JUDGMENT OF THE COURT

24 January 2003

(Failure of a Contracting Party to fulfil its obligations – Equal Rights Directive - Reservation of academic positions for women)

In Case E-1/02,

EFTA Surveillance Authority, represented by Dóra Sif Tynes, Officer, Legal & Executive Affairs, acting as Agent, 74 Rue de Trèves, Brussels, Belgium,

Applicant,

v

The Kingdom of Norway, represented by Fanny Platou Amble, Advocate, Office of the Attorney General (Civil Affairs), acting as Agent, and Ingeborg Djupvik, Legal Adviser, Ministry of Foreign Affairs, acting as Co-Agent, PO Box 8012 Dep, 0030 Oslo, Norway,

Defendant,

APPLICATION for a declaration that, by applying its legislation so as to reserve a certain number of academic positions exclusively for women, the Kingdom of Norway has failed to fulfil its obligations under the EEA Agreement.

THE COURT,

composed of: Carl Baudenbacher, President (Judge-Rapporteur), Per Tresselt and Dóra Guðmundsdóttir (ad hoc), Judges,

Registrar: Lucien Dedichen,

having regard to the written pleadings of the parties and the written observations of the Commission of the European Communities, represented by John Forman,

Legal Adviser, and Nicola Yerrell, Member of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

having heard oral argument of the Applicant, represented by its Agent Dóra Sif Tynes, the Defendant, represented by its Agent Fanny Platou Amble, and the Commission of the European Communities, represented by its Agent Nicola Yerrell, at the hearing on 18 October 2002,

gives the following

Judgment

I Facts

1 By an application lodged at the Court on 22 April 2002, the EFTA Surveillance Authority brought an action under Article 31(2) of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice (the "Surveillance and Court Agreement") for a declaration that, by maintaining in force a rule which reserves a number of academic posts exclusively for women, Norway has failed to fulfil its obligations under Articles 7 and 70 of the EEA Agreement and Articles 2(1), 2(4) and 3(1) of Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, referred to in point 18 of Annex XVIII to the Agreement.

2 The present case involves permanent and temporary academic positions earmarked for women either by direction of the Norwegian Government or by the University of Oslo (hereinafter, the "University"), pursuant to Article 30(3) of the Norwegian Act No 22 of 12 May 1995 relating to Universities and Colleges (hereinafter, the "University Act"). That provision reads as follows:

> "The appointing body advertises academic posts. A member of the Department's Steering Committee or of the Appointments Committee can however always request the Board to advertise the post itself. If one sex is clearly under-represented in the category of post in the subject area in question, applications from members of that sex shall be specifically invited. Importance shall be attached to considerations of equality when the appointment is made. The Board can decide that a post shall be advertised as only open to members of the underrepresented sex."

3 Based on that provision, the Norwegian Government in 1998 allocated 40 so-called post-doctoral research grants, funded through the national budget, to universities and university colleges. Of these 40 posts 20 were assigned to the University. A post-doctoral scholarship is obtainable after completion of a

doctoral degree and is designed to be a temporary position with a maximum duration of four years. The scholarships were intended to improve the recruitment base for high-level academic positions. According to the directions issued by the Ministry of Education, Research and Church Affairs, these positions were to be made available in fields where the recruitment of women needed to be strengthened. Fields where women are clearly under-represented were also to be taken into consideration. Pursuant to Article 30(3) of the University Act, the University earmarked all of these positions for women. Of the 179 post-doctoral appointments at the University from 1998 to 2001, 29 were earmarked for women. Of the 227 permanent academic appointments during that period, four were earmarked for women.

4 Under the University's Plan for Equal Treatment 2000-2004, another 10 post-doctoral positions and 12 permanent academic positions are to be earmarked for women. According to the Plan, the University will allocate the permanent positions to the faculties by way of an evaluation of, *inter alia*: academic fields where women in permanent academic positions are considerably under-represented, giving priority to fields with less than 10 percent female academics; and academic fields where women in permanent academic positions are under-represented as compared to the number of female students.

II Legal background

5 Article 7 EEA provides that acts referred to or contained in the Annexes to the Agreement or in decisions of the EEA Joint Committee shall be binding upon the Contracting Parties, and be, or be made, part of their internal legal order.

6 Article 70 EEA stipulates that the Contracting Parties shall promote the principle of equal treatment for men and women by implementing the provisions specified in Annex XVIII to the Agreement.

7 Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training, promotions and working conditions (1976 OJ L 39, p. 40-42, hereinafter, the "Directive") is listed in Annex XVIII to the EEA Agreement.

8 Article 2(1) of the Directive states:

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

9 Article 2(2) of the Directive states:

> "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."

10 Article 2(4) of the Directive 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…"

11 Article 3(1) of the Directive states:

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

12 The Directive has been amended by Directive 2002/73/EC, (OJ L 269/15, 5.10.2002). In its amended version, paragraph 4 of Article 2 is replaced by new paragraph 8, which provides, "Member States may maintain or adopt measures within the meaning of Article 141(4) of the Treaty with a view to ensuring full equality in practice between men and women." Article 2, paragraph 3 of Directive 2002/73/EC further provides that Member States shall communicate to the Commission, every four years, the texts of laws, regulations and administrative provisions of any measures adopted pursuant to Article 141(4) of the Treaty as well as reports on these measures and their implementation.

13 At the oral hearing, the Commission indicated, that it was likely to take some 6 to 12 months to make the amended Directive, which is to be implemented in the Member States of the Community by 5 October 2005, a part of the EEA Agreement.

III Pre-litigation procedure

14 In August 2000, the EFTA Surveillance Authority received a complaint alleging that by reserving a number of academic positions for women, Norway was in breach of the EEA Agreement. In the course of subsequent examinations, the EFTA Surveillance Authority sent a request for information to the Government of Norway. In its reply, the Government of Norway referred to the under-representation of women in academic positions, despite the availability of qualified female applicants and maintained that its legislation was in compliance with EEA law, namely with Article 2(4) of the Directive.

15 On 6 June 2001, the EFTA Surveillance Authority sent a letter of formal notice to Norway. With reference to the case law of the Court of Justice of the European Communities, it contended that measures promoting women could only be regarded as compatible with the exception clause laid down in Article 2(4) of the Directive if they did not automatically and unconditionally give priority to women where men and women were equally qualified. Moreover, according to

the EFTA Surveillance Authority, the candidates in question must be subject to an objective assessment, which takes into account the specific personal situations of all candidates.

16 In answering the letter of formal notice, the Government of Norway again referred to the under-representation of women in higher academic positions when compared to the proportion of female students. Moreover, the Government pointed to the fact that a need for affirmative action measures is widely recognised in international law, particularly in Article 4(1) of the United Nations Convention on the Elimination of all forms of Discrimination Against Women (hereinafter, "CEDAW"). Furthermore, the Government contended that the Directive must be interpreted in the light of Article 141(4) EC, which provision allows affirmative action measures. Finally, the Government took the view that affirmative action measures are permissible under Article 2(4) of the Directive as interpreted by the Court of Justice of the European Communities, provided that they are proportionate; and, since the measures in question are temporary and form part of a special programme favouring women in a last attempt to achieve a more balanced representation of the sexes, they have to be considered proportionate.

17 On 28 November 2001, the EFTA Surveillance Authority sent a reasoned opinion to the Government of Norway, maintaining its position that the measures in question were in breach of the EEA Agreement. Norway was asked to take the necessary measures to comply with the reasoned opinion within three months following notification thereof.

18 In its reply of 27 February 2002, the Government of Norway reiterated its position that the measures taken were in compliance with the Directive. With regard to the principle of proportionality, the Government again referred to the case law of the Court of Justice of the European Communities, and contended that even discriminatory effects of affirmative action measures could be counterbalanced by an objective fact, such as the under-representation of women, as long as these measures do not exceed what is necessary.

19 Since the Government of Norway did not take any measures to comply with the reasoned opinion, the EFTA Surveillance Authority filed the application that gives rise to the present proceedings.

IV Arguments of the parties

20 The application is based on one plea in law, namely that the Kingdom of Norway has failed to fulfil its obligations under EEA law by maintaining in force a rule that permits the reservation of academic positions exclusively for women.

21 The *Applicant* submits that the measures in question, by totally excluding men from the selection procedure, entail differential treatment on grounds of gender

and thus encroach upon the individual right to equal treatment as laid down in Article 2(1) of the Directive.

22 As to possible justification, the Applicant argues that even if the social reality of a given sector is characterized by gender inequality, a measure giving priority automatically and unconditionally to women constitutes a violation of the Directive. Such a rule precludes any objective assessment of a possible male candidate and therefore does not allow for the examination of the individual criteria specific to such a candidate. The contested Norwegian legislation can therefore in the view of the Applicant not be justified, neither under Article 2(4) of the Directive nor under the principle of proportionality. Whether the Defendant has failed, by the employment of other means, to achieve its goals in the area of gender equality is, in the Applicant's view, irrelevant.

23 The Applicant further argues that the provisions of international law invoked by the Defendant do not support the latter's position. With regard to Article 141(4) EC, the Applicant maintains that the measures in question would not be lawful under that provision, which, in any event, is not part of EEA law.

24 The Applicant's view is supported by the *Commission of the European Communities*. The Commission argues in particular that measures giving automatic and unconditional priority to women are not compatible with the individual right to equal treatment. Article 2(4) of the Directive is in itself an expression of the proportionality test. The total exclusion of one gender from the selection procedure cannot, in the Commission's view, be justified.

25 The *Defendant* invites the Court to adopt an alternative to the interpretation of the Directive developed by the Court of Justice of the European Communities, under which affirmative action measures are legally defined as derogations from the prohibition on discrimination. According to the Defendant, an interpretation is warranted that views affirmative action measures aimed at gender equality in practice, not as constituting discrimination but rather as an intrinsic dimension of the very prohibition thereof.

26 The Defendant does not dispute that Section 30(3) of the University Act, in allowing certain academic positions to be earmarked for women, provides an automatic and unconditional preference for one gender. The Defendant is, however, of the opinion that the rule in question is not in breach of Articles 2(1) and 3(1) of the Directive. The Defendant argues that formal equality in treatment is not sufficient to achieve substantive equality. The modest number of women in academia stands in glaring contrast to the percentage of women in the student body. The Defendant points to the fact that women tend to leave academic careers before they are qualified for higher academic positions. The aim of the disputed legislation is to achieve long-term equality between men and women as groups.

27 The Defendant seeks support for its view in provisions of international agreements such as Article 4(1) of CEDAW, Article 14 of the European

Convention on Human Rights, Protocol 12 to the same Convention, Articles 2 and 5 of the ILO Convention 111 concerning Discrimination in Respect of Employment and Occupation, as well as Recommendation No R (85) 2 from the Council of Europe. The provisions of the Directive must, in the Defendant's view, be interpreted in the light of those provisions.

28 The Defendant also refers to Article 141(4) EC, maintaining that affirmative action measures like the one in question fall within the scope of that provision. Since the amended Directive 2002/73/EC makes direct reference to Article 141(4) EC, the latter provision will, once the new Directive is made part of EEA law, apply as a part of the EEA Agreement for the purposes and within the scope of the new Directive. The Defendant asks the Court to apply Article 141(4) to the case at hand by analogy.

29 With regard to possible justification, the Defendant invokes Article 2(2) of the Directive, maintaining that the allocation of earmarked positions within the University of Oslo is premised on a need for female members of faculty that are able to meet the students' legitimate needs.

30 The Defendant further contends that the Court of Justice of the European Communities has not yet had an opportunity to rule on whether earmarking of specific posts for women may fall within the scope of Article 2(4) of the Directive.

31 The Defendant is of the view that the judgments of the Court of Justice of the European Communities in Cases C-79/99 *Schnorbus* [2000] ECR I-10997 and C-476/99 *Lommers* [2002] ECR I-2891 support its position. Whereas in *Schnorbus*, preference was automatically accorded to persons who had completed compulsory military or civilian service, the sole purpose of the Norwegian earmarking scheme is to compensate for an actual disadvantageous situation, namely the significant under-representation of women in higher academic posts. With regard to *Lommers*, the Defendant maintains that whereas in that case all the employer's nursery places were reserved for women, the Norwegian earmarking scheme only applies to a limited number of academic positions at the University of Oslo with the consequence that there is otherwise ample opportunity to take special account of male applicants.

32 The Defendant argues further that its contested legislation is proportionate to the aim pursued. Post-doctoral posts are temporary appointments with a maximum duration of four years. In the Defendant's view, the measures at stake in Case C-158/97 *Badeck and Others* [2000] ECR I-1875 concerning training positions were very similar to those provided for in the Norwegian legislation. Permanent professorships earmarked for women will lapse at the latest when the professors in question retire.

33 In the Defendant's view, the measure at issue in Case C-407/98 *Abrahamsson* [2000] ECR I-5539, was significantly more disadvantageous to the other gender than the measures at issue in the present case, the latter being at least neutral as

regards quality and not involving the adverse effect of a rejection on a researcher's reputation.

34 The Defendant also emphasizes that the earmarked posts represent only a minor part of all new temporary and permanent appointments; the limited numbers are of significant importance when assessing proportionality.

35 Moreover, the Defendant submits that the positions earmarked for women at the University of Oslo are new posts constituting a real extension of the total number of available posts. Therefore, male applicants are not in a more difficult position with respect to career advancement than they would be without the earmarked posts.

V Findings of the Court

36 The legal basis for deciding the present application is provided by the Directive, which has been made part of EEA law by the reference in point 18 of Annex XVIII to the EEA Agreement. According to Article 6 EEA and Article 3(2) of the Surveillance and Court Agreement, the case law of the Court of Justice of the European Communities is relevant for the Court when interpreting the Directive.

37 The Court of Justice of the European Communities has, in the context of Community law, consistently held that Article 2(4) of the Directive permits measures that although discriminatory in appearance, are in fact intended to eliminate or reduce actual instances of inequality that may exist in the reality of social life. Measures relating to access to employment, including promotion, that give a specific advantage to women with a view to improving their ability to compete on the labour market and to pursue a career on an equal footing with men come within the scope of Article 2(4) of the Directive (Case 312/86 *Commission v France* [1988] ECR 6315, at paragraph 15; C-450/93 *Kalanke v Freie Hansestadt Bremen*, [1995] ECR I-3051, at paragraphs 18-19; C-409/95 *Marschall v Land Nordrhein-Westfalen* [1997] ECR I-6363, at paragraphs 26-27; *Badeck*, cited above, at paragraph 19; *Lommers*, cited above, at paragraph 32). In *Kalanke* however, the Court of Justice of the European Communities found that Article 2(4), as a derogation from an individual right, had to be interpreted strictly and that the national rules at issue guaranteeing women in the case of equal qualifications absolute and unconditional priority for appointment or promotion in the public service were incompatible with the Directive. The Court, following the Opinion of Advocate General Tesauro, found that such measures went beyond promoting equal opportunities and substituted equality of representation for equality of opportunity (*Kalanke*, cited above, at paragraphs 21-23).

38 In *Marschall*, the Court of Justice of the European Communities considered the impact of prejudices and stereotypes concerning the role and capacities of women in working life and found that the mere fact that a male and a female

candidate are equally qualified does not mean that they have the same chances (see *Marschall*, cited above, at paragraphs 29-30). Preferential treatment of female candidates in sectors where they are under-represented could therefore fall within the scope of Article 2(4) of the Directive if such preferential treatment was capable of counteracting the prejudicial effects on female candidates of societal attitudes and behaviour and reducing actual instances of inequality. However, such a measure may not guarantee absolute and unconditional priority for women in promotion, but should be subject to a savings clause (flexibility clause), guaranteeing an objective assessment of all candidates, taking into account their individual circumstances. Such an assessment, which should not be based on criteria that discriminate against women, could then override the priority accorded to women if the assessment tilted the balance in favour of the male candidate (*Marschall*, cited above, at paragraph 35; see also *Badeck*, cited above, at paragraph 23).

39 At issue in *Badeck* was national legislation where binding targets were set for the proportion of women in appointments and promotions. The Court of Justice of the European Communities found that such a rule that gave priority to equally qualified women in a sector where women are under-represented, if no reasons of greater legal weight were opposed, and subject to an objective assessment of all candidates, fell within the scope of Article 2(4) of the Directive. The Court of Justice of the European Communities further indicated that in assessing the qualifications of candidates, certain positive and negative criteria could be used, which, while formulated in gender neutral terms, were intended to reduce gender inequalities that occur in practice in social life. Among such criteria were capabilities and experiences acquired by carrying out family work. Negative criteria that should not detract from assessment of qualifications included part-time work, leaves and delays as a result of family work. Family status and partner's income should be viewed as immaterial and seniority, age and date of last promotion should not be given undue weight (*Badeck*, cited above, at paragraphs 31-32).

40 In *Badeck*, the Court of Justice of the European Communities held that a regime prescribing that posts in the academic service are to be filled with at least the same proportion of women as the proportion of women among the graduates and the holders of higher degrees in the discipline in question is compatible with the Directive. The Court of Justice of the European Communities thereby followed Advocate General Saggio's Opinion according to which such a system does not fix an absolute ceiling, but fixes one by reference to the number of persons who have received appropriate training, which amounts to using an actual fact as a quantitative criterion for giving preference to women (*Badeck*, cited above, at paragraphs 42-43; Opinion of Advocate General Saggio in *Badeck*, point 39).

41 In *Badeck*, the Court of Justice of the European Communities further accepted a rule according to which women are to be taken into account to the extent of at least one half in allocating training places in trained occupations in which women are under-represented. The Court of Justice of the European Communities found that the allocation of training places to women did not entail total inflexibility.

The state did not have a monopoly on training places, as they were also available in the private sector. No male was therefore definitely excluded (*Badeck*, cited above, at paragraphs 51and 53).

42 In *Abrahamsson*, the Court of Justice of the European Communities considered a Swedish statutory provision under which a candidate for a professorship who belongs to the under-represented gender and possesses sufficient qualifications for that post may be chosen in preference to a candidate of the opposite gender who would otherwise have been appointed, where this would be necessary to secure the appointment of a candidate of the under-represented gender, and the difference between the respective merits of the candidates would not be so great as to give rise to a breach of the requirement of objectivity in making appointments. It was found that this provision was incompatible with Article 2(1) and (4) of the Directive. The portent of the savings clause relating to the requirement of objectivity could not be precisely determined, implying that the selection would ultimately be based on the mere fact of belonging to the under-represented gender.

43 As the case law outlined above shows, the Court of Justice of the European Communities has accepted as legitimate certain measures that promote substantive equality under Article 2(4) of the Directive. In determining the scope of a derogation from an individual right, such as the right to equal treatment of men and women laid down by the Directive, regard must, however, be had to the principle of proportionality, which requires that derogations remain within the limits of what is appropriate and necessary in order to achieve the aim in view and that the principle of equal treatment be reconciled as far as possible with the requirements of the aim pursued (see *Lommers*, cited above, at paragraph 39).

44 The Court will now deal with the invocation of the case law of the Court of Justice of the European Communities as it applies to the arguments of the Defendant.

45 In the light of the homogeneity objective underlying the EEA Agreement, the Court cannot accept the invitation to redefine the concept of discrimination on grounds of gender in the way the Defendant has suggested. The Directive is based on the recognition of the right to equal treatment as a fundamental right of the individual. National rules and practices derogating from that right can only be permissible when they show sufficient flexibility to allow a balance between the need for the promotion of the under-represented gender and the opportunity for candidates of the opposite gender to have their situation objectively assessed. There must, as a matter of principle, be a possibility that the best-qualified candidate obtains the post. In this context the Court notes that it appears from the Defendant’s answer to a written question from the Court that it cannot be excluded that posts may be awarded to women applicants with inadequate qualifications, if there is not a sufficient number of qualified women candidates.

46 The Defendant’s submission to the effect that Article 2(2) of the Directive applies in the present case, as gender constitutes a genuine occupational

qualification to ensure the quality of the occupational activity and thus constitutes a determining factor for carrying out the activities in question, cannot be accepted. Such an interpretation does not find support in the wording of the Directive nor in the case law of the Court of Justice of the European Communities. The provision, which allows Member States to exclude from the field of the Directive certain occupational activities has primarily been applied in instances where public security calls for the reservation of certain policing or military activities for men only (see, for instance, Cases 222/84 *Johnston v Chief Constable of the Royal Ulster Constabulary* [1986] ECR 1651; C-273/97 *Sirdar* [1999] ECR I-7403).

47 The Defendant has invoked the judgments of the Court of Justice of the European Communities in Cases *Lommers* and *Schnorbus*. In *Lommers*, the Court of Justice of the European Communities held that a scheme reserving a limited number of subsidized nursery places for female officials fell within the scope of the derogation provided for in Article 2(4) of the Directive, since in cases of emergency, it permitted male officers access to them, thus allowing for individual assessment of the officials' needs for day care facilities. What was held decisive in *Lommers* was that men were not totally excluded from these benefits because the regulation at issue contained a flexibility clause and additional nursery places were available in the private sector. As the Applicant points out, that ruling shows that an absolute rule such as the one contested in the present case exceeds what is acceptable under Article 2(4) of the Directive.

48 The rules at issue in *Schnorbus* were found to constitute indirect discrimination, which, however, was justified as the rules sought to reduce the inequality suffered by men as a result of fulfilling their obligation to perform military or civilian service, being objective in nature and prompted solely by the desire to counterbalance to some extent the effect of the delay in the progress of men's education (*Schnorbus*, cited above, at paragraph 44). The *Schnorbus* case concerned a special constellation. It follows that the measures taken by the Defendant cannot be justified by way of recourse to the judgments of the Court of the European Communities in cases *Lommers* and *Schnorbus*.

49 The Defendant has highlighted the training aspects of the contested post-doctoral positions. These positions, which are limited in time, are intended to offer holders of doctoral degrees the possibility to qualify for permanent academic posts and develop the necessary competence to compete for higher academic positions. The postdoctoral positions are further described as research posts, where teaching and administrative obligations are at a minimum. The Defendant has in this respect sought to rely on the principles developed by the Court of Justice of the European Communities in *Badeck*.

50 As the Commission of the European Communities has emphasized, the Court of Justice of the European Communities has drawn a distinction between training for employment and actual places in employment. With regard to training positions, it has relied on a restricted concept of equality of opportunity allowing the reservation of positions for women, with a view to obtaining qualifications

necessary for subsequent access to trained occupations in the public service (*Badeck*, cited above, at paragraphs 52 and 55). The Court finds that even for training positions, the law requires a system that is not totally inflexible. Moreover, alternatives for post-doctoral positions in the private sector appear to be rather limited.

51 In the Court's view, the Norwegian rule goes further than the Swedish legislation in *Abrahamsson*, where a selection procedure, involving an assessment of all candidates was foreseen at least in principle. Since that Swedish rule was held by the Court of Justice of the European Communities to be in violation of the principle of equal treatment of women and men, the Norwegian rule must fall foul of that principle *a fortiori*.

52 It has been argued that the positions in question are new posts and that male applicants are not in a more difficult position with respect to career advancement than they would be without the earmarking scheme. The Court notes, however, that it is unlikely that newly created professorship posts would be allocated to specific disciplines, subjects or institutions without an evaluation of already existing posts, or without regard to future needs and expected consequential adjustments of teaching or research staff. It therefore appears that the earmarking scheme will have an impact on the number of future vacancies open to male applicants in any field in which it has been applied. The Defendant has not even alleged that in the case at hand the situation could be different.

53 The argument that the permanent professorships set up and earmarked for women are temporary in nature since they will lapse at the latest when such a professor retires cannot be accepted.

54 On the principles laid down in the foregoing, the Norwegian legislation in question must be regarded as going beyond the scope of Article 2(4) of the Directive, insofar as it permits earmarking of certain positions for persons of the under-represented gender. The last sentence of Article 30(3) of the University Act as applied by the University of Oslo gives absolute and unconditional priority to female candidates. There is no provision for flexibility, and the outcome is determined automatically in favour of a female candidate. The Defendant has argued that the criteria of unconditional and automatic priority do not exhaust the scope of the proportionality principle. The Court notes, in this respect, that other aspects of the Norwegian policy on gender equality in academia – including target measures for new professorship posts, priority in allocation of positions to fields with less than 10 percent female academics and in fields with high proportion of female students and graduates – have not been challenged by the EFTA Surveillance Authority, except with regard to the earmarking of positions exclusively for female candidates.

55 As to the Defendant's submissions to the effect that Article 141(4) EC and the new Directive 2002/73/EC of 23 September 2002 amending Directive 76/207/EEC should apply to the present case by analogy, the Court observes that these provisions have not been made part of EEA law. They therefore do not

provide a legal basis to decide the present application either directly or by analogy.

56 The Court notes, however, that since the entry into force of the Directive substantial changes have occurred in the legal framework of the Community, providing *inter alia* for increased Community competences in matters relating to gender equality. Under Article 2 EC the Community shall have as its task to promote equality between men and women. Article 3(2) EC states that the Community shall, in carrying out the activities referred to in the first paragraph of that provision, aim to eliminate inequalities and to promote equality between men and women. Article 13 EC gives the Council the competence to take appropriate action to combat discrimination based on sex. According to Article 141(4) EC, the principle of equal treatment shall, with a view to ensuring full equality in practice between men and women in working life, not prevent Member States 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. Inevitably, the interpretation of the Directive will reflect both the evolving legal and societal context in which it operates.

57 Under the present state of the law, the criteria for assessing the qualifications of candidates are essential. In such an assessment, there appears to be scope for considering those factors that, on empirical experience, tend to place female candidates in a disadvantaged position in comparison with male candidates. Directing awareness to such factors could reduce actual instances of gender inequality. Furthermore, giving weight to the possibility that in numerous academic disciplines female life experience may be relevant to the determination of the suitability and capability for, and performance in, higher academic positions, could enhance the equality of men and women, which concern lies at the core of the Directive.

58 The Defendant cannot justify the measures in question by reference to its obligations under international law. CEDAW, which has been invoked by the Defendant, was in force for Community Member States at the time when the Court of Justice of the European Communities rendered the relevant judgments concerning the Directive. Moreover, the provisions of international conventions dealing with affirmative action measures in various circumstances are clearly permissive rather than mandatory. Therefore they cannot be relied on for derogations from obligations under EEA law.

59 Based on the foregoing, the Court holds that by maintaining in force a rule which permits the reservation of a number of academic posts exclusively for members of the under-represented gender, Norway has failed to fulfil its obligations under Articles 7 and 70 of the EEA Agreement and Articles 2(1), 2(4) and 3(1) of Directive 76/207/EEC of 9 February on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions as referred to in point 18 of Annex XVIII to the EEA Agreement.

VI Costs

60 Under Article 66(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. The EFTA Surveillance Authority has asked for the Kingdom of Norway to be ordered to pay the costs. Since the latter has been unsuccessful in its defence, it must be ordered to pay the costs. The costs incurred by the Commission of the European Communities are not recoverable.

On those grounds,

THE COURT

hereby:

1. **Declares that by maintaining in force a rule which permits the reservation of a number of academic posts exclusively for members of the under-represented gender, Norway has failed to fulfil its obligations under Articles 7 and 70 of the EEA Agreement and Articles 2(1), 2(4) and 3(1) of Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions as referred to in point 18 of Annex XVIII to the EEA Agreement;**

2. **Orders the Kingdom of Norway to pay the costs of the proceedings.**

Carl Baudenbacher Per Tresselt Dóra Guðmundsdóttir

Delivered in open court in Luxembourg on 24 January 2003.

Lucien Dedichen
Registrar

Carl Baudenbacher
President