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Article 1d SR – equal treatment –
positive discrimination in favour
of the under-represented sex –
decision to refuse extension of an
assignment

Absence of equality
considerations can justify
the annulment of a decision
– even if there is no one to
compare with

Case C-93/19 P, EEAS / Hebberecht,
of 19 November 2020,
appeal on
Case T-315/17, Hebberecht / EEAS,
of 27 November 2018

Staff Matters

Legal News from Union Syndicale

This newsletter is about a very recent decision of the Court of Justice confirming that equality between men and women must be taken into account as one factor when deciding about the extension of a posting in a managerial position. An intriguing feature in this case law is that equality has to be considered even where there is no choice between several candidates. This strict line of applying the principle of equality between men and women – as an individual right derived directly from Art. 1d SR - is of relevance also in other circumstances. Yet, positive discrimination in favour of the under-represented sex requires a set of general implementing measures in order to be applicable to the individual.

You can continue to send us your suggestions for new subjects or your questions and comments :
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Waiver

Although this newsletter is accurately prepared, it cannot replace individual legal advice. Legal situations are manifold and require both complex analysis and strategic action. You should therefore not rely on general presentations or former case-law alone to draw conclusions for your concrete situation. Please turn to us timely, should you require individual legal advice and/or representation.

Legal Background

Article 1d of the Staff Regulations (SR) provides:

“(1) (...) any discrimination based on any ground (...) shall be prohibited.”

(2) With a view to ensuring full equality in practice between men and women in working life, which shall be an essential element to be considered in the implementation of all aspects of these Staff Regulations, the principle of equal treatment shall not prevent the institutions (...) 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 appointing authorities of the institutions shall determine (...) 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.”

Facts of the Case and Procedure

The applicant was appointed as head of delegation in Ethiopia for a four-year term. The rules of a rotation exercise offered to the officials of delegations the possibility to request an early rotation or an extension of posting. Such requests would be granted only in exceptional, duly substantiated cases in the light of the interests of the service. The applicant requested that her posting be extended for a fifth year. The EEAS refused that request, stating, inter alia, that ‘in the interests of ensuring regular rotation of heads of delegation, a clear policy of rotation after a maximum of four years in the post has generally been implemented’. The applicant challenged this decision at the General Court, which decided in her favour. Upon an appeal brought by the EEAS, in April 2020 also Advocate General J. Kokott opined that the appeal is to be dismissed. This has now been confirmed by the Court of Justice.

The Arguments of the Parties and the Decision of the Courts

In front of the General Court, the applicant raised three pleas in law: an infringement of the interests and continuity of the service, of the obligation of transparency and of the principle of equal treatment. The General Court rejected the first two pleas as unfounded, as well as an allegation of a discrimination on grounds of race. However, it upheld the plea concerning the measures to be taken in respect of women. The General Court pointed out that Art. 1d (2) SR not only provides for the adoption of measures by the EU institutions but states, without prescribing any conditions, that equality between men and women is **an ‘essential’ element to be considered in the implementation of ‘all’ aspects of the Staff Regulations**. It concluded that, **by excluding equality between men and women from the considerations underlying the adoption of the contested decision, the EEAS infringed Art. 1d (2) and (3) SR**. The Court found that the contested decision could have been different if equality between men and women had not, as a matter of principle, been excluded at the outset from the assessment.

In its appeal, the EEAS argued that the policy of equal opportunities for men and women must be applied at the time of the annual rotation of staff between the EEAS



headquarters and the Union delegations, or between the Union delegations, when vacancy notices for the positions concerned are published. However, such a policy could 'hardly be applied to decisions extending a term of office, which are by their nature individual decisions for which there is no competition between several candidates'. The EEAS would then be obliged, so it argued, to favour requests from women, irrespective of whether that is in the interests of service; further this would amount – in the opinion of the EEAS – to an individual right of the under-represented sex to have her term of office extended.

The **Court of Justice** in its decision of November 2020 differentiates the two parts of Art. 1d (2) SR in the sense that the principle of equality between men and women, as an individual right, does not require, for the purposes of its application, any implementing measure. That is not, however, the case with specific advantages intended to make it easier for the under-represented sex to pursue a vocational activity, referred to in the second part of Art. 1d (2) SR: Individual decisions granting specific advantages in order to make it easier for the under-represented sex to pursue a vocational activity cannot be adopted in the absence of general measures implementing the second part of Art. 1d (2) SR. When adopting implementing measures, due regard must be had to the principle of proportionality, which requires that derogations remain within the limits of what is appropriate and necessary in order to achieve the aim and that the principle of equal treatment be reconciled as far as possible with the requirements of the aim thus pursued.

In the absence of measures implementing the second part of Art. 1d (2) SR, an institution is not relieved of the obligation to take account of the principle of equality between men and women when adopting an individual decision. Because – so confirms the Court of Justice – equality between men and women is an 'essential' element to be considered in the implementation of 'all' aspects of the Staff Regulations, without that declaration being accompanied by any time limit or condition, and without it being subject to the adoption of measures. The **principle of equality**, which excludes all discrimination on grounds of sex, **is not limited to competitive situations between candidates**, but also requires an examination of whether the treatment accorded, in this case to a woman, **would have been accorded equally to a man in a comparable situation**. Institutions, when adopting decisions relating to the organisation of their departments, have to **weigh up the various interests at stake**, taking into account, inter alia, the principle of equal treatment and the interests of the service.

The Court of Justice confirms the assessment of the General Court in that it cannot be ruled out that considerations relating to equality between men and women might militate in favour of granting the request for extension, with the result that the EEAS was required to take into account, as one factor, the need to ensure equality between men and women. This principle has to be taken into account when adopting an individual decision, even if this decision does not entail a choice between several persons.



Comments :

1. It is important to note the two parts of Art. 1d (2) SR: (a) the individual right derived from the principle of equality between men and women, and (b) the actions of positive discrimination for the under-represented sex. Actions of positive discrimination presuppose implementing measures in order to translate into individual decisions. By contrast, an individual can directly rely upon the principle of equality between men and women, as expressed in the first part of Art. 1d (2) SR. The absence of implementing measures does not relieve the institution from observing the principle of equality.

2. As AG Kokott correctly annotated, Art. 1d SR codifies and reflects Art. 21 and 23 of the Charter of Fundamental Rights for the decision-making practice of the appointing authorities. Case law recognised equal treatment of men and women as an actionable fundamental right very early on.

3. When adopting implementing measures for a positive discrimination in favour of the under-represented sex and when applying them to the individual case, the principle of proportionality has to be respected.

4. There is a broad discretion of the institutions to adopt its self-organizational rules. As a counter-balancing element of this discretion, the institutions have to follow the procedural safeguards in place for weighing various interests. The judgment shows that an internal organizational rule which calls for taking administrative decisions solely on the basis of the interests of the service falls short of indispensable considerations prescribed by the principle of equality. **The weighing process for a decision concerning a woman would thus have to contain an assessment whether a man would have been treated the same in a comparable situation, and vice-versa.** It was the a-priori exclusion of this weighing process on equality considerations that was sanctioned by the courts.

5. The case at hands only treats the situation of a decision taken in the framework of a rotation exercise and on the specific question regarding the extension of an assignment in the mobility scheme of regularly four years' time of posting. However, the provision of Art. 1d (2) SR in respect to the equality between men and women, and in respect to actions of positive discrimination in favour of the under-represented sex has a much broader scope



of application. The Court of Justice interprets the wording of Art. 1d (2) SR in a way that supports this broad scope and that calls for a consideration of equality as an “essential element” in “all” aspects of the SR. The obligation to consider equality between men and women affects many areas, such as the filling of vacancies, the decision-making process for the extension of contracts of limited duration, or the decision on promotions.

6. It can be deduced that where, in such situations, an institution refuses from the outset to take considerations of equality (gender-specific elements) into account, the decisions adopted under these circumstances can be liable to annulment in the same way as if other important procedural elements (e.g. the reasoning of the decision) were missing.

7. Once annulled, the institution would have to take the decision afresh, now with the appropriate weighing of the gender-specific elements. This does not mean that the institution must take a different decision on the substance question (as was here the request to extend an assignment).