the UK context. Gender-neutral criteria and transparency in the job application and employment process may imply other things than what we hitherto have visualised. Equal treatment of part-timers and fixed-term workers – since the adoption of the 1997/81/EC Part-time Work Directive and the 1999/70/EC Fixed-term Work Directive a requirement in Community Law – may provide new solutions concerning ‘the long hours culture’ and the quantity argument upon hiring and also with regard to other ‘conventional’ practices within Academia.⁴⁸ *Equality planning and Equality Officers* may prove as efficient – or at least not more inefficient – as positive action upon hiring.⁴⁹ There is also such things as coaching and ‘result and development interviews’ with the direct executive and the human resources manager.⁵⁰ These are measures apt to deal with issues such as equal pay and a working environment free from sexual harassment, also stressed in the debate as serious obstacles for women in Academia.

A parallel strategy to further women in Academia may be said to be ‘*mixité*’ as described in the French report. Its logic is that with a fair representation of

45 Compare the German report and its Section ‘New Perspectives: Embracing the Budgetary Perspective and Beyond’. See also the Danish report.

46 See also the Danish report and German report on the new German career scheme.

47 Compare, however, also the Hungarian report where part-time employment is a way for Academia to keep the men on Faculty despite competing labour markets.

48 Compare, however, the Danish report. An interesting case regarding a minimum number of articles to be published within a time-span is reported in the Dutch report.

49 Compare the German report.

50 Compare the Dutch report.

women in decision-making bodies more women will be chosen, speeding up the process and the results.⁵¹ This is also the position behind the EU's 40% target for women's representation in committees, groups and panels in the Research Framework Programmes ever since the Fifth Framework Programme. This strategy comes close to the interest and resource arguments presented in Section 3 above and it also triggers the concept of women as a 'role model'. Many were those in the discussions – Sacha Prechal, Dagmar Schiek and Csilla Kollonay Lehoczky – who stressed *the importance of creating a situation in Academia where woman excellence shows*.

5 COMMUNITY EQUALITY LAW AND EDUCATION AND RESEARCH POLICIES IN AN ENLARGED EUROPE – WHAT WILL BE THE IMPACT ON WOMEN IN ACADEMIA?

In its communication *Women and science – Mobilising women to enrich European science*⁵² the Commission addresses the issue of equality between men and women in research and science in adherence with the mainstreaming approach. The communication is said to pursue two objectives: (i) to stimulate discussion and the sharing of experience, and (ii) to develop a systematic step-by-step approach towards promoting women research financed by the Union and more specifically in the Fifth Framework Programme (1998–2002). Already when launching the Fifth Framework Programme for research and technological development the Commission decided to include an equal opportunities dimension by promoting the participation of women in European research. As regards the Fifth Framework Programme an explicit goal was set, to achieve at least a 40% representation for women within various bodies. The aim was articulated so as to promote research by, for and on women. The step-by-step process was labelled 'the gender and science watch system'.

Among the background motives are democracy and citizen's service. A greater involvement of women is said to 'enrich European science, in terms of its methods, the subjects on which it focuses and the objectives assigned to scientific research'. An immediate motive was of course the actual gender situation in higher education and regarding academic/research positions. The 1996 UNESCO metaphor of the leaking pipeline⁵³ was referred to and four critical stages identified: (i) staying on the job market; (ii) staying in a scientific career; (iii) progressing in the scientific career; (iv) being appointed to positions of responsibility and power within the scientific community. A general lack of statistics and good indicators was lamented.

51 A contrary view is presented in the German report, though.

52 COM(1999)76 final.

53 See the UNESCO 1996 'World Science Report'.

Finally, the general aim is stated as follows: ‘it is, in fact, about giving a new face to research in the next millennium’.

Following the communication, both the Council and the Parliament adopted Resolutions on women and science.⁵⁴

In the process described, the Commission set up a group of experts meeting under the auspices of the ETAN (European Technology Assessment Network) producing their final report in 1999.⁵⁵ The ETAN report was the subject of a Commission conference in Brussels in April 2000 and it was also processed by a group of national civil servants, the so-called Helsinki Group after their constitutive first meeting in Helsinki in November 1999.

The Helsinki Group has paid a lot of attention to the issue of baseline statistics⁵⁶ on the presence of women in scientific research as well as on creating proper indicators in this field. The Commission was later on called upon by the Council in a Resolution adopted on 15 June 2000 (building on the Lisbon Summit) to elaborate a full set of indicators and a methodology for benchmarking.⁵⁷ There was also a Commission initiative to establish links with Europe’s existing networks of women scientists, which has now (2005) developed into a ‘European Platform of Women Scientists’.

Since the Lisbon Summit and its strategy of the EU becoming ‘the most competitive and dynamic knowledge-based economy in the world, capable of sustainable economic growth with more and better jobs and greater social cohesion by 2010’, science and research are identified as key components for progress. The Lisbon strategy was thus followed up by the Commissions Communication ‘Towards a European Research Area’.⁵⁸ Then there was the Barcelona Summit and the 2001 ‘Science and Society Action Plan’. There was set a goal of 3% of GDP being spent on research.⁵⁹ Following the Brussels summit 2003 a new Action Plan was adopted.⁶⁰ Since March 2005, there is also the Commission’s Recommendation on the European Charter for Researchers and on a Code of Conduct for the Recruitment of Researchers (2005/251/EC).

In all these documents the issue of (lacking) equality between women and men in science and research are addressed one way or another. Thus in the 2001 Action

54 Council Resolution, adopted 20 May 1999, OJ C 201/1 – 16.7.1999 and European Parliament Resolution, adopted 3 February 2000 (PE 284.656), respectively. See also the Commission Staff Working Paper ‘Women and Science: the gender dimension as a leverage for reforming science, SEC(2001)771.

55 The so-called ETAN Report, *Science Policies in the European Union: Promoting Excellence through Mainstreaming Gender Equality*, November 1999.

56 See now the Commissions global database on sex-disaggregated data referring to higher education: http://europa.eu.int/comm/research/science-society/women-science/statistics_en.html.

57 See SEC(2000)1842, Working document from the Commission services: Development of an open method of co-ordination for benchmarking national research policies – Objectives, methodology and indicators.

58 COM(2000) 6 final.

59 COM(2002)499, More research for Europe – Towards 3% of GDP.

60 Investing in research: an action plan for Europe, COM(2003)226 final.

Plan the question of women's participation is addressed mainly under the strategy of bringing science policies closer to citizens. Legitimacy is said to require specific measures to address both the under-representation of women in science and the lack of attention paid to gender differences within research. With a reference to the 1999 communication and the work of the Helsinki group four initiatives are announced under the actions 24–27: establishing a European platform of women scientists, monitoring progress towards gender equality in science, mobilising women scientists in the private sector and promoting gender equality in science in the wider Europe. In the 2003 Action Plan the gender issue is given somewhat less 'visibility'. However, it is still treated as a question of 'legitimacy' under the heading 'Improving public support to research and innovation' and the need for making research more attractive to especially women is stressed as an important means to meet the increased demand for researchers (700,000) in the Knowledge-based Economy. Women are said to be 'the biggest untapped potential of scientists and researchers'! This aspect is addressed also in the preamble of the 2005 Recommendation on the European Charter for Researchers, stressing the importance of improving attractiveness creating the necessary conditions for more sustainable and appealing careers for women.⁶¹ The Charter itself refers to the fundamental rights recognised by the 2000 EU Charter of Fundamental Rights and include non-discrimination (inter alia with regard to sex) as a general principle. There is also a requirement on 'Gender balance' stating that 'employers should aim for a representative gender balance at all levels of staff, including at supervisory and managerial level. This should be achieved on the basis of an equal opportunity policy at recruitment and at the subsequent career stages without, however, taking precedence over quality and competence criteria. To ensure equal treatment, selection and evaluation committees should have an adequate gender balance'.

There have also been later documents addressing women and science specifically. In 2001 there was a Council resolution 'On Science and Society and on Women in Science'.⁶² Recently there was a Commission staff working document issued on women and science.⁶³ In the latter five main challenges are identified: empowering women in decision-making positions, reconciling professional and private life, gender and scientific excellence, strengthening gender research and increasing the participation of women in science, technology and innovation. As future priorities are mentioned: improving scientific excellence by promoting gender awareness and fairness increasing transparency of screening and selection procedures using appropriate indicators of performance, boosting the numbers of women in leading positions to at least 25% by 2010, strengthening gender research in European research funding, mobilising women for industrial research to make up at least 33% by 2010, creating career patterns which allow for a reconciliation of professional

61 P. 4 in the Recommendation (2005/251/EC).

62 Adopted on 3 July 2001.

63 Women and Science: Excellence and Innovation – Gender Equality in Science, SEC(2005)370.

and private life and better gender monitoring both in the Member States and in EU Research Framework Programmes.⁶⁴

Research is thus seen as a key component for economic growth and progress in general. In the 2003 Action Plan, although recognising that differences and disparities as regards research and innovation between regions in the enlarged Europe are considerable, the importance of progressing jointly is stressed. In 2004 the so-called Enwise Group – a consequence of the 2001 Action Plan – which examines the situation facing especially women scientists in Central and Eastern European countries and in the Baltic States presented their report.⁶⁵ Although acknowledging the legacy of the communist gender policy, which led to a considerable proportion of highly-qualified women active in all public spheres and notably in science, the report draws our attention to the usually negative impact of the transition to a market economy in these countries with regard to women's role in science. 'The prospects for young female scientists are very bleak due to the unavailability of funding, the rigid patterns of promotion and recognition and the lack of welfare policies, all of which are potential causes of brain drain', it is said in the report. The conclusions of the report are rather depressing: women scientist have thus been left in a more vulnerable situation than their male colleagues when research systems have been restructured. Women tend to have been squeezed out of competitive and expensive areas and absorbed into struggling areas as a 'back-up' resource and are now concentrated in the lower-grade academic positions.⁶⁶

The conference participants, and explicitly Sacha Prechal, who gave the introduction lecture at the closing session of the conference, and Lynn Roseberry, were encouraged by both the general and more gender specific developments at EU level. Especially the gender issue in relation to the recent Research Framework Programs was addressed. However, there are also some 'buts' related to these developments. The Framework Programs as such – and this goes also for the 7th Framework Program now in the process of being articulated – focus on science and research and not to a sufficient extent on the areas where woman are present, i.e. the humanities and the education (teaching) sector of higher education institutions. And the gender aspect is still mainly lacking in central programmes such as the student-exchange programmes, the Jean Monnet programme, etc. Csilla Kollonay Lehoczky stresses in the Hungarian report the absence of gender issues in higher education area documents during the accession process. Moreover, there is not much evidence of a permissive attitude towards positive action in the official policy documents. On the contrary, gender-promoting ambitions are declared not to take

64 For new recruitments the proportion of women is set to at least 33%.

65 European Commission (2004d) 'Waste of talents: turning private struggles into a public issue. Women and Science in the Enwise Countries.

66 A follow-up workshop to the Enwise report was held in Tallinn in April 2005, 'Implementing Enwise Results', see http://europa.eu.int/comm/research/science-society/women/enwise/index_en.html.

precedence over quality and competence criteria.⁶⁷ However, in the latest Commission Staff Working Document the existing systems of defining and evaluating scientific excellence are at least questioned as being gender biased.⁶⁸

Maybe this should not come as a surprise. The Lisbon strategy, the ‘Knowledge-based Economy’ goal and the European Research Area project are all parts of the EU economic growth strategy in a global competition perspective. This is a market-steered process, and, may be, as Sacha Prechal put it, ‘the market is a men’s game’. It became depressingly evident from Csilla Kollonay Lehoczky’s presentation that the market aspect often has little that is positive to offer women. She sketched market developments in Hungary – as in many of the new Member States – to be earlier, stronger and faster as compared to developments in the older Member States. It may be true that the proportion of women in Academia – meaning public higher education institutions – are sometimes higher than in the older Member States and even that the share of women has increased considerably lately. Such developments may, however, to a considerable extent be ascribed to the fact that men ‘in marketable sciences’ to a larger extent tend to leave such institutions and, as a consequence, working conditions are weakening, what Csilla Kollonay Lehoczky calls ‘downward feminisation’. ‘Only women can afford to work in universities’. This was also the picture given of the situation of women academics in the Enwise Report only just touched upon above.

I, too, do see a risk in the way developments tend to go (and not only in the New Member States): increasing privatisation of higher education and a focus on sciences and the innovative economic growth potential of research. There is a risk that in some countries the already existing ‘dual character’ of research increases and that the tendency is towards a clearly segregated area of higher education where women tend to stick with the teaching tasks and less marketable research disciplines in public universities, whereas men join private research institutes. And Christopher McCrudden pointed to the already conceivable effects of the UK Research Assessment Exercise, making higher education and research employers in their striving for excellence upon hiring, focus not so much on what was hitherto done by the candidates but on prospects, thus creating a trap for women in reproductive age. According to Csilla Kollonay Lehoczky, it is thus, paradoxically enough, an important task for the future also ‘to stop the feminisation of Academia treating it as a ‘male’ area’. To do that we must work hard to keep up the status of Academia in general and not let the whole sector deteriorate. It is necessary to develop a set of criteria to monitor the efforts made to this end.

67 Recommendation (2005/251/EC), see further above. Compare also the Commission already in its 1999 communication on the Fifth Framework Programme: an explicit goal was set, to achieve at least a 40% representation for women on various bodies ‘while, of course, meeting the fundamental criterion of scientific excellence’, Com (1999)76 p. 9.

68 SEC(2005)370 p. 4. See also the Commissions report (2004) ‘Gender and Excellence in the Making’ from a Florence workshop ‘Minimising gender bias in the definition and measurement of scientific excellence’. A follow-up conference is being planned for 2006.

At the conference there was, however, also the voice of Kirsten Ketscher telling us that we were naïve to believe in positive action as a way forward, in the first place. What we ought to do, she said, is to play a long with the market. The promotion of women in the area of higher education must be argued as ‘a quality project, not a poverty project!’ she said, and suggested a ‘Gender Assessment Exercise’ to accompany it. This is the resource argument revisited but also – provided we succeed in recruiting the most intelligent individuals of both sexes as pointed out by Lynn Roseberry – the plain efficiency argument. The individuals holding the highest positions in Academia should be the ones most gifted for such activities regardless of sex. Although nobody, of course, would argue anything else regarding the goal: the ‘market optimism’ of Kirsten Ketscher was seriously challenged in the concluding discussions chaired by Birgitta Nyström, Professor of Private Law at Lund University. One can also compare Sacha Prechal’s remark, only just quoted above, of the market as ‘a men’s game’. However, many participants did agree that focusing on the excellence aspect (in a gender neutral way and making also women visible!) is what it takes to reach the vision of ‘a Faculty of Individuals’ and so ultimately putting an end to the need for positive action in the area of higher education and research!