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**POSITIVE ACTION IN THE FIELD OF
EQUALITY BETWEEN WOMEN AND MEN**

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**FINAL REPORT OF ACTIVITIES
OF THE
GROUP OF SPECIALISTS ON POSITIVE ACTION
IN THE FIELD OF EQUALITY BETWEEN WOMEN AND MEN
(EG-S-PA)**

Strasbourg, 2000

THE COUNCIL OF EUROPE

The Council of Europe is a political organisation which was founded on 5 May 1949 by ten European countries in order to promote greater unity between its members. It now numbers 41 European states.¹

The main aims of the Organisation are to promote democracy, human rights and the rule of law, and to develop common responses to political, social, cultural and legal challenges in its member states. Since 1989 it has integrated most of the countries of central and eastern Europe and supported them in their efforts to implement and consolidate their political, legal and administrative reforms.

The Council of Europe has its permanent headquarters in Strasbourg (France). By Statute, it has two constituent organs: the Committee of Ministers, composed of the Ministers of Foreign Affairs of the 41 member states, and the Parliamentary Assembly, comprising delegations from the 41 national parliaments. The Congress of Local and Regional Authorities of Europe represents the entities of local and regional self-government within the member states.

The European Court of Human Rights is the judicial body competent to adjudicate complaints brought against a state by individuals, associations or other contracting states on grounds of violation of the European Convention on Human Rights.

The Council of Europe and equality between women and men

The consideration of equality between women and men, seen as a fundamental human right, is the responsibility of the Steering Committee for Equality between Women and Men (CDEG). The experts who form the Committee (one from each member State) are entrusted with the task of stimulating action at the national level, as well as within the Council of Europe, to achieve effective equality between women and men. To this end, the CDEG carries out analyses, studies and evaluations, defines strategies and political measures, and, where necessary, frames the appropriate legal instruments.

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FOREWORD

Over the last few years, the Steering Committee for Equality between Women and Men (CDEG)¹ of the Council of Europe has been particularly concerned about inventorying and analysing the tools which are available to promote equality between women and men. It was with this objective in mind that the Committee, in 1996, began work on gender mainstreaming, the outcome of which was, in 1998, a report entitled "Gender mainstreaming: conceptual framework, methodology and presentation of good practices". The success of the work on gender mainstreaming² has prompted the Committee to undertake a similar exercise on positive action as an instrument/strategy to promote gender equality.

The present report is the result of five meetings of the Group of Specialists on positive action (EG-S-PA), which was set up by the CDEG in 1998. The Group was composed of eight experts: two members of the CDEG and six other experts (see Appendix II).

The Group was entrusted with studying the legal and administrative basis of positive action in the field of equality between women and men, as well as the practice of positive action in the different member States of the Council of Europe, with a view to preparing the present report (see the terms of reference of the Group in Appendix III).

In order to obtain a good overview of the practice of positive action, the Group collected a vast amount of legislative, policy and information documents on this question. The replies to a questionnaire on positive action which was sent to all members of the CDEG also constituted a valuable source of information. Finally, all members of the Group contributed actively to the drafting of the report by submitting written contributions to the different chapters.

Part I deals with definitions and the international legal framework for positive action. Parts II and III respectively tackle positive action in the labour market and in decision-making. Part IV describes the need for awareness-raising related to positive action, whereas the fifth and final part sets out the Group's reflections, conclusions and recommendations.

The Group is very much aware of the fact that even if women have been granted equal rights with men, traces of their former inferior status remain in the thinking and attitudes of many. Social institutions and behaviour continue to reflect such attitudes in a way that special efforts are needed to give women a real equality of opportunity.

In writing this report, the Group has set itself the aim of giving as comprehensive a picture as possible of positive action, to explain how it interrelates with the principle of non-discrimination and how it interacts with other tools, such as gender mainstreaming. It hopes that the report will be disseminated as widely as possible by the Council of Europe and that it will constitute a valuable tool for all those who are involved in the process for the promotion of equality.

¹ See terms of reference in Appendix I.

² The report on Gender mainstreaming has been a very popular publication (*Gender mainstreaming*, Council of Europe Publishing 1998, ISBN 92-871-3799-4). The Committee of Ministers of the Council of Europe adopted, in 1998, Recommendation No. R (98) 14 on gender mainstreaming, inviting the governments of member States to put the ideas contained in the report into practice.

I. THE INTERNATIONAL LEGAL FRAMEWORK

1. INTRODUCTION

The interrelation between the principles of equality before the law, non-discrimination and positive action

The evolution of the general principle of equality before the law and equal protection of the law can be followed from Aristotle to Montesquieu and Rousseau, to the Declaration of Independence proclaimed by the 13 American colonies, written by Thomas Jefferson and adopted unanimously on 4 July 1776:

“We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain inalienable rights, that among these are life, liberty and the pursuit of happiness”.

In addition to the Declaration of the Rights of Man and of the Citizen, the American Bill of Rights (added to the constitution of the United States in 1791), is central for the understanding of the principles of equality and non-discrimination which form an essential element of the protection of human rights.

In the late 18th and throughout the 19th century, the concept of human rights and the general principle of equality played a key role in the social struggles in some European countries, against attempts by governments to obtain absolute power. It appears in such reforms as the abolition of slavery, factory legislation, popular education, trade unionism and the movement for universal voting rights.

The idea that all persons are created equal implies recognition of a prohibition against discrimination, including on the basis of sex. This was very clearly expressed in the United Nations Universal Declaration of Human Rights (1948): “All human beings are born free and equal in dignity and rights” (Article 1).

Prohibition of discrimination takes up a central position in the International Labour Law, and equal treatment has been among ILO's objectives since the foundation in 1919. The principle of equal treatment was originally contained in the ILO statute, and transferred to the Philadelphia Declaration from 1944:

“All human beings, *irrespective of race, creed or sex*, have the right to pursue both their material well-being and their spiritual development in conditions of freedom and dignity, of economic security and *equal opportunity*”.

International law differentiates normally between, on the one hand, discrimination which is prohibited and, on the other, distinction, which is permitted, under certain conditions.

No-one should be discriminated against on grounds of sex, race, colour, language, religion, political or other opinion, national or social origin or because of association with a national

minority, property, birth or other status.¹ Discrimination is seen as a failure to respect the principle of equal treatment, which is one of the most fundamental demands in a democratic society.

The principle of non-discrimination is the cornerstone and basis for promoting gender equality. Without legal protection against gender discrimination, it would not be possible to raise awareness of the need for justice and for promoting the abilities of both sexes.

When two persons who are considered comparable are not treated equally, it is considered discriminatory unless the difference in treatment has a legitimate aim and a reasonable justification, for example because their situations are different.

It has been clearly recognised that protection against discrimination is not enough to ensure the equal treatment of women and men in practice. This implies that unequal situations should be treated unequally. In the different international conventions and other legal texts which contain a definition of the concept of discrimination, a definition of positive action is also included. Such definitions differ, depending on the legal instrument in question. There is, however, a certain pattern, which shows where different treatment is not considered discriminatory. The most important categories of measures which justify the different treatment are “protective measures”, “genuine occupational qualifications” and “positive measures to promote equality”. These will be dealt with in Chapter II.

Because of the intertwining of the concepts of non-discrimination and positive action, positive action must be defined within the framework of each convention, or within the framework of each national legislation. It is therefore extremely difficult to give an overall or a common definition of positive action. The following chapter, “Description of the legal background” presents a number of definitions as they appear in international legal texts, together with an analysis of each instrument. This is intended to make available to the users of this report, in one document, all the main texts including references to positive action. But before examining these texts, it may be useful to look at why positive action is still a controversial concept, and at the same time try to understand what its added value can be.

¹ See European Convention on Human Rights, Article 14; European Social Charter of 1961, Preamble; Revised European Social Charter, Article E. The principle is also stated in the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up of 1998. The ILO declares that all members, even if they have not ratified the conventions in question, have an obligation, arising from the very fact of membership in the Organisation, to respect, to promote and to realise, in good faith and in accordance with the Constitution, the principles concerning the fundamental rights which are the subject of those conventions, namely the elimination of discrimination in respect of employment and occupation. A first step towards this declaration was made in Copenhagen in 1995, when the Heads of State and Government attending the World Summit for Social Development adopted specific commitments and a Programme of Action relating to “basic workers’ rights”.

Critics voiced against positive action in the field of gender equality and its added value

As explained in the Council of Europe report on Gender mainstreaming¹, gender equality is taken to mean equal visibility, empowerment and participation of both sexes in all spheres of public and private life. This implies that the search for real equality between women and men cannot be limited only to rights and treatment concerning access to rights, but must also, as far as possible, be seen in terms of sharing collective benefits, including jobs and responsibilities. In other words, not just equal rights or even equal opportunities, but also equal outcomes and circumstances.

Such an understanding of gender equality – and equality in general – clearly raises various types of problems. Some are simply practical or technical, others are more complex. Disciplines which imply a real break with age-old practices pose a threat to contemporary ways of thinking, which normally reckon in terms of individual rights and, to the extent that a freedom is being exercised to secure a benefit, comparison of merits or qualities which are themselves individual.

Most modern democracies have made equality of all citizens before the law, with no distinctions as regards sex, origin, race, religion or whatever, one of the fundamental principles of their form of society and government. In practice, though, while appearing to offer members of groups that have long been deprived of equal rights the same safeguards enjoyed by other groups for many years, this principle amounts to a rejection of their legitimate claims to equality in practice. There can be no real equality of opportunity between members of different groups, even if they have now been granted equal rights, when in the minds of many, including members of those previously disempowered groups, psychological traces of the former inferior status remain, and when social institutions and behaviour frequently continue to reflect these attitudes and their effects or apply the theoretically acknowledged equality in such a piecemeal fashion as to make it unlikely that it will ever be achieved. Unless, that is, efforts are made, using appropriate methods, to compensate for the accumulated burden of the past and psychological and social inertia.

This burden of the past means that society is still organised according to a male norm, in such a way that men's needs are met to a much higher degree than those of women. Women are still seen as a secondary labour force; working conditions and working hours are tailor-made for men who have practically no everyday responsibilities towards a family or a household.

However, it is no easy matter to secure recognition for a compensation strategy for women, since it involves a break with the principle of equal rights, or at least that of equal treatment as regards access to rights, in order to achieve real equality. Eliminating certain forms of discrimination requires not the abolition of all discrimination and the introduction of an inflexible disregard of factors such as sex, origin, race or social situation, but the temporary reversal of the forms of discrimination previously practised.

It cannot be denied that such an approach is liable to cause concern among all those brought up in the liberal tradition, alive to the dangers of any form of social screening, or communitarian or corporatist isolation. According to this view, if all human beings, women included, have equal worth, any deviation from the free play of social and of economic competition between individual members of society and of the economic system could lead to increasing social rigidity, and then ossification, and a return to a former caste system. This applies irrespective of the group targeted by the equality policy, even if it is women, and only women, since approaches adopted to deal with this problem are likely to spill over into other areas. Many argue that however much the issue of discrimination on grounds of sex, and efforts to end it, differs from that of other forms of discrimination, it cannot be totally isolated from them, mainstreaming or not.

¹ Gender Mainstreaming: Conceptual framework, methodology and presentation of good practices.

Whether in a social or an economic context, individuals have to be seen in terms of certain characteristics, as subjects. Apart from their level of performance, as measured by their practical and formal qualifications, and the different forms of social bonds which together determine the extent and boundaries of their potential social relations, they can be characterised in terms of their sex and, where appropriate, their ethnic or national origins. It is not therefore a regressive step for such characteristics to be taken into account in determining how far individuals are suited to sharing collective benefits and responsibilities. This is true even when according to the criteria traditionally used to assess abilities in examinations or recruitment or appointment procedures, which are themselves not exempt from arbitrary elements, they are of equal or even lesser merit. For better or worse, the concept of employability¹, which is increasingly being used in labour market and recruitment procedures, to some extent reflects an approach not unrelated to that just described.

Nevertheless, there are limits on the extent to which this approach differs from the principles of legal individualism and meritocracy. To say that the criterion of sex, or some other characteristic, may be taken into account in determining the circumstances under which persons with rights can be allowed to assert those rights and how to apply a principle of equality in their case so that historical or actual circumstances are not disregarded does not mean that these persons cease to have rights, that this is the end of the equality principle and that democracy is being sacrificed in favour of a return to holism.

In a nutshell, the break with the equal rights principle, is necessitated by the need to make this principle a reality for formerly oppressed groups, particularly women. It does not amount to rejecting the rule that situations must be examined on an individual basis, though it does entail an acceptance that certain characteristics, in this case sex, should be taken into account.

This is necessary not just in the context of a fair distribution of social opportunities but also in the interests of a more harmonious and better functioning society.

This is the – narrow – way forward to which this analysis of positive action points. The temptation is to abandon it as soon as we encounter strong negative reactions – whether spontaneous or contrived – on the part of society, or allow ourselves to be dissuaded from taking this path. In such an event, positive, standard-setting, financial or any other form of action becomes meaningless. All that is left is education and instruction. That is something, but it is probably insufficient. Positive action is an essential instrument if there is political will to speed up the process of achieving equality and eliminate hidden discrimination.

¹ The meaning of the term “*employability*” used in this report corresponds to the broad meaning used by the European Commission in its employment strategy. Improving employability was established as the first pillar of the employment guidelines of the European Commission for 1998. This resulted in recommendations and undertakings for the member States of the European Union such as: tackling youth employment and preventing long-term unemployment; moving from passive to active measures; easing the transition from school to work and promoting a labour market open to all.

2. DESCRIPTION OF THE LEGAL BACKGROUND

i. The United Nations

a) **Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)**

Article 4

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

2. Adoption by States Parties of special measures, including those measures contained in the present Convention, aimed at protecting maternity, shall not be considered discriminatory.

The Convention was adopted by the General Assembly of the United Nations on 18 December 1979 and entered into force on 3 September 1981.

It is comprehensive in scope and applicable to all areas of life: civil, cultural, social, political and economic. The Convention represents the idea of equality of opportunity. Its preamble and articles clearly reflect the idea that, despite all the efforts of the traditional human rights conventions, strong social and cultural stereotyped roles still prevail for both women and men. In addition to proclaiming traditional principles of equality and anti-discrimination, the Convention urges the States Parties to take all appropriate measures e.g. to modify these cultural and social patterns of conduct. The need for a change in the traditional roles of men, as well as the role of women in society is underlined in order to achieve full equality between men and women. The substantive provisions of the Convention, covering a broad range of subjects, specifically enumerate forms of discrimination that States Parties agree to eradicate.

The historical importance of the Convention is unquestionable. It is the first international and universally applicable legal instrument that introduced a derogation article allowing special measures to achieve *de facto* equality without constituting discrimination. Positive measures must be temporary, and discontinued when the objectives of equality of opportunity and treatment have been achieved. The Convention raised the question of positive action to a higher hierarchical level, to the level of international community. It has been said that, for the first time in its field, Article 4 reflects a unified interpretation of a general principle of law which is common to all legal systems. The Committee on the Elimination of Discrimination against Women recommended in 1988¹ that States Parties make more use of temporary specific measures, such as positive action, preferential treatment or quota systems, to advance women's integration into education, economy, politics and employment.

The provisions are formulated in fairly flexible terms and are not specific enough to guarantee numerous subjective rights. Therefore, the introduction of a right to petition under the Convention was called for.

On 12 March 1999, the Commission on the Status of Women adopted by consensus an **Optional Protocol**, which will put the CEDAW Convention on an equal footing with other international human rights instruments which provide individual complaint procedures. The

¹ General Recommendation No. 5, seventh session 1988, Temporary special measures.

Protocol contains two procedures: 1) a *communication procedure* allowing - after certain criteria have been met - individual women, or groups of women, to submit claims of violations that are protected under the Convention, and 2) an *inquiry procedure* enabling the Committee to initiate inquiries of grave or systematic violations of women's rights.

The Optional Protocol was signed by 23 countries at the United Nations General Assembly on 10 December 1999. As of 15 June 2000, it has been signed by 42 countries and ratified by five. The Protocol, which includes an opt-out clause from the inquiry procedure, will enter into force when ten States Parties have ratified it or acceded to it. No reservations to this Protocol are permitted.

b) International Covenant on Civil and Political Rights (ICCPR)

Article 26

All persons are equal before the law and are entitled without any discrimination to equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

The International Covenant on Civil and Political Rights (ICCPR) and its first Optional Protocol allowing individuals to submit complaints to the Human Rights Committee were adopted by the General Assembly on 16 December 1966 and entered into force on 23 March 1976. Civil and political rights are frequently viewed as human rights of the first generation.

Article 2(1) of the Covenant is to guarantee that the States Parties undertake to ensure and respect that the rights guaranteed under the Covenant are recognised without distinction of any kind, such as sex. This obligation is immediate; i.e. all Covenant rights have to be guaranteed from the date of its entry into force. The obligation to respect the rights indicates the negative character of civil and political rights, whereas the obligation to ensure indicates their positive character - meaning that states must take positive steps to give effect to the Covenant rights.

Article 26, as declared by the Human Rights Committee, consists of an autonomous right in the ICCPR. In other words, the application of the principle of non-discrimination in Article 26 is not limited to those rights which are provided for in the Covenant. The Committee has even extended the protection against discrimination beyond civil and political rights, to economic and social rights.

The Human Rights Committee was established to monitor the implementation of the Covenant and its Protocols. One of its tasks is the examination of state reports and individual complaints concerning possible violations of the rights covered under the ICCPR. Under Article 40, States Parties must submit reports every five years on the measures they have adopted to give effect to the rights recognised in the Covenant and on the progress made in the enjoyment of those rights. The Human Rights Committee is also authorised to formulate General Comments by Covenant Article 40(4).

The Human Rights Committee has made a distinction between *differentiation* and *discrimination* by stating that: "Not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant."¹ Action needed to correct discrimination is in fact a case of legitimate differentiation, when aimed at redressing

¹ General Comment 18 on non-discrimination, Thirty-seventh session, 1989.

inequalities. According to another comment¹ by the Human Rights Committee, governments even have an obligation to undertake affirmative action designed to ensure the positive enjoyment of rights, since the prevention of discrimination cannot be achieved only by measures of protection and simply by enacting laws.

c) International Covenant on Economic, Social and Cultural Rights (ICESCR)

Article 2(2)

The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Article 3

The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the present Covenant.

The International Covenant on Economic, Social and Cultural Rights (ICESCR) was adopted and opened for signature, ratification and accession on 16 December 1966, and it entered into force on 3 January 1976. It stands alongside its sister Covenant, the ICCPR.

However, the two Covenants differ principally in relation to the terms of their respective obligation clauses (Article 2 in both cases) and in their system of supervision. Economic, social and cultural rights are to be implemented progressively rather than immediately (as was the case with the ICCPR), and they are to be subject to supervision by the Economic and Social Council of the United Nations rather than by a committee of independent experts (as the Human Rights Committee). The ICESCR is supervised solely by means of a system of periodic reporting. Despite the differences, many provisions have similarities. Even the preamble to the ICESCR underscores the indivisible and interdependent nature of all human rights and suggests that the two Covenants should be taken as one package.

The ICESCR is the only universal human rights instrument dealing extensively with the whole range of economic, social and cultural rights, since many other covenants tend to be limited in some respect. The protection given in the Covenant to economic rights is broad but phrased in a general manner. The problem relating to social and economic rights relates to their applicability, not to their validity. Many feel that economic and social rights - because of their very nature - are not 'justifiable' in the sense that they are not capable of being invoked in courts of law and applied by judges.

Indeed, many countries still do not recognise economic and social rights as rights by giving them the same recognition in their domestic legislation as to civil and political rights. This creates an additional barrier to women, who often suffer substantial and disproportionate difficulties in securing economic, social and cultural rights. At international level, the ICESCR Covenant creates an important precedent for economic, social and cultural rights as a whole. It provides a framework for undertaking progressive and immediate measures, so that women may enjoy on an equal footing those rights which have often been denied them.

The Covenant provides significant legal protection against all forms of discrimination in the pursuit of economic, social and cultural rights. *Article 3* guarantees that men and women possess precisely the same legal entitlement to the rights set forth in the Covenant and that, if necessary, special measures will be employed by States Parties to ensure that this position of equality is attained. Pursuant to *Article 2(1)*, each State Party undertakes to take steps,

¹ General Comment 4 on gender equality, Thirteenth session, 1981.

individually and through international assistance and co-operation – especially economic and technical – to the maximum of its available resources, with a view to achieving progressively the full realisation of the economic and cultural rights provided in the Covenant. In other words, Article 2(1) obliges the States Parties only to take steps toward a progressive realisation of the economic and social rights, not to guarantee them immediately as in the ICCPR. However, according to the modern human rights theory and the practice of the Committee on Economic, Social and Cultural Rights, the difference is only of a relative nature.

It is evident that *Article 2(2)* of the ICESCR does not forbid a state to undertake positive measures. It has been argued that there is a difference between Articles 2(2) and 3 in this respect. The wording of Article 3 seems to imply a positive obligation upon the states: “to ensure the equal right of men and women”, while the wording of Article 2(2) – “without discrimination” – indicates a negative obligation.

The International Labour Organisation

For the purpose of this report, ILO Convention No. 111 concerning discrimination in respect of employment and occupation and ILO Convention No. 100 concerning equal remuneration for men and women workers for work of equal value are very important. These conventions have been recognised as fundamental both inside and outside the ILO, and this has recently been reaffirmed in the ILO Declaration on fundamental principles and rights at work and its follow-up, adopted by the International Labour Conference at its eighty-sixth session, 18 June 1998.

a) Convention No. 111 of 4 June 1958

The Convention deals with discrimination in respect of employment and occupation and refers to both equality of opportunity and treatment by stating in its Article 2 that “each member for which this Convention is in force undertakes to declare and pursue a national policy designed to promote, by methods appropriate to national conditions and practice, equality of opportunity and treatment in respect of employment and occupation, with a view of eliminating any discrimination thereof.”

The concept of discrimination in Convention No. 111 is defined as follows:

Any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation ...

Article 1.2

Any distinction, exclusion or preference in respect of a particular job based on the inherent requirements thereof, shall not be deemed to be discrimination"

Article 5

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

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

b) Convention No. 100 of 1951

In its Article 2, the Convention states that “each member shall, by means appropriate to the methods in operation for determining rates of remuneration, promote and, in so far as is consistent with such methods, ensure the application to all workers of the principle of equal remuneration for men and women workers for work of equal value.”

c) Declaration on equality of opportunity and treatment of all women workers

The ILO adopted the declaration on 25 June 1975. All forms of discrimination on grounds of sex, which deny or restrict equality, are precluded in Article 1. The declaration also provides that positive special treatment shall not be regarded as discriminatory, when it lasts only a transitional period and is aimed at effective equality between the sexes.

ii. The Council of Europe

a) **European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)**

The European Convention on Human Rights was adopted and opened for signature in 1950. Its signature and ratification is a core commitment assumed by States aspiring for membership of the Council of Europe. The remarkable feature of the ECHR is that it not only lays down substantive norms guaranteeing individual rights, but also institutes an international supervisory mechanism, the European Court of Human Rights. The Court is independent and judicial in character, leading to judgments and decisions which are binding on the States concerned.

The ECHR guarantees civil and political rights. It contains a non-discrimination clause, Article 14, which reads as follows:

“The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”

The protection provided by the ECHR with regard to equality and non-discrimination is limited in comparison with those provisions of the Universal Declaration of Human Rights and other human rights instruments as it prohibits discrimination only with regard to the enjoyment of the rights and freedoms set forth in the Convention.

Case-law of the European Court of Human Rights

There has been a relatively small number of applications raising complaints concerning discriminatory practices and therefore the case-law regarding discrimination on grounds of sex or on other grounds is rather limited.

This is often explained by the fact that the nature of the human rights enshrined in the Convention is civil and political, and that discriminatory practices are more likely to be situated in the socio-economic area, which is not within the ambit of the Convention.

However, the case-law of the European Court of Human Rights has made it clear that not every distinction or difference of treatment amounts to discrimination. In the “Belgian Linguistic case” (the Court’s judgment of 23 July 1968), the Court established that the convention organs must establish in relation to any allegation of discrimination whether there is a comparable situation where treatment differs, whether there is an objective and reasonable relationship of proportionality between the means employed and the aim sought to be realised thereby.

In the test case “Mrs Abdulaziz, Cabales and Balkandali v. the United Kingdom (judgment of 28 May 1985),” the Court held that the exclusion of the applicants’ husbands from the United Kingdom entailed sexual discrimination in the securing of the applicants’ right to respect for family life. It was of the opinion that the difference of treatment between women and men in this case lacked objective and reasonable justification. It added that since advancement of the equality between the sexes was a major goal in the Council of Europe member States, a difference of treatment on the ground of sex could be regarded as compatible with the Convention only if very weighty reasons were advanced.¹

¹ For further information on the case-law, see Human Rights Files No. 14 “Equality between the sexes and the European Convention on Human Rights”.

It should also be recalled that the Court has stated that Contracting States enjoy a certain “margin of appreciation” in assessing whether and to what extent differences in otherwise similar situations justify a different treatment in law (judgment of 28 November 1984 in the case of Rasmussen v. Denmark).

These judgments would indicate that even if Contracting States have a certain possibility to undertake positive action without violating the Convention, they are under no obligation to take such action.

b) Future developments regarding the ECHR

In recent years, the Council of Europe has been actively considering providing further guarantees in the field of equality and non-discrimination through a protocol to the ECHR. On 26 June 2000, the Committee of Ministers adopted Protocol No. 12, which provides for a general prohibition of discrimination by broadening in a general fashion the field of application of Article 14 of the Convention.

Article 1 – General prohibition of discrimination

1. The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

2. No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1.

The Protocol affords a scope of protection extending beyond the enjoyment of the rights and freedoms set forth in the Convention, e.g. to the enjoyment of any right specifically granted to an individual under national law.

As regards positive action, the Protocol does not impose a general positive obligation on the Parties to take measures to prevent or remedy all instances of discrimination between private persons. However, it cannot be excluded that the Court of Human Rights can interpret the Protocol as entailing positive obligations. Both the principle of equality before the law and positive action are included in the preamble. The preamble refers to measures taken in order to promote full and effective equality and reaffirms that such measures shall not be prohibited by the principle of non-discrimination, provided that there is an objective and reasonable justification for them. This might open the way for positive action aimed at accelerating *de facto* equality.

The use of the term “secure” in Article 1(1) might entail positive obligations, even if it does not impose them.

c) The European Social Charter

The European Social Charter is the counterpart of the European Convention on Human Rights in the sphere of economic and social rights. It is a binding instrument covering a wide range of economic and social rights in connection with conditions of employment and social cohesion, the right to housing, the right to health, the right to education, the right to employment, the right to social protection and the right to non-discrimination. The Charter prohibits discrimination in the implementation of the rights it protects. It underlines in the various articles concerned that these rights must be ensured without distinction as to sex, age, colour, language, religion, opinions, social origin, health, association with a national minority, etc. A specific article on non-discrimination in the revised Charter (see below) strengthens this prohibition. The Charter was opened for signature on 18 October 1961 and entered into force on 26 February 1965. It

guarantees a variety of rights grouped under nineteen articles; the Additional Protocol of 5 May 1988, which entered into force on 4 September 1992, adds a further four articles. A revised version of the Charter, which brings together in a single instrument all the rights guaranteed by the 1961 Charter, the 1988 Additional Protocol and eight new rights, was opened for signature on 3 May 1996 and entered into force on 1 July 1999. It amends and extends the list of guaranteed rights. The Charter addresses the issue of equality for women and men from the viewpoint of two fundamental aspects of life: work and the family.¹

The need to see that rights are effectively enjoyed is a central concern of the Social Charter. Its supervisory machinery, based on the analysis of national reports, regularly and systematically assesses whether the Contracting Parties are honouring their undertakings in law and in practice. The 1995 Additional Protocol providing for a system of collective complaints added an optional procedure to the reporting system. According to the Protocol, trade unions, employers' organisations and NGOs may appeal to the European Committee of Social Rights when they consider that the Charter is not respected in a State having accepted this optional procedure.²

Several provisions of the Charter explicitly prohibit discrimination or guarantee equality in employment. Article 1, para. 2, obliging the Contracting Parties to eliminate all discrimination in employment is reinforced by Article 4, para. 3, which recognises the right of men and women workers to equal pay for work of equal value. Under Article 16 (the right of the family to social, legal and economic protection), the status of couples is viewed principally from the angle of equality in relations between partners, both as couples and as parents, at the personal level and in respect of property. The additional protocol of 1988 reiterates the scope of the rights and obligations mentioned above in the field of employment and imposes additional duties on the Contracting Parties.

The 1988 protocol reads as follows:

Part II, Article 1

1. With a view to ensuring the effective exercise of the right to equal opportunities and equal treatment in matters of employment and occupation without discrimination on the grounds of sex, the Parties undertake to recognise that right and to take appropriate measures to ensure or promote its application in the following fields

- access to employment, protection against dismissal and occupational resettlement;*
- vocational guidance, training, retraining and rehabilitation;*
- terms of employment and working conditions including remuneration;*
- career development including promotion.*

2. Provisions concerning the protection of women, particularly as regards pregnancy, confinement and the post-natal period, shall not be deemed to be discrimination as referred to in paragraph 1 of this article.

3. Paragraph 1 of this article shall not prevent the adoption of specific measures aimed at removing de facto inequalities.

4. Occupational activities which, by reason of their nature or the context in which they are carried out, can be entrusted only to persons of a particular sex may be excluded from the scope of this article or some of its provisions.

The Additional Protocol specifically states that it does not impede the adoption of specific measures intended to remedy *de facto* inequalities. The Parties undertake to recognise the right to equal opportunities and treatment in the field of employment without any discrimination based on sex. Appropriate measures in order to ensure or encourage the implementation in various sectors are also demanded of the Parties.

¹ See "Equality between Women and Men in the European Social Charter". Human Rights-Social Charter Monographs, No. 2.

² To date (March 2000), it has been accepted by Cyprus, Finland, France, Greece, Italy, Norway, Portugal, Slovenia and Sweden.

Provisions concerning the protection of women, particularly as regards pregnancy, confinement and the post-natal period, shall not be deemed to be discrimination in the light of this Article.

Among the new rights guaranteed by the revised European Social Charter, special mention should be made of Article 26 providing for the right to dignity at work, and Article 27 providing for the right to equality of opportunity and treatment for women and men workers with family responsibilities and between such workers and other workers. In addition, Article E contains a non-discrimination clause strengthening, as mentioned above, the prohibition of discrimination in the rights protected by the revised Charter.

Case law of the European Committee of Social Rights (formerly Committee of Independent Experts)

The Committee examines the reports submitted by the Contracting Parties and gives its legal opinion on the extent to which the States have honoured their undertakings. It has held that the full exercise of the right to equality requires “not only that [the States] remove all legal obstacles to admission to certain types of employment, but also that positive, practical steps are taken to create a situation which really [ensures] complete equality of treatment in this respect.”¹

In its general observations on Article 1 of the Additional Protocol of 1988, the Committee noted that the rights and obligations ensuing from this provision obliged the Contracting Parties “to define active policies and to take measures to implement them, and thus the rights concerned under Article 1, in practice.”² The Charter therefore requires the adoption where necessary of positive measures so that the provisions for equality can be effectively implemented. Furthermore, the Additional Protocol is explicit in this respect, since under the terms of its Article 1 para. 3 the appropriate measures mentioned in para.1 “shall not prevent the adoption of specific measures aimed at removing *de facto* inequalities.”

d) Recommendation No. R (85) 2 of the Committee of Ministers to member states on legal protection against sex discrimination

III. Special temporary measures (positive action)

States should, in those areas where inequalities exist, give consideration to the adoption of special temporary measures designed to accelerate the realisation of de facto equality between men and women, where there are obstacles of a constitutional nature, in particular by:

- a. making employers aware of the desirability of having as an objective the achievement of equality between the sexes;*
- b. giving or encouraging special training for persons of the under-represented sex to enable them to obtain the necessary qualifications.*

Recommendations are non-binding legal instruments adopted by the Committee of Ministers. They are intended to give legal and political guidance to member States on specific issues. This recommendation, adopted at the end of the United Nations Women’s Decade in 1985, is rather vague as far as positive action is concerned. Its explanatory memorandum specifies:

78. In spite of new equality legislation, in many countries progress in removing inequalities between men and women has not been as rapid or as extensive as had been expected. One way of achieving more certain results would be to adopt positive action programmes in some fields. Such programmes may be used to eliminate systematic discrimination and to make the best use of the abilities of women.

¹ Conclusions I, Italy, p. 15-16

² Conclusions XIII-5, p. 256

79. *As positive action could, in some states and in some cases, be considered unconstitutional as it might create a discrimination against the other sex, the only action states are recommended to take under the third principle is to give consideration to the adoption of temporary special measures in areas where inequalities exist.*

The wording “making employers aware of the desirability...” indicates that the equality mentioned is only equality of opportunity, not of results. It is also noteworthy that it does not extend further than to the traditional fields of employment and training, even if the Recommendation has a broader scope.

e) The Framework Convention for the protection of National Minorities

Even if this Convention does not concern equality between women and men, it is interesting to note how far it goes in supporting positive action. It was opened for signature on 1 February 1995 and entered into force on 1 February 1998. The Convention contains an article which clearly encourages the parties to undertake positive action to promote effective equality. This article reads as follows:

Article 4

- 1. The Parties undertake to guarantee to persons belonging to national minorities the right of equality before the law and of equal protection of the law. In this respect, any discrimination based on belonging to a national minority shall be prohibited.*
- 2. The Parties undertake to adopt, where necessary, adequate measures in order to promote, in all areas of economic, social, political and cultural life, full and effective equality between persons belonging to a national minority and those belonging to the majority. In this respect, they shall take due account of the specific conditions of the persons belonging to national minorities.*
- 3. The measures adopted in accordance with paragraph 2 shall not be considered to be an act of discrimination.*

The contrast between the approach to positive actions in this article and Protocol No. 12 broadening the scope of Article 14 of the ECHR is striking. The difference confirms the reluctance to institute positive action in a Convention which has an independent international supervisory mechanism and whose decisions are binding on the States concerned.

iii. The European Union

a) **The situation before the Treaty of Amsterdam**

In general, the significance of equality of the sexes has been increasingly recognised within the European Union. It has been strengthened both in the jurisdiction as well as in relevant policies of the Union. The rulings by the European Court of Justice have been especially important in this respect.

As regards positive action and positive measures in the Union context, they were not dealt with in the Treaties before the Treaty of Amsterdam, even though the principle of equality between men and women had become an important principle. The possibility of positive measures was mainly dealt with in the derogation article – Article 2(4) – of the Equal Treatment Directive (207/76/EEC) and in the Council Recommendation (84/635/EEC) on the promotion of positive action for women.

A derogation article, Article 6(3), was also included in the Agreement on Social Policy (1991). The Agreement was annexed to the Protocol on Social Policy, which was a result of the inability of the member States to agree on the extension of common social policies. Article 6(3) served later on as a basis for the amendments made by the Treaty of Amsterdam.

b) **The Treaty of Amsterdam**

The Treaty of Amsterdam, which entered into force on 1 May 1999, confirmed the importance of equal opportunities as well as respect for human rights in the integration process. It also made some very relevant legislative amendments, which will open up new possibilities for advancement.

Article 2 (ex Article 2)

The Community shall ... promote a high level of employment and of social protection, equality between men and women, the raising of the standard of living and quality of life, and economic and social cohesion and solidarity among Member States.

Article 2, which enshrines the objectives of the Community, assigns *the promotion of equality* among those objectives. This is an important indicator of the significance that equality has been given at the highest possible political and legal level. Still, the Article does not stipulate anything about *de facto* equality or equality in practice.

The promotion of a high level of employment and social protection as well the raising of the standard of living and quality of life are also of importance in equality matters. The rate of unemployment is higher amongst women than men in most parts of the Community. Women still account for the majority of the long-term unemployed, they have often low-skilled, poorly paid and insecure jobs, and there are still pay gaps between men and women. Now, Article 2 – together with the mainstreaming principle set out in Article 3¹ – constitutes a stronger legal ground in order to change this unsatisfactory situation in the future.

Article 3 (ex Article 3)

...

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

¹ In respect of the new employment strategies and employment guidelines, the Member States may adopt measures that constitute positive actions. Strengthening of the equal opportunities policies is a central issue in employment strategies.

Article 3 of the Treaty lists all activities of the Community as well as the policy areas with which it is concerned and in which it has the competence to act. Article 3(2) assigns to the Community the duty to eliminate inequalities and to promote equality in all its activities. Thus, it takes a clear mainstreaming approach in all Community activities.

Article 13 (ex Article 6a)

Without prejudice to the other provisions of this Treaty and within the limits of the powers conferred by it upon the Community, the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.

Earlier, the Community measures to combat discrimination had reflected the narrow scope of existing Community competence. Under Article 13, the Council will have the legal competence to take action (unanimously) on various grounds in its effort to combat discrimination. Gender is one of the aspects to be protected. Article 13 could be regarded as a general anti-discrimination provision, but it will not be in force until Directives on its content have been adopted. These are currently being prepared.

Within the powers of the Community, prohibition against gender discrimination extends beyond the traditional fields of employment and training. Potentially, Article 13 could provide a wider platform for action and have particular implications for areas which are presently unregulated by national legislation. It is to be without prejudice to the other provisions of the Treaty.

Article 137 (ex Article 118) entails an obligation to the Community to support and complement the activities of the member States e.g. in the field of equality between men and women with regard to labour market opportunities and treatment at work.

However, in relation to positive measures and to achievement of equality in practice, the amended **Article 141 (ex Article 119)** is the most crucial provision. Article 141(4) gives these measures a specific legal base, since it raises positive measures at the 'constitutional' level of the Community.

Article 141 (ex Article 119)

1. Each Member State shall ensure that the principle of equal pay for male and female workers for equal work or work of equal value is applied.

2. For the purpose of this Article, 'pay' means the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives directly or indirectly, in respect of his employment, from his employer.

Equal pay without discrimination based on sex means:

(a) that pay for the same work at piece rates shall be calculated on the basis of the same unit of measurement;

(b) that pay for work at time rates shall be the same for the same job.

3. The Council, acting in accordance with the procedure referred to in Article 251, and after consulting the Economic and Social Committee, 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 for equal work or work of equal value.

4. 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.

Article 141(1) compels the member States to ensure *the principle of equal pay for equal work* for women and men. The Article was amended with the notion of *work of equal value*. This clarifies the current situation and follows the established interpretation of the European Court of Justice of Article 119. **Article 141(2)** remained untouched and stipulates what is meant by ‘pay’ in the light of this Article. The reference to equal ‘pay’ has raised definitional difficulties. The European Court of Justice has steadily widened the definition, widening at the same time the impact of ex-Article 119. The Treaty of Amsterdam will hardly have any effect on the relevancy of the rulings concerning equal pay. **Article 141(3)** is a new, important amendment. Its reference to Article 251 (ex 189b) means *qualified majority voting* in the Council, unlike the previous Article 308 (ex. 235), which was usually used for legislating equality Directives (e.g. 76/207 and 79/7).

Article 141(4) allows the member States to *maintain* or to *adopt special measures* in order to ensure *full equality in practice* between women and men in *working life*. It permits the member States to use measures providing for specific advantages in working life, if they make it easier for the under-represented sex:

1. to pursue a vocational activity or
2. to prevent disadvantages in professional careers or
3. to compensate for disadvantages in professional careers.

It could be argued that Article 141(4) has to some extent adopted a philosophy different from that of Article 2(4) of the Equal Treatment Directive, which will be discussed hereafter in more detail.

- Article 141(4) puts *de facto* equality into focus, placing less emphasis on equality of opportunity.
- Article 141(4) explicitly permits specific advantages under certain conditions.
- Article 141(4) refers in formally gender-neutral terms to positive action for the under-represented sex. (However, it is clear that women are the under-represented sex in employment throughout the Community. This was also acknowledged by the Declaration (No 28) making it quite clear that Article 141(4) is above all intended to improve the situation of women in working life.)

The most important aspect is that Article 141(4) does not entail the same kind of boundaries to positive action as Article 2(4) of the Equal Treatment Directive. The distinction between equality of opportunity and equality of results has been the culmination point shadowing the scope of lawful positive action. Currently, in the light of Article 141(4) this scope might be extended, which might lead the European Court of Justice to revise its case-law (if it has connections to amended areas of Community law).

c) **The Directives**

As mentioned earlier, before the Treaty of Amsterdam the question of positive action was dealt with in secondary legislation, mainly in *Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions.*¹ In the context of preliminary rulings under Article 177, the European Court of Justice has defined the boundaries of justifiable positive measures and of measures that constitute discrimination.

¹ Official Journal No. L 039, 14/02/1976, p. 0040 – 0042.

The Commission has made a proposal for an amendment¹ to Article 2(4) of the Equal Treatment Directive in the light of the European Court's ruling in the Kalanke case. However, it has not made much progress and the need for it has been called into question after the ruling in the Marschall case (see next page and page 42).

Directive 76/207/EEC (the Equal Treatment Directive)

Article 2

- 1. For the purposes of the following provisions, the principle of equal treatment shall mean that there shall be no discrimination whatsoever on grounds of sex either directly or indirectly by reference in particular to marital or family status.*
- 2. 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.*
- 3. This Directive shall be without prejudice to provisions concerning the protection of women, particularly as regards pregnancy and maternity.*
- 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).*

Directive 76/207 goes beyond the requirement for equality in pay and requires *equal treatment* of men and women. It prohibits discrimination on grounds of sex either directly or indirectly. As stated in Article 1 of the Directive, its purpose is to put into effect in the member States the principle of equal treatment for men and women as regards *access to employment*, including *promotion*, and to *vocational training*, and as regards working conditions and social security, on the conditions referred to in paragraph 2. Thus, its scope is fairly strictly limited to employment and vocational training.

The Equal Treatment Directive entails three exceptions from the principle of equal treatment. Articles 2(2) and (3) entail rather limited possibilities of derogation. Their objective is not to introduce positive actions, but rather to maintain such derogative provisions for biological reasons (pregnancy) or for specific occupational reasons (e.g. requirement of a male actor for a male role in a play).

Article 2(4), on the other hand, is clearly a provision permitting positive actions. If compared with Articles 2(2) and (3), its objective is to promote equal opportunities in a more general manner. It pays particular attention to removing existing inequalities which affect women's opportunities in access to employment, including promotion, and to vocational training and as regards working conditions and social security.

Article 2(4) is rather vague as regards the lawful measures permitted by it. The wording seems to set the limits of equality of opportunity, since it neither stipulates nor implies anything about equality of results. Yet, it has been generally argued that in order to achieve *de facto* equality between women and men, attention should more and more be paid to equality of results. Based on past experiences, the traditional requirement for equality of opportunity has not actually eliminated the difficulties of the sexes in reality. Even though the formal *de jure* equality would have been achieved, women in particular find themselves in a less favourable position compared with men. *De facto* equality remains to be achieved. The most important cases of the European

¹ COM(96)93 final

Court of Justice regarding the interpretation of Directive 76/207/EEC are the Kalanke and Marschall cases. These will be explained in detail later in this report.

Besides the Directive 76/207/EEC, many other Directives have had a bearing on equal opportunities and equal treatment of women and men, and for those who wish to gain a global picture of the Community regulations on the subject, these should be consulted.¹

d) Council Recommendation of 13 December 1984 on the promotion of positive action for women (84/635/EEC)²

The Recommendation is based on the idea that equal opportunities can be promoted either by the actions of the member States or by voluntary engagement of the social partners. It admits in its preamble that traditional anti-discriminatory provisions have been inadequate for the elimination of all existing inequalities. The recommendation pays special attention to the fact that the public sector could make an extra effort and act as an example to other fields.

The Council recommends that **member States** adopt a *positive action policy* designed to eliminate existing inequalities affecting women in working life and to promote a better balance between the sexes in employment. An objective would be e.g. to *eliminate or counteract the prejudicial effects on women in employment* or seeking employment which arise from existing attitudes or to *encourage the participation of women* in various occupations in those sectors of working life where they are at present under-represented, particularly in the sectors of the future, and at higher levels of responsibility in order to achieve better use of all human resources.

The **social partners** are recommended to adopt positive action programmes within their own organisations by e.g. guidelines, codes of conduct and principles. The **Commission** is requested to organise and to promote, in liaison with the Member States, a systematic assessment of information on and experience of positive action in the Community and to submit a report to the Council on the implementation of the Recommendation.

All in all, the recommendation is quite old and to some extent too lenient. It is not legally binding and its relevance as a soft law or a political instrument has also diminished as the concept of positive action has developed in both the jurisprudence and jurisdiction of the Community, eventually by the Treaty of Amsterdam.

¹ Council Directive of 10 February 1975, relative to the adjustment of the legislature of the member States referring to the application of the principle of equal pay between men and women workers (75/117/CEE).
Council Directive of 9 February 1976 relative to the application of the principle of equal treatment between men and women in reference to access to employment, professional training and promotion and work conditions (76/207) already mentioned in the text.
Council Directive of 19 December 1978, relative to the progressive application of the principle of equal treatment between men and women in the area of Social Security (79/71 CEE).
Council Directive of 24 July 1986, relative to the progressive introduction of the principle of equal treatment of men and women in the professional schemes of the Social Security (86/378 CEE).
Council Directive of 20 December 1996 modifying Directive 86/378 CEE relative to the application of the principle of equal treatment between men and women in the professional schemes of the Social Security (86/378 CEE).
Council Directive of 11 December 1986 on the application of the principle of equal treatment between women and men who are self-employed including agricultural activities and maternity protection (86/613 CEE).
Council Directive of 19 October 1992 relative to the application of measures for the promotion of the improvement of safety and the health of breast-feeding mothers in the workplace (92/85 CEE).
Council Directive of 3 June 1996 relative to the Framework Agreement on parental leave celebrated by the UNICE, the CEEP and the CES (96/34 CE).
Directive 97/80 CEE of 15 December relative to the burden of proof in cases of sexual discrimination.

² Official Journal No. L 331, 19/12/1984, p. 34 - 35

Although the member States have hardly any legal obligation to adopt positive actions, the most effective fulfilment of the amended objectives of the Community concerning equality between the sexes would certainly entail such measures. In particular when paying attention to the new Article 141, which explicitly - with a view to ensuring gender equality in working life - permits such actions under certain conditions.

The foregoing shows that the international legal background for positive action is complex. It has ingredients from human rights conventions, Community law, as well as from soft law documents. These texts have all their own influence, depending on the legal situation of each State. This influence takes shape in domestic law in many ways, requiring new interpretation of the law or even new legislation.

As regards the wording of relevant United Nations human rights covenants, as well as other instruments mentioned above, none of them actually obliges the signatory States to adopt positive action. On the basis of their wording, positive action remains voluntary. Provisions for derogations are only concerned with permitting such measures in order to reach *de facto* equality.

The Treaties bind the signatory States to act in such a way that obligations of each convention will be fulfilled within their jurisdiction. In general, each State exclusively decides within its legal system how to reach the standards and objectives of each convention. The way in which each treaty will be given effect in domestic law depends on the State.

The European Community, as the Court of Justice has interpreted, has its own legal system which not only imposes obligations on individuals but is also intended to confer rights upon them. Laws stemming from the founding treaties are independent sources of law, which cannot be overridden by domestic legal provisions. Interpretation of national legislation is not allowed to challenge the Community law. Hence, the question of the obligation of positive action has to be resolved in this context.

None of the Community provisions actually imply obligations as regards positive action. But if the strong emphasis on equality issues in the Community is taken into account (programmes, policies, new provisions in the Treaty of Amsterdam, etc.), one is inclined to think that member States are encouraged in various ways to adopt the most effective measures available to promote equal opportunities. Positive action is certainly among them.

II. POSITIVE ACTION IN THE LABOUR MARKET, TRAINING AND EDUCATIONAL SYSTEMS

1. INTRODUCTION

Positive action in favour of women, or in some cases of the under-represented sex is, as stated in the introduction to Chapter I of this report, a rather controversial instrument to promote gender equality. The opponents of positive action think that it is a violation of the principle of individual human rights and contrary to the concept of universalism. They argue that gender should not be a criterion for the distribution of positions in the labour market or places for students. The argument most widely put forward is that gender quota is contrary to employing the best qualified people.

On the other hand, the supporters of positive action see this instrument as an excellent means of achieving real equality between the sexes. They argue that positive action allows for removing structural gender stereotypes and differences by treating the sexes differently. Furthermore, they explain that structural gender stereotypes prevent selection to be based on qualifications. In short, the argument is that different treatment cannot always be seen as discrimination, because such treatment can be justified as it removes hidden discrimination, in most cases affecting women considered as the “inferior” sex.

The Group spent some time discussing whether it was possible to come up with a broad definition of the various measures which constitute positive action. It came to the conclusion that positive action is closely related to the concept of discrimination and has to be seen within the context of where it is to be used. From this perspective, the Group agreed on some definitions which can be described as follows:

By **action to combat discrimination**, we mean standard-setting or non standard-setting action, aimed at asserting or putting into practice **equal rights and treatment on access to rights** between the members of different categories of persons and in this case in particular between women and men.

By **positive action**, on the other hand, we mean action aimed at

favouring access by members of certain categories of people, in this particular case women, to rights which they are guaranteed, to the same extent as members of other categories, in this particular case men.

Experience proves that they do not accede to these rights in the same proportion as the size of their categories, because of behaviour which amounts to *de facto* discrimination (even if *de jure* discrimination and discrimination in the implementation of the law have been eliminated) or, more generally, because of the lack of genuine equality of opportunity (though equality of opportunity should not be regarded unquestioningly as an ultimate or even a sufficient objective).

In view of the difficulty of giving a general definition of positive action within the labour market, the Group has made an attempt at defining the different sub-groups which make up this concept within the labour market. These definitions follow hereafter. It should be mentioned that it is often discussed whether positive action should be gender neutral or only aimed at women: a neutral provision intends to favour the access of men to those categories of jobs where women are in majority, and the access of women to jobs where men are in a majority, as a sort of mechanical equality provision. Neutrality provisions have proved to be very controversial, as they often favour men and not women because of the gender stereotypes already mentioned.

2. DEFINITIONS AND EXAMPLES

i. Protective measures

Protective measures have a very long tradition. The ILO Statute from 1919 already stated that the protection of pregnant women and women being confined did not constitute discrimination.

Protective measures are measures of a special kind, since they do not actually endanger the principle of equal treatment and equal rights. Their aim is not directly the elimination of inequality. In a strict sense, they neither contribute to combating discrimination nor do they constitute positive action. Protective measures endeavour to secure certain objective circumstances of women.

Traditionally, attention has been paid to the biological differences between women and men. Questions of *pregnancy* and *motherhood* have been placed under special protection. Relevant international covenants recognise this and permit the states to adopt measures aimed at protecting maternity in their domestic laws. Wordings¹ vary, but the content of those provisions is about the same. They all deal with the area of reproductive rights: provisions for maternity protection and childcare are among the proclaimed rights. They guarantee pregnant women a minimum maternity leave (either 12 or 14 weeks), which, if not paid, has to be secured by adequate social security benefits or by benefits from public funds. Legislation is also to guarantee that it is unlawful for an employer to give a woman notice during her absence on maternity leave.

At domestic level, besides a maternity leave of a varying length (with payment or allowance), provisions for parental leave are also common in some countries. The conceptual progress from motherhood to parenthood is a recent phenomenon, which partly explains why parental leave is often granted to mothers only. A different kind of approach would be needed in order to overcome the old-fashioned gender roles and to promote the sharing of family responsibilities. Fathers should be granted this opportunity as well. For instance, parental leave was introduced in the EU by Directive (96/34/EC)² on the framework agreement on parental leave concluded by the social partners. The agreement grants men and women workers an individual right to parental leave. The right to parental leave is granted on a non-transferable basis.

Provisions for the protection of *pregnant women in working life* are also common, in one way or another. As such, they are applied in order to avoid the risks that might be associated with work that is considered to be dangerous to the health and safety of the mother or the human foetus.

The picture of protective measures changes even further when social and cultural backgrounds are taken into account. This sort of approach might be worthwhile especially in relation to some migrant/ethnic communities, where women encounter risks of their own kind. For instance, the risk of being disowned by her own community, if a woman behaves in a way which is at odds with the culture in the community. In the case of immigrants and refugees, the risk of being abandoned by one's father or husband might create difficult situations in the host country, if the

¹ See for instance the International Labour Organisation Convention No. 103 concerning Maternity Protection (Revised 1952), the European Social Charter (Article 8) or Council Directive (92/85/EEC) on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding.

² Council Directive 96/34/EC of 3 June 1996 on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC *Official Journal No. L 145, 19/06/1996.*

woman's right to reside depends on the husband for instance, which is still the case in many European countries.¹

The question of limiting *night-time work for women* as a protective measure is a difficult one. Usually, such restrictions exclude women from certain well-paid sectors of industry, which are regarded as too dangerous, while at the same time they allow women to work by night in the less well-paid sectors of health and welfare services.² To what extent is such an exclusion of women necessary, or is it necessary at all?³

In the light of the replies to the questionnaire on positive action from the members of the Steering Committee for Equality between Women and Men (CDEG) (see foreword), protective measures may create obstacles to the fulfilment of equality. In general, it seems that in the new member States of the Council of Europe, i.e. the ex-socialist countries, provisions for the protection of women are the most dominant and complex sphere of positive actions – if not the only one applicable. Excessive protection, whether it aims at protecting women's reproductive function or reconciling family and working life, has also negative effects on women's position. Also, one has to remember that the employer may use strong protective measures as a pretext to discriminate against women workers, by the motivation that women would be more expensive labour force, or that they would be absent more frequently than male workers.

The case-law of the European Committee of Social Rights and developments regarding protective measures for women in the Social Charter

Article 8 of the European Social Charter of 1961 establishes the right of employed women to protection. It contains special provisions on maternity protection (Article 8, paras 1-3) and general protection provisions for women doing night work or performing dangerous, unhealthy or arduous tasks (Article 8, para 4 a and b).

With the exception of those relating to maternity, the provisions on special protection for working women have been hard for some Contracting Parties to accept. The fact that they restrict women's employment opportunities is seen as difficult to reconcile with, or even contrary to, the principle of gender equality. Certain Contracting Parties have even gone so far as to denounce them.

Article 8, para 4 has been accepted by 11 of the current 21 Contracting Parties to the Charter (March 2000). Spain denounced para 4.b (dangerous, unhealthy or arduous work) on 5 June 1991, and the United Kingdom successively denounced para 4.a (night work) and para 4.b on 26 February 1988 and 26 February 1990 respectively.

The Committee thus felt obliged to make it clear in the general introduction to Conclusions XII-1 that it had interpreted the provisions in the light of "sociological, scientific and technological developments in an effort to reconcile these contradictory trends" (the principle of equality between the sexes and the specific protection of women), and that its entire case law consequently reflected "the consideration which it [had] always given to real equality between women and men in employment, while bearing in mind such specific forms of protection as [were] necessary".⁴

¹ See the Report of the Council of Europe Joint Specialist Group on Migration, Cultural Diversity and Equality of Women and Men (Strasbourg, 1996).

² See for instance the ILO Convention 89 concerning Night Work of Women Employed in Industry (Revised 1948).

³ In its judgment of 3 February 1994 (case C-13/93, Minne), the European Court of Justice "inevitably" found that Article 5 of Directive 76/207 does not allow that a national legislation (such as the Belgian one), while declaring a prohibition of night work for men and women, may maintain different sets of exceptions (far less strict for men than for women), unless the difference is justified by the necessity of protecting women, especially as far as pregnancy and maternity are concerned. The ECJ repeated what it had previously stated in its judgment of 2 August 1993 (case C-158/91, Levy): Article 5 does not apply to national provisions intended to ensure that the state respects the obligations resulting from an international commitment such as ILO Convention No. 89.

⁴ Conclusions XII-1, p.22-24.

Similar criticism in other fora has resulted in rulings of the European Court of Justice (eg the Stockel case, where the ruling went against the prohibition of night work for women - C-345/89), as well as the adoption, in 1990, of the ILO protocol to Convention No. 89 extending the exemptions to the prohibition of night work for women and the adoption of the ILO Convention No. 171 in the same year (regulating night work for men and women).

As a result of all these developments, and in order to reflect the current approach in the field of equality between women and men, Article 8 (paragraphs 1, 2 and 4) of the Revised European Social Charter has been modified so as to specifically protect employed women only in the case of maternity. In cases other than maternity, women and men workers must benefit from the same protection (see for instance Article 2, paragraph 7, of the Revised European Social Charter which provides for protective measures for workers of both sexes in the case of night work).

Article 8

The right of employed women to protection of maternity

With a view to ensuring the effective exercise of the right of employed women to the protection of maternity, the Parties undertake:

- 1. To provide either by paid leave, by adequate social security benefits or by benefits from public funds for employed women to take leave before and after childbirth up to a total of at least fourteen weeks.*
- 2. To consider it as unlawful for an employer to give a woman notice of dismissal during the period from the time she notifies her employer that she is pregnant until the end of her maternity leave, or to give her notice of dismissal at such a time that the notice would expire during such a period;*
- 3. To provide that mothers who are nursing their infants shall be entitled to sufficient time off for this purpose;*
- 4. To regulate the employment in night work of pregnant women, women who have recently given birth and women nursing their infants;*
- 5. To prohibit the employment of pregnant women, women who have recently given birth or who are nursing their infants in underground mining and all other work which is unsuitable by reason of its dangerous, unhealthy or arduous nature and to take appropriate measures to protect the employment rights of these women.*

Examples of significant rulings by the European Court of Justice (ECJ) regarding protective measures

There have been ECJ rulings on an exclusion, article 2(3) of Directive 76/207/EEC, which allows for special protection to be afforded to women in relation to pregnancy and maternity. An infringement action was brought against Italy for breach of articles 5 and 6 of the Directive for failing to grant parental leave to adoptive fathers on the same terms as leave granted to adoptive mothers. The Court accepted the justification that the difference in treatment was based upon a legitimate concern to assimilate as far as possible the conditions of the entry of an adopted child into a family with those of the arrival of a newborn baby during the very delicate initial period. The Court was even less responsive to paternity leave in *Hofmann v Barmer* where a father's request to take over the extended period of maternity leave granted to mothers was rejected, on the grounds that maternity leave was a legitimate form of special conditions granted to women for physiological and biological reasons to recover from childbirth and secondly to protect the special relationship that exists between a woman and her child from being disturbed by the multiple burdens of bonding, childcare and the simultaneous pursuit of employment. The Court was not willing to take Community law into the realms of altering the division of responsibility between parents. Despite these rulings, both Italy and Germany amended their domestic laws to accommodate forms of parental leave.

Articles 2(1) and 3(1) have come under consideration in a number of cases relating to pregnancy discrimination against women. In *Dekker v Stichting Vormingscentrum voor jong volwasseneen* an employer refused to hire a woman because she was pregnant, and the employer's insurer would not reimburse the maternity payments payable during her maternity leave. The employer argued that it would be impossible to pay for a replacement during the period of maternity leave, and as a result the undertaking would be short-staffed. The Court ruled that the refusal to engage a pregnant woman on the ground that she was pregnant constitutes a form of *direct* discrimination on the grounds of sex. Proof of such discrimination is not contingent upon a comparison with the treatment of a male employee. The Court stressed that the primary liability for a breach of Council Directive 76/207/EEC was upon the employer and that he/she cannot rely upon exemptions, exclusions or justifications available in national law to justify discrimination against a pregnant employee.

In contrast the Court ruled that an illness originating in pregnancy or confinement was not covered by Council Directive 76/207/EEC once an employee had exhausted the period of maternity leave set by the member State. Then the special rules relating to pregnancy ended, and one had to compare the treatment of the woman with the way a man could be treated in similar circumstances. In this case the employee had been dismissed after exhausting the periods of maternity and sick leave (the latter being available to male and female employees). The Court went on to rule that since the illness occurred *after* the period of maternity leave, it was unnecessary to distinguish between an illness which originated in pregnancy, childbirth or confinement from any other illness. Since both men and women were liable to be ill, the national court should look to see whether the woman was dismissed on the grounds of absence due to ill health under the same conditions as a man. If the answer was in the negative then there was direct discrimination on the grounds of sex. It was deemed unnecessary to consider whether women were absent more often due to illness and consequently whether there was any indirect discrimination.

Not content with the ruling by the ECJ that discrimination on the grounds of pregnancy is covered by the Council Directive 76/207/EEC, the national court has continued to make references to the Court of Justice in order to distinguish the *Dekker* ruling. In *Webb v EMO Air Cargo (UK) Ltd.*, the House of Lords asked the ECJ to rule on whether it was contrary to the Equal Treatment Directive for an employer to dismiss a pregnant woman who had recently commenced work, initially to cover another maternity leave but with the prospect of being retained as a permanent employee. The employer argued that the employee was required for a specific purpose (to cover a period of maternity leave) and that he would have dismissed a man engaged for a special purpose who required leave for medical or other reasons at the crucial time. Both the Advocate General and the Commission put forward the submission that in some circumstances *direct* discrimination could be justified, despite the facts that in *Dekker*, the Court was adamant that direct discrimination can never be justified.

Particular emphasis seems to have been placed upon the fact that *Webb* was taken on as a *permanent* employee with the immediate task of covering for another employee's maternity leave. At § 27 the ECJ states:

"In circumstances such as those of Mrs Webb, termination of a contract for an infinite period on grounds of the woman's pregnancy cannot be justified by the fact that she is prevented, on a purely temporary basis, from performing the work she has been engaged to do".

In another pregnancy dismissal case decided shortly before *Webb*, *Habermann-Beltermann v Arbeiterwohlfahrt, Bezirksverband*, the Court seems to underline the fact that sex discrimination was found because the employee was a permanent employee, and that a different result might occur if there was only a temporary contract. Here the applicant had been engaged under a contract to work only at night in a home for the elderly. Soon after starting her contract the employee became ill and was found to be pregnant, the pregnancy having commenced before her employment. Under German law pregnant women were not allowed to carry out night work thus making the contract void (for contravening the German statute) or voidable by the employer due to mistake. The Court accepted that while member States have a wide discretion to lay down provisions for the *protection* of pregnant women under article 2(3) ETD, the prohibition against night work in German law took effect for only a limited period in relation to the total length of the employment contract. Therefore to allow the contract to be avoided or found to be invalid due to a temporary inability to perform the work would undermine the effectiveness of the ETD and would be contrary to its objective of protecting pregnant women.

In the case of *Ms Tanja Kreil v Bundesrepublik Deutschland* regarding limitation of access by women to military posts in the Bundeswehr, the ECJ ruled that the total exclusion of women from all military posts involving the use of arms is not one of the differences of treatment allowed by Article 2(3) of Directive 76/207 EEC, out of concern to protect women. The Court held that this provision, upon which the German Government relied, is intended to protect a woman's biological condition and the special relationship which exists between a woman and her child. According to the Court, it does not therefore allow women to be excluded from a certain type of employment on the ground that they should be given greater protection than men against risks which are distinct from women's specific needs of protection, such as those expressly mentioned.

Examples from member States regarding protective measures

Austria

In the 1970s and 80s, protective legislation for dependently employed mothers, which had been introduced in the 1950s, was continuously extended. The Act on the Protection of Working Mothers (re-announced in 1979) provides for certain restrictions, or a total ban, on the employment of pregnant women and nursing mothers, for entitlement to continued payments from the employer and increased protection of women against dismissal during certain periods before and after confinement. Under the General Act on Social Insurance, women are entitled to weekly payments during the periods in which they are not allowed to work.

Belgium

Belgian law covers a number of measures to protect pregnant women (for example, they may not do certain kinds of work which threaten their own or their baby's health), protects working women against dismissal while pregnant, provides for maternity leave before and after childbirth, etc.

One special feature of the Belgian system concerns the maternity leave allowance. Employers' contributions to health and disability insurance have now been increased and extended to cover this. From the first day of maternity leave, the allowance is thus paid by the health and disability or mutual insurance scheme, and not directly by employers. Apart from the idea of protecting maternity, the advantage of this is that all employers, whether or not they employ women, help to fund the scheme. This helps to remove one obstacle to the employment of women, rooted in the fact that only employers of women of childbearing age were previously required to pay this contribution.

Bulgaria

Chapter 15 of the Labour Code entitled "Special protection of women", in its provisions from article 306 to article 313, regulates basic problems pertaining to women's work, such as prohibition of some types of work that are considered as being injurious to their health and maternal functions. On the basis of that text, the Ministry of Labour and Social Policy and the Ministry of Health adopted a special regulation (no.7), specifying exactly what activities are considered as falling within this category. Women also receive some specific benefits pursuant to the Labour Code and the Decree on Encouraging Births – monthly child allowances, compensation for childcare, lump sum allowances for childbirth, payment for wage difference in cases of transfer of pregnant women to appropriate work, compensation for pregnancy and childbirth.

Finland

Sub-paragraph 1 of Section 9 in the Act of Equality between women and men states that special protection of women because of pregnancy or childbirth shall not be deemed to constitute discrimination. The same sort of protective provisions are found in the Act on Contracts of Employment, for instance in section 37, which precludes giving notice on the basis of pregnancy or maternity leave. In such cases, the burden of proof is placed upon the employer. Another example is section 34h, which gives employees a right to return to their previous work or to work parallel to it after maternity, paternity or parental leave.

France

In 1993, a new law was passed to try to reinforce the protection granted to pregnant women by reversing the burden of proof. Under the terms of this new law, in force since 27 January 1993, pregnant employees may take time off work to undergo their mandatory medical examinations without incurring any reduction in pay. Pregnant women are also protected with respect to recruitment insofar as employers are not allowed to take a female applicant's pregnant state into account as a ground for not recruiting her. In the event of a dispute, it is up to employers to give evidence before the courts to justify their decision. In addition to this statutory provision, a great many collective agreements provide for adjustments in working hours and rest periods for pregnant members of staff.

Germany

The Maternity Protection Act contains special protective provisions on the employment of pregnant women, for example, they may not do certain kinds of work which threaten their own or their baby's health. Employment is absolutely forbidden during the first eight weeks after giving birth. This period is extended to 12 weeks for multiple and premature births. Since the 1997 Act Amending the Maternity Protection Act, an additional extension in individual cases corresponding to the period by which the protection period before delivery was shortened by the premature birth is also foreseen. If the mother returns to work while still breastfeeding, she must be given the opportunity to do so.

Greece

Act 1302 of 1983 ratified Convention No. 103 of the ILO concerning the protection of maternity. Regarding the private sector, the 1993 National Convention of Labour foresees an increase in parental leave from 15 to 16 weeks and reductions in working time for women who are breastfeeding. In application of Directive 92/85/EEC, a Presidential Decree foresees the transfer of pregnant women or those who are breastfeeding from night work to day work. It is forbidden to dismiss pregnant women or those who are breastfeeding, and pregnant women benefit from special leave for medical examinations. The new Code of public administration, implemented by Act 2683/1999, foresees, among other things, a reduction of 2 hours per day in working time for mothers of children aged between 2 and 4, an increase in maternity leave from 4 to 5 months and 3 months' leave for women who adopt a child.

Ireland

The Maternity Protection Act, 1994 provides protection for all pregnant employees, employees who have recently given birth or who are breastfeeding. It does so by giving them certain legal entitlements which include, *inter alia*, the right to 14 consecutive weeks maternity leave, the right to up to 4 weeks additional maternity leave, the right to time off work without loss of pay to attend ante-natal and post-natal medical care appointments and the right to health and safety leave from their employment in certain circumstances.

Where a risk exists in the workplace to pregnant employees, employees who have recently given birth and employees who are breastfeeding and the risk cannot be removed, Section 18 of the Maternity Protection Act, 1994 provides that the employee shall be granted health and safety leave from work for so long as the circumstances which gave rise to the leave continue to apply.

In addition, the Act deems the dismissal of an employee, solely or mainly because of the exercise of any right granted under it, or arising from any matter connected with her pregnancy, having given birth or her breastfeeding, to be an unfair dismissal for the purposes of the Unfair Dismissals Act, 1977.

Italy

The Act on the protection of working women prohibits the employment of women in arduous and unhealthy jobs during pregnancy and the first seven months after childbirth and prohibits the dismissal of a woman during pregnancy and up until the first birthday of the child. The law recognises the right to job security, the right to maternity leave, the right to a reduction of 2 hours per day working time during the first year after childbirth for breast-feeding, as well as the right to time off for illness and the right to maternity benefits.

The Act on equal treatment of men and women in the workplace extends these advantages to working women who have adopted a child or who have obtained pre-adoptive care, and extends some of the rights to working men. Self-employed women and women in liberal professions are also entitled to maternity benefit.

Portugal

Legislation (Law no. 142/99 on protection of maternity and paternity) makes provision for protective measures vis-à-vis pregnant women, protects pregnant employees against dismissal, makes provision for maternity leave before and after childbirth, paternity leave, leave for the adoption of a child, the right to work reduced or flexible hours, the right for parents to time off to take care of sick children.

Some of these rights are granted on an individual basis and cannot be cumulated, thus representing measures to encourage a real sharing of family responsibilities between women and men.

Pregnant workers, workers having recently given birth and workers who are breastfeeding are protected against risks which could be harmful to their security or health. Women are also exempted from night work for 122 days before and after childbirth and for a year after childbirth if they continue to breastfeed.

Slovakia

Pursuant to Article 38 of the Constitution, women shall enjoy more extensive health protection and special working conditions and, pursuant to Article 41, pregnant women shall be entitled to special treatment, terms of employment and working conditions. At the birth of a child, women have an entitlement to paid maternity leave of 28 weeks (37 weeks for the birth of 2 or more children at the same time or for single mothers), and additional parental leave for another period of 3 years with financial support. If the child is handicapped, parental leave is extended until the child is 7 years old. During pregnancy and continuous care for a child up to 3 years of age, parents (mother or father) are protected against dismissal.

Spain

Certain measures exist to encourage equal opportunities for women and men in access to a job, and to give companies incentives to hire women, while protecting maternity at the same time.

A Royal Decree of 1998 recognises part-time employees' right to maternity benefits and a 1998 Act regulates the payment of social security contributions for pro-term job contracts to hire unemployed persons as stand-ins for other employees who are off on maternity, adoption or child shelter leave.

Also to help employers learn not to consider maternity a handicap to company performance, measures have been passed to give incentives for contracts to substitute for employees who are absent for childcare reasons. A measure called "zero cost" has been approved. The objective is to give companies that hire replacements for employees on maternity or adoption leave an exemption from paying the employer's share of social security contributions.

Switzerland

The Employment Act prohibits employment of mothers in the first eight weeks after childbirth (Section 35, paragraph 2). The natural corollary of this would be maternity insurance to cover loss of earnings, but this is something which Switzerland still lacks. A national maternity insurance scheme has been provided for in the Constitution since 1945, and several attempts have been made to introduce one, but nothing has happened so far. A new law setting up such a scheme was passed by Parliament in 1998 and put to referendum on 13 June 1999, but rejected. It covered fourteen weeks' paid maternity leave and a one-off birth grant for low-income families.

Women are protected against dismissal during pregnancy and the first sixteen weeks after childbirth (Article 336c of the Code of Obligations).

The Equality Act explicitly prohibits discrimination against female employees because they are pregnant (Section 3, paragraph 1).

ii. Genuine occupational qualifications

Even though genuine occupational qualifications do not constitute a positive action as such, it is useful to explain what they are.

Genuine occupational qualifications are best known from the Equal Treatment Directive of 1976, but they had already been set forth in the ILO Convention 111, article 2, which is worded in a similar way. It has always been recognised that sex as a qualification may be a legitimate demand from an employer when a certain job is to be fulfilled, even if it might, at first sight, seem discriminatory.

In the Council Directive on equal treatment, 76/207 art 2(2), it is stated that 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 for their nature or the context in which they are carried out, the sex of the worker constitutes a determining factor.

The equal treatment rules do not preclude the taking into account of sex in cases where the sex is a true qualification for the job with respect to patients, clients or in general to ensure the quality of the service provided.

Sex as a genuine qualification can lead to the principle of non-discrimination being disregarded because of work requirements, often because mixed groups can better ensure that decisions taken are not biased towards or against either sex. A good example is that of selection and evaluation committees or juries which should have a balanced representation of women and men, especially those dealing with evaluation of qualifications.

Article 2(2) is implemented in different ways in the member States of the European Union.

Examples from national legislation regarding genuine occupational qualifications

Belgium

In Belgium, no job or professional activity may be reserved for men or women only, and vacancy notices may indicate no preference for either. In accordance with the country's general policy for positive action, awareness-raising and monitoring are practised in this area. There are a number of legal exceptions to this rule. For example, the Royal Decree of 8 February 1979 sets out cases in which applications for jobs or employment may be invited specifically from men or women. This applies to actors, actresses, singers, dancers or other performers required to play male or female roles, and to fashion and artists' models. Gender may also be stipulated in advertisements for jobs in non-EU countries whose laws or customs restrict certain occupations to either men or women.

Working women are also specifically prohibited from working underground in mines (Act of 16 March 1971, amended by the Act of 17 May 1985), and from doing manual earth-moving, excavation and digging work, or manual work in compressed-air chambers (Royal Decree of 24 December 1968 on women's labour).

Denmark

This provision is implemented through section 13(1) of the Equal Treatment Act. This form of exemption from the non-discrimination principle is allowed when sex is a true qualification for the activity. To give an example, a staff of a crisis centre where the clients may wish to discuss their problems with a member of their own sex.

It must be ensured that an employer is always able to have a job carried out even if it can only be undertaken only by either sex. The employer cannot plead that it would be dangerous for the employees of one sex to do the job.

Italy

Act No. 125/91 stipulates that “in public competitions and in all forms of staff recruitment by private and public enterprises, the services required must be accompanied by the words ‘by one or the other sex’, unless reference to sex constitutes an essential condition of the very nature of the job or the service.”

Norway

A post must not be advertised for one sex only, if there is no apparent reason. The advertisement should not give the impression that the employer expects or prefers one sex for the post.

In special cases a job can only be performed by either men or women and, in such cases, the advertisement should give this information. The condition in the Act concerning apparent reason is interpreted narrowly. An apparent reason is for example a male leading part in a play. Grounds of public decency may be an apparent reason too. For a few positions within the care sector, sex may be relevant if the employee is to provide care for a client who for example needs a role model. General assumptions that one sex does not have the necessary qualifications, such as for example physical strength, are not relevant.

Another example is that of the Norwegian Universities Act (universitetslov), which requires that selection and evaluation committees for appointments and academic theses shall comprise members of both sexes. This ensures that qualification standards are not biased towards or against either sex.

Portugal

Articles 3 and 7 of the Law on equality in work and in employment provide that:

“The right to work implies the absence of any discrimination, direct or indirect, on grounds of sex, particularly with regard to civil status or family situation.

Job vacancy notices and publicity relating to preselection and recruitment must not contain, directly or indirectly, any restriction, specification or preference based on sex.”

The only exception allowing for the recruitment of a specific sex is conditioned by Law no. 392/79, which states that “the specific recruitment of one or the other sex does not constitute discrimination when it concerns activities linked to fashion, art or show business, when this is indispensable for the task to be accomplished, which would differ in quality when carried out by a man or by a woman.”

Spain

In Spain, two particularly significant decisions have been taken by the Constitutional Court. The first, decision 219/1992 of 14 November, refers to women's participation in the armed forces, establishing the right to equality and non-discrimination. The second, decision 219/1992 of 14 December, establishes that to prohibit women from working in mines is an infringement of the principle of equality and therefore implies gender discrimination, which is contrary to the Spanish Constitution.

Switzerland

No one may be refused employment on grounds of gender. Gender-restricted recruitment is not, however, discriminatory when determined by the nature of the job (e.g. for reasons of physical aptitude, or because the context and/or purpose of the work makes this necessary).

Rulings of the European Court of Justice regarding genuine occupational qualifications

France

Article 2(2) was discussed by the ECJ in the case *Commission v France* in an infringement action concerning the recruitment practices for head warders of small prisons and 5 categories of the national police force. Separate recruitment and special allocations had been organised for men and women. The Court used the concept of transparency to judge the validity of the derogation from the equal treatment principle. It was held that the Commission should be in a position to supervise the derogation and the derogation must be capable in principle of being adapted to social developments.

The Court held that Article 2(2) covered the highest grades of the prison service and that it was legitimate to restrict the position to a member of one sex. But for the categories of police officers it was not sufficiently clear or transparent why sex was a determining factor for specific activities, while the French government could rightly argue that there were good reasons for recruiting head warders from experienced prison staff. The post was managerial and did not involve contacts with prisoners, which might rightly justify that the same restrictions should be imposed on prison officers.

The French government could have avoided the problem by organising their departments differently i.e. by creating a separate corps for prison governors or by including the post of prison governor in the management corps.

Germany

In *Commission v Germany* the Court dismissed allegations that the German government had failed to implement Council Directive 76/207/EEC in the public service and the independent professions. In relation to the complaint that Germany had failed to define the scope of the derogations from the equal treatment principle in Article 2(2), the Court ruled that it was for the member States to complete a verifiable list in whatever form and to notify it to the Commission. Since Germany had not adopted measures to create even a minimum of transparency the Court concluded that the Commission had been prevented from exercising effective supervision and had made it difficult for individuals to defend their rights.

United Kingdom

Article 2(2) allows for exclusions where the sex of the worker is a determining factor in the job. In *Commission v UK* the Court rejected the Commission's complaint that the refusal to allow men full access to training in midwifery was not in breach of Article 2 since the occupation fell within a sphere "in which respect for the patient's sensitivities is of particular importance." But in accordance with Article 9(2) the position was to be kept under review. In relation to the exclusion in UK law, exempting employers with fewer than 6 staff from the scope of national discrimination law, this was found not to be in line with Article 2(2). But in relation to the exemption for private households the Court accepted that the exception might be permissible where the principle or respect for private life was relevant.

Articles 2(2) and 2(3) were considered in *Johnston v Chief Constable of the Royal Ulster Constabulary*. A complaint was brought by a female officer in the full-time reserve of the RUC challenging the practice of not allowing female officers to receive firearms training or to carry firearms. The Chief Constable argued that if female officers were armed it would increase the risk of assassination and it would be a departure from the ideal of an unarmed police force. Furthermore, it would hinder the valuable work of female officers in the social field.

The first issue addressed by the ECJ was whether sex could be a determining factor of the job within Article 2(2). The Court looked at the specific context of a police officer in Northern Ireland, a situation in which there were frequent assassinations, and concluded that the requirements of public safety might justify the exclusion of women from handling firearms but any derogations from the principle of equal treatment should be interpreted strictly and justified according to the principle of proportionality:

“The principle requires that derogations remain within the limits of what is appropriate and necessary for achieving the aim in view and requires the principle of equal treatment to be reconciled as far as possible with the requirements of public safety which constitutes the decisive factor as regards the context of the activity in question.”

The Court was thus eager to point out that women should not be excluded from a particular employment.

However, in its judgment of 26 October 1999 concerning *Case C-273/97 (Angela Maria Sirdar v The Army Board, Secretary of State for Defence)*, the Court of Justice ruled that the Royal Marines, as special combat units pursuing activities for which sex is a determining factor, are entitled to exclude women.

The Royal Marines are organised on the basis of the principle of interoperability. This means that each individual, irrespective of his specialisation, must be able to serve at any time within his rank and according to his level of skill in a commando unit. Consequently, the employment of women, according to the Royal Marine authorities, would not allow for the maintenance of interoperability.

The applicant, a chef in the British army and whose request for a transfer to the Royal Marines was rejected, considered that she was the victim of discrimination on the grounds of sex.

The Court observed, at the outset, that whilst the member States were free to take decisions regarding the organisation of their armed forces, those decisions remained subject to Community law (apart from exceptional cases which were strictly defined). Thus, decisions regarding, in particular, access to employment in the armed forces were generally required to observe the principle of equal treatment between men and women.

However, the Court considered that the Royal Marines were organised in a way which differed fundamentally from the way in which other units of the British armed forces were organised. Within that unit, chefs were in fact also called to serve in front-line commandos, no exceptions being permitted to that rule. The Court observed that Community law provides for strictly defined exceptions (they must be appropriate and necessary to the aim to be achieved) to the application of the principle of equal treatment where sex is a **determining** condition for the exercise of the activity in question in view of its nature, and the national authorities enjoy a certain margin of discretion in adopting the measures which they consider necessary to guarantee public security.

The Court considered that in the circumstances of this case, the national authorities could, in the exercise of that discretion, reserve access to the Royal Marines exclusively for men owing to the specific conditions governing their deployment as front-line commando units.

iii. Positive measures to promote equality

Examples and experiences in different countries show that it is rather difficult to classify the range of positive measures exhaustively. One reason for this is that the strictness of positive measures varies, according to whether they may involve a certain danger of discriminating against the other sex. Some are manifestly positive action, while others are sometimes described as belonging to other ways of promoting equality, e.g. to gender mainstreaming. The strictness of each type of positive measure has a crucial effect on the legal implication of each particular measure.

Positive measures are normally authorised in domestic legislation without an obligation of prior approval by a competent authority. Certain equality bodies may, however, give advice and information concerning positive action (without a binding effect). Possible supervision of whether applied measures have exceeded the lawful derogation is usually carried out *a posteriori*. An interesting exception is Denmark, where the equal opportunities board has to state beforehand its views on derogation from the principle of equal treatment in the event of under-representation.

Education is often analysed in conjunction with working life (e.g. vocational training organised by the employer), but higher education may also be looked at independently. The objective is a

more balanced representation of women and men in certain fields of education which will ultimately have an effect on the segregated labour market, notwithstanding the meaning it has on public opinion concerning traditional roles of the sexes.

Some countries have abolished positive measures in education, while to some countries, they remain the only positive measures applicable.

The Group has classified positive measures into the following categories: a) measures implying obligation of results; b) supportive measures and incentives to promote equality; c) measures implying procedures (compulsory or voluntary). These will be described hereafter with examples to make the classification clearer.

A special form of positive measures is affirmative action, which originates mainly from the United States of America, where it is referred to as action to identify and eliminate discrimination in employment or measures aimed at increasing the participation of certain protected groups in the workforce. Apart from gender, affirmative action has been applied in the United States to different minority groups within certain job categories.¹

a) Measures implying obligation of results

These measures are the harshest of all positive measures. They are not dealt with explicitly in any international covenant or treaty. Hence, they are often at odds with the principle of equal treatment and might – without their legitimating aim – constitute discrimination against the opposite sex. Therefore they are permitted only within certain limits, usually stipulated in legislation. They may be used in working life as well as in education. Obligation of results means that **priority** is given to the candidate of the under-represented sex, but it varies how automatic/obligatory/absolute/guaranteed that priority is. Focus is sometimes on aptitude, proficiency and professional experience.

The Equal Treatment Directive is interpreted as having some limitations concerning measures implying obligation of results (see the Kalanke case, page 39). However, this does not have to imply training and education (see the Badeck case, page 40).

Bearing this in mind, the Group has divided measures implying obligations of results into three main categories:

- **measures giving absolute/automatic priority to the applicant of the under-represented sex (who fulfils the minimum requirements)² or whose qualifications are equal;**
- **measures giving priority, but not automatically, to the applicant of the under-represented sex who fulfils the minimum requirements;**

¹ Affirmative action as used in the United States may be defined in the following way: “Affirmative action is a generic term for programmes which take some kind of initiative, either voluntarily or under the compulsion of law, to increase, maintain or rearrange the number or status of certain group members usually defined by race or gender, within a larger group” (Source: Johnson, Roberta Ann (1990): *Affirmative Action Policy in the United States: its impact on women, policy and politics*, 18(2):77-90). The term “affirmative action” can be interpreted in different ways, but this definition is useful because it is open-ended.

² The Group has not yet found any examples of measures giving absolute/automatic priority to the applicant of the under-represented sex who only fulfils the minimum requirements. Equal, or almost equal qualifications always seem to be requested (see description of the Abrahamsson and Anderson v. Fogelkvist case on page 41).

- **measures giving priority, but not automatically, to the applicant of the under-represented sex only when other qualifications are equal.**

In working life, measures implying obligations of result often involve determining a target percentage for the under-represented sex as regards posts and jobs. Therefore, they are relevant in appointments or in promotion. From the legal point of view, as a general rule, they must aim to promote *de facto* equality and they may not be applied randomly. These measures may be authorised by law or even recommended, if a public employer is concerned. They sometimes raise legal problems and controversy, since their compatibility with domestic constitutional rights and with international obligations is a difficult legal issue.

Some Federal Länder in Germany have included provisions in their law, giving preference to women in appointment, assignment to official posts or promotion in the public sector. The room for consideration left to the authority varies according to the nature of these provisions. The European Court of Justice has delivered a number of important rulings, which touch upon the legal implications of these kinds of measures, in particular as regards the derogation provided in Article 2(4) of the Equal Treatment Directive (76/207/EEC). As a result, the “absolute priority measures” have been abolished from the legislation in Germany.

Examples of “measures giving absolute/automatic priority to the applicant of the under-represented sex who fulfils the minimum requirements or whose qualifications are equal”

The Kalanke case

The case which has generated most controversy is *Kalanke v freie hansestadt Bremen*. Here a man challenged a provision introduced by the State of Bremen in the public sector. Where there were less than 50% of employees of one sex in the relevant personnel group and a male and female candidate were equally qualified for a post, then **automatic priority** would be given to the member of the under-represented sex. Advocate General Tesouro found the Bremen law to infringe article 2(4) of the Equal Treatment Directive (ETD). His opinion is unusual in that he refers extensively to American legal precedents to reach his conclusions. He argued that positive action under the ETD cannot be used to secure equal results. It must be directed at moving the obstacles preventing women from having equal opportunities, for example, by tackling educational guidance and vocational training. Numerical – and hence only formal equality – is seen by him as an “Incontestable violation of a fundamental value of every civil society: equal rights, equal treatment for all”. The Court, following the Advocate General, found the Bremen law to be in breach of the ETD. The immediate action to the ruling was series of shock waves around the European Union, particularly since the Community had been keen to encourage positive measures. There are two possible interpretations of the ECJ’s ruling. One is very narrow, confining the ruling to the content of the Bremen law – the Court assumed that because there was no safeguard clause in the Bremen law protecting the best male applicant from individual hardship, it led to automatic preferential treatment for women. A wider reading of the ruling can be found in §16 and §22 where the Court refers to a results approach, as follows:

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

§22. “National rules which guarantee women absolute and unconditional priority for appointment or promotion go beyond promoting equal opportunities and overstep the limits of exception in article 2(4) of the Directive.”

To stem the panic and to defend the automatic approach, the European Commission issued a Communication to the European Council and the European Parliament on the interpretation of the *Kalanke* ruling, proposing the following amendment to article 2(4) of the ETD.

§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 the opportunities of the under-represented sex in the areas referred to in article 1(1). Possible measures shall include the giving of preference, as regards access to employment or promotion, to a member of the under-represented sex, provided that such measures do not preclude the assessment of particular circumstances of an individual case.”

The Commission takes the view that quota systems, which fall short of being rigid and automatic, are lawful. The Communication also provides a list of positive measures that are lawful:

- Quotas linked to the qualifications required for the job, as long as they allow account to be taken of particular circumstances which might, in a given case, justify an exception of the principle of giving preference to the underrepresented sex;
- For promoting women, prescribing the proportions and the time limits within which the number of women should be increased, but without imposing an automatic preference rule when individual decisions on recruitment and promotion are taken;
- An obligation of principle for an employer to recruit or promote by preference a person belonging to the under-represented sex; in such a case, no individual right to be preferred is conferred on any person;
- Reductions in social security contributions which are granted to firms when they recruit women who return to the labour market, to perform tasks in sectors where women are under-represented;
- Other positive measures focusing on training, professional orientation, the re-organisation of working time, childcare etc.

The Commission has a vested interest in maintaining the viability of positive action since its Fourth Medium-Term Action Programme on Equal Opportunities for Men and Women contains proposals to use positive action schemes.

The Badeck case

The Badeck case (judgment delivered by the ECJ on 28 March 2000) concerns a review of the legality of the “Law of the Land of Hesse on equal rights for women and men and the removal of discrimination against women in the public administration”, considered by the applicants to be, *inter alia*, contrary to the Equal Treatment Directive as interpreted by the ECJ in Case C-450/93 *Kalanke v Bremen* (1995) (see above).

Only Paragraph 7 (1) of the Law in question (allocation of training places) fixes in a binding fashion a predetermined quota in favour of women. It states:

“In trained occupations in which women are under-represented, they are to be taken into account to the extent of at least one half in the allocation of training places. The first sentence shall not apply to training procedures in which the State exclusively provides training.”

The Court held that the Hesse legislature, by introducing a strict result quota as regards professional training, was intended to facilitate the equal access of women to qualified positions, because despite formal legal equality, they did not have equal access to those positions, even if their educational success was as good as that of men. It ruled that the provision at issue forms part of “a restricted concept of equality of opportunity. It is not places in employment which are reserved for women, but places in training ...”. The Court underlined further that when taking an overall view of training (public and private sectors) “the provision at issue therefore merely improves the chances of female candidates in the public sector ... Such measures are therefore among the measures authorised by Article 2(4) of the Directive, which are intended to improve the ability of women to compete on the labour market and to pursue a career on an equal footing with men”. Therefore, and given that the State does not have a monopoly on training, the Court concluded that the article in question was not contrary to the ETD.

**Examples of measures giving priority, but not automatically,
to the applicant of the under-represented sex who fulfils
the minimum requirements**

The European Court of Justice delivered its judgment in Case C-407/98 (*Katarina Abrahamsson and Leif Anderson v Elisabeth Fogelkvist*) on 6 July 2000. Again, the question was about Articles 2(1) and (4) of the Equal Treatment Directive: what is meant by its notion of 'measures to promote equal opportunity for men and women', and does the Directive allow such measures in a situation where applicants are not equally qualified?

In the case concerned, a female applicant was given priority in selection over a male applicant by virtue of national legislation. The female selected did possess sufficient qualifications for the public post (professor), but, in comparison with the male applicant, she was still less qualified. The question was whether the difference between the applicants' qualifications was so great that such treatment would be contrary to the requirement of objectivity in making the appointment.

The domestic provisions that served as the basis for positive special treatment in favour of the woman, were legislated in order to redress the persistent gender imbalance of university professors and research assistants in the short run. By a government decision, the application was restricted to appointments to a limited number of pre-determined posts (as under the domestic Regulation 1995/936) or posts created as part of a special programme adopted by an individual university under which special treatment may be applied (as under Article 15a of Part 4 of *Högskoleförordningen* (Law on Universities)).

A domestic regulation provided that an applicant of the under-represented sex possessing **sufficient qualifications** for a public post should be selected over an applicant of the opposite sex who would otherwise be selected. Priority **might** be given to an applicant of the under-represented sex, **if they were regarded as equally or almost equally qualified**. Before such a positive treatment could be undertaken, two relevant criteria had to be met. First, a need for an applicant of the under-represented sex to be selected was required. Second, the difference between the applicants' qualifications must not be so great that such a treatment would be contrary to the requirement of objectivity.

The national provision **did not automatically** oblige the appointing university to give priority to under-represented women. The Swedish government stressed in its proposal that there was a limit for the legitimate difference between applicants' qualifications. If the difference was too great, the adoption of positive measures was prohibited.

The Court concluded that the selection method under the Swedish legislation did not conform to Community law: the selection was ultimately based merely on the fact of belonging to the under-represented sex, and candidatures were not subjected to an objective assessment taking account of the specific personal situations of all the candidates. The selection method was also found to be disproportionate having regard to the aim pursued.

Examples of measures giving priority, but not automatically, to the applicant of the under-represented sex only when other qualifications are equal

The Marschall case

As regards such measures, an interesting case in the European Court of Justice is C-409/95, *Helmut Marschall v Land Nordrhein-Westfalen*. In this case, the Law on Civil Servants of the Land (Beamtengesetz für das Land Nordrhein-Westfalen) provided that “Where, in the sector of the authority responsible for promotion, there were fewer women than men in the particular higher post in the career bracket, women are to be given priority for promotion in the event of equal suitability, competence and professional performance, unless reasons specific to another [male] candidate predominate.” Compared with the Kalanke case, the provision in this case was less binding, leaving room for flexibility in order to allow the administration to take into account any factors specific to individual candidates (*saving clause*). Thus, notwithstanding the rule of priority, a male candidate could also be given preference over a female candidate on the basis of specific individual reasons. Priority for women was not automatic and absolute.

Mr. Marschall, a teacher, had applied for a higher position, but was informed that a woman candidate was to be appointed. Both candidates were equally qualified, but since fewer women were employed in the particular pay and career bracket, the woman candidate had to be promoted by virtue of the legislation. Mr. Marschall brought legal proceedings before the German Courts, which (Verwaltungsgericht Gelsenkirchen) referred the question to the European Court of Justice asking whether the legislation was compatible with Article 2(1) and (4) of the Equal Treatment Directive.

The existence of a flexible saving clause made positive measures, although discriminatory in appearance, more legitimate. The Court of Justice had been given observations by some of the member States of actual difficulties that women encountered in employment and promotion situations in comparison with men. As distinct from the opinion of Advocate General Jacobs, the Court ruled that Article 2(1) or (4) of the Directive did not preclude a national rule set out as above. However, as a condition, the Court laid down a requirement that an *objective assessment* of equally qualified candidates (women and men) must be guaranteed in each individual case. The assessment had to take into account all criteria specific to the individual candidates, and it would override the priority accorded to women candidates, where one or more criteria tilted the balance in favour of the male candidate. Selected criteria were not allowed to discriminate against female candidates.

The implications of the ruling are puzzling. On the one hand, it is definitely a positive sign to the member States regarding the possibility of positive action. But on the other hand, the new requirements laid down by the Court of Justice raise controversy. Who is to control the objectivity and neutrality of the criteria selected as the basis for assessment? And how does it correlate with the overall situation of the structural inequality prevailing in the labour market? Critics have stressed that there is a danger that this kind of individually-based assessment of candidates is – once again – likely to place emphasis on individual rights and non-discrimination, and ultimately likely to ignore the idea of positive measures as a tool for enhancing women’s structural position in areas where it is needed. Instead, focus should have been placed on women as an under-represented group in a particular field of work, and the aim should have been to promote their position in the long run. It is a long way from equality of opportunity to equality of results.

The Badeck case

The ruling in the Badeck case (Case C-158/97) is similar to that of the Marschall case (except for the ruling on article 7 (1), see page 40).

This case was referred to the ECJ by the State Constitutional Court of the Land of Hesse (Staatsgerichtshof). Mr Badeck and 45 other members of the Landtag of Hesse had applied to the Staatsgerichtshof for a review of the Law of the Land of Hesse on equal rights for women and men and the removal of discrimination against women in the public administration (HG1G), adopted in 1993. The applicants considered this law anti-constitutional and incompatible with Articles 2(1) and 4 of the Equal Treatment Directive 76/207.

The ECJ held that the provisions in the Law of the Land of Hesse were not contrary to the Equal Treatment Directive, given that it opts for a “flexible result quota” and that it “does not necessarily determine from the outset automatically that the outcome of each selection procedure must, in a stalemate situation where the candidates have equal qualifications, necessarily favour the woman candidate”. Besides, reasons of greater legal weight may justify overriding the rule of advancement of women. Therefore, the ECJ held that the priority rule introduced by this law is not absolute and unconditional in the sense of paragraph 16 of *Kalanke*.

The Court concluded in similar terms to those of the *Marschall* case that the ETD does not preclude a national rule giving priority to female candidate where male and female candidates have equal qualifications, “... if no reasons of greater legal weight are opposed, provided that that rule guarantees that candidates are the subject of an objective assessment which takes account of the specific personal situations of all candidates.”

The Badeck case is also interesting with regard to gender balance in appointed bodies (see page 98).

Examples of the Council of Europe and the European Commission

Council of Europe

One of the basic recruitment principles is that there shall be no discrimination between staff members on the grounds of race, creed, opinions, civil status or sex.

Vacancy notices for internal and external posts contain the following paragraph:

“Under its equal opportunities policy, the Council of Europe is aiming to achieve parity in the number of women and men employed in each category and grade. In the event of equal merit, preference will therefore be given to the applicant belong to the under-represented sex ([female] [male] candidates in the present case).”

European Commission

In 1998, a new Council Regulation came into force which integrated equality clauses into the recruitment procedures and status of officials.¹ The staff regulations of officials of the European Communities were amended as follows:

1. Officials shall be entitled to equal treatment without reference, direct or indirect, to race, political, philosophical or religious beliefs, sex or sexual orientation, without prejudice to the relevant provisions requiring a specific marital status.
2. With a view to ensuring full equality in practice between men and women in working life, the principle of equal treatment shall not prevent the institutions of the European Communities 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.
3. The institutions shall determine, by agreement, after consulting the Staff Regulations Committee, measures and actions to promote equal opportunities for men and women in the areas covered by these Staff Regulations, and shall adopt the appropriate provisions notably to redress such *de facto* inequalities as hamper opportunities for women in these areas.”

¹ Council Regulation 781/98 of 7.4.1998. OJ L 113 of 15.4.1999, p. 4.

Examples of positive measures regarding working life, education and training at the national level¹

Austria

The federal law on equal treatment of 1993 contains not only a directive on equal treatment but also a directive for the advancement of women. This means that equal opportunities are actively promoted, in accordance with the UN Convention for the Elimination of all Discrimination against Women, which Austria has ratified. To this end, the law stipulates that:

- the various departments are to draw up plans for the advancement of women;
- in keeping with the provisions of these plans, women are to be given preferential access to initial and further training qualifying them to take up high-grade employment;
- in areas in which they are under-represented, women are to be given preferential treatment in recruitment or promotion procedures, provided that they are “no less well suited than the best qualified candidate”.

Women are to be considered under-represented if their share of the overall number of permanent employees in the professional category in question or the functions allotted to permanent employees in the professional category in question amounts to less than 40% in the area covered by the department concerned.

To ensure that these regulations are implemented, those concerned (namely all female applicants or persons appointed to a post who are affected by an infringement of the rules on equal treatment or advancement of women) may apply to the federal committee on equal treatment, requesting it to draw up a report or examine whether there has been discrimination.

The advancement of women within companies rests largely on a voluntary commitment by the company concerned. At the present time only the occasional Austrian company has a plan for the advancement of women, while a few have developed informal structures for the active advancement of women employees. Under the new paragraph 92b of the Industrial Relations Act introduced in 1998, company bosses are now under an obligation at least to discuss measures for the advancement of women within their companies (recruitment procedures, initial and further training, professional advancement, and the elimination of any existing under-representation of women in the overall workforce or in particular jobs) or measures designed to reconcile professional and family commitments. The works committee is entitled to make proposals on these matters and request that measures be taken. However, internal company agreements on these matters are introduced on a voluntary basis. Furthermore, paragraph 2b of the law on equal treatment of 1979 states that federal grants may only be awarded to companies which observe the requirements of the law on equal treatment.

Bulgaria

The quota principle, as a positive action, exists only with regard to higher education to ensure the equal opportunities for progress and development of women and men. Universities are entitled by Decree of the Council of Ministers to determine, by themselves, the quotas for both sexes in the different subjects studied. Equal access of women to both pre-university and university education is a fact in Bulgaria. In the school year 1997/1998, girls accounted for 551,636 of the total number of 1,143,405 students in secondary schools (48%). Out of the total number of 249,744 students in universities, 154,262 were women (61%). During 1997/1998, a total of 51,606 students were enrolled in the universities all over the country, 30,961 of which were women (60%).

¹ The Group has not classified these examples according to the categories used to explain the rulings of the European Court of Justice. This was not possible as the examples are not as clear as the rulings of the ECJ. They therefore appear in alphabetical order by country.

Finland

The preamble of the Equal Opportunities Act states that the derogation's aim is to enable preferential treatment of those in a disadvantaged position because of sex, especially in working life and in education, without constituting discrimination.

Preferential treatment is justifiable only when it endeavours to better fulfil the aims of the Act in practice. In a way, the provision completes the obligation set to public authorities and to employers in sections 4-6.

In Finland, the choice of fields of study is clearly segregated by gender. The proportion of women is the largest in health care, pharmacy and veterinary science as well as in teacher training. The quotas which existed in favour of men in teacher training have been abolished. At the university level, the lowest proportion of women can be found in the scientific and technical fields.

Several projects have been organised in Finland in order to change the imbalance between women and men e.g. in vocational training. The educational administration has undertaken vast projects to develop and diversify the instruction of mathematics, natural sciences and languages in primary and secondary schools. For instance, girls are introduced to subjects that are traditionally boy-dominated, by modifying the content of these subjects. Various policies will be tested. The Ministry of Education targets figures topping 40% for girls' participation in the long courses of mathematics, physics or chemistry in secondary schools and 30% for women's share of all new students in technical fields in the year 2002. Other projects have been launched in order to encourage women to work within certain fields of industry. In some cases, technical universities have modified their recruiting especially as regards women, e.g. by placing more emphasis on language skills instead of traditional natural sciences.

Another example of positive measures in vocational training is the system of extra points. In Finland, a young person applying for a place in vocational training leading to a degree (after primary or secondary school) is given extra points, when the share of applicants of the same sex applying to the same field of vocation and institution is under 30%. The system is formulated in order to make it easier for young persons to enter non-traditional occupations, thus redressing the segregation of the labour market and combating traditional gender roles.

France

Contracts to promote representation of both sexes in the various trades and professions (contrats pour la mixité des emplois). This scheme set up by the state specifically in favour of women aims to broaden the range of jobs performed by women and promote their integration in occupations where they are still severely under-represented. Each contract is concluded on an individual basis and concerns a named individual. However, several such contracts may be signed by any one company. Since the scheme was launched in 1987, 1,500 contracts have been concluded throughout France. The spread of the scheme continues to be characterised by the wide range of areas of activity of the companies that sign the contracts. Ninety per cent of the women concerned are manual workers. Only a few are non-manual workers or technicians and virtually none have executive status.

Schemes to promote equality in the workplace (*plans d'égalité professionnelle*). Thirty-three schemes have been signed since 1983. The most recent ones give priority to re-training of female employees. For instance, one firm employing 320 people offers the following training facilities:

- long training courses (340 hours) for female manual workers (20 in total), consisting of two years of re-training in all industrial sector jobs, as a result of which they are upgraded;
- commercial training courses for 17 women in the administrative sphere, enabling 13 of them to secure positions as sales technicians and thus move up the ladder from the grade of administrative worker to that of technician/supervisor;
- technical adaptations on the packaging lines so that women have access to the corresponding industrial jobs.

In 1991, the Service for Women's Rights set up an inter-ministerial programme of open training (*programme de formations ouvertes*), to include training in the use of multimedia tools, for women in rural areas.

Open training takes the form of sandwich courses that combine periods of training and distance monitoring with group training administered in a training centre. This approach is intended as a solution to the poor training opportunities of women in rural areas whose access to traditional training is very limited on account of their poor availability or the long distances involved.

Germany

In June 1999 the programme “Women and Work” was launched, which aims at:

- improving training opportunities for young women, particularly in the future-oriented occupations associated with the information age;
- expanding the employment and advancement opportunities of women;
- eliminating discrimination against women setting-up in business;
- promoting the reconciliation of family and career and the integration of men into family work;
- counteracting income and wage discrimination against women, and
- increasing the percentage of women in research and teaching.

Women and Work is a long-term, process-oriented programme. Consequently, it is not intended to be a static, temporary programme, but rather an ongoing one which is regularly reviewed and updated.

The programme includes legal regulations concerning the equal rights of women and men both in the public service and the private sector.

In the public service the **Act on the Advancement of Women** for the Federal Administration is to be amended by an **Equal Opportunities Act** which requires that:

- plans with binding targets for establishing equal opportunities be established;
- women be given preference with regard to training, employment and promotion in the areas in which they are under-represented, given equivalent aptitude, qualifications and professional achievement, insofar as personal factors associated with a male applicant do not outweigh the decision (flexible quota provision);
- the award of training places be regulated in such a way that women receive specific promotion, particularly in modern, future-oriented occupations;
- the competence and rights of objection of the commissioners for women’s affairs be strengthened.

In the private sector the objective is to organise a process of change in the economy towards agreed goals and to provide the legal framework to do so.

To this end, the Federal Government will seek to establish a dialogue with the economy and the unions, support companies and businesses which are today already making a successful attempt to achieve equal rights for women and elaborate equal opportunities regulations which are suitable for establishing *de facto* equal rights and also adapted to the diversity of the companies.

In all the various approaches, e.g. be it through collective agreements or shop agreements, the Federal Government places emphasis on the following regulatory objectives:

The actors must agree to:

- eliminate discrimination against women in businesses and companies,
- specifically promote the vocational education of women in future-oriented occupations,
- improve discriminatory working conditions affecting employed women,
- increase the employment rate of women in the areas in which they are under-represented,
- also establish equal pay in practice, and
- ensure representation of the interests of women based on the goal of equal opportunities.

Iceland

Article 1 of the Act on the Equal Status and Equal Rights of Women and Men from 1991 states that the purpose of the Act is to establish the equal rights and equal status of women and men in every sphere and that the status of women shall be improved especially for this purpose. Article 3 of the Act states that all forms of discrimination on the basis of sex shall be prohibited. However, specific temporary measures intended to improve the status of women for the purpose of promoting equality and the equal status of the sexes shall not be considered contrary to the Act. And finally, article 5 states that employers shall work for the equal status of the sexes within their companies or institutions, endeavouring to prevent jobs from being classified as jobs specifically for women or for men.

Based on the above articles, the Icelandic Supreme Court has ruled that, in cases where two applicants for an employment are deemed equally qualified and are of the opposite sex, the employer must favour the woman if fewer women are employed at a similar level or in the equivalent job range in the workplace.

Ireland

Since 1990, FÁS (government training agency) has operated an Action Programme for Women. This programme adopts specific measures in certain key areas to ensure that every opportunity is given to women to participate fully in the labour market. The objectives of the programme are:

- to actively promote the breaking down of traditional patterns of occupational segregation by encouraging increased female participation in sectors of the labour market traditionally dominated by men;
- to actively promote the participation of women at all levels in growing, future oriented sectors of the labour market, including technical and managerial occupations, in order to achieve better use of human resources;
- to actively promote the upgrading of existing skills among women.

Italy

Section 45.d (“Reforms of employment incentives and welfare mechanisms”) of Act No. 144 of 17 May 1999, known as the “employment link” (*collegato lavoro*) of the 1999 Budget Act, provides for specific gender-based restrictions. For example, the “rationalisation of the types and different forms of intervention” should take account of “the extent to which female workers are at a disadvantage in the different regions of the country”. In addition, procedures for approving and awarding incentives are to be simplified, with due regard for female employment rates. Lastly, provision is to be made for “mechanisms and instruments for monitoring and evaluating the results”, taking account of the impact on female employment levels.

Netherlands

Various projects have been started up for women with a low level of education who may additionally be living on benefit and have children to care for. This includes adult education projects. Adult education (“lifelong learning”) is an important way of helping adults to make up for the education they lack. Vocational colleges for women which run practical job-related courses are an especially effective way of helping women (especially those from ethnic minority backgrounds) to meet their specific training needs.

On 7 March 1997, the Proportional Representation of Women in Managerial Posts in Education Act took effect. It is designed to help correct the imbalance of men and women in management and senior positions in educational establishments throughout the field of education from primary schools to universities. The main thrust of these measures is to encourage educational establishments to review their personnel policies and to conduct a more structural policy aimed at improving the status of women. Institutions in which women are under-represented in management posts must compile a strategy document giving the target figures they are working towards to increase the number of women in management posts and describing the specific measures they will be taking to meet these figures.

Norway

The objective of the Gender Equality Act is to promote gender equality. At the same time the Act aims particularly at improving the position of women, based upon an assumption that women in working life and women in general have a weaker position than men.

Any form of discriminatory treatment of men and women is prohibited, both obvious discriminatory treatment and treatment which indirectly discriminates against men or women on the grounds of sex.

The general clause provides the legal framework for introducing positive action. Differential treatment of men and women may be in accordance with the Act, if the treatment promotes gender equality in accordance with the broader purpose of the Act. This action is gender-neutral, but in practice action is widely perceived in such a way as to work in favour of women.

In practice, positive action is currently based mainly upon provisions in collective agreement with the Act as legal authority. These provisions are to be enforced by the parties of the agreement. The Gender Equality Ombud may decide upon questions whether or not a provision of this kind in an agreement is in accordance with the Gender Equality Act.

A review of the Act led in 1995 to the following amendment in article 3:

“The King may issue regulations regarding the kinds of differential treatment which can be accepted pursuant to this Act, including provisions in positive special treatment of men in relation to care for and education of children.”

The amendment has been limited to certain professions connected with the tuition of and care for small children. The main objective is to increase the number of men participating in work of a caring nature, both domestic and in the professional life, and thus to make role models, to remove the gender-segregated labour market etc.

Otherwise positive action in favour of men will still normally be viewed as being in conflict with the Act and its purpose.

The provision on positive action in favour of men is to be enforced by the Gender Equality Ombud.

Portugal

Article 3 of Decree-Law No. 392/79 of 20 September 1979, “Law on equality in work and in employment”, provides that:

“1. The right to work implies the absence of any discrimination, direct or indirect, on grounds of sex, particularly with regard to civil status or family situation.

2. Temporary provisions establishing preferences based on gender and measures aimed at protecting maternity as a social value shall not be deemed to be discriminatory whenever they are dictated by the need to redress a *de facto* inequality.

Article 5 provides that:

“1. It shall be for the State to promote, encourage and co-ordinate vocational training initiatives for women, according to their wishes and in the light of employment trends.

2. In order to render these initiatives effectively, preference shall be given to women aged between 14 and 19 or 20 and 24 years who have no qualifications or certificate of compulsory education and to single mothers.

3. Women’s access to vocational training courses shall be guaranteed, according to the percentage which shall be fixed each day by the order of the Ministry of Labour, in keeping with the priorities laid down in the previous paragraph. (This particular provision has never been implemented).

4. Appropriate measures shall be taken, whether in the form of vocational guidance or the introduction of special retraining and further training programmes, to further the occupational reintegration of women who have interrupted their careers.”

The goal of equal opportunities for women features in all the Community Support Framework Programmes (1994-1999), and the vocational training activities and activities aimed at integrating women into working life which are clearly and explicitly geared to this objective have been designated a priority.

This applies to activities which are intended not just for women, but also for mixed target groups, and to activities which are aimed at people involved in decision-making or the groups which play an important role in the process of integrating women into working life, such as trainers or human resource managers.

Sweden

In Sweden, affirmative action (this is the term used in Sweden) has been integrated into the promotion of gender equality for some time. Although the provisions concerning affirmative action are gender neutral (under-represented sex), they are primarily aimed at improving women's conditions in working life. Affirmative action in Sweden has mostly been applied in the fields of access to employment and working conditions, but also in order to promote women's participation in decision-making bodies in the public sector. Here, focus will be on working life.

The employer, whether public or private, is obliged under the Equal Opportunities Act:

- a. to conduct goal-oriented work in order to actively promote equality of opportunity;
- b. to prepare annually a plan in relation to the employer's equal opportunities efforts;
- c. to promote equal proportions of women and men in various types of work and within different categories of employees by training, skill development and other suitable measures, and;
- d. to make every effort – in respect of new positions - to recruit applicants of the under-represented sex and to do his/her best to ensure that the proportion of that sex gradually increases.

The above-mentioned provisions only aim at promoting gender equality – there is no obligation to undertake positive actions. The Equality Ombudsman shall see to it that these provisions are fulfilled. Adopting and applying affirmative action is voluntary (notwithstanding the possibility that the Ombudsman may in certain cases apply for an order obligating the employer to take affirmative action). The lawfulness of affirmative action depends on *whether the decision constitutes an element in efforts to promote equality of opportunity in working life*. Otherwise, e.g. in promotion, discrimination based on grounds of sex shall be deemed to exist. The employer is permitted to appoint a person (usually a woman) even if another candidate of the opposite sex (a man) has equal or even better qualifications, if the appointment meets the promotion requirement set out above. Such measures must be planned beforehand in equal opportunity plans or in personnel policy documents.

With regard to *working conditions*, the employer shall take measures that may be required in order to:

- a. ensure that working conditions are suitable for both women and men, and;
- b. facilitate the combination of gainful employment and parenthood for both female and male employees.

Affirmative actions may be applied in order to meet those requirements, as long as the decision constitutes an element in efforts to promote equality of opportunity in working life. Again, applicable measures must be planned beforehand.

As regards terms and conditions of employment, the Ombudsman has a duty to encourage affirmative action where it is necessary and permitted (i.e. access to employment and promotion).

Switzerland

Early in 1997, Parliament adopted a decree on apprenticeships, providing 60 million Swiss francs for measures to make more apprenticeships available from 1997 to 1999. One specific aim was to ensure equal opportunities for young people of both sexes, and remove the obstacles young women still face in choosing careers and in vocational training. The appropriation (now 100 million Swiss francs) has since been extended for a further period.

In its 1996-99 four-year plan, the Conference of Swiss Universities made the promotion and co-ordination of gender studies and research on gender relations one of its priorities. Switzerland is still a long way behind other countries in women's studies and gender studies, especially when it comes to institutional research. In its message on the promotion of training, research and technology from 2000 to 2003, the Federal Council stated that part of the appropriation of 16 million Swiss francs would be spent on measures to institutionalise research on gender relations in the community.

The order on measures to promote the recruitment of young staff in cantonal universities provides that at least one-third of the posts so funded must be filled by women.

Turkey

The Women's Employment Promotion Project, which was specifically designed to address the employment problems of women, has been completed recently. It was one of the components of the World Bank's umbrella "Employment and Training Project". The main objectives of this project were to promote the efficiency of employment by varying the services, create employment opportunities for unemployed and unqualified women, develop gender segregated statistical data on the labour market, determine the obstacles to women's employment and increase their employment opportunities in productive jobs. This project has produced successful results:

- a number of women received training in various job categories, including male dominated ones;
- gender-neutral vacancy announcements have become applicable;
- a more clear understanding of gender-based discrimination on the labour market has been obtained;
- new policy formulations to tackle gender bias on the labour market are being introduced.

United Kingdom

A special unit for Science, Engineering and Technology (SET) has been established in the Department of Trade and Industry. Among its activities it promotes careers for women at all levels in higher education. The Unit also encourages, supports and co-ordinates the activities of various bodies concerned with the interests of women in the SET Higher Education environment.

b) Supportive measures and incentives to promote equality between women and men

This group comprises most of the positive measures actually in use. Such positive measures are usually adopted in order to improve women's position for instance in the *employment market*, but they are also used in training and education systems. The main purpose of these measures is to give the under-represented sex the opportunity and/or the qualifications to be able to apply on an equal footing with the other sex.

Encouraging applications of the under-represented sex

These measures include the active recruitment of the under-represented sex by encouraging it to apply. However, one sex should not be favoured in the actual selection situation between the candidates for the job.

Examples of national measures

Croatia

One of the measures adopted by the government is that all government agencies are required to include in the text of the public announcement of every job opening a sentence that encourages women to apply. After the adoption of the National Policy of the Republic of Croatia for the promotion of equality, it was established that this measure was not adequate to achieve the desired goal. According to data from the Ministry of Public Administration, women comprise 55.47% of the employees in the government administration, but only 6.91% of the employees of the Ministry of Defence and 7.05% of the employees in the Command Headquarters of the Croatian Army.

Denmark

The Act on Equal Treatment, Article 6, prohibits discrimination on the grounds of sex in advertisements. However, it is possible to encourage women to apply, on the condition that both women and men are treated equally when the appointment is decided. This is one of the very few examples where exemptions from the prohibition of discrimination without explicit permission is possible. Active recruitment has been very popular among both private and public companies in order to announce that a gender balanced composition of staff is desirable.

Finland

The objective of a project launched in 1997 is to offer women the same possibility as men to apply for Air Force pilot training. Since summer 1997, the first two women performing their voluntary military service attended successfully the Air Force reserve officers' course. One of the others was chosen upon application to the four-year air warfare branch of the cadet course, which will provide fighter pilot training that will make the students eligible for the post of Air Force pilot in 2002. Since 1998 women have been able to apply to the new Air Force reserve officers' course. In 1998 one woman was accepted. The Ministry of Defence monitors and evaluates the situation of female pilot trainees in the training process of the Air Force.

Applying requirements adapted respectively to women and men

Another example is the application of *different requirements for the two sexes* based on the average differences between them. For instance, in police recruitment the requirement of height may be modified in order to meet the average height difference between women and men.

Examples of national measures

Denmark

It has been desirable to recruit women to the police force. Therefore, the requirements concerning height and sports skills are adapted to correspond to women's and men's different average physical constitution.

Reserving vocational training for one sex only

There are examples where a certain amount of *vocational training* places have been reserved for one sex only to enable them to acquire certain basic skills. Such positive measures are usually aimed at women. They can take the form of introductory courses, courses in day universities and courses targeted at the unemployed. PhD grants may also endeavour to qualify people who have unequal opportunities at the outset. Their aim is to qualify young researchers for a later research career in higher education.

Examples of national measures

Belgium

Vocational training projects reserved for women have been accessible for a number of years in Belgium in the framework of the *ad hoc* provisions for programming, cofinanced at European Union level by the European Social Fund. Two specific programmes – NOW and WORK-NOW, have been set up in order to finance a large number of actions reserved for women with a view to their integration on the job market, taking into account all the obstacles that they face (counselling and vocational training, reconciliation of family and professional life, organisation of working time, changing of mentalities, etc.).

Denmark

The Ministry of Education has been granted an exemption from the Equal Treatment Act to carry out introductory courses in technical training schools for girls who wish to follow education in industrial training as metal workers or skilled builders.

Copenhagen University and the Technical Engineering University have also been granted exemptions from the Equal Treatment Act, which ensure that a greater number of PhD grants are allocated to women. These exemptions are granted in order to disintegrate the gender-segregated labour market and to compensate women in areas where they empirically need extra training, also because they are often discriminated against.

Financial incentives

Pay bonuses to women

Despite all the efforts made, the labour market is still very gender-segregated, both at horizontal and vertical level. The female labour force is concentrated in the lower positions in the occupational hierarchy. According to recent studies and statistics, occupational segregation is strongly prevalent. The segregation extends to occupations and specific tasks. This is notably the case in the Nordic labour markets, where around 50 to 60% of the female labour force work in sectors where women themselves are predominant by 80%. Occupational segregation is followed by pay segregation, which turns the situation into a difficult structural problem. The bargaining power of female-dominated sectors of work is limited, since, to give an example, the social sector is never in the same position to bargain as male-dominated industries.

Efforts to diminish the segregation – by doing away with traditional attitudes and encouraging women/men to apply for ‘untraditional’ vocational education and work – have not produced the desired effect. Occupational segregation and structural pay gaps have prevailed to a large extent. Therefore, in a few cases, pay bonuses to women have been introduced in order to help bridge the gap.

Examples of pay bonuses to women at the national level

Finland

A new effort to combat this vicious circle, namely special pay bonuses to women, was introduced in the collective agreement in Finland. Pay bonuses have been allocated four times, most recently in the last collective agreements at the end of 1997. The social partners agreed on a special gender equality package which included, *inter alia*, a special pay bonus for women. Its objective was to raise the pay rate position of the women whose pay was not in balance with the requirements of the work and with their vocational training¹. Pay bonuses were aimed at improving women's position in working life by correcting their indisputably unjust structural pay gap in relation to men working at the same level of occupational hierarchy.

The allocation of the pay bonus is an essential part of a wider collective bargaining procedure, where – as a final stage – the ultimate implementation of the collective agreement is the responsibility of the employer. The employer's role is of paramount importance, since he/she is to guarantee that the targeting of the pay bonus will not discriminate against men. Each allocation shall be considered case by case, since workplaces and their workforce are all unique. In other words, the system of pay bonus to women is conditional, since it requires consideration case by case. Indeed, the reason why pay bonuses are not considered discriminatory against men is the way in which they are ultimately implemented and allocated at "the plant level". Guaranteeing that non-discrimination provisions are followed in the process of paying the pay bonus is an important duty of each employer. He or she is the key person in this respect.

The effects of the pay bonus have been biggest at the municipal level, where structural pay gaps have diminished most. Experiences have shown that it is possible to balance unjustifiable pay gaps, if such pay bonuses are aimed correctly.

In *Norway*, wage bonuses for women have been applied over the last years in central as well as in local tariff negotiations, but not in the private sector. Women's salaries have increased more than men's have in the 90s (4%).

Since 1991, the central parties have agreed to give women a relatively higher part in the local negotiations, which is confirmed by statistical data. In 1996, in the central negotiations in the government sector, a pro rata division would have given women 42% of the wage bonuses; they got 47%.

In the municipal sector in 1995 and 1996, special funds were set aside for women. In 1995, 2,200 NOK was given as a bonus to all positions occupied by more than 75% women. In 1996, the funds were allocated to female-dominated occupations in the lower and middle levels.

Loans or other assistance to women entrepreneurs and other financial incentives for women

Women often hesitate to cross the threshold of business life and self-employment. Yet, it might be a solution to women's unemployment in many cases. Various forms of projects and reforms have already been undertaken to promote women's entrepreneurship.

¹ The agreement consisted of a low-pay bonus as well, which was meant to tackle the pay gap in certain sectors of work. In theory, the low-pay bonus did not take account of the gender, while in practice, low-pay sectors are mainly female-dominated.

Examples of national projects to promote women entrepreneurs and of other financial incentives for women

Austria

To promote and support women who wish to venture into self-employment, a “Women’s Business Centre” was set up in Vienna at the initiative of, and funded by, the Federal Minister for Women’s Issues and Consumer Protection. Young women who are potential entrepreneurs are to be furnished with pertinent advice, business management know-how and information about attractive possibilities of financing before, during and after the formation stage of an enterprise.

Croatia

The Croatian Bureau of Employment informs all women whose educational background and abilities meet the requirements and are interested in entrepreneurship about a project for granting loans with favourable conditions of repayment to entrepreneurs for small enterprises. In the implementation of this project, particular attention is given to securing funds for loans to women entrepreneurs in deficit professions. Counselling services are provided to women entrepreneurs who contact the Bureau of Employment.

Estonia

The Estonian “Action Plan for More and Better Jobs for Women” is the product of collaboration with the International Labour Office. Part of the plan focuses on the development of women’s entrepreneurship in the regions most adversely affected by economic transition. During 1999, intensive training for several hundred women in entrepreneurship development was organised. This training led to the setting up of new businesses and the establishment of a regional database of women-owned businesses in South-East Estonia.

Finland

In Finland, the Act on the Regional Development Fund was amended so that in the beginning of 1997 the Fund can commence to grant special types of small loans to small-scale enterprises and women’s business activities in the service sector.

One type of loan is targeted at women entrepreneurs and granted for investment and development projects of women entrepreneurs starting up or developing their operations. This special loan for women entrepreneurs will be granted during a trial period of five years and will be closely monitored.

Between 1 January and 28 September 1997, altogether 84 million FIM were granted as special loans to women entrepreneurs. When examining the supplementary state budget for 1997, Parliament decided to authorise the granting of an additional 20 million FIM as loans aimed at women entrepreneurs, raising the total sum to 110 million FIM in 1997. It has been estimated that the loans granted in 1997 have contributed to the creation of 1,530 jobs.

In line with the state budget for 1998, about 50 million FIM were granted as loans to women entrepreneurs.

France

A special fund (*Fonds d’Incitation à la Formation des Femmes*) has been set up to promote training of women and thereby facilitate their entry into the labour market. Women experiencing difficulties finding a job are eligible for an individual grant that enables them to enrol on a training course or secure an assisted contract. The fund, which is incorporated in the employment measures, may be used to cover childcare costs or the cost of looking after dependent persons in the home. Its use is to be monitored and specifically assessed. Additional funding will be injected into it by the European Social Fund as part of the specific measures taken to facilitate women’s entry into the job market.

Germany

The Federal Government intends to promote women setting up in business and is therefore participating in the following programmes:

“Start Funds” - A new loan programme for small business launches

As the funding bank of Federal Government, the Deutsche Ausgleichsbank established a new loan programme in May 1999 which is particularly geared towards women.

With this loan, a financing requirement of a maximum of €50,000 (approx. DM 98,000) can be financed up to 100%. The term amounts to a maximum of 10 years and repayment can be suspended during the first two years. Part of the programme includes an option of relieving 80% of the risk borne by the principal bank offered jointly by the European Investment Fund and the Deutsche Ausgleichsbank. Thus, this loan programme is primarily geared to the needs of small business launches. It is available for launching industrial and service businesses, as well as for freelance initiatives. The Deutsche Ausgleichsbank provides DM 400 million per year for this programme.

Joint Change/Chance initiative

In this programme, counselling and information services are offered with the intention of encouraging women to take over company management as successors.

The Deutsche Ausgleichsbank, the Deutscher Industrie- und Handelstag and the Zentralverband des Deutschen Handwerks jointly organise and finance events and projects centred around acceding to company management.

The Federal Ministry for Family Affairs, Senior Citizens, Women and Youth is also providing DM 1.4 million in funding for women-specific counselling projects and support programmes.

Greece

A project was initiated by the Ministry of Industry to support young women entrepreneurs in the creation of small- and medium-sized enterprises. Its activities include assistance in the setting-up of businesses (legal, financial and technical advice); labour market surveys; supporting the activities of local companies when setting up new businesses employing at least 3 people; financing of 50% of the total budget of accepted projects (limited to 50 million drachmas).

In 1998, the Ministry of Development proposed a project to support businesses run by women, lasting 2 years with a budget of one million drachmas. The aim of the project is to support new businesses being set up and existing businesses already operating in which 51% or more of the capital is owned by women and affairs are managed by women. Assistance covers 50% of the budget (within the limit of 50 million drachmas per project) and is aimed at actions such as consultative services and product promotion.

In February 1998, the Ministry of Labour and Social Insurance published a Project for Young Professionals, which includes positive measures in favour of women. The project plans to give grants to 10,000 unemployed people to set up small businesses or exercise a liberal profession (total expenditure: 10 million drachmas) and support 2,000 long-term unemployed (total expenditure: 2.7 million drachmas).

Italy

Law 215/1992 provides funds for the start-up and development of women's entrepreneurial activities, training, information and technical and managerial assistance to women. Financing for this law had been blocked for years, and the one of the first initiatives taken by the Minister for Equal Opportunities appointed in 1996 was to have the financing unblocked, with allocations of 43 billion lire in 1997, 80 billion lire in 1998 and 105 billion lire in 1999. With approximately 288 billion lire released through the first three financial commitments, Act 215/92 has helped the creation of 2,746 enterprises; 16,513 jobs have been created. The government plans to allocate 300 billion lire for its fourth financing.

Section 13 of Act 140/99 – norms in the field of productive activities – foresees incentives for enterprises employing a majority of women and introduces *ope legis* the obligation for all central and local administrations to define mechanisms in order to promote the access of women's enterprises to financial and public incentives.

The *Observatory for Women's Entrepreneurship* was set up in 1997 to monitor the implementation of equal opportunities legislation and governmental, local and European programmes in order to promote women's entrepreneurship. It also gives information about laws concerning incentives for the creation of new enterprises.

Law 125/91 has, over the past eight years, financed enterprises to the tune of approximately 78 billion lire, but has also financed co-operatives, associations, etc.

Slovakia

The work of the National Agency for the Development of Small- and Medium-Sized Enterprises is very helpful for women starting their own businesses. Within this agency a network of advisory and information centres has been created. One of these centres in particular provides women with information and advisory services on how to create a business project, how to carry out a market research, how and under what conditions they can obtain a loan, etc.

Spain

The programme called "From Enterprising to Business-Owning" offers technical assistance and free diagnosis to women who want to consolidate existing companies or create a company. In 1998-1999, over 400 companies have been created by women all over Spain. The programme is paid for by the Women's Institute and it forms part of the action called for in the Third Plan on Equal Opportunities.

Sweden

One project involves offering municipal authorities business consultants for women in order to increase the number of female entrepreneurs. The women business consultants provide support and advice for women who want to start their own companies, or for established female entrepreneurs. The project commenced in 1993. The 62 municipal authorities selected welcomed the scheme and, with financial support from the Swedish National Board for Industrial and Technical Development (NUTEK), county administrative boards and county labour boards invested money and started to employ consultants. NUTEK later extended the project to include additional municipalities. In 1999 there were around 100 business consultants who assist women who want to start or run their own firms. In some municipal authorities, the consulting authorities have been made permanent and have become part of the traditional business activity.

A project to promote women's innovations started in February 2000. It aims at creating the necessary conditions for more women to receive the support they need to realise their inventions and innovations.

NUTEK has initiated a research programme about women entrepreneurs that involves acquiring more knowledge of female business areas, describing women's situation and assessing their importance.

Switzerland

The Equality Act also authorises the Confederation to provide financial assistance for programmes to promote equality between women and men in the workplace, and for advisory services. Ideally, this assistance is meant to go to ground-breaking, practical projects with a long-term impact, and to advisory services concerned with equality in working life. Some of these projects are specifically aimed at the women most at risk from poverty (women with no vocational training, marginalised groups, migrants). The bodies running them include women's organisations, trade unions and professional associations, and also training organisations and employers' associations. The total sum allocated for financial assistance in 1999 was 3.2 million Swiss francs.

Turkey

The very first programme to encourage women's entrepreneurship in Turkey was launched in 1993 by the Office of the Prime Minister. Currently, three public and semi-public banks provide various credit schemes for women entrepreneurs with very low interest rates.

Bonuses and/or incentives to companies

These are special bonuses or financial incentives to employers or businesses which can prove that they have undertaken or will undertake an active policy to promote equal opportunities.

Examples from member States

Austria

Coupling the **award of public contracts** with the goal of **promoting employment for women** is regarded as a potential way of influencing companies' willingness to accept and implement special company policies for the advancement of women within them, by applying allocation criteria or preconditions for the award of contracts. Accordingly, at the instigation of the Federal Minister for Women's Affairs and Consumer Protection, a symposium was held on 24 October 1997 in Vienna on the theme "Awarding of public contracts as a means of advancement for women". Its purpose was to clarify the basic provisions of EU, federal and Land law which would enable public contracts to be awarded preferentially to businesses pursuing an active in-house policy of advancement of women.

On the initiative of the Federal Minister for Women's Affairs and Consumer Protection, the federal ministries headed by Social Democrat members of the government will consequently in future favour companies which have an active policy of advancement of women. Corresponding guidelines to ensure that the arrangements for advancement take European and domestic legal rules more fully into account when awarding public contracts have already been drawn up for the Federal Chancellery. Now all Social Democrat departments will be expected to prepare similar guidelines which, in future, will be implemented by decree in the departments concerned. When awarding public contracts the advancement of women is given a 2% weighting in the evaluation of tenders; promotion of training accounts for another 2%, and the economic competitiveness of the tender for the remaining 96%. Advancement of women is only taken into account for contracts below the threshold value set by the federal law on the award of contracts and by the EU guidelines, thereby ensuring compatibility with Austrian constitutional law and EU law.

Germany

Two Equal Rights Acts of the Länder (Berlin, Brandenburg) include provisions that governmental orders involving more than 10,000 DM shall be given to suppliers who can prove that they operate an effective equal opportunity policy.

At federal level contract law is to be reviewed in order to determine whether social criteria (e.g. promotion of women) can also be taken into consideration of public contracts.

Greece

Companies can benefit from a bonus ranging from 1,800,000 to 2,200,000 drachmas during 18-22 months if they take on an unemployed woman. Bonuses also exist to take on young unemployed women with university diplomas, in order to help them acquire the necessary professional experience, as well as single mothers. These bonuses are paid by the OAED (Organisation for the employment of workers).

Portugal

The prize "Equality is quality", created in 1999 by the Commission for Equality in Work and Employment, aims to honour companies that follow an exemplary policy of promoting equality of opportunity between women and men. The prize was given to companies presenting good practices, particularly with regard to the integration of equality into management and the culture of the organisation.

c) Measures implying procedures (compulsory or voluntary)

Action plans often include measures implying compulsory procedures and target-setting. Target-setting is necessary in order to monitor the action plans and to measure the progress made thanks to the plan. Targets are also useful as a tool to benchmark countries.

Action plans, or “equal opportunities plans”, have been in use in some countries for several years. Most member States of the Council of Europe set up action plans to promote equality after the Beijing World Conference on Women (September 1995), sometimes taking information directly from the Beijing Platform for Action.

National action plans are commitments made by governments to promote equality. The implementation is entrusted to various actors, mainly the national equality machinery and its different agencies at the national, regional and local level. In some countries, specific regional action plans exist. Non-governmental associations working for equality and/or the social partners often assist with the implementation of these plans. A growing practice, encouraged by many governments through national action plans, is the adoption of equal opportunities plans in private enterprises.

The examples on the following pages give an idea of action plans in the different member States of the Council of Europe.

Examples of action plans

Austria

The Austrian national action plan for employment includes various measures to secure and promote employment for women, for instance in the area of training for unemployed women seeking jobs, extending regional women's institutes, setting up innovative regional training establishments especially for women, greater commitment to setting up schemes for the advancement of women in the context of the amendment of the industrial relations act and the law on equality; promoting further education during waiting periods; offering organisational and staff planning guidance to companies taking on persons returning to work or taking on or re-employing people whose availability for work has been reduced by family commitments; improving information for companies about reinstatement grants; and organising information sessions for persons returning to work, courses for specific categories of returnees, training centres for returnees, etc.

The national action plan for employment also includes measures for the advancement of women and girls in the field of vocational, initial and further training, such as selective advertising to encourage women and girls to take part in European Union training programmes; raising the proportion of women under 25 receiving further education to at least 85%; taking account of equal opportunities in teaching content and in the initial and further training of teachers; special skills development courses to prepare women candidates for apprenticeships; increasing the number of apprenticeships on offer for girls in progressive, non-traditional areas; increased advertising for visits to higher engineering colleges and universities for applied sciences with a technical orientation for women; a general improvement in career guidance for girls and women; special measures in colleges, academies and universities to promote non-traditional professions; the establishment and extension of special advice centres for women entrepreneurs; more attractive design of existing advice facilities with increasing contacts with interested women; easy access to information; help with overall understanding of advice and development possibilities; and explaining the potential impact of proposed business initiatives.

Belgium

Belgium has two specific laws providing for the implementation of positive action plans. One covers the private sector, the other the public sector. Both define positive action as action to remedy *de facto* inequalities affecting women's opportunities. It may take the form of measures to correct the harmful effects on women of traditional attitudes and practices, or measures to give more women a more active role in all areas, and on all levels, of professional and working life.

Positive action plans are compulsory for public services, but voluntary in the private sector.

The legislation on the private sector (Royal Decree of 14 July 1987) states that positive action plans may be drawn up either in companies or in sectors. Only companies in difficulty wishing to secure recognition as companies in the process of reorganisation are obliged to introduce them. The procedure provides for consultation at each of the five stages in implementation of the plan (initial decision, analysis, development, execution, and monitoring and assessment). All positive action plans are tailored to the special features of the sector or company concerned.

The legislation is backed by other facilities, such as expert guidance and support for companies and sectors which call in consultants, run special training schemes or decide to carry out equality audits.

The legislation on the public sector (Royal Decree of 27 February 1990) makes equal opportunity plans compulsory. This applies at federal, regional and local level (central government ministries and other departments; community and regional ministries and other departments; national public-interest bodies, provinces, municipalities, inter-municipal bodies and CPAS [public social welfare centres]).

There are two stages in drawing up the plan: preparation of an analytical report and preparation of the plan itself. The report gives a gender breakdown of the staff situation, with reference to certain criteria. The plan indicates aims, measures envisaged, launch date, deadlines for completion of the various stages on the way to achievement of the aims, the person(s) responsible for positive action measures, and arrangements for evaluating these measures and monitoring their implementation.

A civil servant is made specifically responsible for implementing positive action. The Royal Decree of 24 August 1994 explicitly states that he/she is to be relieved of some of his/her other duties, depending on the number of staff employed in the public body concerned.

Each government department is also to have its own internal support committee (within the highest relevant advisory committee). Its tasks are to give an opinion on the draft equal opportunities plan, assess positive action and monitor its implementation.

In both the private and public sectors, practical action has focused on careers (recruitment, development - e.g. training - and departure), working conditions (including reconciliation of private and working life) and institutional awareness of the need for equality between women and men.

Bulgaria

A national action plan was elaborated in the process of implementation of the commitments undertaken by the Republic of Bulgaria at the United Nations Fourth World Conference on Women in Beijing in 1995. It specified long-term and mid-term targets, such as the initial attainment of the 30% threshold of women's participation in senior positions, which would enable them to take part in economic and political decision-making.

Finland

Giving a preferential status to a member of the under-represented sex has to be based on a plan. This requirement is to hinder arbitrary decision-making. According to the preamble of the Equal Opportunities Act, justifiable measures are those which promote women's position in working life, because (a) that is the aim of the Act and (b) women's position in working life is often disadvantaged in comparison with men.

Plans apply only to given places of work. Plans are always temporary and applicable only as long as *de facto* equality has not been achieved. The Act does not require any particular format of the plan nor does it require that plans should be approved by the authorities. The preamble states that the Equality Ombudsman can, if necessary, give assistance.

However, the question whether a certain action or certain measures can be considered as discriminatory, is to be dealt with under this section. A particular plan does not affect assessments and implications carried out under other provisions.

An action plan may cover a number of areas, for example:

- When persons are equally qualified, the employer may, when recruiting persons, e.g. to training or education, prefer those belonging to the under-represented sex in a specific field of work;
- To confirm other positive measures to women applicants;
- To encourage employees to take paternity and parental leave.

Plans may be aimed at personnel policies dealing with employers' duties. Such aim gives a more specific content to an action plan. Plans can also have a more functional approach to equality, focusing on the activities of organisation concerned. Functional plans are mainly launched in the public sector by ministries, institutions, universities, etc.

In order to achieve *de facto* equality, special measures may be required. The aim is to achieve a more balanced representation especially in education, in the workplace and in some specific fields of work. A substantial plan enables favouring persons of the under-represented gender or who are in a disadvantaged position, thus justifying means that otherwise could constitute discrimination. Special measures may be used only as long as inequality prevails.

The idea behind planning is that employers will then place their equality work on a more practical level than before. It means that there will have to be an assessment of working conditions of both sexes and implementation of special measures, as well as of relevant follow-up techniques. Planning could be done in co-operation with employee organisations. The employer carries out the final plan.

A separate equality plan is not compulsory as this can be appended to e.g., an annual plan for human resources. A plan is a flexible tool, which enables combining for instance work protection, new management solutions and equality programmes. It is a means to set concrete targets for the future, which may be achieved gradually by annual monitoring.

Planning for the promotion of gender equality is the starting point. A plan focused on equality promotion may in turn allow for other measures in favour of the under-represented sex or disadvantaged groups, for example in certain fields of work or education.

Planning may even be compulsory. This means that employers who employ a certain number of people are obliged to include an equality plan in the annual training plan or action programme for labour protection. It should be pointed out that action plans are only a part of the process, since employers are, of course, entitled to take e.g. applicants' personal qualifications and characteristics into consideration. Employers are not obliged to recruit persons who clearly do not meet the requirements of the employer.

The Equality Ombudsman does not have the right to give legal sanctions when supervising equality planning. Section 19 of the Equality Act names **advice-giving** and **counselling** as possible measures the Equality Ombudsman has when obligations are not complied with or the provisions are otherwise violated. Section 17 authorises the Equality Ombudsman to **receive information** necessary for the supervision of observance of this Act for the employer. Section 18 gives the Equality Ombudsman a right to carry out an **inspection** at a workplace if there are grounds to believe that the employer has acted contrary to this Act.

Another way to promote equality planning in Finland is to present annually a reward for the best equality plans. The Minister responsible for equality issues together with the Equality Ombudsman awards the prizes for the best equality plans. A basic requirement for a good equality plan is a thorough and careful analysis, where relevant information on the organisation's workforce and employment practices are collected and analysed in order to set concrete targets for the equality promotion measures.

Recently, such a prize was awarded to the Police Force of Finland. Its equality plan aims at increasing the share of women in the police force by 1% each year. At the managerial level the target is set at 0.5% per year.

The targets are reached by developing the recruiting process for professional training and by motivating women in career advancement. Job segregation is also addressed by evaluating the female-dominated office work. The content of the work is being developed to inspire men to apply for office work as well. Applied measures might include career planning of the office personnel and offering more courses for professional development and specialisation as well as for other vocational training.

Employers' policy to combat sexual harassment was also dealt with in the awarded equality plan.

France

A proposal for a government scheme to promote equality was submitted to the Cabinet on 23 June 1999. The proposed scheme comprises 25 different measures that take in all aspects of government policy. Three areas are identified as priorities and an ongoing partnership between the voluntary sector, both sides of industry and the public authorities will ensure the measures are effectively implemented.

The first priority area concerns equality in the workplace. The national action plan for employment (*Plan National d'Action pour l'Emploi*) provides the coordination framework. Principal objectives in this area are broader career choices for women, better conditions of access to employment as laid down in the Law against Social Exclusion, as well as better conditions for juggling family life and a career.

The second area concerns balanced access to decision-making posts in the political, economic and social spheres. The European action plan submitted to the European Ministerial Conference in April 1999 is to serve as a basis for measures taken with regard to jobs in not only politics and the public service but also the economic and social spheres.

The last of the three priority areas is concerned with establishing specific rights for women by consolidating certain established rights. Over and above equality of status for women, the aim is to reinforce the degree of women's autonomy and freedom in society by combating sexist violence and consolidating the right of women to make their own decisions with respect to their sexuality and childbearing.

Germany

The Act on the Advancement of Women obliges every Federal administration agency to implement a three-year plan for the promotion of women with compulsory aims for the elimination of female under-representation, including executive positions. The plan for the promotion of women must be updated every year and published. If the aims were not achieved, the reasons should be reported to the agency at the next level.

The success of the promotion of women greatly depends on the elaboration of such plans for the promotion of women. This prerequisite has already been fulfilled in all of the large Federal agencies. Nevertheless, women are still under-represented especially in higher management positions – as heads of directorates, departments and agencies – even though the proportion has increased a little in this sector. In the context of the planned amendment of the **Act on the Advancement of Women** by an **Equal Opportunities Act** the Federal Government intends to make the targets of these plans more binding and efficacious.

Greece

The Greek Government's action plan contains the following political priorities for the period 1999-2000:

- mainstreaming equality issues in all policies;
- strengthening the mechanisms to promote equality;
- work – employment;
- balanced participation in decision-making;
- combating violence against women;
- mass media – publicity.

Italy

The government is currently implementing policies to ensure equal opportunities for women and men. The 1999 national action plan for employment focused on stepping up gender mainstreaming policies, for example by incorporating the principle of gender analysis into consultations and, more specifically, prioritising “family-friendly” policies on working hours and services in order to encourage the reapportionment of parents' family and professional responsibilities.

Specific measures:

- a) Act No. 53 of 8 March 2000 on parental leave (“Provisions governing support for mothers and fathers, the right to health care and training and the harmonisation of working hours”) provides for financial incentives for firms awarding worker-friendly contracts that encourage employees to assume their family responsibilities (transferable part-time contracts, teleworking, flexible hours at the start and end of the working day, “time banks” (storing up hours worked), etc). It also provides for the introduction of parental leave as an individual, non-transferable right, conferring equal responsibilities on fathers and mothers vis-à-vis children. Parents may take leave for a combined total of ten months and an individual total of six months each. To encourage responsible fatherhood, it is envisaged that fathers taking at least three months' leave will be awarded a bonus of an additional month's leave. The Act lays down measures to rearrange working hours and calls for innovative forms of co-operation and mutual support, such as “time banks”, as part of a coherent policy aimed at reconciling time, working hours, responsibilities and personal interests.
- b) A government bill to set up a system of services for children under three years of age (“Standards for the development and validation of a system of services for children under three years of age and their families”) was presented to the Chamber of Deputies on 23 September 1999. A policy on very young children is fundamental to the action plan on promoting rights and opportunities for children and teenagers.

- c) The outline Act on the reform of the welfare system and on social policies is a family-friendly law providing for the annual allocation of 1 000 billion lire to help families raise and educate their children and to develop an integrated network of personal services, such as day care centres and home help and welfare services.
- d) Measures have been taken to encourage part-time work and the reorganisation and reduction of working hours. The legislative decree approved by the Council of Europe on 28 January 2000, pursuant to Council Directive 97/81/EC of 15 December 1997 concerning the framework agreement on part-time work concluded between UNICE, PEEC and the ETUC provides for incentives for firms recruiting part-time workers.
- e) Rules have been adopted on teleworking in the civil service (Section 4 of Act No. 191 of 10 June 1998, Presidential Decree No. 70 of 8 March 1999 and the national outline agreement of 21 July 1999).

Measures have been taken to strengthen equal opportunity bodies by consolidating the network of “equality advisers” (consigliere di parità) at national, regional and district level. Section 47 of Act 144 of 17 May 1999 instructs the government to define the role and duties of equality advisers and establishes a fund of 20 billion lire per year to support their activities.

Under Act No. 125/91, the judge can “oblige an employer to define a plan with a view to eliminating proven discrimination.” The provisions have an important role to play in that they bring to light cases of collective indirect discrimination in the apparently neutral conditions required for employment, which produces an adverse impact in much larger proportions for women compared to men. For example, the requirement to be in possession of a professional driving licence when participating in a selection that only foresaw aptitude tests; a certain height requirement for work for which this condition is not essential.

Luxembourg

The Law of 12 February 1999 concerning the implementation of the National Action Plan to Promote Employment 1998 contains an article on positive action in the private sector. Under the terms of this law, positive action takes the form of concrete measures that foresee special advantages to facilitate the exercise of a professional activity by the under-represented sex, or to prevent or compensate for the disadvantages encountered in a professional career. Positive action must be part of a company’s project and concern the following measures:

- implementation of a new work organisation;
- concrete measures concerning recruitment before and/or after taking on a job;
- special training measures;
- measures related to changing professions;
- promotion measures;
- actions to promote access of the under-represented sex to decision-making posts;
- measures to promote reconciliation of family and professional life.

Prior to their implementation, positive action projects must obtain the agreement of the minister with responsibility for positive action. The State’s contribution takes the form of a subsidy, which varies depending on the total cost of a company’s positive action measures.

In 1998, the Ministry for the Advancement of Women supported the positive action projects of 4 companies.

Netherlands

The Women and Technology Action Plan 1995-1998 was designed to encourage more girls and women to opt for careers in engineering and technology. Axis, a consortium of employers, government and training providers, was set up in 1998 as a national platform for science and technology in education and the workplace. The issue of women and technology is given express attention.

Portugal

On 6 March 1997, the Council of Ministers adopted a resolution containing a Global Plan for equal opportunities between women and men. This plan comprises nine general measures plus a number of sectoral measures, the aim of which is to incorporate the principle of equal opportunities for men and women into all economic, social and cultural policies. Among the sectoral measures envisaged are measures designed to promote equal opportunities in employment and labour relations. Below are details of some of the most important:

“Enterprises will be encouraged to adopt positive action measures, such as recruiting long-term unemployed women over 40 years of age, the integration of women into new spheres of employment where they are under-represented, or access for young women to practical training, by means of work placements designed to facilitate their occupational integration.”

“The setting up, under the auspices of the Commission for Equality in Work and Employment, of an Observatory to monitor equality in instruments for the collective regulation of labour, particularly with a view to identifying and preventing direct and indirect discrimination, and encouraging the introduction of positive action and of a new culture of equality in the workplace, and the promotion of awareness-raising among trade-union and employer negotiators to this effect.”

The plan also provides for the introduction of “positive action measures” as a basis for “consultation between the two sides of industry, when negotiating instruments for the collective regulation of labour”.

“Encouraging women’s participation in vocational training and improving their opportunities for obtaining qualifications and accessing new spheres of employment where they are under-represented, as well as managerial posts”.

“Promoting women’s career development, particularly through the introduction, in the regulations governing programmes financed by the European Social Fund, of preferential treatment or extra funding for initiatives which pursue these objectives.”

The Global Plan for Equal Opportunities provides for matters relating to gender and equal opportunities to be included in school curricula, as well as in basic training courses for education professionals, including trainers working in labour market training schemes.

Since the late 1970s, the Commission for Equality and Women’s Rights has been pursuing a policy of positive action in this area. In recent years, it has been working with colleges of higher education, universities and teacher training centres to get these subjects included in basic and in-service teacher training courses.

Slovakia

In 1997 the government approved a National Action Plan which consists of a thorough analysis of the situation of women in various fields of life and the solutions presented to the problems found. The Plan is evaluated annually by the government.

Among the priorities of this Plan are:

- the creation of equal opportunities for women as regards family, work and society;
- the promotion of the abolition of the economic disadvantages causing women’s poverty;
- the promotion of the development and employment possibilities for women with limited professional opportunities.

Spain

The Third Plan on Equal Opportunities for women and Men (1997-2000) has 10 action areas and almost 200 measures. The action areas are as follows: education, health, economy and employment, power and decision-making, image and mass media, environment, violence, social exclusion, women in rural areas, co-operation.

Certain areas of positive action which could be highlighted from the Plan are the concession of grants for the carrying out of activities related to the promotion and development of affirmative action in the university arena encouraging the principle of equal opportunities for women, or the Optimum Programme which, within the business framework, promotes the setting-up of different types of positive action within companies.

Switzerland

To encourage the promotion of women in the Confederation's public services, the Federal Council issued instructions on improving the representation and professional situation of female staff, which came into force on 1 January 1992. These instructions require the various departments to draw up their own detailed four-year plans for the promotion of women. Implementing them involves other priorities too, e.g. the promotion of part-time work and work sharing, basic and continued training and, lastly, childcare facilities outside the family.

3. WHO ARE THE ACTORS AND WHAT ARE THEIR TOOLS?¹

i. International organisations

The United Nations

The United Nations have a vital role in guaranteeing *human rights* at international level. The most important global covenants in relation to women and positive action are the Convention on the Elimination of All Forms of Discrimination Against Women, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. Their relation to positive action was dealt with in detail earlier in this report.

In addition to the human rights covenants, the UN also has special programmes and agencies which function in the area of gender equality. For instance, the UN organises *world conferences on women*, which approve texts such as platforms for action.² The Beijing Platform for Action was adopted at the 4th World Conference on Women in Beijing in 1995. It established a set of actions that are expected to lead to fundamental changes by the year 2000. Its implementation is primarily the responsibility of governments, but also of other institutions in the public, private and non-governmental sectors at the regional, national and international level. The platforms for action are closely monitored by various UN agencies. The UN Commission on the Status of Women (CSW) prepares recommendations and reports to the Economic and Social Committee (ECOSOC) on the promotion of women's rights and monitors, within the UN system, the implementation of the Beijing Platform for Action. The ECOSOC on the other hand oversees the system-wide co-ordination of the implementation of the Platform for Action and makes recommendations in this regard.

The *World Summit for Social Development* (held in Copenhagen in 1995) called on Governments and other social actors to eliminate all forms of discrimination, to ensure that women can participate fully in all political, economic and social activities, and to protect and promote the participation in economic and social life of vulnerable and disadvantaged groups. The Summit recommendations included actions to strengthen and expand education and health services, to ensure full and equal access to productive assets and social services, and to provide support for those who cannot support themselves. It emphasised that these issues could not be addressed by sectoral action alone, but that social goals must be integrated into general policy-making at all levels. *The Programme of Action of the International Conference on Population and Development*, which was held in Cairo in 1994, had gender equality and the empowerment of women throughout the world among its goals.

In relation to gender equality in general, the following other *UN agencies* might be mentioned: the International Labour Organisation (ILO), the UN Division for the Advancement of Women (DAW), acting as a focal point for co-ordinating gender issues in the UN system, the United Nations Development Fund for Women (UNIFEM), which promotes women's empowerment and gender equality by working primarily at the country level, the International Research and Training Institute for the Advancement of Women (INSTRAW), the United Nations Development Programme (UNDP), etc.

¹ This chapter dealing with the actors and their tools is also valid for Part III on decision-making, even if it contains more references to the labour market.

² Mexico 1975, Copenhagen 1980, Nairobi 1985 and Beijing 1995.

The Organization for Security and Co-operation in Europe

The OSCE has recently started to focus on gender issues. In 1998, a Gender Focal Point was appointed in the OSCE Secretariat, with responsibility for mainstreaming gender into the work of the Secretariat, including in the OSCE's internal policies, and for providing training on gender issues. At the Office for Democratic Institutions and Human Rights (ODIHR), the primary OSCE institution implementing projects in the field, gender work has focused not only on mainstreaming but also on the human rights of women. The aim is to work with women in key areas, to help them to attain specific skills or knowledge or to address issues faced predominantly or only by women. In the framework of the OSCE Implementation Meetings on Human Dimension Issues, a specific Supplementary Meeting on Gender Issues was held in June 1999.

Following the adoption of the Stability Pact for South-Eastern Europe in June 1999, and in order to include gender equality issues in the Stability Pact work plan, a Gender Task Force was set up. The main goals of its First Plan of Action are to promote women's political participation by establishing national and regional plans for women's capacity building, to campaign for positive action in national electoral legislation to increase women's chances to stand for election and to be elected, and to strengthen national machinery for the promotion of gender equality in South-East Europe.

The OSCE has a lot of experience in conflict prevention and resolution, particularly through its field missions, and it would be very useful to evaluate gender-sensitive policies and projects in this particular area.

The Council of Europe

As explained earlier in this report, the legal instruments of the Council of Europe (the European Convention for the Protection of Human Rights and Fundamental Freedoms and the European Social Charter) comprise an extensive list of civil and political as well as economic, social and cultural rights. The possibility of undertaking positive action is explicitly mentioned in the Additional Protocol to the European Social Charter, now incorporated into the Revised European Social Charter, which came into force on 1 July 1999.

Besides the stimulation provided by these instruments and the follow-up organised by their supervisory bodies, the activities of the Steering Committee for Equality between women and men (CDEG) for the promotion of equality between women and men have an important influence on equality policies in the 41 member States. The work of the Committee, which comprises one representative from each member State, is mainly linked to the promotion of women's human rights and genuine democracy. Its current activities, to give a few examples, aim at promoting the balanced representation of women and men in political and public life and combating violence against women, including sexual exploitation. Extensive work has been done in many member States with the help of Council of Europe experts to assist with establishing national machinery to promote equality and to advise on equal opportunities and anti-discriminatory legislation. One of the main tasks of the CDEG is to prepare draft recommendations – which are so-called “soft law” instruments – from the Committee of Ministers to member States on issues linked to equality. The Committee is currently preparing recommendations on combating trafficking in human beings for sexual exploitation as well as on the protection of women and young girls against violence.

At regular intervals, the CDEG acts as the preparatory body for European Ministerial Conferences on equality between women and men. The last Ministerial Conference was held in Istanbul in November 1997. The Ministers adopted a Declaration on equality between women

and men as a fundamental criterion of democracy, to which strategies to increase the participation of women in political and public life were appended. Such texts serve as a reference for implementing positive measures.

Through groups of specialists working under its auspices, the CDEG also prepares reports on strategies and instruments to promote equality between women and men. One of the most recent is a report on Gender mainstreaming, which contains an explanation of the concept as well as a methodology for implementing the strategy. The present report on positive action is another example of this work.

The European Union

The legislation of the European Union has had an immense effect on gender equality in the member States – even though its scope is more or less limited to working life. Community *provisions* are important with regard to the scope of legitimate positive action in the member States – as discussed earlier.

The Fourth Equal Opportunities Programme (1996-2000) was adopted to promote the integration of equal opportunities of women and men into the process of preparing, implementing and monitoring all policies, measures and activities at Community, national and local levels. The programme focuses upon six objectives, including the reconciliation of family and working life and the promotion of balanced participation of women and men in decision-making. The programme offers methodological, technical and financial support; observation and monitoring of relevant policies and conducting of studies in this field as well as a rapid dissemination of the results of the initiatives taken. An interim report is drawn up. The added value of the programme lies in the identification and pooling of information on and experience of good practices in the field of equal opportunities.

The Commission is proposing a new Community Programme on Gender Equality 2001-2005 in order to continue and strengthen gender equality policy at Community level. Mainstreaming gender equality in all Community policies and activities and developing appropriate actions are the main instrumental axes of the proposed programme, which should be built around clear assessment criteria, monitoring, benchmarking and evaluation. All Commission services will be invited to identify their activities to promote gender equality, including gender mainstreaming policies and/or concrete actions targeted at women (specific actions).

Following the adoption of the Amsterdam Treaty, it was agreed at the Luxembourg Jobs Summit in 1997 that the European Employment Strategy should be built on four main pillars: employability, entrepreneurship, adaptability and equal opportunities. Every year, a set of guidelines are adopted for each of the pillars, which set out a number of specific targets for member States to achieve in their employment policies.

The adoption of the *1999 Employment Guidelines* reinforced the approach to equal opportunities based on benchmarking and gender mainstreaming. The member States have to take gender mainstreaming into account in all policies and actions proposed under the pillars to improve employability, develop entrepreneurship and encourage the adaptability of businesses and their employees. They are also urged to provide for adequate data collection systems and procedures in order to provide country-comparable statistics and indicators.

The *2000 Employment Guidelines* contain a series of adaptations to the 1999 guidelines, with regard to the national action plans and the joint employment report 1999. As the equal opportunities pillar was substantially strengthened in 1999, only one clarification is foreseen for 2000, i.e. the recommendation that reintegration into the labour market after an absence be facilitated.

ii. The State

The State as a promoter of equality policies

The State, or the central government, has clearly a leading role – which in most democracies it alone can play in recognising the legitimacy of and legitimating, organising and implementing positive action.

Firstly, it is the responsibility of national parliaments, either on their own initiative or more probably in the majority of cases given the constitutional, social and political circumstances, in response to government proposals, to enact legislation, within the limits laid down in their constitutions or in accordance with their international undertakings, which imposes or authorises positive action. The legislation in question may establish procedural obligations or requirements in terms of outcome, or in the case of financial legislation, make money available for spending.

The tools for action are numerous as regards the labour market.

The following examples should be mentioned:

- The State can allocate special funding to projects that, for instance, improve women's position in the labour market.
- Positive measures in traditionally segregated job categories may be subsidised.
- The State can adopt measures that are particularly addressed to women entrepreneurs.
- Those employers who have made significant progress in the promotion of equality could be rewarded.

In certain countries and in certain fields (elective office and the public service), standard-setting provisions, even those having legislative status, laying down certain forms of positive action in the form of outcome-related obligations such as quotas and priorities for recruitment or appointment, probably necessitate changes to the constitution, whether spontaneously introduced or to accommodate further commitments in international instruments.

Governments are responsible not only for initiating and promulgating legislation but also for its implementation. They can also introduce a number of modest and selective financial measures, funded from the appropriations approved in the relevant financial legislation, even if no specific reference was made to the conditions governing their use or their allocation to a particular sex when they were enacted.

The task of the courts is to see that the laws are enforced. If access to them is fairly easy and they are concerned about this issue, they can make a critical contribution to advancing equal rights and equal treatment as regards access to rights. On the other hand, in a way that is both legitimate and worrying, they can pose an obstacle to any attempts to initiate positive action whose scope is not precisely laid down in legislation that is clearly constitutional. There are areas where judicial interpretation contributes to updating the law. This is very unlikely to be the case in a field such as equality between women and men, where the unconventional measures required to meet the challenge will very probably run counter to traditional forms of judicial reasoning, unless the courts receive clear guidance to the contrary in legislation.

The State can promote employment by providing job seekers with extensive information on available employment and training and by supporting clients who are looking for jobs outside the traditional gender boundaries as well as self-employment. The State may try to remove disadvantages that are related to atypical (part-time, fixed-term) employment, which is more

common among women. The status of persons in atypical employment should be harmonised with the status of those in regular work.

Official statistics should be made gender-specific so as to take both sexes into account. The differences between women and men in different areas of life would become visible and more concrete. In this way everyone, not just experts and government officials, would be able to easily monitor the development of segregation in certain sectors of education and working life.

The State as an employer

Ministries, offices, public services and state-owned companies ought to demonstrate an exemplary attitude towards the promotion of equality and positive action. This should include drafting of annual plans, carrying out the decided staff policy measures, as well as other measures that are applicable to employers.

Action by the State as an employer may trigger a learning process among the employers in the private sector. Positive signs and results from other sectors are crucial, and the awareness-raising function of the public sector should be highlighted.

In this light, obliging – or at least encouraging – the public sector to undertake positive action and to promote equality should be the role of the State.

iii. Local authorities

Even in the most decentralised countries, local authorities do not appear to have the power to lay down rules in such sensitive areas. However, they can play a useful role in establishing financial incentives and plans and projects in the form of agreements or contracts.

iv. The social partners

International Labour Organisation

The functioning of the International Labour Organisation is essentially based on a tripartite structure, where the social partners are deeply involved in the decision-making procedures of the ILO. Here, the social partners are as permanent as the other actors. The principle of tripartism influences the characteristics as well as the content of the instruments adopted in the organisation.

Council of Europe (the European Social Charter)

The European Social Charter invites a representative from the ILO to participate as an observer in the plenary sessions of the European Committee of Social Rights, as well as in the meetings of the working groups. It also invites representatives of European trade unions and employers' organisations to participate as observers in the meetings of the Governmental Committee of the European Social Charter.

The Additional Protocol to the European Social Charter providing for a system of collective complaints (1995) recognises the right of the following organisations to submit complaints alleging unsatisfactory application of the Charter:

- a. *international organisations of employers and trade unions referred to in paragraph 2 of Article 27 of the Charter;*¹
- b. *other international non-governmental organisations which have consultative status with the Council of Europe and have been put on a list established for this purpose by the Governmental Committee;*
- c. *representative national organisations of employers and trade unions within the jurisdiction of the Contracting Party against which they have lodged a complaint.*

The collective complaints procedure has already been used by certain NGOs and trade unions. The European Committee of Social Rights adopted its first decision on the merits in case No. 1/1998 (*International Commission of Jurists v. Portugal*, concerning the prohibition of work for children under fifteen years). It transmitted its report containing its decision to the Committee of Ministers on 10 September 1999. The Committee of Ministers adopted Resolution ChS (99) 4 closing the procedure on 15 December 1999. Complaints 2, 4, 5 and 6 have been declared admissible. This procedure, used by the social partners and NGOs, should considerably improve the protection of women's rights in employment.

European Union

As the social dimension of the European Union develops, the importance of the social partners increases at the European level. The role of ETUC (the European Trade Union Congress), UNICE (the Union of Industrial and Employers' Confederations of Europe) and CEEP (Centre Européen des Entreprises Publiques) ranges from consultations with the Community – even on Community legislation – to implementation of Council Directives and to European-wide collective bargaining. The autonomy of the social partners has been considerably enhanced by giving the social partners a more active and powerful role also as regards gender equality. They have already concluded framework agreements on parental leaves and part-time work. In the latest representatives' meeting of ETUC in Helsinki in June 1999, there were discussions that equal work communities will become an important competition factor in recruitment. The adoption of a new framework agreement on equality, which would aim for instance at favouring the establishment of equality plans at workplaces, was suggested.

Under the Employment Guidelines, and together with the member States of the European Union, the social partners are urged to translate their desire to promote equality of opportunity into increased employment rates for women. Attention should be paid to the imbalance in the representation of women or men in certain economic sectors and occupations, and to the improvement of female career opportunities.

For instance, social partner agreements should be accelerated and monitored with the aim of reconciling work and family life. Policies on career breaks, parental leave and part-time work, as well as flexible working arrangements are of particular importance. In order to strengthen equal opportunities, the social partners will design, implement and promote family-friendly policies. These will include affordable, accessible and high quality care services for children and other dependants, as well as parental and other leave schemes.

The European Council, meeting in Lisbon in March 2000, agreed that there will be a new open method of co-ordination at all levels, coupled with a stronger guiding and co-ordinative role of the European Council to ensure more coherent strategic direction and effective monitoring

¹ "The sub-committee [of the Governmental Committee] shall be composed of one representative each of the Contracting Parties. It shall invite no more than two international organisations of employers and no more than two international trade union organisations as it may designate to be represented as observers in a consultative capacity at its meetings." Currently, two representatives of the European Trade Union Confederation (ETUC) are invited, as well as one of the Union of Industrial and Employers' Confederation of Europe (UNICE) and one of the International Organisation of Employers (IOE).

progress. A meeting of the European Council to be held every spring will define the relevant mandates and ensure that they are followed up.

National level

At the national level, the social partners' interest in positive action varies from one country to another. This diversity is partly explained by the overall role and strength that the social partners have in each State, whether they take part in developing social affairs or not. Many trade unions seem to take greater interest in positive action than before, for instance by integrating positive action into collective agreements.

The social partners' ways of influencing at domestic level are numerous, ranging from public statements to collective agreements.

The example of Finland

The importance of the social partners has grown gradually, leading to a highly centralised three-tier collective bargaining system (federation, union and workplace). Collective agreement provisions have become increasingly expansive and detailed. In 1997, the social partners agreed upon a special gender equality package, which consisted of, inter alia, a *special pay bonus to women*. It has been dealt with already. Other measures to promote equality included provisions concerning the following topics:

- *Reconciliation of work and family life*. Fathers are encouraged to take parental as well as paternity leaves. Pay benefits that are paid during maternity leaves burden employers in female-dominated industries in particular. This, in turn, is detrimental to their possibilities to employ, thus weakening women's position in the labour market.
- *System of equality auditing*. This special project aims at supporting work communities in their equality work as a natural part of their other development work – stemming from the particular needs of each organisation. The measures that they have taken will be monitored with regard to their impacts on the functioning of the work community and on the personnel.
- *Information co-operation*. The social partners co-operate to inform and educate on issues that are related to gender equality (promotion of equality, remedying defects in gender equality, equality provisions in Community law etc).
- *Permanent Round Table*. The so-called 'Round Table' will be used on a permanent basis in order to follow the gender pay differences and to take the necessary measures to redress it.

The social partners have been very active in developing the pay system based on job evaluation. Previously a working group, whose duty was, for example, to assess the pay differences between the sexes, was established. Now, its role has been strengthened by enabling it to issue statements concerning sectional pay systems.

v. The employer

Ultimately, it is the employer who is responsible for the fulfilment of many provisions concerning equality and positive action. Legislation as well as collective agreements bind the employer, but they only rarely place a firm obligation on the employer to apply positive action. That is for the most part voluntary. However, this is not always the case, since the employer may be obliged to draw up equality plans (e.g. in Sweden and Finland).

Depending on the framework of each country and workplace, the scope and range of the applicable positive action is more or less versatile. Some actions are clearly identified as positive measures, because they are focused on promoting one sex only, treating it preferentially in order to promote and achieve equality *de facto*, while other methods are less rigid. These methods may comprise encouragement, information and vocational training, which in fact may be the most widespread form of positive action.

Each organisation needs a purpose-built programme of its own reflecting its size, special requirements and possibilities. The particular practices and measures that are taken should also reflect the particular situation in each work organisation.

4. MONITORING POSITIVE ACTION

The real impact of positive action, whatever its aims, can be gauged correctly only if the analysis is broad enough in its scope and makes use of a sufficiently varied range of indicators to be able to record instances where discrimination has simply been shifted rather than eliminated.

However, this also means that any true strategy of positive action must be comprehensive enough in itself to prevent these shifts and ensure a degree of conformity between the field of application and the field being analysed in order to gauge the effectiveness of the action being taken.

At the very least, the following **indicators** need to be taken into account:

For employment:

- the proportion of members of each gender in each sector of activity and socio-occupational category, and at each level of qualification and responsibility;
- the proportion of members of each gender working full-time and part-time (women work fewer hours, which is one of the main reasons why they earn less than men, but this is rarely a free choice and it does not necessarily help them to reconcile family and working life because of incompatible hours¹);
- the proportion of members of each gender with insecure jobs (fixed term contracts, temporary contracts, and so-called assisted contracts);
- unemployment rates for each gender by age category;
- a comparison of pay for equal qualifications and responsibilities, highlighting **disparities**;
- the impact on each gender of job creation or job cuts over a given period and/or in a particular region or industry;
- scales comparing career development and salaries between one occupation and another, related to the proportion of members of each gender in the occupations in question (it is well known that scales are more advantageous in male occupations than in female occupations and that, in mixed occupations, disparities between women and men in terms of career development and salaries are less pronounced the more women there are; the aim is to identify male careers with high esteem and female careers with low esteem and any progress that has been made as a result of the action carried out).

For education and training:

- the proportion of members of each gender in each branch of study or course of training;
- the proportion of members of each gender in each branch of study or course of training compared to the demand for training;
- a comparison of pass rates for diplomas or certificates delivered at the end of courses of education or training;
- rates of employment for holders of degrees and other qualifications.

This should not preclude **qualitative analyses** relating to the explicit or implicit presuppositions of any strategies implemented and their impact in terms both of social factors and representation.

¹ Cf. French National Council for Equality between Women and Men at Work - Working Group no.1 – Comparison of women and men's pay – Final Report, January 1996.

It is particularly evident that the dividing line between work and leisure time is not drawn in the same way for women and men, since it is still mostly women who are responsible for housework and looking after children. So much so that equal access to jobs, which are modest anyway, must be regarded not only from the point of view of the salary paid but also in terms of care facilities provided for children from birth up to 6 years of age. Systemic analyses such as these have already been conducted in Canada.

Similarly, the issue of child care facilities for women performing the most modest jobs should be the subject of investigations linked to ones designed to assess positive action, even if as a whole these facilities are simply one aspect of general social policy, with no direct relationship to positive action.

Appropriate qualitative investigations should also be carried out into:

- the consequences of protective measures which eventually become discriminatory, but whose repeal, in an unchanging economic and employment context, can increase the level of oppression;
- the consequences of apparently neutral rules which in practice are mainly aimed at women, and which may or may not promote male-female equality, the equal sharing of unemployment or under-employment and the reallocation of parental roles (“parental” leave);
- the consequences of certain strategies such as:
 - the “under-represented sex” strategy, which is necessary to prevent there being excessive numbers of women in certain occupations, with a resulting loss of status, in terms of the image of these occupations and how they are perceived, but which becomes counter-productive if it legitimises the removal of women from jobs they already occupy or an unwillingness to take them on when the labour market is depressed;
 - the pay-bonuses strategy, whose status has to be looked into more carefully to determine whether it acts as a spur to equal pay on a permanent basis, an incentive to provide more jobs for women in certain occupations where they are under-represented or long-term compensation for continuing inequalities of pay.

These analyses can also be expanded on by studying the different rates of **union membership**.

The appropriate **contexts** in which to implement the measures described above and interpret their meaning clearly fall into the following two categories:

- that of collective bargaining within companies and occupational branches and between occupations, which must serve both as a planning schedule for the elimination of discrimination and positive action and a framework for the analysis of the results of these strategies (it is in this context in particular that programmes such as the ‘plans for equality at work’ introduced in France by a law of 13 July 1981 can be implemented. These plans, which may also go by another name, can be accompanied by regular, yearly, or more or less frequent, reviews and an effort to **reappraise occupational categories** with a view to increasing equality between women and men and removing obstacles deriving from a ‘protectionist’ definition of certain jobs or categories of jobs as being for men only when there is nothing about them which should make them an exclusively male preserve);
- less directly, that of a state-sponsored system of monitoring involving both employers and employees, but independent both of the public authorities and of unions and employers’ associations and employing leading specialists to run the monitoring bodies and experts recruited from various disciplines (statisticians, sociologists, anthropologists) and backgrounds to conduct surveys or make up the teams appointed for this purpose.

III. DECISION-MAKING

1. INTRODUCTION

European democracies have been slow to integrate the idea of equality of women and men into the functioning of democracy. The right to vote and to stand for election was reserved for men, right from the beginning of the democratic tradition. Even the obvious contrast between the universal principle of equality of rights and women's exclusion from political life did not facilitate their long struggle for civil rights. When women finally obtained the right to vote, they continued to be marginalised in political and public life, the traditional liberal notion being equality of opportunity and not equality of results. The marginalisation of women is based in particular on centuries-old structural inequality between women and men, women's subordination and confinement to the private sphere.¹

However, over the last twenty years, the question of gender-balanced representation in political and public life has become a major issue on the agenda of those who work for the promotion of equality between women and men. The debate on the lack of equal representation of women and men has raised questions of justice, of legitimacy of power, of representation through participation, rule of law, respect for all human beings; in short, about the functioning of democracy and the respect of human rights. The result of discussions in national and international fora is that it is now more easily accepted than before 1980 that women participate in political and public life on an equal footing with men.

Even if it is far from being a reality in some countries, gender-balanced representation is increasingly seen as crucial for "achieving democracy, social equality and transparent and multiform administration".² It is commonly recognised that gender-balanced representation in all walks of life is a prerequisite for the development of gender equality. It is both a tool and a goal in itself. In all decision-making processes it is necessary to look at as many angles as possible, and this also includes men's and women's different experiences in life. Because, to a large extent, women and men have different living conditions and there are also divergences between the living conditions of different groups of women. Furthermore, it is now commonly admitted that in order to have an influence in decision-making, women need to reach the "critical mass" of at least 30%.³

This change has been favoured, *inter alia*, by the work of intergovernmental organisations. The CEDAW Convention (see *supra*, page 10), adopted in 1979, contains Articles 7 and 8 which concern appropriate measures to eliminate discrimination against women in political and public life. If these articles are combined with Article 4.1 on positive action, the Convention makes it possible for those who have ratified it to take positive measures in order to foster women's access to political and public life.

The Beijing Platform for Action (1995) contains a separate chapter on women in power and decision-making and the 181 member States of the United Nations which signed the Beijing Platform, have committed themselves to taking a number of measures to ensure women's equal access to and full participation in power structures and decision-making. Target-setting and positive action are among the possible measures mentioned.

¹ This introduction is mainly based on the Final Report of Activities of the Council of Europe's Group of Specialists on Equality and Democracy (Council of Europe, 1996).

² "The Netherlands. Five years after Beijing". National Implementation Report, June 1999.

³ The term "critical mass" is often understood as meaning at least 30% participation of women in a given decision-making body; a "parity threshold" is usually taken to mean 40% or more.

The question of equal representation of women and men has been an important part of the work of the Council of Europe for a long time. It was in the Council of Europe that the concept of parity democracy was put forward in the 1980s and developed during the beginning of the 1990s. More recently, the European Union bodies have done some important work on women and decision-making (see below).

It is easy to accept in theory that gender-balanced representation is good for equality and democracy, but when it comes to implementing this idea, that is another matter entirely. Positive action in decision-making seems to raise more questions than positive action in the labour market. The questions raised may also seem quite different. It is, however, a fact that in some countries, they have been used with considerable success.

This chapter on positive action in the field of decision-making will first examine the major constitutional obstacles to the use of positive action. It will then study how these questions are dealt with nationally by the political institutions (at national, regional and local levels), as well as how the different procedures can bring about changes. Finally, it will discuss examples of how to reach gender balance in appointed bodies, boards and councils.

Activities of the Council of Europe

For many years now, the Council of Europe has paid particular attention to the subject of equality and democracy. It was at the Seminar “The democratic principle of equal representation – 40 years of Council of Europe activity” (Strasbourg, 6-7 November 1989) that the concept of parity democracy was first discussed. As a follow-up to that seminar, a Group of specialists began working on a report on parity democracy, which was published at the beginning of 1995.¹ Besides giving an explanation of the concept, this report puts forward strategic guidelines aiming at enabling women to become full actors in society, both as contributors and beneficiaries, with the same rights and responsibilities as men. These strategic guidelines include the setting of parity thresholds and target figures in the various organs of the State as well as in political parties.

The Conference “Equality and Democracy: Utopia or Challenge?” (Strasbourg, February 1995) constituted the Council of Europe’s specific contribution to the preparatory process of the 4th World Conference on Women. The proceedings, published prior to the Beijing Conference, have been translated into several languages of the new member States of Central and Eastern Europe and benefited from a wide dissemination.²

The participation of women in political decision-making has often been discussed by the European Ministers responsible for equality between women and men. The theme of the first ministerial conference (Strasbourg, 4 March 1986) was: “Participation of women in the political process – Policy and strategies to achieve equality in decision-making”. One of the texts adopted by the second ministerial conference (Vienna, 4-5 July 1989) dealt with “Political strategies for the achievement of real equality of women and men”. At the fourth conference (Istanbul, 13-14 November 1997), the Ministers adopted a Declaration on equality between women and men as a fundamental criterion of democracy, together with multidisciplinary strategies aiming at the balanced representation of women and men in all walks of life, including political life.

In preparation for the fourth ministerial conference, the Council of Europe prepared a document containing statistics on the number of women holding government posts, the percentage of women in elected positions at national, regional and local level and measures designed to facilitate women’s participation in political life. This document is updated regularly. A compilation of internationally agreed texts concerning democracy and equality between women and men was also prepared.

¹ Final report of activities of the Group of Specialists on Equality and Democracy, Council of Europe publishing, ISBN 92-871-2977-0.

² Proceedings of the Conference “Equality and democracy: Utopia or challenge” (Strasbourg, 9-11 February 1995), Council of Europe publishing, ISBN 92-871-2918-5.

The following events have also taken place:

- Conference “Women in local and regional life; equal participation by women in policy-making at local and regional level” (Athens, 10-12 September 1986);
- Seminar “Participation by women in decisions concerning regional and environmental planning” (Athens, 25-27 October 1990);
- Multilateral Seminar for women’s NGOs (Strasbourg, June 1996). The action of NGOs is essential in encouraging women to become involved in politics and in community activities, to develop their leadership skills and to exercise fully their rights.
- Seminar on “Equality between women and men in the political decision-making process”, organised at the initiative of the Minister of Foreign Affairs of Finland in her capacity as President of the Committee of Ministers (Helsinki, 11 March 1997);
- several national seminars funded by the Council of Europe have been organised in the new member States, where the theme of women’s participation in political and public is very popular.

The **Parliamentary Assembly** and the **Congress of Local and Regional Authorities of Europe (CLRAE)** are active in this field and have recently adopted texts concerning women’s participation in political life.¹ The CLRAE also carried out a survey concerning women’s holding of political office at regional level and on policies adopted to promote their involvement in politics (see more details in chapter ii. “Different levels”).

Activities of the European Union

The equality provisions of the Amsterdam Treaty together with Article 6 of the Treaty on European Union define equality as a central task of the European Community. The concept of equality must be understood as including the task of the promoting equality between women and men in power and decision-making. Even before the Treaty of Amsterdam, women in power and decision-making was the subject of high political interest and commitment, research and data collection, exchange of experiences and good practices of the member States and non-governmental organisations.

Within the framework of the Third medium-term Community Action Programme on equal opportunities between women and men (1991-1995) the European Expert Network “Women in decision-making” was established. The network (1992-1996) contributed to the European process of accumulating data and information about women in decision-making and organised activities which inspired a whole range of women policy-makers, researchers and the NGOs.

A conference “Women in Power” and the first European Summit of Women in Politics were held in Athens in November 1992. The female ministers of the EU member States, together with other women in positions of power in East European countries and in European institutions adopted the “Athens Declaration”.

The Italian Presidency invited the EU Ministers for Women’s Affairs to Rome in May 1996 to participate in the Conference on Women for the Renewal of Politics and Society, which culminated in the signature of the Charter of Rome. The Charter affirms that the Treaty on the EU should guarantee the fundamental equality of status between men and women, in particular in decision-making.

A Council Resolution on the balanced participation of men and women in decision-making was adopted on 27 March 1995. The Council adopted a Recommendation on the balanced participation of women and men in the decision-making process in December 1996 (96/694/EC). In the Recommendation, the EU calls on state bodies and institutions to develop suitable measures and strategies to correct the under-representation of women in decision-making positions. A review of the impact of the Recommendation is presently under preparation in the European Commission.

¹ Recommendation 1413 (1999) of the Parliamentary Assembly on equal representation in political life. Recommendation 68 (1999) and Resolution 85 (1999) of the Congress of Local and Regional Authorities of Europe on women’s participation in political life in the regions of Europe.

The French Government organised a conference on “Women and Men in Power” in Paris on 15-19 April 1999. The Ministers adopted and signed the “Paris Declaration”, which, referring to the persisting inequalities between women and men in decision-making, calls upon the European Union and its member States to take actions and measures in order to attain a balanced representation of women and men.¹

Following a proposal by the Austrian Presidency and in the framework of the review of the implementation by the member States and the European Union institutions of the Beijing Platform for Action, the Council of the European Union welcomed the report prepared by the Finnish Presidency on indicators and benchmarking in relation to women in the decision-making process. The report proposes nine common measurement indicators to be used by member States so that regular statistics can be made available on women in power and decision-making.

The indicators are as follows:

1. The proportion of women in the single/lower houses of the national/federal parliaments of the member States and in the European Parliament.
2. The proportion of women in the regional parliaments of the member States, where appropriate.
3. The proportion of women in the local assemblies of the member States.
4. Policies to promote a balanced participation in political elections.
5. The proportion of women members of the national/federal governments and the proportion of women members of the European Commission.
6. The number of women and men senior/junior ministers in the different fields of action (portfolios/ministries) of the national/federal governments of the member States.
7. Proportion of the highest ranking women civil servants (after the Minister) of the ministries (appointed, elected or nominated) (central government) and the respective levels in the European institutions (A1 and A2).
8. The distribution of the highest ranking women civil servants in different fields of action.
9. The proportion of women members of the Supreme Courts of the member States and the proportion of women of the members of the European Court of Justice and the Court of First Instance.

¹ Information taken from a report made by the Finnish presidency of the European Union in October 1999.

2. THE POLITICAL FIELD

i. Compatibility between positive action and constitutional rules regarding free elections

With respect to the holding of elective office, most countries have taken a longstanding decision, in view of the applicable constitutional rules, and under the influence of the judicial or non-judicial authorities or bodies responsible for constitutional review, that positive action for women can take various forms (encouragement, information, awareness-raising) but cannot amount to an obligation to achieve *de facto* equality within various categories of national or local representative bodies appointed by means of elections, whatever the procedures used to achieve this result. The reasons given fell into different categories:

- the need to preserve the unity of the electorate and the various representative bodies arising from electoral procedures conducted at different levels, particularly at national level, since neither the electorate nor the representative body may be divided;¹
- freedom to vote and stand in elections.

The reluctance to allow any attempts to introduce gender quotas into legislation has been clear in most countries over the past twenty years. In France, a quota on candidate lists for the 1982 local elections was ruled unconstitutional. In Italy, quotas on candidate lists for local elections were used from 1993 to 1995 and were then ruled unconstitutional. In Portugal, a proposal to introduce a quota of a minimum of 25% of both sexes for the 1999 elections was not approved. The so-called all-women shortlists introduced in 1993 by the Labour Party in the United Kingdom were ruled to be discriminatory. In the Nordic countries, there has been clear resistance to any constitutional changes regarding equal participation.

However, there is no lack of conceivable means of circumventing the issue. The main one consists in relying on the decisions of the political parties responsible for drawing up lists, when there are lists, or nominating candidates, without which it is very difficult to stand as a candidate in an election and have a reasonable chance of winning, hoping that they will propose lists or make nominations with due respect for the principle of balanced representation, whether in its strict or approximate sense, between women and men.

It would seem that it is impossible to go any further unless there is a revolution in people's way of thinking and, more specifically, a constitutional innovation or a change in the way that courts of various kinds interpret the concept of "equality". In this respect, however much one might wish to treat the problem of reducing inequalities between the sexes as a special issue, it is impossible to ignore the repercussions that a change in the understanding of the principle of equality in this field might have in other fields. A clear distinction can and must be drawn between gender-based discrimination and discrimination on grounds of ethnic origin or nationality, if only because women constitute 50% of the population in most countries. However, it is difficult to prevent forms of reasoning which have emerged in one field from spreading to other fields. This has already occurred, and not without reason, in respect of a field which is most certainly quite different from that of appointing elected representatives, though only up to a certain point: that of access to employment.

¹ France is particularly sensitive about this issue in the light of its Republican and secular tradition as expressed in Article 1 of the French Constitution.

Perhaps the fundamental question that needs to be answered is whether the role of an elected member should be assimilated to that of any job, in which case criteria similar to those used on the labour market should prevail, or whether it should be seen as a specific occupation of a different nature, implying different legal reasoning and different policy strategies.

Examples of legal changes to promote balanced representation of women and men in political decision-making

Belgium

According to the Act of 24 May 1994, no more than two-thirds of the candidates on electoral lists in Belgium may be of the same sex. The minimum representation requirement is thus exactly the same for men and women. It applies to the Chamber of Representatives and the Senate, and also to regional, community, provincial and municipal councils, as well as elections to the European Parliament. If this requirement is not respected, the list is declared invalid. It should be noted, however, that lists comprising only women or men candidates are permissible – but are restricted to two-thirds of the number of candidates required for a full list.

The Act was fully enforced for the first time in the elections held on 13 June 1999. Overall (in the European Parliament and in the federal and regional assemblies), female representation increased by 4.8%, from 18.5% to 23.3%, between the 1995 and 1999 elections. This represents a 25% increase in the number of women elected, from 95 to 120 (out of 514). This increase between elections is far from negligible when set against the increase in female representation over a long period (since 1946).

France

The constitutional revision voted by Parliament at its congress on 28 June 1999 (Constitutional Law 99-569 of 8 July 1999) confirmed the principle of equal access by women and men to electoral office and elective positions. Article 3 of the Constitution confers on the law the responsibility of promoting this equal access, whereas Article 4 provides that political parties “shall contribute to implementation of the principle”. The Government was in favour of a rapid implementation of the constitutional revision, starting with the municipal elections planned for 2001.

Consequently, as soon as December 1999, the Government presented a bill to the National Assembly in favour of equal access by women and men to electoral office and elective positions, as well as a draft institutional Act for the overseas territories (New Caledonia, Polynesia and Wallis and Futuna). The texts were adopted on 3 May 2000.

The Government chose, on the one hand, balanced representation (50% of candidates of both sexes) and, on the other hand, not to modify the voting system, in conformity with the Prime Minister’s commitment. Therefore, the law will apply as from March 2001 in municipalities of more than 2,500 inhabitants, as from September 2001 for the senatorial elections (proportional representation) and as from 2004 for the regional and European elections.

In all these voting systems, the law provides for each list that “the difference between the number of female candidates and the number of male candidates on each list must be no more than one” and that “each group of six candidates in order of presentation on the list shall contain an equal number of candidates of each sex”.

Moreover, in placing the political parties and groups at the heart of the disposition to renew French politics, the law provides that “when for a political party or group the difference between the number of candidates of both sexes having declared their link to this party or group, at the time of the last general renewal of the National Assembly, ... exceeds 2% of the total number of candidates, the amount of the first instalment ... which is attributed to it is decreased by a percentage equal to one half of this difference added to the total number of candidates.” Therefore, according to the law, a party is not penalised if it presents 49% of women and 51% of men. On the other hand, the decrease in the first instalment of public funding will be 5% for a difference of 10%, 30% for a difference of 60% and a maximum of 50% for a difference of 100%. This mechanism of financial penalisation will avoid a threshold effect. It also guarantees the receipt of at least 50% public funding.

The law contains simple mechanisms organised according to a balance of obligatory measures and financial provisions. At the same time, it does not put into question the present electoral architecture. It will contribute to the modernisation of French politics by the arrival of a significant number of women in the next elections.

ii. Different levels

There are a wide range of institutions at all levels – international, national, regional and local.

This report shall look more specifically at those assemblies within the geographical area of the Council of Europe and the European Union.

a) **The international level**

The Inter-Parliamentary Union (IPU) is the international organisation which brings together the representatives of the parliaments of sovereign States. Each National Group designates members to attend the biannual conference and, according to the statutes, each group is invited to include at least one woman if it has women members.

The Organization for Security and Co-operation in Europe (OSCE) is a regional security organisation with 55 participating States. Its decisions are politically but not legally binding. The OSCE Parliamentary Assembly gathers over 300 parliamentarians from the participating States in an annual session.

b) **The European level**

Parliamentary Assembly of the Council of Europe

The Council of Europe's Parliamentary Assembly, a consultative assembly which meets four times a year for one week each time, is composed of 291 members and their 291 substitutes elected or appointed by the 41 national parliaments of the member States.¹ Each country has between 2 and 18 representatives depending on the size of its population. All the main national political parties should be represented. The Parliamentary Assembly is at present composed of 103 women and 479 men (21.5% women). No statutory texts exist concerning the balanced representation of women and men in the Assembly.

The Parliamentary Assembly, aware of the lack of women representatives in political institutions, adopted the following recommendation on equal representation in political life in 1999, specifically inviting its national delegations to urge their parliaments to introduce specific measures to correct the under-representation of women:

¹ Member States of the Council of Europe (March 2000): Albania, Andorra, Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Moldova, Netherlands, Norway, Poland, Portugal, Romania, Russia, San Marino, Slovakia, Slovenia, Spain, Sweden, Switzerland, "The former Yugoslav Republic of Macedonia", Turkey, Ukraine, United Kingdom.

**Recommendation 1413 (1999) of the Parliamentary Assembly
of the Council of Europe on equal representation in political life**

[...]

12. The Assembly therefore invites its national delegations to urge their parliaments to introduce specific measures to correct the under-representation of women in political life, and in particular:

- i. to set up parliamentary committees or delegations for women's rights and equal opportunities;
- ii. to institute equal representation in political parties and to make their funding conditional upon the achievement of this objective;
- iii. to adopt dispositions aiming to reconcile family and public life;
- iv. to introduce legislation to create a system of equality education, beginning in elementary schooling, so as to ensure the same chances of access to all levels of training.

[...]

European Parliament

The European Parliament meets every month for one week at a time. Its 626 members are elected every five years by direct universal suffrage in the 15 member States of the European Union¹. Women's representation has increased steadily with each election since 1984. The trend continued with the June 1999 elections, yet, at 30.2%, they still continue to be under-represented.

In 1999, a woman was elected President for the second time in the Parliament's history.

c) The national level

Parliaments

In March 2000, women occupied less than 1,700 seats out of a total of 10,000 seats in the 41 member States of the Council of Europe (16%). The percentage varies greatly from country to country, ranging from 4% in Liechtenstein and Turkey to nearly 43% in Sweden. It is obvious that gender-balanced representation is still far from reality in most of the member States.

The major issue regarding positive action in the field of equality in parliaments is, in the present circumstances, whether women are elected as speakers in parliament and as chairs of parliamentary committees, and whether it is ensured that the composition of parliamentary committees not only reflect the political composition of the parliament in question, but also respect, as far as possible, gender-balanced representation. The Group has not found any evidence of parliamentary regulations on this in the member States of the Council of Europe.

There is little knowledge about how parliaments set up their committees with regard to gender. Parliamentary committees are to a certain degree as gender segregated as all other walks of life, which means that women are mostly represented in social, cultural and educational committees, and men sit on finance, technical and research committees. A 1999 report of the Inter-Parliamentary Union² indicates that some countries have recently reported a greater diversity in the committees chaired by women, and that they now chair committees such as foreign affairs, defence and justice. Research into this subject would be most useful.

¹ Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, The Netherlands, Portugal, Spain, Sweden, United Kingdom.

² *Participation of women in political life*, Series "Reports and Documents" No. 35.

A cross-political initiative taken by the Icelandic Parliament to increase the share of women in politics is an interesting example of what parliaments can do in this field without adopting specific quota legislation (see chapter on awareness-raising).

Governments (national and federal)

Looking at governments and gender balance in decision-making, two main aspects are to be taken into account as regards the result of positive action or the promotion of positive action.

1. The proportion of women in government and the functions they perform as ministers;
2. The government's attitude towards establishing a gender balance when composing advisory and decision-making teams at the disposal of its members (private offices, experts, etc.).

At the beginning of 2000, the average proportion of women in governments of the Council of Europe member States was 15%. This average is much higher in the member States of the European Union: around 25%. However, there is no woman in the most powerful post, that of a prime minister, in any of the Council of Europe member States – even if three countries have female Heads of State (Finland, Ireland and Latvia). Seven countries have no woman ministers at all, and four have only one woman in government. The vast majority of women ministers deal with socio-cultural matters or health.

Thus, even if there seems to be constant progress in many countries, as far as gender-balanced representation in governments is concerned, this is by no means an indisputable trend in all member States. Only in eight member States are there more than 30% of women ministers (the critical mass), and only one country, Sweden, has had an equal number of women and men in government since 1994.

One can hardly speak about “positive action” when it comes to forming gender-balanced governments, as no legislation, regulations or procedures exist in this field.

It is even difficult to say whether deliberate action to reach a gender balance has been used by those who form the governments which have a higher representation of women. It would seem, however, that in the case of Denmark, France, Italy and the United Kingdom, where women's participation in government is much higher than their representation in parliament, this is clearly the result of political will, and could be seen as a deliberate action by the prime ministers in question to increase the number of women in the highest decision-making political institutions. It was also clearly a deliberate action when the first gender-balanced government was appointed in Sweden at the end of 1994. Often, such actions also include appointing women to ministerial functions that have usually been performed by men, such as foreign and internal affairs, defence, finance, trade and justice. Such appointments can be considered as strong actions in favour of the promotion of equality.

In the Nordic countries, especially Finland, Norway and Sweden, the political climate/environment/mentalities have developed in such a way that the values and the attitudes of society now expect gender-balanced parliaments and gender-balanced governments even if, in these countries, the gender segregation which prevails in the labour market often repeats itself when it comes to the distribution of ministerial posts. In Sweden, it is now clearly a part of the political environment that every government consists of 50% men and 50% women. In Norway and Finland, it is not likely to be easily accepted that less than 40% of the government consists of women. The acceptance of gender equality as an important organising principle in politics and society has somehow institutionalised the balanced representation of women and men in decision-making in these countries.

Once a gender-balanced government has been appointed, it is important that it shows its full commitment to the promotion of equality and gender-balanced representation at all levels of decision-making by making, for example, a public statement and/or by adopting a plan of action (see chapter on plans of action) which contains a special part on gender balance in decision-making. The government must ensure that those in charge of implementing a plan have at their disposal relevant information on the status of women and men in all sectors of society, acquired from gender-specific statistics, studies, gender impact analysis and scientific research.

Another important step to foster gender-balanced representation would be to ensure that public funding should only be given to those parties which present a certain gender balance on their lists. This is a much discussed issue in some member States.

d) The local level

The organisation of local government varies greatly between the member States of the Council of Europe, but it can be divided into three main tiers. The highest level – the regional tier – exists in most of the larger countries. Practically all European countries have a provincial tier – for example the Swiss cantons, the Italian provinces and the English counties – but with very different powers and institutional standing. The basic level, or municipal tier, provides direct contact between citizens and the authorities.

The main bodies at European level regrouping the representatives of local and regional authorities are the Congress of Local and Regional Authorities of Europe (CLRAE) of the Council of Europe, the Council of European Municipalities and Regions of Europe (CEMR), the Assembly of European Regions (AER) and the Committee of Regions (COR) of the European Union.

The Council of Europe's **Congress of Local and Regional Authorities of Europe (CLRAE)**, modelled on the Parliamentary Assembly (see above), is made up of elected local or regional authority representatives and officials directly responsible to them. National delegations must represent the various types of local and regional authorities and the political forces in the statutory bodies in each of the 41 member States.

The Charter of the CLRAE stipulates that:

“The membership of each member State’s delegation in the CLRAE shall be such as to ensure:

[...]

d. equitable representation of women and men on the statutory bodies of local and regional authorities in the member State.”

At present, the CLRAE is composed of 91 women and 467 men, ie. 19% women.

In 1998, the CLRAE carried out a survey into women's representation in the local and regional institutions of the member countries.¹ The survey showed that, although the rates of women's participation in political life vary greatly from one country to another, the overall proportion of female elected representatives at local and regional level remains unsatisfactory and very few steps are taken to promote women's political integration. From the replies received, it came to light that:

- individual political parties had taken steps to make up for a lack of legislation on quotas;
- the most widely used means of action were information campaigns and vocational training;

¹ *Women's participation in political life in the regions of Europe*, CPR (6) 4, Part II.

- measures to promote women's access to the labour market were few in number, despite the general recognition that such measures are of importance to women's participation in politics.

From the results of this survey, it can be seen that the presence of women tends to be higher in local than in central government, in parliaments/assemblies than in positions of responsibility or executive bodies (not least because executive bodies usually have a smaller number of seats), and in the largest or more economically advantaged governmental bodies than in the smallest or economically least developed.

The CLRAE subsequently adopted the following recommendation and resolution on women's participation in political life in the regions of Europe.

Texts adopted by the Congress of Local and Regional Authorities of Europe (CLRAE)

Recommendation 68 (1999) on women's participation in political life in the regions of Europe

The Congress [...] requests the governments of member States:

- a. to amend national legislation with a view to removing the obstacles to implementing genuine equal opportunities for men and women in political life, and to granting legal recognition to the legitimacy of anti-discriminatory measures;
- b. to introduce positive measures to facilitate women's access to public and political office, and this in liaison with regional and local authorities, in accordance with the principle of subsidiarity;
- c. to facilitate, in co-ordination with regional authorities, the introduction of measures liable to increase women's participation in regional institutions, such as:
 - alerting political parties to the possibility of fielding female candidates when administrative elections are held;
 - the launching of specific training courses for candidates, to familiarise them with political techniques, and of awareness raising campaigns to overcoming women's fear of lacking sufficient skills and motivate them to become actively engaged in political life;
 - establishing specific measures to enable candidates to reconcile family life with civil jobs and political duties;
 - support for joint activities by political parties to increase the number of women actively engaged in politics;
- d. to provide for examination of the texts of the Congress and of the interregional organisations which closely co-operate with it in this area and assessment of the questions raised therein by the relevant government institutions and by elected Assemblies, with a view to informing the Congress of their comments, conclusions and, where appropriate, measures taken to improve the situation.

Resolution 85 (1999) on women's participation in political life in the regions of Europe

The Congress [...] requests regional authorities:

- a. to undertake the appropriate measures to facilitate women's access to the political institutions of regional authorities;
- b. to launch programmes to work for and encourage women to become more involved in the political life of the regions and to assume responsibilities in their political, parliamentary and administrative institutions;
- c. to encourage organisations in civil society to launch information and training programmes aimed at facilitating women's access to political institutions in the regions;
- d. to institute an action programme based on the principle of positive discrimination, to ensure that there is balanced participation by women in the political institutions of the regions;
- e. to examine, so far as this is practicable, the report submitted to the session and the accompanying documents in regional assemblies, both within special committees and in the executive bodies;
- f. to inform the Congress about the results of these deliberations and, where appropriate, about any action that is planned or undertaken as a result of the Recommendations put forward;

6. Requests the Bureau to instruct its relevant working group to launch a major campaign at European level to promote the holding of public office by women in the regions of Europe and to involve in this Campaign particularly active organisations of regional and local authorities, such as, notably, the Assembly of European Regions (AER) and the Council of European Municipalities and Regions (CEMR).

The **Council of European Municipalities and Regions (CEMR)**, which is an international non-profit association, brings together more than 100,000 local and regional authorities from 29 countries. It has set up a Committee of Women Elected Representatives of Local and Regional Authorities to increase women's involvement in European construction and to strengthen their role in European politics. For several years now, the Committee has had an open dialogue with women elected representatives from central and eastern Europe.

The CEMR has developed information tools and organised seminars on the presence of women in political life at local level, and has conducted research on women's presence in local politics in the different member States of the European Union.¹ At its meeting in March 2000, the CEMR Executive Bureau adopted a resolution which, inter alia, encourages the European Union member States to implement adapted legislative measures in favour of gender balance in decision-making, particularly at local and regional level, and invites member national associations to ensure a balanced presence of men and women in their governing bodies. In the framework of this meeting, the women elected representatives of CEMR organised a seminar on "women and employment" which closed with the adoption of a declaration which was integrated into the CEMR position paper on employment.

iii. Different procedures

a) **Legal and statutory**

Electoral systems

Even if methods used to elect representatives differ greatly from country to country, it is possible to say that there are three broad families of electoral systems in Europe: 1) plurality-majority systems; 2) semi-proportional systems and 3) proportional representation systems.

The plurality-majority system is for instance used in the United Kingdom and in France. The "First Past the Post" system used in the UK means that contests are held in single-member districts and the winner is the candidate with the most votes, but not necessarily an absolute majority of the votes. The French system is the "Two-Round System", which takes place in two rounds, a fortnight apart. The first round is conducted in the same way as a normal "First Past the Post" election. If no candidate receives an absolute majority in the first round, then a second round of voting is conducted between the highest-polling candidates from the first round, and the winner of this round is declared elected.

Semi-proportional systems in use in Europe (e.g. in Germany and Austria) are "parallel systems" using both proportional representation lists and plurality-majority districts running side by side. Often, a part of the parliament is elected by proportional representation and another part by some type of plurality or majority method.

Proportional representation systems are widely used in Europe. Their objective is mainly to reduce the disparity between a party's share of the national votes and its share of the parliamentary seats. Political parties present lists of candidates to the voters on a national or

¹ See report on "Men and women in European municipalities", published by the Council of European Municipalities and Regions (CEMR), Paris, 1999.

regional basis, and where there are many members to be elected from each district. In some cases, voters can specify their favoured candidates within a given party list (“open” lists). But usually they can only vote for a party without influencing which party candidates are elected (“closed” lists).

Research and statistics have proved that where proportional representation systems exist, it is easier for women in practice to achieve greater representation in political bodies. According to comparative evidence, women have always had a slight advantage in countries with proportional representation.¹ During the three last decades, thanks to the effective organisation of the forces interested in women's better representation in political life, there has been a significant increase in women's representation in proportional representation systems, while only modest advances have been made in plurality-majority systems. Single-member district plurality-majority systems have consistently proven to be the worst possible systems for women. When a choice must be made between two persons, many are afraid of losing the man. It may therefore be seen as a “positive action” in favour of women to change the electoral system from a plurality-majority system to a proportional representation system, especially as it seems very unlikely that a consistent and effective policy aiming at gender-balanced representation can be pursued under an electoral system with single member constituencies.

However, as is clear from the chapter below on political parties, proportional representation systems can only be useful if the forces interested in balanced representation of women and men are organised **and active** within the party.

Why can proportional representation systems result in a higher representation of women?

First, there are higher number of seats per district, and thus the party lists present greater opportunities to nominate women. The party can expect to win several seats in each district.

Second, a party list presenting only men or only women in the first seats runs the risk of appearing old-fashioned and could have the effect of driving voters away. Besides, within a given party, equity would not be respected if there is not a fair balance of women and men. This is of course especially true where women's fractions of parties are active.

Third, when one party adopts balanced lists, other parties are likely to follow the example, especially if they wish to challenge the party already using gender quotas. This seems to be easier in countries with proportional representation systems than in those having plurality-majority systems. In fact, when there is only one candidate, it is often much more difficult to refuse the incumbent candidate/the type of candidate having traditionally been nominated and give the seat to a woman. In proportional representation systems, it is not so difficult to add a woman to the party list, and even could result in the party winning more seats.

As to whether “open (preferential)” or “closed” party lists are better for women's representation – that is whether the voters are able to influence which of the party's candidates are elected or whether the party determines the rank ordering of candidates, - the answer is probably different from country to country. It is a question of how much respect there exists for the question of equality between women and men in a country. In some countries, voters would possibly be easier to convince to actively vote for women, and in some others the party gatekeepers might actually be ready to include more women on party lists in eligible positions than the average voter would place there.

¹ *Women in Parliament: Beyond numbers*, International IDEA, Handbook Series No. 2. *Electoral systems in Europe: a gender impact assessment*, European Commission, 1999.

Examples of electoral systems¹

Greece

Parliamentary democracy re-emerged in Greece in 1975 after a seven-year period of military rule. The 1974 Constitution established a unicameral legislature of 300 members, the Chamber of Deputies. In terms of electoral arrangements, the country comprises 56 single or multi-member constituencies for 288 seats and one multi-member nationwide constituency for 12 "State Deputies". Constituencies vary in size from six one-seat constituencies to the 38-seat second constituency of the capital, Athens. In all, 39 of the 57 constituencies have between one and five seats each. There is a single round of voting in accordance with the Hagenback-Bischoff system of "reinforced" proportional representation. Voters express a preference for party lists and, within each list, for individual candidates. Parties that have nominated candidates in at least three-quarters of the country's constituencies and obtained a minimum of 3% of the vote are guaranteed one to three seats in parliament. Greek women were granted the right to vote in 1952 and the first woman Member of Parliament was elected in 1953.

The September 1996 general election resulted in the return of 19 women MPs (6% of the legislature). This gives Greece the unenviable reputation of having the lowest proportion of women in parliament in the EU. Accounting for the under-representation of women in Greek politics is not an easy task. It is exacerbated in part by the unavailability of basic data and in part by the paucity of research on the subject. Nonetheless, there are several critical factors operating to minimise the representation of women in political life, with cultural attitudes and party gate-keeping practices dominant. As of now, there are no studies indicating the effect of the electoral system on opportunities for women's political representation.

Russian Federation

The total number of deputies in the State Duma (parliament) is 450. Both party-list proportional representation (PR) and plurality-voting in a single-member district are used for choosing deputies in the Duma, but there is no adjustment of the number of single-member deputies to reflect the proportion of political party votes on the proportional representation ballot, as in other countries. The proportional representation system operates in effect as one constituency as the votes for political party or bloc are aggregated across the entire country. A minimum participation of 25% of eligible voters is required for a valid election. The candidate elected is the one who received the most votes, no matter how low a plurality, as there is no second round.

Sweden

Sweden uses a closed party list electoral system with preferential voting. Constituency seats, of which there are 310, are distributed proportionally according to the modified St-Lague method adopted in the 1950s. To be awarded a seat, a party must obtain at least 4% of the votes cast throughout the country or 12% of the votes cast in one of the 29 multi-member constituencies. There are 39 additional member seats allotted on the basis of nationwide vote. These additional seats are distributed among the parties so that the final allocation of seats in parliament corresponds as closely as possible to the proportion of votes cast for each party throughout the country. The smaller parties are the major beneficiaries of the additional seats.

The facility to cast a personal as distinct from a party vote was introduced in September 1998. Voters are given the option of indicating a preference for one of the candidates on the party list of their choice. Candidates who receive personal votes amounting to 8% or more of their party vote in the constituency are ranked above all other candidates. This innovation had only a marginal effect on the gender balance in parliament. It was a positive factor in the election of five women and of three men.

The right to vote and stand for election to parliament was granted to women in 1919 and Sweden's first woman MP was elected in 1921. The 1998 election resulted in the return of 149 women MPs (43% of the total). The proportion of women elected to the Swedish Parliament has risen since 1971 when women constituted 14% of the legislature. This impressive performance, which stands out in contrast to women's electoral fortunes in other countries, is to a large extent the result of intense efforts by women to promote women candidates during the nomination process.

¹ Source: *Women in Parliament: Beyond numbers*, International IDEA, Handbook Series No. 2. *Electoral systems in Europe: a gender impact assessment*, European Commission, 1999.

This nomination process is dominated by the political parties and women have been deliberately and consistently selected for winnable seats. In addition to the party lists in which women are given prominent positions, the electoral system is seen as encouraging women's representation through proportional representation in large multi-member constituencies which vary in size from 2 to 34 seats.

United Kingdom

The British electoral system, the single-member plurality system (SMP), involves "first past the post" contests in 659 single-seat constituencies throughout the United Kingdom. Voters within each constituency cast a single vote for one candidate from a ballot paper containing the names of all the candidates in that constituency. The candidate with the most votes in a constituency is returned to parliament.

The most recent election, held in May 1997, resulted in the return of 121 women to parliament (18.4% of the total). This was double the number of women returned at the previous election and was a distinctly a Labour phenomenon. The remarkable increase in the number of Labour women returned to parliament is a direct outcome of the selection strategy used by that party in the years preceding the election. However, while the selection strategy was vital in increasing the opportunities for Labour women to be elected to parliament, it was not the only defining factor in their success. A carefully orchestrated electoral campaign and an efficient maximisation of the party's vote assisted in returning a record number of MPs (419) and the largest government majority (179) since 1935.

b) At political parties' initiative

Political parties play a crucial role regarding the participation of women, in that they nominate candidates for elective office. There are many ways and systems to choose candidates, but research has shown that there is usually a set of characteristics which party selectors look for, and that at least until recently, and in most countries, these characteristics favour men. Among the most important criteria are the following: to have a track record in the party and visibility in the community. These criteria are more likely to favour men.

There are several ways in which political parties or their members can favour balanced representation of women and men in political decision-making. These actions can be divided into two main categories: 1) the adoption of formal or informal regulations; 2) other measures such as training activities, or making gender an issue within the party.

The measures explained below, which should be implemented within political parties with a view to reaching balanced representation of women and men, only have a meaning for those parties whose aim it is to represent or take into account the interests of the whole population.

They cannot be imposed on parties having chosen, within the limits of constitutional or other provisions which regulate the political life of the States concerned, to represent only a fraction of the population or a given sex (women's league). Generally speaking, such parties may not be considered desirable, but they may also be considered politically necessary by the members of this sex, as by the members of any other social group, under certain circumstances and in a given country.

Formal or informal quotas

Research has shown that party rules and norms will affect the ways in which a party carries out the process of nomination. Once there are clear rules and norms, women seem to be more easily able to invent strategies to work together within the political parties towards enhancing their recruitment as candidates.

Other factors which can influence political parties and increase women's chances of being recruited as candidates for political office are: 1) the existence of strong women's organisations focusing on women's issues in the country in question; 2) the existence of women's groups/organisations within the parties. These factors have often prompted political parties to adopt, informally or formally, a system to promote a balanced representation of women and men, including in some cases a system of quotas. A quota system in a political party means that women (or men) must constitute a certain number or a percentage of the members of its candidate lists for all or some elections and, in some cases, of its internal bodies.

Research on how women have organised themselves within political parties to reach this goal is limited and would be much needed. However, when looking at, for example, the historic development of women's political representation in the Nordic countries, which were the first among Council of Europe member States to achieve a large representation of women in parliament, it is obvious how crucial the empowerment role of independent women's groups within political parties has been. They have had a very important role in training women to become candidates and have been instrumental for women in the nomination process for elected office. The historical development also shows that the number of members in political parties has decreased in many countries, but female members have had an increasing share of the number of members and more influence in the internal democratic functioning of the party.

No constitutional clause or law demands a high representation of women in politics in the Nordic countries. It can be assumed that the very significant increase of women in Parliament during the last 30 years can be attributed to sustained pressure of women's movements in general as well as that of women's groups within parties. It can also be attributed to the support to equality within society and the existence of the welfare state, making it easier for women to devote some of their time to politics.

In the political parties in the Nordic countries there is a strong tradition of independent women's organisations within parties: the so-called Women's Unions. Most of these promote the election of women and aim to recruit constituents and party members. These women's organisations have also functioned as an intellectual fellowship and as a forum to formulate women's policy.

The influence these women's organisations within the parties have had when quota systems based on sex have been discussed and adopted cannot be ignored. Some researchers argue that not only the concrete quota systems, but also the symbolic importance of the gender dimension, have led to clear changes in the political culture and women's political presence in the Nordic countries and, more recently, in other countries such as the Netherlands and Germany.

It has to be noted that, in many countries in transition towards democracy, the number of women given political responsibilities following democratic elections has diminished. But the past situation cannot be taken as a reference for these countries, because until 1990 there were no democratic elections. Democratic elections have revealed the true situation of women. Positive action is therefore particularly necessary in these countries.

Party rules regarding quotas on candidate lists can take different forms and have evolved considerably during the last twenty years. One of the first political parties to introduce quotas formally, the Norwegian Labour Party, decided in 1983 that "at all elections and nominations both sexes must be represented by at least 40%"; however, this said nothing about how candidates should be placed on the lists. A year later, the Swedish Liberal Party invented a different, informal quota system, the so-called "zipper or sandwich system", alternating the sexes on the party list, every other candidate being a woman. Other Swedish parties followed this example.

Some political parties only use quota systems at local elections and/or in the internal structures of the party.

Gradually, many political parties in other member States have adopted formal quotas or informal agreements aiming at ensuring balanced representation of women and men on party lists (see examples in the box below).

A quota system within a party can only reach its objective if the process of implementation is respected. The quota must be present in the selection and nomination processes from the very beginning, and should never be discussed only at the last stage. Therefore, it is sometimes necessary to enlarge the size of committees and other bodies within parties in order to introduce women without having to push men aside.

Examples of the use of formal or informal quotas within political parties in some member States

In *Austria*, all five political parties with seats in the National Assembly are in principle in favour of encouraging women to become more involved in politics. The Social Democratic Party (SPÖ) has decided at federal level that by the year 2000 the proportion of women present at all party levels should reach 40%; the People's Party (ÖVP) wishes to promote equal rights for women in politics by introducing a minimum quota of one third of women in public office; the Green Party is demanding, for example, that grants to parties should be dependent on the quota of women in the party concerned and that, in addition, at least 50% of the persons appointed to the Green Party's electoral lists must be women. The Liberal Forum has no quota rules on women because it currently fulfils the quota anyway (5 of its 9 regional spokespersons and 4 of its 9 National Assembly members are women). However, if this relationship came to be altered, a quota rule would not be out of the question. The manifesto of the Austrian Freedom Party (FPÖ) makes no mention of a female quota.

Belgium

Elections are based on proportional representation, and the Act of 24 May 1994 sets out to "promote an equal balance between men and women on lists of candidates for elections".

This Act stipulates that "on any list, the number of candidates of the same sex may not exceed two-thirds of the total number of seats which are to be filled". Obviously, any party deciding to present a list in any of these elections must respect this Act. Although the quota applies only to the total number of seats to be filled (or the total number of candidates and substitutes on the list), and not to politically important posts, the Act has had the merit of making under-representation of women in politics an issue for all the parties, which must now make an effort to recruit more women members. Furthermore, even though its literal application would produce no significant increase in the number of women elected, it can be seen as the first stage in a process making it impossible to leave women in the background any longer. Moreover, a revision of this provision is envisaged in order to ensure better effectiveness.

In *Denmark*, the quota system has only been used by the Social Left and by the Social Democratic Party. Regulations on quotas in public elections have only been used to a very limited extent (limited to local and regional elections and to internal party bodies), and those two parties have now abolished quota systems based on gender.

In *Finland* the quota systems have only been used for internal elections in the Left Party and in the Green Party. One of the reasons for not using quotas in Finland is that the Finnish electoral system is an "open" one, meaning that the voter can express his/her preference for a particular person. Therefore quotas have less effect than when voting for a "closed" party list. To some degree that is also the case in Denmark.

In *Germany* three of the five major political parties have a 40-50% quota system in their party statutes. One party has a quorum, which prescribes one-third participation of women in all offices, seats and functions within the party.

In **Ireland**, two out of four political parties – the Social Democrats and the Peoples Alliance – have a system of quotas (40%) which is applied in elections and appointments to all party organs. Until now the quotas have not been applied to the party lists participating in elections. One political party has adopted an Equality Action Programme.

In **Liechtenstein**, one of the three political parties has a 50% quota system.

Luxembourg

Among the most important political parties, the majority have either a system of quotas, or a system of positive discrimination towards women candidates. The statutes of one party stipulate that one of the vice-presidents must be a woman.

Malta

The Malta Labour party introduced its first quota system for women in 1993, whereby 20% of all party delegates at the level of the General Conference were to be women. In January 1998, this quota was revised to ensure that, over a three-year period, women representatives at the General Conference will total a minimum of 40%. Furthermore, a 20% quota was approved to ensure a higher female representation at the National Executive level. A report, commissioned by the Malta Labour Party, to examine and make proposals as to how women can be helped in participating equally with men in all spheres of the Maltese society, was adopted by the Malta Labour Party General conference in January 1998 as government policy.

Norway is clearly the country where quota systems based on gender are most widespread, both within the party organisation and political representation. Both the Social Left and the Labour Party have used both forms of quotas. The Labour Party decided in 1983 that “at all elections and nominations both sexes must be represented by at least 40 per cent”. The Centre Party and the Christian Democrats have also used quotas.

The most important single factor to explain the relatively high participation of women in politics in Norway, is certainly the use of quotas. The use of quotas in political parties was highly controversial when first introduced in the 1970s. Today, most political parties apply quota systems when nominating candidates for election and in the composition of governing bodies at all levels.

Electoral campaigns have also proved to be useful in Norway. The government financed a new campaign run by the Centre for Gender Equality prior to the local elections in 1999.

Slovakia

At present there are only a few political parties that are willing to think about quotas, and only the Party of Social Democratic Left has a 25% quota system for women.

Sweden

According to some researchers there has been strong opposition to formalised regulations on quotas within political parties in Sweden. Gender quotas have never been constructed as a legislative requirement. Informal “sandwich” lists, which respect the principle that every second appointed person is a woman have been better accepted, without using quotas formally. However, the demand for gender-balanced lists was so strong before the parliamentary election in 1994 that the Swedish Social Democratic Party decided to formalise the principle whereby every second person on the list should be a woman. Now it is institutionalised in the party regulations.

Turkey

In 1989, one political party introduced a system whereby in the provincial and district councils and top-level administrative organs of the party, a minimum of 25% representation of either men or women would be granted. Another party adopted a 10% quota system in 1996. Yet another party is currently implementing a 20% quota system.

United Kingdom

Positive discrimination practices such as quotas amount to unlawful sex discrimination and are illegal. Use is made of targets and associated measures which seek to ensure that targets are reached.

The Labour Party: Of particular note is the commitment to achieving the equal representation of men and women and the chosen process of “pairing” to ensure half of the successful candidates in parliamentary elections will be women. Getting more women into local government is also a key objective, with only 26.5% of Labour councillors currently women. Local Labour parties are to run “tester” events for members interested in becoming candidates and to target these and other initiatives at women in particular.

The Liberal Democrat Party: The Liberal Democrats possess a federal structure comprising three “State Parties”, one each for English, Scotland and Wales.

The Party does not operate women-only short lists nor quotas but is taking positive steps to increase the number of women at all levels. Examples of practical measures are given. For the European elections, the selection process known as “zipping” is being adopted. Three major barriers to the success of many women in politics have been identified: money, confidence and culture. The Party is seeking to tackle each one: eg by making small grants to aid women seeking political office to help pay for travel expenses, childcare; increasing confidence by “work shadowing” MPs and training in skills such as speech making; making local parties more aware of equal opportunities issues and the potential skills that women have to offer.

The Conservative Party: The Conservative Party recognises that there is not enough representation among women in the party, in particular not enough Councillors, MPs and MEPs. They want to attract more women into the Party at all levels and plan to set up an advisory group, comprising women with experience of business, the professions and the Party, including former Parliamentary candidates to seek out actively, talent spot and headhunt women from all walks of life and across the country, and encourage them to put themselves forward as candidates. They have set up a Conservative Women's Network to encourage more women to participate and benefit from membership of the Party through networking with like-minded women: professional working women, those involved in the voluntary sector or considering a return to work.

In the Scottish Parliament and the Welsh Assembly, the Labour Party and the Liberal Democrat Party are committed to the principle of achieving equal representation, by using an “additional member” system. In Scotland there will be 73 constituency members and 56 additional members and in Wales 40 constituency members plus 20 additional members. At the Annual Conference of 1997, three principles were agreed for selection to these bodies: use of a panel of candidates (as in local government selection), selection by One Member One Vote, and equal representation for women and men.

Other measures and/or initiatives favouring balanced representation taken by political parties

Although formal or informal quota systems within political parties have been used with good results in some countries, they are not the only measures to reach better representation of women in political life. The example of Spain, where only the Socialist Party (PSOE) has a quota of 25% of women, shows that there has been a major increase in women's participation in political life. In the last national elections, women's representation went up by 6% in the Congress and 2% in the Senate. The reasons may be a very active and visible equality policy of the government during the last 10 years, the setting-up of plans of action and institutions (the Women's Institute) to implement them, which have made women much more visible than before. A study into what exactly has favoured women's increased participation in political parties and political life in Spain would be most interesting.

In a number of countries, gender has become an issue for political parties. This has in turn resulted in the fact that, sometimes, being a woman has become a criterion for selection in itself. Some parties have even had to search outside their ranks in order to find the women candidates

needed. This can also be considered as another type of positive action in favour of women. Having more women in their midst enables parties to deal with a wider range of subjects.

A type of positive action which can be taken by political parties is to offer training programmes specifically designed for women, aimed at teaching them campaigning skills, presentation techniques and, more generally, how to deal with the media. This is done by many parties, especially those having been the most successful in recruiting and presenting female candidates.

In some countries, it has been proved that an efficient way of ensuring better representation of women holding elected office and at the same time putting pressure on political parties to nominate women candidates, is to create a special women's list or to threaten political parties with creating such a list (see the following examples).

Other measures taken by political parties/movements to favour balanced representation of women and men in parliaments

In *Iceland*, an alliance of women's lists was formed prior to the local elections in 1982. In the parliamentary elections in 1983, it proposed lists in three constituencies. Three women from these lists were elected to the Althing, the Icelandic parliament. A direct result of these women's lists was to prompt other political parties to offer more room for women on their lists of candidates. The proportion in the Althing of women representatives has risen from 5% before the 1983 elections to the present 35% or 22 women.

The Netherlands

Searching for candidates outside the party can enhance the number of women who want to present themselves as candidates. An interesting measure to increase the number of women candidates was used by the Netherlands Labour Party prior to the parliamentary elections in 1998. The party placed an advertisement in newspapers asking women and men to send their applications. The answers from women were so numerous that the selection committee could nominate 45% of women candidates.

Russian Federation

The political movement or bloc (an all-women's list) called "Women of Russia" was created prior to the election in 1993. Thanks to this bloc, the election witnessed women's comeback in terms of legislative representation (which had fallen to 5% in 1990) and 13.5% of women were elected as members of parliament in the State Duma. In the 1995 elections, the "Women of Russia" list failed to reach the 5% threshold of the party-list vote. Its existence did, however, force other parties to nominate women higher on their lists so that the percentage of women remained around 10%. In the December 1999 parliamentary elections, the "Women of Russia" list did not put forward any candidates and women now hold 7.6% of the Duma seats.

c) Initiatives taken by women's organisations

Women's organisations have played an historic role in the promotion of the idea of equality between the sexes, notably in politics (see also item b) above: "at political parties' initiative"). The first claims for an equal political representation were tabled by women's organisations, because the other organisations did not deal with women's integration in the political decision-making process. For this reason, the positive role of these organisations was mentioned in the Beijing Platform for Action.

The possibilities for action by women's organisations today consist mainly in reaffirming the necessity to make a place for women in politics, organising courses for women and organising political platforms of women's lists during elections.

The role played by women's NGOs in States in transition must be emphasised.

Examples of initiatives taken by women's organisations in member States

Croatia

With a view to the January 2000 parliamentary elections, a women's NGO organised a five-day seminar on "Women in politics" in October 1999, the aim of which was to deepen the understanding of women's issues in political parties and politics and encourage women to become more active in politics. Four of the participants were candidates for the elections. A Croatian journalist and TV producer ran two workshops providing a place for women to exercise their media skills.

The NGO also organised fora in order to make women's issues visible and mobilise women to vote. Radio broadcasts were organised featuring candidates from four important parties. The issues discussed were the responsibility of politicians, communication with voters, women's issues, etc. Two of the male radio guests are now ministers in the new government.

France¹

Following a conference organised in Athens in 1992 by the European Network "Women in decision-making" and the European Women's Lobby, six national women's associations with access to a local network met under the theme "Elles aussi" with the objective of encouraging women to present their candidacies in the 1995 municipal elections. During the two years preceding the elections, the network organised public meetings on this subject throughout France. These meetings mobilised many women who wished to devote their efforts to municipal life, and were also widely reported in the local and regional newspapers. Political leaders were compelled to take women's requests to be candidates into account due to the widespread impact of these events uniting women from all over France.

Another example was carried out in the region of Alsace. In this region, where there is a structural under-representation of women in politics, the initiative was taken by women from the parties of the right. In 1992, women from the UDF, furious about the lack of women candidates from their party running in the regional elections, convened all the women's associations in the *département* and decided to present an electoral list of women. While other experiments with women's lists or women's political parties were a failure, this one met with relative success since it was solidly backed by an associations' network. The list obtained 6.6% of the votes cast and the *Women of Alsace* movement was created, which is not a political party but a people's movement.

Slovakia

The non-governmental organisation "Professional Women" has been involved for 8 years in the education and training of women interested in entering politics. It created the Democratic Institute of Professional Women and, with the support of foreign grants, carries out training courses for future women politicians.

Sweden

The decrease in women's representation in parliament after the 1991 elections triggered off an intense debate to create a new "women's political party" for the 1994 elections. Many new women's networks were set up all over the country and when they joined forces, these women started to campaign with the aim of "threatening" to register as a party "if the existing political parties did not take women's issues into account more seriously". This challenge, which received extremely good media coverage, was taken up by the political parties and resulted in the number of elected women topping 40% and the nomination of the first "parity" government.

¹ Information taken from a report on "Men and women in European municipalities", published by the Council of European Municipalities and Regions (CEMR), Paris, 1999.

An example of co-ordination at European level

The European Women's Lobby

The EWL is a co-ordinating body of national and European non-governmental women's organisations in the European Union, with over 2,700 member associations. The EWL systematically monitors European legislative activity and takes action when this seems necessary. The EWL's goal is to eliminate all forms of discrimination against women and to serve as a link between political decision-makers and women's organisations. It also works to promote the implementation of a European social policy and to ensure that women are involved in co-operation between the European Union and other countries. The role of the EWL is to represent the interests of its member organisations to the European institutions and to propose campaigns to them on the basis of information gathered at European level.

3. GENDER BALANCE IN APPOINTED BODIES, BOARDS AND COUNCILS¹

The number of women in elected bodies is increasing throughout Europe. However, it is not only in those bodies where important political decisions are taken, but also in boards, councils, etc, where the persons involved are appointed. In appointed bodies, women's representation is lower than in elected ones. That is why the need for positive action in the former should be specifically stressed. Various examples show that the general obligation to promote gender equality tends to be forgotten. Balanced participation in decision-making is a more concrete obligation to be implemented and monitored, and several countries have adopted legislation in this field.

In order to get all the expertise and knowledge needed in the discussion and the decision-making, it is important that both women and men have equal opportunities to take part in the decision-making process. This is extremely important in various decision-making bodies at local level. The needs and views of local inhabitants should be reflected in the decisions. For example, women often have more understanding of the needs of children and elderly people.

Gender-balanced composition in the public administration was one of the subjects of the Badeck case (C-158/97 – see pages 40 and 42 for more details). The European Court of Justice ruled that Article 2(1) and (4) of the Equal Treatment Directive does not preclude a national rule which, relating to the composition of employees' representative bodies and administrative and supervisory bodies, recommends that the legislative provisions adopted for its implementation take into account the objective that at least half the members of those bodies must be women.

i. Public committees

Besides elected bodies, a great number of nominated bodies exist within the sphere of influence of governments, such as advisory councils, boards of public authorities, commissions and committees, with appointed or delegated members. In these bodies, women have long been under-represented, and have had little means to actually have an impact on decision-making. It is commonly admitted that in order to have an influence on decision-making, women need to reach the "critical mass" of at least 30%.

The use of targets in order to achieve gender balanced representation in *appointed bodies* (e.g. public committees or boards of public authorities) is rather advanced in some countries, and one can find quite explicit provisions concerning nominations to these appointed organs.

According to the replies received to the Group's questionnaire, quotas in appointed bodies may determine the minimum percentage of each sex to be for instance 40, unless there are special reasons to the contrary (Norway, Finland). Such a reason might be the lack of women/men experts in some specific sector of work as well as a situation where the members are selected on the grounds of their position in a public authority. However, the grounds for each derogation should be clearly stated so that it can be accepted. The scope of the obligation may cover the state, the regional and the local administration. This is an advisable way of dealing with the question because:

- it does not speed up the implementation of the quota system in conditions which would make it counterproductive, given that the progress that is necessary for the respect of quotas would not have been realised in the administrative and private spheres where the members of the commissions in question are recruited;

¹ The concept of 'appointed bodies' is distinct from organs or representatives which are elected through general election.

- it puts pressure on these spheres to incite them to progress, even if this may mean that, for the composition of the commissions, representatives of the administration or of private groups which give better results may be preferred.

Examples of targets aiming at gender balance in public committees and appointed bodies

Belgium

The law of 20 July 1990 stipulated that, for each seat to be filled in a federal consultative body, the agency responsible for nominating candidates had to put forward both a male and a female candidate. As this provision did not guarantee the presence of more women, a modification was made in 1997. The principle of a double nomination was maintained, but the law now also provides for an obligation of results and specific penalties if this provision is not respected. The law therefore states that a maximum of two-thirds of the members of a consultative organ can be of the same sex. Should this not be case, it could not longer convey valid opinions. Nonetheless, a derogatory procedure is envisaged.

The Flemish Community

On 18 May 1999, the Parliament of Flanders adopted the Act on better balanced representation of men and women in administrative and management bodies of the institutions, companies, partnerships or associations of the Flemish authorities (Belgian Official Gazette of 29 June 1999). In principle, this Act lays down that no more than two-thirds of the members entitled to vote of the administrative and management bodies of the institutions, companies, partnerships or associations of the Flemish authorities may be of the same gender. This quota must be reached on the occasion of any complete or partial renewal of the composition of administrative or management bodies.

As of 1 January 2002, deviations from this stipulation will no longer be possible and the quota laid down must be met on the occasion of any renewal or replacement of the mandates. In order to realise this principle, the Act also imposes that the proposing body shall submit the candidacy of one man and one woman whenever a vacancy arises.

The application of this Act and of the Act regarding a more balanced composition of advisory bodies is supported by a database – “Pluspunt” – which essentially searches for women to fill vacancies in advisory or management bodies. “Pluspunt” sensitises, counsels and supports authorities and organisations aiming at equal representation between women and men in their advisory or management bodies, and sensitises, trains and selects interested and competent women for these advisory and management functions. “Pluspunt” started its operations in mid-1999 and included just over 200 female candidatures in late 1999.

Denmark

The Equal Status Council, which was set up in 1975, immediately took initiatives to increase the number of female members of administratively appointed bodies. These were not very successful, and in 1985 the pressure on the government was so strong that an act on the appointment of the members of public committees was adopted. The purpose of this act was to promote a gender-balanced representation in public committees appointed by a minister.

The act obliges all ministries, organisations and others to designate both a woman and a man. Then it is up to the minister to constitute the committee in a gender-balanced way.

The result is that now more than 37% of all members of bodies appointed by a minister are women. Before this initiative was taken, only 10% of the members were women.

Finland

The results of quotas in appointed bodies in Finland have been very encouraging: the quotas have raised the proportion of women tremendously, e.g. in governmental committees and municipal bodies. In *governmental committees* the proportion of women is now around 43%, having risen from 28%. In *municipal executive boards* the percentage of women has risen from 25 to 45, and in *municipal committees* from 35 to 47. In practice, all 452 municipalities have succeeded in the implementation of quotas. In *agencies* and institutions appointed by the ministries the percentage of women rose from 27 to 40. These results are based on a study carried out in 1996.

Germany

The 1991 Bodies Report of the Federal Government noted that the proportion of women in the over 1,000 bodies (committees, boards etc) within the Federal Government's sphere of influence averaged a mere 7.2% and that not a single woman was represented in more than half of these bodies. One consequence of this is the Federal Bodies Law (Article 11 of the Second Equal Rights Act), in effect since September 1994, which is aimed at equal participation of women and men in the composition of these bodies and created a statutory basis in this sector.

The Act fundamentally obliges all agencies with a right of nomination in the state, political, economic and sector to put forward double nominations, ie to nominate one woman and one man of equal suitability for the seat in the body. The appointing agency responsible for the body must work towards the aim of the Act when making its decision on the personnel suggestions. According to the Federal Bodies Law - if the agency having a right of nomination is not able to make a double nomination for factual or legal reasons - it must submit these reasons to the appointing agency, which must then examine the validity of the reasons given.

The Federal Bodies Law is not applicable to the Federal Courts, the German Bundesbank and the nomination of the members of the Federal Government by the Federal Chancellor. It is also not applicable to the memberships in bodies, if the membership rests on an electoral procedure, prescribed in a law or statute. The reason for this exception is the priority of the democratic electoral procedure

According to the latest Federal Bodies Law Report of the Federal Government published in 1998 there were only 12.7% women in such bodies. In order to improve this situation, the Federal Government intends to amend the **Federal Bodies Law** in such a way that more women are effectively appointed in practical implementation of the law.

Iceland

The Act on the Equal Status and Equal Rights of Women and Men from 1991 states that, wherever possible, an approximately equal number of women and men shall be appointed to boards, committees and councils under the auspices of the government, local government and organisations. Attention shall be called to this fact whenever appointments are sought for the boards, committees and councils in question.

Ireland

In March, 1993 the Government decided to set the objective of achieving gender balance in direct appointments to State boards. In August, 1996, 32.5% of serving ministerial/governmental nominees to State boards were women and 25.8% of total serving members were women. The position is monitored on an ongoing basis.

Nominating bodies have been asked to comply with the Government's target of a minimum representation of 40% of men and women on State boards. In many cases that level of compliance has not been achieved. Pressure is being brought to bear and appointing bodies are being told when making nominations, particularly when more than one appointment is concerned, that they should comply with the standard set by the Government.

Malta

It is declared government policy that 30% of nominations to government boards and committees are reserved for women. No legislative measures are in force.

Netherlands

The Advisory Bodies Framework Act took effect on 1 January 1997. It imposes a legal requirement to work towards equal participation by women in government advisory bodies. This has led to a substantial rise in the number of women on newly created bodies.

Norway

Since 1981, the Gender Equality Act contains an article (Article 21) which deals with publicly appointed and elected committees, boards, councils and other bodies. The main principle is that both men and women shall be represented on all official bodies, councils and committees. When a public committee is appointed, each sex shall represent 40% of the members. The provision also applies to deputy members. Exceptions may be granted only where special circumstances render the requirements evidently unreasonable. In practice, this means that it must have proved to be impossible to find any woman or man at all qualified for the committee.

Sweden

In 1987 Sweden adopted a programme in order to increase the proportion of women in *decision-making* in public administration. The programme follows a three-step approach. First, to make the shortage of women visible by presenting statistics to Parliament. These can be monitored annually. Second, concrete time-specific targets have been established in order to increase the proportion of women in public boards and committees. Finally, the Government has funded special projects and other activities of women's organisations and the social partners.

Switzerland

The order on the extra-parliamentary committees, management bodies and representatives of the Confederation came into force on 3 June 1996. It provides that each sex must have at least 30% representation on committees, with gender parity the longer-term goal. Since the order came into force, the proportion of women in the bodies concerned has grown steadily.

United Kingdom

The Government is committed to the principle of a 50:50 ratio of women and men in public appointments, and to appointment on merit using fair selection procedures, including those which recognise skills acquired through non-traditional career patterns as suitable qualifications for appointments. This commitment was made public in a document entitled: "Quangos: Opening up public appointments", published by the Cabinet Office on 29 June 1998. This document contains individual Departmental Plans for Public Appointments and Equal Opportunities 1998-2001.

The Public Appointments Unit (PAU), situated within the Cabinet Office, holds a central computerised list of candidates who have nominated themselves as interested in a public appointment. PAU also co-ordinates the Departmental Planning process and monitors the progress of departments against the specific goals and objectives which they have set for themselves.

PAU is working with the Women's Unit on a plan of action to encourage more women to apply for public appointment.

The Women's Unit has organised three pilot Women into Public Life Workshops, during which women are given an overview of the variety of public appointments available and how to get started in public life. This includes opportunities as school governors, in National Health Service Trusts or in the magistracy.

ii. Boards (semi-public and private)

Semi-public enterprises are those in which the public sector (state, region, municipality) owns more than half of the shares. In some countries, participation in boards of these enterprises is regulated in a similar way as in appointed public bodies. By contrast, the participation of women and men in boards of private enterprises regulated very little or not at all. Research

would be much needed in this area. A survey carried out by the European Commission in 1997 shows that, in 1995, only 5% of the members of boards of directors and 3% of the members of executive committees of commercial banks were women.¹

Examples from member States

Denmark

The Act on Equality Opportunity between Men and Women in the Occupation of Certain Executive Positions in the Public Administration has been effective since July 1990. The aim of the law was to secure that boards have a balanced composition of women and men. In this context, “balanced” means 40% of the under-represented sex. This goal has not been reached, as can be seen from the following figures: 1990: 24.1%; 1994: 29.2%; 1997: 26.5%.

The Danish legislation in this field actively influences the appointment of women, but statistics show that women are still a minority, especially as members of secretariats and chairpersons of the various bodies. In order to improve the situation, some ministers have refused to appoint members from organisations unless the latter nominate an equal number of women and men. Other ministers have shortened the appointment period to put pressure on the organisations.

As part of its endeavours to achieve a better gender balance in the composition of government committees and executive committees, the government has announced a white paper, leading to the amendment of the two relevant Acts.

Finland

Quotas concerning decision-making have been gradually extended to include companies of which the state or a municipality owns *the majority of shares* (semi-public enterprises). Such companies shall see to it that their boards of directors, supervisory boards (which supervise the boards of directors) or some other executive or administrative bodies comprise an equitable proportion of both women and men, unless there are special reasons to the contrary.

The Equality Ombudsman has made an interpretation that the notion of equitable share means a representation of 40-60% of both sexes. In practice, however, there are often legitimate special reasons to the contrary, since most of the members are often elected by virtue of their position/duty in the company concerned (e.g. general manager).

The rule of equal representation is applied in the elections of those representative members on which the authority decides as a shareholder in general meetings. Thus, the provision has implications for all those situations where the state or a municipality may nominate members to relevant executive or administrative bodies of companies that are owned by them at least by 50%.

The results are not so impressive as might be expected. This is partly explained by the decision-making rules of company legislation. According to a study in 1996, the share of women in the boards of *state-majority companies* had risen from 22 to 24%.

The provision does *not* oblige companies/enterprises of which the public ownership is less than 50%. However, when the number of employees is 30 or more, the employer is obliged to include an equality plan in the annual training plan or action programme for occupational safety and health. In smaller companies, the adoption of equality plans is voluntary.

Sweden

The proportion of women on the boards of government-controlled companies in 1999 was 28%. The Government’s target is an increase in female representation to at least 40% by the year 2003. The Government has, however, no possibility of directly influencing the development in this area.

¹ *Women in decision-making in finance*, European Commission, 1997.

In 1998, the proportion of female members of boards of companies listed on the stock exchange amounted to 4.5%. During the last five years, the proportion of women has been around 5%.

A number of seminars were held jointly with the business community in 1998 and 1999. They included a conference entitled “*Gender Equality - For Greater Profitability*”. As a result of this conference, a reference group has been set up to help develop methods that can expedite and assist moves towards equality between women and men in trade and industry. From the autumn of 2000, an annual conference on gender equality is to be organised with the same theme.

In the autumn of 1998, the Government gave funds to the Swedish National Board for Industrial and Technical Development (NUTEK) for a project involving the development of methods for gauging whether profitability and efficiency are affected by the degree of gender equality that a company has achieved. This project, “*Gender Equality and Profitability*”, was the subject of a report by NUTEK (R 1999:19) in the autumn of 1999.

iii. Staff councils

In enterprises and companies staff councils can also play an important role when it comes to positive action. Depending on their rights as representatives of employees to influence the decision-making process in companies, they can take part in the implementation of positive action at the company level.

To achieve and secure an active role of staff councils in the implementation of positive action, staff councils should be subject to positive action themselves. Aiming at a more effective pursuit of the needs and interests of female employees at company level, it could be useful to increase their number in staff councils.

Examples from member States

Germany

Supplements to the Employees’ Representation Act give staff councils expanded rights for participating in the promotion of women and facilitating the reconciliation of family and career, improving the representation of women in the election committee (for the election of such councils) and providing staff councils with increased decision-making authority in implementing *de facto* equal rights for women and men.

iv. Appointment of persons to high ranking/senior decision-making posts

a) The Civil Service

The issue of access to posts in the public service differs according to whether they are filled by appointment to the civil service, which may be (as is usually the case) preceded by a competitive examination or based on qualifications, and which is subject to special rules and regulations, or by open recruitment under the same conditions as any other jobs. As a rule, access to posts in the first category will pose very similar difficulties to those raised by access to elective office and, while this will probably vary from country to country, in some cases, such as France, the problem will be an acute one. The notion of equality of access to public posts – or more generally to public services, since users are also included – which in France dates back to the Revolution, extends both to elective office and to other public service posts.

It will be more difficult in this area than in others to reduce the role of the individual assessment of merit according to traditional criteria, so as to give a weighting to specific characteristics, such as sex, with a view to achieving greater female participation in a particular occupation or alternatively to containing the level of participation to ensure that an occupation's status is not diminished by virtue of the fact that it is confined largely to women. The very approach that gave women access to public service posts from which they were once barred now threatens to impede efforts to open them up still further or prevent them from becoming dominated by women. So far, arguments based on the general interest have failed to convince those concerned, possibly for lack of opportunity.

Examples from member States

Ireland

Recruitment to the Civil Service is by open, public competition and there is no discrimination between men and women. Advertisements and circulars announcing external and internal competitions indicate clearly that the Civil Service is committed to a policy of equality opportunity. Members of interview boards convened by the Civil Service Commission are provided with written guidelines stating the policy in relation to the conducting of interviews and, as far as possible, interview boards include women and men.

Up to 1994, a three day training programme was offered to women in management grades by the Centre for Management and Organisation Development. Participants on this programme had the option of becoming part of a Women Manager's Network on completion of the course. In 1995 it was decided to discontinue the standard training programme and to expand the activities of the Network to encompass training events, presentations by expert speakers and initiatives to promote equality throughout the Civil Service. Membership of the Network was opened to all interested women managers and there are currently over 200 members.

Norway

Women, Quality and Competence in the Government Sector in Norway, 1997-2001, is a project aiming to increase the number of women in top and middle management jobs in the government sector from 22% in 1997 to 30% by the end of 2001. Each ministry, and its agencies, have committed themselves to reach this aim. In 1998 the Ministry of Labour and Government Administration gave the Centre for Gender Equality the task of building a central database consisting of names of competent women, where one can search for leadership candidates and specialists. The database was opened in June 1999.

A Mentoring Programme for women in middle management jobs aspiring for higher positions in the government sector started in April 1999, and is operated by the Directorate of Public Management.

Sweden

The Government is actively working to achieve an equal distribution between male and female managers within the public sector and is attempting to stimulate the development in this field within the private sector as well.

One target is that, during the present Government's term of office, at least half of the positions as agency managers appointed by it within the public administration, should be awarded to women. The governmental agencies have been encouraged to establish corresponding targets with regard to the distribution of women and men at management level.

United Kingdom

The Civil Service has a long standing commitment to equality of opportunity. Civil Service equal opportunities policy provides that all eligible people must have equality of opportunity for employment and advancement on the basis of their suitability for the work. There must be no unfair discrimination on the basis of age, disability, gender, marital status, sexual orientation, race, colour, nationality, ethnic or national origin, or (in Northern Ireland) religious belief or political opinion.

All Departments and Agencies are required to devise and implement their own equal opportunities action plans to suit their needs, based on the Civil Service's Programmes for Action, one of which concerns women.

1984 saw the first Programme for Action to achieve equality of opportunity for women and since then the proportion of women has increased at nearly every level.

A Senior Civil Service Group has set up a working party to improve the under-representation of women in the 3,000 most senior posts across the whole Civil Service (where currently some 16% are women – only 6% in 1984).

The example of the European Commission

The European Commission has reaffirmed its commitments to making senior appointments of officials on the basis of quality as the premium consideration, and to improving the proportion of women appointed to senior posts.

It has decided to take positive action to improve the career prospects of women civil servants by giving them preference when there are male and female candidates of equal merit.

It should be noted that 40% of the 120 positions held in the cabinets of the 20 European Commissioners are held by women. The Commission members complied with the President's request to show that equal opportunities for women and men were taken seriously.

b) Magistrature/judiciary

The number of women judges is very high in a number of Council of Europe member States; it could even be considered too high in some sectors of certain judicial bodies (for example children's judges). However, the presence of women is less visible when it comes to high-level posts in the judiciary, for instance in the Supreme Courts. The problems raised by positive action in favour of an equal representation of women and men at all levels of the judiciary are similar to those explained above regarding access to elective office and the civil service, in that posts are filled by election or by appointment by the government, with or without competitive examination. The fact that, in all democratic countries, the appointment and promotion of judges benefit from special guarantees (irremovability, co-option or similar procedures) makes it even more necessary than in the preceding cases to use statutory – or even constitutional – provisions to ensure

- the pursuit and attainment of balanced representation on the one hand, and an independent judicial system on the other;
- an increase in the proportion of women in Supreme Courts or superior judicial bodies, while at the same time respecting the guarantees that the present holders of posts or mandates benefit from.

There are no easy solutions to this. It should not be forgotten that such solutions are to a large extent in the hands of the judges themselves and depend on their level of awareness regarding gender issues. It is therefore very likely that balanced representation in decision-making in the judiciary can only be achieved after a transition period, which should if possible be programmed, or perhaps, as it would be advisable to speed things up, in the framework of more career opportunities at the summit of the judicial entities or the institutional pyramids.

Examples at European level

An interesting example of political will to improve the representation of women in high-level positions in the judiciary was given by the **Council of Europe**. The new permanent **European Court of Human Rights** was inaugurated on 3 November 1998 in Strasbourg to replace the former two-tier, part-time system. This Court is the only international court in the world where an individual can file a complaint against a state for a violation of human rights. The Court has 41 judges, ie. one judge elected from each member State of the Council of Europe. During the procedure for the election of judges, and with a view to achieving a more balanced representation of women and men in the new Court, the Committee of Ministers invited governments to foster a balanced representation when drawing up national lists of candidates to be put forward for election and to ensure that the qualifications and experience of all candidates allowed their candidatures to be taken into consideration on an equal footing. Many governments responded positively.

The elections to the new Court resulted in the appointment of 8 women judges. During the lifetime of the old Court 1959-1998, there were only 3 women judges, and never more than 2 at a time.

It should be noted that for the first time in the history of the **European Court of Justice** in Luxembourg, a woman judge was appointed in October 1999.

c) Leading management within enterprises

Assignment of women to jobs with high-level decision-making responsibilities is of crucial importance in order to achieve a more balanced representation of men and women at all levels of the workforce. However, career paths of women seem to come to an end sooner than they do for men. Even if their qualifications are equivalent it appears that more women than men obtain their first placement in jobs which do not guarantee very good promotion opportunities. Women encounter great resistance in entering male-dominated sectors and in breaking the so-called '*glass ceiling*'. This is particularly true in decision-making in the financial sector, and women are extremely rare in the top positions of commercial banks for example, but also in national and European financial institutions.

Access to senior decision-making posts seems to be difficult even in sectors where women are highly concentrated, such as in education and social affairs. Diversification of career choices is particularly crucial in areas where new technologies are introduced and developed on a large scale. There, the occupational segregation and other rigidities of working life might be overcome.

Examples from member States

Sweden

In 1993, the government set up a commission to analyse the reasons for the low number of women in top management positions in the private sector. One of the proposals made by the commission was to form a "leadership academy" with the task of furthering knowledge, public debate and active work to increase the number of women managers in the private sector. The government decided to provide initial financial support to the Business Leadership Academy, which was established in 1995. An advisory scientific council is linked to the board of the Academy.

d) Associations

The basic principle underlying associations is the freedom of citizens to choose a particular social purpose and form of organisation. Overly rigid rules would restrict members' freedom and make it impossible in future to set up associations that are, for example, specifically for women or in defence of fatherhood. However, in many countries the access of associations to certain advantages (fiscal measures or public grants) is dependent on their compliance with certain statutory obligations. There is no reason why one such obligation, where appropriate, should not be to balance the numbers of men and women on the managing bodies.

IV. AWARENESS-RAISING

When discussing awareness-raising, distinction must be made between: 1) positive awareness-raising action, aimed at educating the public opinion about equality between women and men as an issue of democracy and human rights and 2) activities to raise awareness of positive action.

Positive awareness-raising action is essential in order to bring about a lasting change in mentality. Such awareness-raising action can be undertaken through school curricula or through a lifelong learning process, in-service training. It may be necessary to set up specific awareness-raising plans and programmes to be used in the education systems, perhaps integrated into general human rights education.

One of the actions which would seem to be of extreme importance is to “educate the educators”, making them aware of the integration of the perspective of gender in all areas, whether it be in public administration, private companies, the educational arena or the family.

The issue of awareness-raising of positive action, which should be a component of any positive action strategy worthy of the name, must naturally take account of the range of target groups:

- the public
- political, administrative and economic decision-makers
- the work community
- opinion leaders (the press and “thinkers”).

Interesting examples of this may be found in the new member States of the Council of Europe, where seminars and workshops are a useful way to put on the agenda issues related to positive action.

The aim of any action aiming at raising awareness of positive action is to publicise and legitimise the standard-setting, financial and other decisions that have been taken.

In addition, consideration must be given to what changes are desirable in female and male images and the distribution of male and female roles, and, where appropriate, to developing an educational approach to getting across what needs to be understood.

However, in certain cases standard-setting and other initiatives might be preceded by a discussion on:

- the various possible conceptions of the notion of equality (equal rights, access to rights, opportunities, situations);
- merit and characteristics, the instruments of measurement;
- the “fair” apportionment of responsibilities in society, particularly between the sexes.

Activities to raise awareness of positive action are not necessarily incompatible with positive awareness-raising action. While any proposals likely to be regarded as threatening the freedom of the press have to be treated with caution, efforts must be made to ensure that the various sections of the media undertake, on ethical grounds, not to purvey, either directly in their columns or in their

advertising, messages likely to discredit positive action strategies or the social changes that they are designed to achieve or that underpin them.

Examples from member States

In *Bulgaria*, seminars have been organised by several women's fora where the main item on the agenda has been the implementation of a quota system in the process of assignment of political functions.

Finland

A *Parliamentarian Council for Equality* has an advisory status in the state administration. Its tasks are to promote equality; to work with authorities, labour market organisations and other collective bodies; to follow and to promote the implementation of equality in societal planning; to make proposals and take initiatives in developing legislation and information activities and to promote women's studies and equality research.

For these purposes, the Council for Equality contemplates questions of equality policies, and for instance before parliamentary and municipal elections gives information concerning equality issues.

One of the obligations of *the Equality Ombudsman*, besides the supervision of the Equality Act, is to follow equality issues in general, and for this purpose, to give advice and counselling, which also may have an awareness-raising function.

Work between equality authorities and *labour market organisations* is very close. Common projects have concerned eg issues of family, of equal pay etc.

Germany

One example of awareness-raising initiatives in the employment sector is *Total E-Quality*, an initiative of trade and industry. It dates back to a conference of the network "Positive Action" organised by the European Commission in May 1994 in Como (Italy). Co-founders of Total E-Quality were staff of several companies and the social partners (Deutscher Gewerkschaftsbund - German Trade Union Federation, Bundesvereinigung der Arbeitgeberverbände - Confederation of German Employer Associations). Two Federal Ministries, the Ministry for Education and Science, Research and Technology and the Ministry for Family Affairs, Senior Citizens, Women and Youth are involved as well as the Institute for Employment Research of the Federal Employment Agency and the Bildungswerk der Hessischen Wirtschaft e.V.

The Total E-Quality Deutschland e.V. Association gives an award to enterprises to acknowledge a personnel management that is guided by the equal opportunities principle. This association promotes the talents, skills and special qualities of women in the corporate setting. These qualities, first of all, must be identified and made transparent. Furthermore, the existing potential of female staff must be developed and women offered a career perspective. However, it also implies that women be given adequate work according to their skills and qualifications and that they are allowed to participate on every corporate level. And last but not least women must receive adequate pay and professional acknowledgement. Prerequisites for all this are a corporate culture for equal opportunities and measures for implementation. This frequently warrants a shift of paradigms in personnel management. Total E-Quality Deutschland e.V. endeavours to publicise, promote and further these objectives. As a visible symbol of activities already implemented, the TOTAL E-QUALITY award has been developed. For the first time in January 1997 enterprises received this award.

Greece

On the initiative of the General Secretariat for Equality, spots and interviews have been shown on television for the promotion of women in posts of responsibility. Publications and special video spots were prepared for the municipal and regional elections of October 1998, to promote the role of women in decision-making, especially at local government level.

Iceland

In June 1998, the Icelandic Parliament (Althingi) adopted a resolution to charge the Government with appointing a committee of representatives of the political parties, the Office for Gender Equality and the Women's Rights Association of Iceland to organise cross-political measures to improve the share of women in politics.

The Minister of Social Affairs appointed a committee that began operating in October 1998. The committee has a budget at its disposal to organise projects in order to foster the participation of women in politics, raise awareness and provoke thought about increasing women's share in politics. Projects include newspaper and television campaigns, consultative meetings with the women's groups in political parties, open meetings in all election districts with women politicians and other interested people about an increased share for women in politics.

The share of women in the Icelandic Parliament was 25% after the 1995 elections and increased to 35% in the 1999 elections.

Luxembourg

A brochure published by the Ministry for the Advancement of Women entitled "Women and men: the human potential of a company" has been distributed to a large number of companies. It presents examples of good practice in the field of positive action on the labour market and invites companies to submit a project with a view to receiving funding.

Portugal

At the initiative of 3 women members of the European Parliament, the Parity Parliament met in the Assembly of the Republic of Portugal on 21 and 22 January 1994. 115 past or present women parliamentarians invited the same number of their male counterparts to meet with them in Parliament. The main aim was to discuss the situation of women in Portugal, citizenship and parity democracy. (Out of the 230 members of the Portuguese Parliament, only 21 were women).

The Parity Parliament had a remarkable impact on the press, but above all on incorporating the theme in political discussions. The notions of "parity" and "parity democracy" were included in the vocabulary of journalists and politicians, even if in a limited and not always clear way. It was also noted that the manifestation of these preoccupations by a political party or association created a copycat or snowball effect, which led to other specific actions.

It should be noted that, following the 1999 elections, 45 women are now members of Parliament (19.5%).

Slovakia

A project "Slovak women on the move" was initiated with the support of UNDP, in order to inform NGO members and women in general about the goals of positive action.

Sweden

The government gives information on the possibility of applying for funds for projects aiming at increasing women's participation in decision-making.

The Equal Opportunities Ombudsman provides the public with information on the provisions of the Equal Opportunities Act.

Switzerland

Women's organisations, as well as committees and bodies working for the promotion of equality, carry out awareness-raising work at the local and regional levels. At national level, the Federal Commission for Women's Issues provides information to political parties, the media and electors. It organises special actions with a view to elections and continues its overall information campaign on different themes relating to equality between women and men.

United Kingdom

The Women's National Commission (WNC – the official, independent advisory body which gives the views of women to the government) and the Equal Opportunities Commission (EOC) have drawn up a National Agenda for Action, in consultation with and endorsed by organisations representing millions of women throughout the UK. The Agenda highlights the essential issues that must be addressed by government and decision makers in other organisations including local government, political parties, business and the voluntary sector to achieve equality.

Opportunity 2000 is a business led campaign to increase the quality and quantity of women's employment opportunities in private and public sector organisations. Launched in October 1991 and self-financing, the campaign is underpinned by work carried out by a group of top influential business leaders who believe that organisations which fail to fully utilise the nation's female resource are compromising competitive performance. Employers are asked to make a public statement of their ambitions and goals for improving women's representation at all levels in the workplace and demonstrate clearly how they are going to be achieved. Employers monitor progress towards their goals each year. Opportunity 2000 also carries out an independent annual progress review within its membership.

Example of the European Commission

Coming up to the 1999 elections, efforts were made at a number of levels to promote the balance of women and men in the European Parliament. Based on the experience of the successful 1994 information campaign "Vote for a balance in the European Parliament", the Commission prepared a brochure for mass distribution during the 1999 election campaigns as well as a "campaign-kit" distributed free of charge to all interested bodies.

V. FUTURE-ORIENTED INSTRUMENTS, CONCLUSIONS AND RECOMMENDATIONS

The implementation of positive action largely depends on the acceptance of the addressees. Especially in the private sector, positive action can only be successful if firms are convinced of the usefulness and added value of such measures. Besides awareness-raising techniques, incentives should be discussed as new and future-oriented methods.

One form of incentive will link the awarding of public orders and contracts to positive action programmes (see the examples of Austria and Germany).

Such action has its pros and cons. On the one hand, incentives could encourage private employers more than strict obligations to use positive action. On the other hand, the range of such incentives is very restricted, because public orders are often limited to only a few areas of the private sector (e.g. construction engineering, procurement, service).

The way in which the notion of positive action is finding its place in positive law at national and international level is somewhat unsatisfactory. This is true in a number of respects:

- positive action is practically only ever described as **acceptable** or **desirable**, within certain limits, and never as an **obligatory** measure;
- its **aims** are often couched in extremely vague terms such as “special” or “specific” measures, or, a little more precisely, it is said to be “designed to offset the **detrimental effects on women**” of various social factors or ways of behaving, or “designed to **encourage the participation of women**” or “the achievement of **equal opportunities**¹, **de facto equal rights**², or **de facto equality**³ between women and men”, etc.

The result of most of the applicable rules is that the relevant authorities are:

- either **recognised as being entitled to adopt** measures of this type **temporarily, without this being regarded as an act of discrimination**⁴;
- or **invited** to work towards this goal⁵.

No national or international legal instrument expressly states that the relevant authorities are under any **obligation** to adopt such measures.

Positive action is often seen as a means to combat hidden discrimination. The requirement that there shall be no discrimination against women has gradually been making headway. This implies that the under-representation of one sex requires that an employer has to prove the justification of such a fact.

¹ France (Employment Code), Spain (Constitution).

² Germany (Basic Law).

³ Belgium (Royal Decree), Denmark (Equal Treatment Act), Finland (Act on Equality between Women and Men), Iceland (Act on the Equal Status and Equal Rights of Women and Men).

⁴ United Nations Convention on the Elimination of All Forms of Discrimination against Women, 1979 (Article 4). Treaty of Amsterdam (Art.141 – formerly 119), Iceland (Act on the Equal Status and Equal Rights of Women and Men), Sweden (Equal Opportunities Act).

⁵ Council of Europe: Recommendation R (85) 2 of the Committee of Ministers. EEC: Council recommendation of 13 December 1984 on the promotion of positive action for women (84/635/EEC).

So much so that EC Directive 97/80 of 15 December 1997 on the burden of proof in cases of discrimination based on sex states that, in cases brought before a court or other competent authority by persons who consider themselves wronged because the principle of equal treatment has not been applied to them, facts must be established from which it may be presumed that there has been direct or indirect discrimination and it shall be for the respondent to prove that there has been no breach of this principle. This has made it necessary, albeit implicitly, to consider what proportion of persons of one gender are affected by a single recruitment condition or procedure or a whole series thereof,¹ which means that equality of opportunity is no longer a question of goodwill, but an obligation that must be achieved by certain means. How? By using positive action.

It is obvious that the effective fulfilment of gender equality requires a firm commitment of the States, going beyond the “**voluntary**” nature of positive action.

Probably what should be attempted, at least at international level and for example within the Council of Europe, is a more imperative form of wording which might read more or less as follows:

“The States parties agree, with a view to expediting the establishment of *de facto* equality between men and women, to adopt positive measures aimed at offsetting handicaps for one of the sexes resulting from the attitudes or behaviour which have caused him/her to be under-represented in terms of qualifications, work or responsibilities”.

Or better still:

“The member States agree to adopt the positive measures necessary to allow, within the time limits consistent with their economic and social development, an equal representation of both sexes in all qualifications, occupations and responsibilities”.

Moreover this kind of approach seems vital if we are to overcome the many existing constitutional obstacles in the member States, because this is the only way of forcing people to discuss any contradictions between constitutional rules and international commitments.

¹ See M.T. Lanquetin – Discrimination based on sex – Comments on the EC Directive of 15 December 1997 on the burden of proof in cases of discrimination based on sex – Social Law 7/8 July 1998.

RECOMMENDATIONS

Recommendations 1 to 5 propose an extension of the range of positive action. Recommendations 1 and 6 deal with implementation.

1. Stretching the reach of positive action beyond the public service

Most of the equal opportunity legislation with positive action provisions applies only to the public service. In Germany for example, plans for the promotion of women and quota regulations are created for the public service at the Federal and the Länder levels. It would be most useful to look into the possibilities of extending positive action to the private sector. The concept of bargaining in the shadow of law could be useful to implement positive action. The aim of this concept is to initiate negotiations and reach agreements on positive action at various levels of the private sector (eg. collective agreements or shop agreements). In this process the State as an actor sets goals and standards for the outcome and demonstrates the conviction to implement legal provisions if negotiations fail or agreements are insufficient.

2. Positive action outside standard forms of employment

Equality legislation has a limited impact on how standard and non-standard forms of employment are distributed between women and men (permanent full-time employment, part-time, precarious, flexible, badly protected employment). It is usually designed by reference to standard employment, and its implementation depends on traditional industrial relation structures (Women and Structural Change – New Perspectives, OECD, 1994, p. 32). In the context of globalisation and deregulation with an increasing number of non-standard and atypical forms of employment, another recommendation is to look for possibilities of positive action that enable women to avoid becoming confined in standard forms of employment and even protect them from being directed towards such employment.

3. Positive action for men

The positive action approach has a strong focus on women. There are also areas of professional or non-professional activity where men are under-represented, not the least in the area of domestic activities. It would be useful to discuss effective positive action for men to increase their participation in such areas (e.g. parental leave, which is not longer neutral but designed preferentially for men).

4. Positive action in sectors dominated by one sex

The segregation in the labour market should be one area for positive action. For instance, how to develop lifelong learning and other methods to tackle this problem. It would be useful to develop positive action for both women- and men-dominated sectors/branches.

5. Positive action and new technology

New technology has changed the labour market rapidly. In basic education, but also in vocational training and lifelong learning, activities should be developed so that the needs of girls and women are taken into account.

6. Consultative bodies for the implementation of positive action

The implementation of positive action is a crucial point. This recommendation is to create independent consultative commissioners/committees with a view to settling disputes, and even to initiate, implement and monitor positive action.

APPENDIX I

TERMS OF REFERENCE OF THE STEERING COMMITTEE FOR EQUALITY BETWEEN WOMEN AND MEN (CDEG)

Specific terms of reference

1. Name of committee: STEERING COMMITTEE FOR EQUALITY BETWEEN WOMEN AND MEN (CDEG)
2. Type of committee: Steering committee
3. Source of terms of reference: Committee of Ministers
4. Terms of reference:

Having regard to the major lines of intergovernmental action set out in the Declaration on the future role of the Council of Europe and Resolution (89) 40, adopted by the Committee of Ministers on 5 May 1989, and within the framework of the annual Intergovernmental Programme of Activities:

- i. to examine the situation as regards equality between women and men in European society and consider its progress;
- ii. to promote European co-operation between member States with a view to achieving real equality between women and men as a sine qua non of genuine democracy and to stimulate actions at both national and Council of Europe level, having regard to activities undertaken within other international fora, in particular the United Nations Commission on the Status of Women;
- iii. to this effect, to establish analyses, studies and evaluations, to confront national policies and pool experiences, to work out concerted policy strategies, measures and tools for implementing equality and, as necessary, to prepare appropriate legal and other instruments;
- iv. to prepare the European Ministerial Conferences on equality between women and men and ensure the follow-up thereto, having regard to the relevant decisions of the Committee of Ministers;
- v. to co-operate with other steering and ad hoc committees in the implementation of various projects and encourage them to put into practice the strategy of gender mainstreaming with a view, in particular, to improving and developing their activities so as to contribute to the implementation of the objectives coming under ii. above, for which the CDEG has principal responsibility;
- vi. to comment on the annual reports of the Secretary General on the implementation of the equality objective within the Secretariat and activities of the Council of Europe

5. Membership of the committee:

- a. The governments of all member States are entitled to appoint members with the following desirable qualifications: persons with high-level responsibility for policies in favour of equality between women and men, or other highly qualified specialists.

The Council of Europe's budget bears travelling and subsistence expenses for one expert per member State (two in the case of the State whose expert has been elected Chairperson).

- b. The [Parliamentary Assembly](#) may be represented at the meetings of the Steering Committee.
- c. The [Congress of Local and Regional Authorities of Europe](#) may be represented at the meetings of the steering committee.
- d. The [European Commission](#) may send representatives, without the right to vote or defrayal of expenses, to meetings of the Committee.
- e. The following states having observer status with the Council of Europe may send a representative without the right to vote or to refund of expenses to meetings of the committee: [Canada](#), [Japan](#), [United States of America](#).
- f. The following States or organisations may send representatives, without the right to vote or defrayal of expenses, to meetings of the Committee:

[Holy See](#)

[Belarus](#)

[UNO](#): the appropriate organs and specialised institutions,

[OECD](#)

[NGO Grouping for "Equality"](#), with consultative status at the Council of Europe

[Office for Democratic Institutions and Human Rights \(ODIHR-OSCE\)](#)

the Standing Committee of women elected representatives of local and regional authorities of the CEMR

6. Working structures and methods:

Within the framework of its terms of reference, the CDEG shall have the possibility to have whatever contacts or consultations with professional bodies that it deems necessary for the implementation of its terms of reference.

7. Duration:

These terms of reference shall be reviewed before 31 December 2000.

APPENDIX II

COMPOSITION OF THE EG-S-PA

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APPENDIX III

TERMS OF REFERENCE OF THE EG-S-PA

Specific terms of reference

1. **Name of the committee:** Group of Specialists on positive action in the field of equality between women and men (EG-S-PA)
2. **Type of committee:** Committee of experts
3. **Source of terms of reference:** Steering Committee for equality between women and men (CDEG)
4. **Terms of reference:**

On the basis of the work already done in this area by the CDEG and of national reports submitted to the CEDAW Committee:

- i. studying the legal and administrative basis of positive actions in the field of equality between women and men, taking into consideration, *inter alia*, the recent decisions taken in the framework of the European Union and the judgments of the European Court of Justice;
 - ii. on the basis of i, studying, in particular, the practice of positive actions in the different member States of the Council of Europe, with a view to identifying examples of good practice and the strategies followed; the following areas should be studied: on the one hand, the labour market and the education system; on the other, political and public life and administration. This should be the main task of the Group;
 - iii. studying awareness-raising techniques aiming at informing the public opinion of the necessity and usefulness of positive actions;
 - iv. elaborating, on the basis of the work identified in i, ii and iii, a Final Report of activities describing positive actions and their objective, containing practical guidelines and recommendations on positive actions.
5. **Composition**

The Group has a membership of 8 specialists from various Council of Europe member States, whose expenses shall be borne by the Council of Europe, having the following qualifications:

- a) 2 expert members of the CDEG (Denmark, “the Former Yugoslav Republic of Macedonia”);
- b) 6 experts, e.g. in the field of law and having dealt with quotas and/or positive action in the political sphere and in the professional field;
- c) the European Commission may send a representative at its own expense and without the right to vote;

These specialists shall be appointed by the Secretariat in consultation with the Steering Committee and/or member States. The composition of the EG-S-PA should, as far as possible, be made according to a geographically balanced as well as to a gender balanced representation, and include representatives of the various legal systems.

6. Working methods

Within the framework of its terms of reference, the EG-S-PA shall have the possibility to have whatever contacts or consultations with interested professionals and others that it deems necessary for the implementation of its terms of reference, in particular through hearings or written consultations. It may also have recourse to outside consultants.

7. Duration of the terms of reference

These terms of reference expire on 31 December 1999.¹

¹ The terms of reference were extended until the end of June 2000.

