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Unfair Discrimination or Necessary for Equal Opportunity? The ECJ Upholds Positive Action in *Lommers v. Minister Van Landbouw*

I. INTRODUCTION

Picture the following scenario: One female and one male employee would each like to use their company's nursery facility for their children. Without any further questions being asked, the company grants the female employee full access to the nursery. The male employee, on the other hand, meets a much different result—he is turned away because he cannot prove that he has the responsibility of taking care of his children by himself. Two different employees, two different genders, and two different standards. Is this approach consistent with the European Union's guidelines on equal treatment of the sexes? This question was the focus of *Lommers v. Minister van Landbouw, Natuurbeheer en Visserij*,¹ a recent European Court of Justice (ECJ) case brought by a male employee against his employer.

The dispute at issue in *Lommers* originated when the plaintiff's employer enacted a rule which provided that only female employees could use the workplace's nursery for their children. Only in the case of emergency were the children of male employees allowed access to the nursery. H. Lommers, a male employee of the company, filed suit on the grounds that the company's program violated an EU directive which mandated equal treatment for men and women in the workplace. The ECJ held that the program did not violate EU regulations because another EU directive allowed for discriminatory laws designed to further equal opportunity in the workplace.²

The ECJ followed the established law in the area of gender equality, but in doing so it failed to fully consider important public

1. Case C-476/99, *Lommers v. Minister van Landbouw, Natuurbeheer en Visserij* (E.C.J., Mar. 19, 2002), at <http://www.curia.eu.int/en/content/aide/index.htm>.

2. *Id.* ¶¶ 9, 11, 20, 50, at <http://www.curia.eu.int/en/content/aide/index.htm>.

policy implications. The ECJ's decision will produce minimal benefits but will bring about significant harm. It will perpetuate the viewpoint that child care is a woman's responsibility, a view which will curtail women's opportunities in the workplace. Thus, the ECJ has created a dynamic that has a detrimental impact on women's rights and runs afoul of the EU's directive on gender equality. In short, the ECJ should have paid greater attention to public policy concerns and struck down the employer's gender-biased rule as violative of EU law.

This Note aims to present an overview of the factors that gave rise to the case and to analyze whether the ECJ reached the correct decision. Part II discusses much of the key background information in the case, the circumstances surrounding the EU's formation, the ECJ's role within the framework of the EU, the EU directives at issue in this case, and the case law illustrating the ECJ's interpretation of these directives. Part III delves into all aspects of *Lommers*: the national law that spurred the conflict with the EU, the parties' litigation history, and the ECJ's ultimate holding in the case. Part IV discusses the ECJ's holding and examines it relative to legal and public policy standards. In this section, an argument is set forth that the ECJ violated EU law by relying primarily on legal precedent and not focusing on public policy concerns to a sufficient extent.

II. BACKGROUND

A. European Union

On February 7, 1992, twelve European nations signed the Maastricht Treaty, which established the EU.³ Three more nations joined in 1995, bringing EU membership to its current level of fifteen member states.⁴

The EU comprises five governing bodies: the European Commission (Commission), the Council of the European Union, the European Parliament, the European Court of Auditors, and the ECJ.⁵ Although the five governing bodies of the EU perform specific roles,

3. P.S.R.F. Mathijsen, *A Guide to European Union Law* 3 (7th ed. 1999).

4. Carson W. Clements, Note, *A More Perfect Union? Eastern Enlargement and the Institutional Challenges of the Czech Republic's Accession to the European Union*, 29 SYRACUSE J. INT'L L. & COM. 401, 410 (2002). Austria, Finland, and Sweden entered the EU in 1995. They joined the original twelve member states-Belgium, Denmark, France, Germany, Greece, Ireland, Italy, Luxembourg, The Netherlands, Portugal, Spain, and the United Kingdom. *Id.*

5. Paul Libretta, Note, *The Economic and Monetary Union: A Standards or Rules-Based Institution?*, 29 BROOK J. INT'L L. 409, 411-412 (2003).

they share the common objectives of promoting social harmonization and increasing the economic prosperity of the citizens of the EU member states.⁶ For the purposes of this Note, it is helpful to understand the fundamental functions for which the Commission and the ECJ are respectively responsible.

1. European Commission

To achieve its goals, the EU primarily relies upon its legislative power. The Commission is the primary legislating body of the EU. It has the authority to initiate two types of legislation. First, the Commission can issue regulations, which have binding force upon all member states without further action and preempt any conflicting national law.⁷ Alternatively, it can set forth directives, which are not enforceable until the member states enact implementing legislation transposing the directives into national statutory law.⁸ By codifying legislation as a directive, as opposed to a regulation, the EU allows each Member State's national legislature to dictate the terms of the rule that governs its citizens.⁹ If a Member State fails to properly transpose a directive into its national law, it faces liability for violating EU law.¹⁰

2. European Court of Justice

The ECJ consists of fifteen Judges, with each Member State appointing one of the judges.¹¹ The ECJ's primary function is to interpret and implement the Maastricht Treaty in order to ensure that the European Commission, the Council of the European Union, the European Parliament, and the member states comply with EU law.¹²

6. Gianluca Bacchiocchi, Book Annotation, 28 N.Y.U. J. INT'L L. & POL. 841, 841 (1996) (reviewing BEHIND THE MYTH OF THE EUROPEAN UNION (ASH AMN & HHN TOMANEY, EDS., 1995)); see also Jasmine Jordaan, Note, *Proposal of Dispute Resolution Mechanisms for the Israeli-Palestinian Interim Agreement: A Crucial Step in Establishing Long-Term Economic Stability in Palestine and a Lasting Peace*, 23 BROOK. J. INT'L L. 555, 570-71 (1997).

7. Terry W. Conner et al., *International Considerations in Licensing*, PRACTISING LAW INSTITUTE PLI ORDER NUMBER GO-01BF, 762 PLI/Pat 681, 762 (2003).

8. See *id.*; see also, *Report of the International Energy Transactions Committee*, 24 ENERGY L.J. 429, 433 (2003).

9. Thomas W. Reader, Comment, *Is Self-Regulation the Best Option for the Advertising Industry in the European Union? An Argument for the Harmonization of Advertising Laws through the Continued Use of Directives*, 16 U. PA. J. INT'L BUS. L. 181, 212 (1995).

10. MATHIJSEN, *supra* note 3, at 29.

11. *Id.* at 126.

12. *Id.* at 124; see also, Kenneth M. Lord, Bootstrapping an Environmental Policy from an Economic Covenant: The Teleological Approach of the European Court of Justice, 29 CORNELL INT'L L.J. 571, 574 (1996).

The ECJ is able to perform this task by exercising either of two forms of jurisdiction. The first type of jurisdiction is direct judicial control. When utilizing such jurisdiction, the ECJ interprets a law and applies it to a case before it. The second type of jurisdiction is indirect judicial control. In utilizing such jurisdiction, the ECJ interprets a law at the request of a Member State's national court, and the national court then applies such interpretation to the pending litigation.¹³

B. Case Law

In 1976 the Commission passed Council Directive 76/207/EEC (Directive). The Commission stated the objective of the Directive in Article 1(1): "The purpose of this Directive 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"¹⁴ Article 2(1) adds, "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."¹⁵

Despite the language of Article 2(1) mandating equality of treatment, Article 2(4) carves out an enormous exception to the prohibition on disparate treatment on the basis of gender. Article 2(4) states: "This Directive shall be without prejudice to measures to promote equal opportunity for men and women, in particular by removing existing inequalities which affect the opportunities of the under-represented sex in the areas referred to in Article 1(1)."¹⁶ Article 2(4) allows for the possibility of gender-based discrimination in the form of a positive action. Positive action encompasses "many different measures and strategies which are undertaken in order to compensate for past injustices suffered by women, by redressing current inequalities amongst men and women, primarily in an employment context."¹⁷

In 1995, the ECJ limited the scope of positive action measures that were authorized by Article 2(4). In *Kalanke v. Freie Hansestadt Bremen*, the ECJ ruled that a particular positive action program was not

13. GERHARD BEBR, DEVELOPMENT OF JUDICIAL CONTROL OF THE EUROPEAN COMMUNITIES 6 (1981).

14. Council Directive 76/207/EEC, art. 1(1), 1976 O.J. (L39) 40.

15. *Id.* art. 2(1), 1976 O.J. (L39) at 40.

16. *Id.* art. 2(4), 1976 O.J. (L39) at 40.

17. Katherine Cox, *Positive Action in the European Union: From Kalanke to Marschall*, 8 COLUM. J. GENDER & L. 101, 105 (1998).

justified under Article 2(4) and thus violated Article 2(1).¹⁸ The ECJ struck down the program because it guaranteed women absolute and unconditional priority for promotions over equally qualified men.¹⁹ According to the ECJ, such unconditional guarantees were inconsistent with the EU's goal of promoting equal opportunity for men and women.²⁰

The ECJ's decision in *Kalanke* sparked legislative change. After *Kalanke*, the Commission sought to amend Article 2(4) to restore the validity of positive action measures, provided that the measures were not rigid quotas and allowed for subjective elements to factor into hiring as well as promotion decisions.²¹ In 1996, the Commission provided more specific guidelines of which positive action programs Article 2(4) would protect. The Commission added the following to Article 2(4): "Possible measures shall include the giving of preference, as regards access to employment or promotion, to a member of the under-represented sex, provided that such measures do not preclude the assessment of the particular circumstances of an individual case."²²

By adding to the text of Article 2(4), the Commission—and, by extension, the EU—made it clear that it would permit positive action programs without rigid quotas.²³ The ECJ's decisions since the addition to Article 2(4), including *Marschall v. Land Nordrhein-Westfalen*²⁴ and *Badeck v. Hessischer Ministerpräsident and Landesanwalt beim Staatsgerichtshof des Landes Hessen*,²⁵ reflect the EU's approach to positive action measures. Both cases involved disputes regarding positive action laws for public service appointment. The laws accorded employment priority to women over men, where women were under-represented at the level of the positions sought.

In *Marschall*, the ECJ upheld the program but attached a caveat to its decision. Tempering its decision with boundaries, the ECJ required

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

19. *Id.*

20. *Id.*

21. Todd Joseph Koback, *The Long, Hard Road to Amsterdam: Effects of Kalanke v. Freie Hansestadt Bremen and the Treaty of Amsterdam on Positive Action and Gender Equality in European Community Law*, 17 WIS. INT'L L.J. 463, 483 (1999).

22. *Id.* at 463, 483-84.

23. Michelle I. Rozof, *Overcoming Traditional Gender Stereotypes in the European Union: The European Court of Justice's Ruling in Hellmut Marschall v. Land Nordrhein-Westfalen*, 12 EMORY INT'L L. REV. 1505, 1524 n.107 (1998).

24. Case C-409/95, *Marschall v. Land Nordrhein-Westfalen*, 1997 E.C.R. I-6394.

25. Case C-158/97, *Badeck v. Hessischer Ministerpräsident and Landesanwalt beim Staatsgerichtshof des Landes Hessen*, 2000 E.C.R. I-1931, I-1931 to I-1932.

the employer to take account of the criteria specific to the candidates and to override the priority accorded to female candidates where one or more of those criteria shifted the balance in favor of the male candidate.²⁶ Similarly, the ECJ in *Badeck* allowed the employer's gender-based discriminatory policy, provided that the evaluation of the applicants included an objective assessment which took account of the specific personal situations of all candidates.²⁷

III. THE LOMMERS CASE

A. Background Facts

In 1993, the Minister of Agriculture ("Minister"), who headed the Netherlands Ministry of Agriculture, Nature Management and Fisheries ("Ministry"), enacted a program which governed access to the Ministry's partially subsidized nursery scheme. The Minister adopted Circular Number P 93-7841 ("Circular"), which stated: "In principle, nursery places are available only to female employees of the Ministry of Agriculture, Nature Management and Fisheries, save in the case of an emergency, to be determined by the Director."²⁸ By adopting the Circular, the Minister sought to reverse the under-representation of women within the Ministry.²⁹ A survey of the Ministry's employees performed in 1994 revealed that women constituted approximately 25 percent of the workforce and were under-represented at senior levels.³⁰

In December 1995, Lommers, an employee of the Ministry, and his wife, who worked elsewhere, were expecting a child. The Minister rejected Lommers's request to reserve a nursery place for his child. This rejection ultimately spawned a series of litigation which resulted in the *Lommers v. Minister van Landbouw, Natuurbeheer in Visserij* decision.

B. Procedural History

In December 1995, Lommers lodged a complaint with the Minister. At the same time, Lommers asked the Commission for Equal Treatment to give its opinion on the compatibility of the Minister's position with the *Wet Gelijke Behandeling van Mannen en Vrouwen* (WGB), a Netherlands national law. The WGB provided that a public

26. *Marschall*, 1997 E.C.R. at I-6394.

27. *Badeck*, 2000 E.C.R. at I-1931 to I-1932.

28. *Lommers*, ¶ 11, at <http://www.curia.eu.int/en/content/aide/index.htm>.

29. *Id.* ¶ 15.

30. *Id.*

service agency could only distinguish between men and women if it intended the distinction to place women in a privileged position to reduce inequalities and the distinction was reasonable to achieve such a goal.³¹ The Commission for Equal Treatment struck down Lommers's complaint under domestic law, determining that the Minister did not violate the WGB.³² In September 1996, acting on the basis of the Commission for Equal Treatment's opinion, the Minister rejected Lommers's complaint.³³

Lommers appealed the Minister's decision to the Arrondissementsrechtbank (District Court), but in October 1996 it too endorsed the Commission for Equal Treatment's opinion.³⁴ In November 1996, Lommers appealed the District Court's decision to the Centrale Raad van Beroep (Appellate Court).³⁵ At this stage of the litigation, Lommers raised the issue of EU law for the first time by asserting that the Minister's program violated the Directive.³⁶ The Centrale Raad van Beroep determined that it could not decide the compatibility of the Minister's program with the Directive on the basis of the ECJ's case law, so it decided to stay proceedings and refer this issue to the ECJ for a preliminary ruling.³⁷

C. The ECJ's Holding

The ECJ held that the Directive would not necessarily prevent the Minister from enforcing the Circular. The validity of the program depended on the results of a fact-finding investigation that the ECJ referred to the Centrale Raad van Beroep.³⁸ The ECJ made a threshold determination, however, that in reserving places in the nursery exclusively for the children of female employees, the Minister created a difference of treatment on the grounds of gender, violating Article 2(1).³⁹

The ECJ next acknowledged that despite the Circular's noncompliance with Article 2(1), the Circular could still be validly enforced under Article 2(4) if the results of the Centrale Raad van

31. *Id.* ¶¶ 7-8.

32. *Id.* ¶ 16.

33. *Id.* ¶ 18.

34. *Id.* ¶ 19.

35. *Id.* ¶ 20.

36. *See id.*

37. *Id.* ¶ 23.

38. *See Id.* ¶¶ 36-38.

39. *Id.* ¶ 30.

Beroep's investigation led to affirmative answers to the following inquiries: (1) whether the employment situation in the Ministry was characterized by a significant under-representation of women and (2) whether an insufficiency of suitable nursery facilities was more likely to induce female employees to give up their jobs.⁴⁰

IV. CRITICAL ANALYSIS OF *LOMMERS*

A. Legal Analysis

The ECJ's decision was consistent with the Directive's statutory goal of providing equal opportunity for women without imposing rigid quotas. The ECJ's past decisions illustrated its willingness to allow discriminatory programs when such programs were necessary to provide for equal opportunity in situations where women were historically disadvantaged,⁴¹ and *Lommers* was no exception.

In *Lommers* the Minister intended the Circular to provide his female employees with an advantage over their male counterparts in order to reverse what the Minister perceived to be an under-representation of women in his department. To determine if the facially discriminatory Circular could have been a valid means of providing for equal opportunity, the ECJ assigned a two-pronged factual inquiry to the Centrale Raad van Beroep before resolving the case.

Marschall and *Badeck* both provided that Article 2(4) would only authorize the positive action measures at issue in situations where women were underrepresented in the particular workplace.⁴² Accordingly, the first line of inquiry was whether female employees were underrepresented in the Ministry.

The second inquiry concerned causation. Specifically, the ECJ asked whether the insufficiency of nursery facilities caused women to give up their jobs.

Courts will strictly construe an attempt to enforce positive action measures over individual rights, such as following Article 2(4) instead of Article 2(1).⁴³ This standard implies that the provision concerned should be an ultimate remedy in a particular situation.⁴⁴ To establish

40. *Id.* ¶ 36-37.

41. See *Marschall*, 1997 E.C.R. I-6394; *Badeck*, 2000 E.C.R. I-1931.

42. See *Marschall*, 1997 E.C.R. at I-6394; *Badeck*, 2000 E.C.R. at I-1931 to I-1932.

43. See EVELYN ELLIS, EC SEX EQUALITY LAW 253 (1998).

44. See SACHA PRECHAL & NOREEN BURROWS, GENDER DISCRIMINATION LAW OF THE EUROPEAN COMMUNITY 112 (1990).

that the Circular is an ultimate remedy to the under-representation of women in the Ministry, the Minister should have to establish causation—the lack of nursery positions contributed to the lack of women in the workplace. Accordingly, the ECJ in *Lommers* correctly added causation as a foundational requirement for Article 2(4).

B. Policy Analysis

Although the ECJ used sound legal analysis in reaching a decision which on its face benefited women, the ECJ's holding will, in the long run, likely harm women's interests in a manner that undermines the purpose of the Directive. The detrimental effects of positive action programs, like the initiative in *Lommers*, outweigh the benefits that such programs produce.

Positive action programs have not provided a significant boost to women despite their purported benefits. In the Second Medium-term Community Programme for Women, the Commission investigated the impact of positive action programs and stated that, despite the Equal Treatment Directive, "women remain largely confined to traditional occupations at fairly low levels."⁴⁵ The Commission has concluded that economic and social measures adopted to produce greater gender equality have failed to markedly improve women's opportunities.⁴⁶ An attempt to initiate positive action programs in Germany provided another illustration of the minimal gains such initiatives produce. After positive action programs had been in place in some German states for a decade, the proportion of positions occupied by women increased by less than 1 percent.⁴⁷

Not only do positive action programs provide insignificant benefits, they also produce substantial detrimental results. Positive action programs, such as the initiative in *Lommers*, perpetuate negative stereotypes about women in the workplace. The support European women receive in caring for their young children has created the perception that women are less dependable workers because they are more likely to rely on others for assistance.⁴⁸ Moreover, the Minister's scheme could actually reinforce the traditional notions of the man in the workplace and the woman as the homemaker. As the scheme only

45. Rozof, *supra* note 23, at 1531.

46. *Id.*

47. Steve Mazurana et al., *Badeck, and Abrahamsson v. Fogelqvist, and Schnorbus v. Land Hessen, European Court of Justice Decisions on Positive Action to Promote Employment of Women*, 96 AM. J. INT'L L. 453, 460 (2002).

48. Rozof, *supra* note 23, at 1506 (1998).

allows men to use the nursery for their children in emergency situations, men will be more likely to rely upon their spouses to take care of their children. This will likely preclude women from reaping the fruits of employment. As a result, many of the gains women have made in the workplace will be washed away.

C. Alternative Approaches

The ECJ followed the legal precedent established in *Marschall* and *Badeck*, but it should have overruled these cases and used a different approach in order to avoid the untoward consequences that result from the *Lommers* decision. There were at least two possible legal alternatives to the rule that the ECJ reaffirmed with its holding. These alternatives offer viable and superior solutions to the issues with which the ECJ grappled.

One alternative approach would have been for the ECJ to have provided a more stringent set of requirements for the Minister's scheme to be upheld. The ECJ determined it would allow the scheme if women were under-represented in the Ministry and if the insufficiency of nursery facilities generally contributed to female employees relinquishing their jobs.⁴⁹ This two-pronged inquiry left one critical question unanswered: whether women would be more likely to work at the Ministry if they had better access to nursery facilities.

This additional inquiry was critical in determining whether the Minister's scheme was necessary. If the ECJ investigated potential employment at the Ministry and found that the Minister's scheme would raise the percentage of female employees, the Minister would be able to make a more convincing argument for the necessity of the program. Conversely, the opposite finding would tend to show that the scheme would not be able to achieve its intended result and thus would have little utility. As previously discussed, past positive action programs have received criticism for yielding few, if any, improvements relative to their target groups. The only way to know whether the Minister's scheme would be different from ineffective positive action programs that address but fail to reverse gender discrimination would be to determine the scheme's specific impact on female employment matriculation in the Ministry.

Another alternative approach the ECJ could have utilized in its decision was a conditional validity scheme. In other words, the ECJ

49. *Lommers*, ¶¶ 36-37, at <http://www.curia.eu.int/en/content/aide/index.htm>.

could have upheld the Minister's scheme on the condition that the Ministry agreed to host awareness programs on gender issues for its employees. One of the downsides of the Minister's scheme is that its net effect might be a curtailment of women's advancement in the workplace due to the likelihood that it will perpetuate the image of women in the child rearing role. The Ministry could mitigate this negative aspect of its scheme by educating its employees about the importance of women in the workforce and why the positive action program is necessary. If the ECJ had required the Ministry to host a seminar, distribute pamphlets, or use some other method of communicating to its workforce the key background facts of the Minister's scheme, the ECJ's decision to uphold the positive action program would have enjoyed increased legitimacy.

D. Recommendation

Both of the alternative approaches discussed above propose modified plans for upholding the Minister's scheme, but in *Lommers* the most pragmatic solution would have been to strike down the scheme altogether. Although the ECJ justifiably sought to advance the EU's goal of providing equal opportunity in the workplace, it went about achieving this goal without taking stock of another EU objective, that of balancing the division of child care responsibilities between men and women.

The Commission illustrated its support of the division of child care responsibilities when it passed Council Recommendation 92/241/EEC on childcare (Recommendation).⁵⁰ The Commission passed the Recommendation because it recognized an increase in the female labor force without a corresponding decrease in women's family responsibilities.⁵¹ The Recommendation encouraged member states to adopt initiatives in four areas: (1) child care programs, (2) special leave arrangements for employed parents with child care responsibilities, (3) employer responsiveness to the needs of workers with children, and (4) the allocation of child care responsibilities between men and women.⁵² The fourth area anticipated efforts to create greater equality in the home and less strain on female members of the workforce.⁵³

50. Council Recommendation 92/241/EEC, 1992 O.J. (L 123).

51. See CATHERINE BARNARD, *THE EU AND HUMAN RIGHTS* 267 (Philip Alston ed., Oxford University Press 1999).

52. Council Recommendation 92/241/EEC, art. 2, 1992 O.J. (L 123).

53. See BARNARD, *supra* note 51, at 267.

The objectives of the Recommendation are intertwined with the goals of the Directive, and the irony of the ECJ's decision is that in trying to further one interest, it actually hindered both. The scope of the ECJ's analysis focused exclusively on the impact its ruling would have on equal opportunity in the workplace. The ECJ paid no attention to the fact that its decision defied the Recommendation by creating a family structure that reduced male parental child care responsibilities. The ECJ's violation of the Recommendation will perpetuate the traditional separation of spousal duties, in which the man is responsible for earning a living and the woman takes care of the home as well as the children. Such a traditional responsibility dynamic will hamper women's career opportunities, thereby undermining one of the principal goals of the Directive.

The emphasis on women being responsible for child care duties will hurt female prospects in the employment arena in two ways. First, it will force many women to abandon partially or fully their careers in order to spend more time looking after their children. Second, women who continue to work will be viewed by their employers in a more negative light than their male counterparts, for whom work is the primary responsibility.

The ECJ should have reached a decision that avoided these untoward results. Any provision which gives women preferential treatment over their male counterparts for access to child care facilities will inevitably hinder the movement toward balancing parental responsibilities and consequently undermine efforts to level the playing field in the workplace. Just such a provision was at issue in *Lommers*, and in rendering its decision, the ECJ should have looked at the policy considerations that drove existing EU legislation. Given the violations of EU law highlighted by such policy considerations, the ECJ should have struck down the Circular.

V. CONCLUSION

In *Lommers* the ECJ faced the decision of whether to uphold the Ministry's Circular, a positive action program facially designed to reverse the under representation of women in the Ministry's employment ranks. Under Article 2(1) of the Directive, all discriminatory measures, including positive action programs, are prohibited. Article 2(4) sets forth a strictly construed exception to Article 2(1), however. Under Article 2(4), courts may allow for positive action measures that seek to provide equal opportunity for an under-represented class, but not to the extent of imposing a rigid quota.

Pursuant to its legal roadmap, the ECJ adopted the standard that the Circular would be valid if it helped give women an equal opportunity to work in the Ministry. In reaching its verdict, the ECJ focused heavily on legal precedent and paid little attention to public policy. The ECJ failed to foresee the wide-reaching impact of its holding. The ECJ's decision will most certainly lead to a greater emphasis on women handling the bulk of child care duties. As a result of this increased responsibility in the family, women's employment prospects will diminish. Such results will conflict with the Directive's mandate of equal treatment in the workplace.

Through a more thorough review of public policy concerns, the ECJ could and should have noticed the practical flaws in its abstract and somewhat nearsighted conclusion that the Minister's scheme was consistent with the EU's objectives. The theoretical set of legal dynamics created by the Ministry's Circular may have looked tranquil, but in reality they will catalyze a reactionary undertow of gender-biased discrimination. The ECJ should have overruled previous decisions and struck down the Minister's program. Ultimately, that is the decision that would have produced the most positive result for women, and that is the decision that would have led to greater equality.

By Brady Mitchell

