

FINDINGS
(Article 4(6) of Law 3094/2003)

SUBJECT: ‘Discrimination against women in entry exams for the Hellenic Police Force academies: the compatibility of Presidential Decree 90/2003 with the provisions of Law 3488/2006 and Directive 2006/54/EC’

Background

In the context of its powers as the body responsible for monitoring implementation of the principle of equal treatment of men and women in relation to access to employment, vocational training and career advancement, and the terms and conditions of employment (under Article 13 of Law 3488/2006) the Ombudsman received complaints relating to discrimination against women as part of the entry procedure to the Hellenic Police Force academies. In particular, the complainants protested about them being excluded from the selection process due to the fact that they did not meet the minimum height requirement of 170 cm which is the same for both sexes, and they also stated that they appealed to the competent services of the European Commission complaining about an infringement of EU law on gender equality.

The evidence presented to the Ombudsman by the complainants included letter of response No. 6000/2/2914-α/18.11.2009 from the Hellenic Police Force which set out the following views:

- The adjustment in the minimum height requirement for both sexes and the uniform performance levels which apply in athletic trials which were introduced in the provisions of Presidential Decree 90/2003 were primarily based on the need to ensure actual equality between men and women, and secondarily on the nature and mission of the Hellenic Police Force which requires more exacting levels of physical strength and special bodily attributes.
- The Council of State has ruled (in judgement No. 1247/2008) that the adoption of a minimum height common to both sexes for the entry of men and women to the Police Academies is not an unjustified derogation from the principles of equality of the sexes.
- Article 9 of Law 3304/2005¹ (which however does not relate to sex discrimination) states that different treatment based on a characteristic which, due to the nature of the specific occupational activities or the context in which they are carried out, is a substantive and determining occupational requirement, where the objective pursued is legitimate and the condition is proportionate, does not constitute impermissible discrimination.
- Article 14(2) of Directive 2006/54/EC states that “Member States may provide, as regards access to employment including the training leading thereto, that a difference of treatment which is based on a characteristic related to sex shall not constitute discrimination where, by reason of the nature of the particular occupational activities

¹ Law 3304/2005 (Government Gazette 16/A/27.1.2005) on implementation of the principle of equal treatment irrespective of gender or ethnic origin, religion or other beliefs, disability, age or sexual orientation.

concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that its objective is legitimate and the requirement is proportionate”.

- Consequently, the adoption of uniform criteria for men and women is legitimate on grounds of public interest, where it is in accordance with the principle of proportionality.

Moreover, the Ombudsman was also presented with the letter of 17.11.2009 from the European Commission (addressed to one complainant) in which the Commission's services stated that they were aware of the issue and stressed that they had raised the issue of the compatibility of Presidential Decree 90/2003 with Article 14 of Directive 2006/54/EC with the competent Greek authorities on 29.5.2009. The Greek authorities replied on 15.9.2009 stating that a committee of experts would be set up to examine the issue and provide a substantiated and well-documented response. It was pointed out that the Commission is waiting for the Greek public administration to take action.

On 5.11.2009 the Ombudsman sent a letter to the Office of the Minister for the Protection of Citizens requesting that information be provided so that it could examine the impact of the provisions of Presidential Decree 90/2003 on the entry of women to the Police Academies. In particular, the information requested related to the exclusion of women from such tests during the measurement of height procedure and during the athletic trials procedure. On 29.1.2010 the Ombudsman received a response from the Hellenic Police Force with the relevant tables attached (letter from Office 5 of the Police Personnel Directorate No. 6000/2/2944-α/29.10.2010).

Following that the Ombudsman was invited by the Ministry of Labour & Social Security (Dept. of European Affairs & Collaboration with European Union Services) to participate in a meeting on 11.12.2009 between the bodies concerned. At that meeting attended by representatives of the Ministry of Labour, the Hellenic Police Force, and the General Secretariat for Equality of the Ministry of Justice, it was decided to request the views of the leadership of the Hellenic Police Force on this matter and the solutions it proposed, in light of the fact that a response had to be provided to the European Commission by the end of January 2010. During the next phone call between the Ombudsman and the head of personnel of the Hellenic Police Force, Brigadier General Konstantinos Kormas, the Ombudsman learned that the Personnel Directorate had prepared a recommendation about this matter; the Minister for the Protection of Citizens being competent to decide on this matter. Since then the Ombudsman has had no other update about the progress of this matter.

In light of the above, having completed an examination of all evidence submitted to it, and the applicable legislation and case law, the Ombudsman has prepared these findings in accordance with the provisions of Article 4(6) of Law 3094/2003 which has been sent and notified through all appropriate channels.

I. Applicable Legislation

Article 20 of Law 3103/2003 abolished the 15% quota on the total number of entrants to the police academies², which had been set as a restriction on the number of

² Law 2226/1994 established the system where persons could enter the Police Constables Academy and the Police Officers Academy by sitting general examinations and set a quota on the number of female entrants which could not be more than 20% for the Police Constables Academy and 15% for the Police Officers Academy. Following that, the second

female entrants and the law was changed to state that men and women could now enter the Police Academies and that “the qualifications of the candidates and the preliminary examinations they sit shall be the same for both sexes”. Following that, Presidential Decree 90/2003 (Government Gazette 82/A/13.4.2003) amended the provisions of Presidential Decree 4/1995 (Government Gazette 1/A/10.1.1995) under which the minimum height was set at 170 cm for men and 165 cm for women, and raised the minimum height by 5cm for women only. As far as athletic trials were concerned the following amendments were also made. The current regime is set out in comparison with past regimes in order to make it clear what the repercussions of these changes were for female candidates:

Athletic trial	<u>Presidential Decree 4/1995 and Presidential Decree 34/1996</u> (per sex)	<u>Presidential Decree 90/2003 and Presidential Decree 76/2006</u> (common)	<u>Increase detrimental to women</u>
Long jump	at least 3.5 m for men and 2.5 m for women (3 attempts)	at least 3.6 m (3 attempts)	An increase of 110 cm
High jump	at least 1 m for men and 0.8 m for women (3 attempts)	at least 1.05 m (3 attempts)	An increase of 25 cm
Races	1000 m for men and 800 m for women within a time of 4 minutes and 20 seconds (one attempt)	within a time of 4 minutes and 20 seconds (one attempt)	An additional 200 m in the same time
100 m race		within a time of 16 seconds (one attempt)	New athletic trial
Shot put (7.275 kg)		a distance of at least 4.5 m on average	Throw using the men’s shot put

Moreover, Article 5(1) of Law 3488/2006 (Government Gazette 191/A) prohibited any form of direct or indirect discrimination due to sex or due to marital status in relation to the conditions of access to salaried or other employment or in general to an occupation, including selection criteria and terms and conditions of recruitment. Paragraph 2 of the same Article prohibited the use of criteria and tests which result in direct or indirect discrimination on grounds of sex, in relation to calls for positions, circulars and regulations for staff selection, including the provision of vocational training designed to enable access to certain occupations. Moreover, the definitions in Article 3(a) and (b) of Law 3488/2006 state that direct discrimination exists “where

indent of Article 1(2)(a) of Law 2226/1994 (Government Gazette 122/A) was replaced by Article 12(1) of Law 2713/1999 whereby the quota on female entrants to the police academies was set at 15% for all entrants, on the grounds that this corresponded to the number of police personnel engaged in activities where the gender factor played no role, while the other police personnel, due to the nature of the mission of the Hellenic Police Force, were engaged in activities which required a more demanding level of muscle strength, speed and endurance “criteria which the teachings of common sense and experience teach us men meet because of their special biological characteristics”. That quota was repeatedly challenged before the courts and was eventually repealed since judgement No. 1918/1998 of the plenary session of the Council of State ruled that the said provisions were unconstitutional to the extent that these quotas placed limitations on the access of women to the police profession. Thereinafter quotas were abandoned as a way of controlling the access of women to the police academies, and Article 20 of Law 3103/2003 stated that men and women could enter the police academies and that “the qualifications of the candidates and the preliminary examinations they sit shall be the same for both sexes”.

one person is treated less favourably on grounds of sex than another is, has been or would be treated in a comparable situation” and indirect discrimination exists “where an apparently neutral provision, criterion or practice would put persons of one sex at a particular disadvantage compared with persons of the other sex, unless that provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary”. Article 17 of Law 3488/2006 states that when a person is discriminated against due to sex and cites facts or evidence before a court or other authority from which direct or indirect sex discrimination can be presumed, the respondent has the burden of proving to the court or other authority that the principle of equal treatment of men and women was not infringed.

Note that Law 3488/2006 on application of the principle of equal treatment of men and women in relation to access to employment, vocational training and career advancement, terms and conditions of employment and other related provisions transposed Directive 2002/73/EC of the European Parliament and of the Council of 23 September 2002 into the Greek legal order. That Directive has been replaced now by the provisions of Directive 2006/54/EC on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation. That Directive recasts, codifies and updates the provisions on the equal treatment of men and women in the employment sector based on developments in the case law of the European Court of Justice³. Article 14(2) of that Directive states that “Member States may provide, as regards access to employment including the training leading thereto, that a difference of treatment which is based on a characteristic related to sex shall not constitute discrimination where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that its objective is legitimate and the requirement is proportionate”. Directive 2006/54/EC does not negate the obligation of the Member States to adjust their laws to the provisions of Directive 2002/73/EC, which is not amended in any way in relation to the provisions of concern in this matter.

II. Relevant Survey Data

Data available from scientific surveys and the views of experts are set out below which allow the Ombudsman to check the correctness of the assertions made by the Hellenic Police Force that the minimum height for both sexes introduced in Presidential Decree 90/2003 seeks to ensure actual equality between men and women. This data comes in the form of two surveys relating to the average height of Greek men and Greek women, and responses from the Hellenic Association of Amateur Athletics and the Greek Olympic Committee to the Ombudsman whose expert view was requested about the common performance levels set in the athletic trials for both the Hellenic Police Force Academies and the military academies (the military higher educational institutions and NCO academies):

³ The previous Directives were automatically repealed when the deadline for transposing the recast Directive expire on 15 August 2009. Greece had not yet completed the procedure for transposing the Directive, which does not mean that the provisions of the said Directive do not apply in the Greek legal order. On the contrary, under the conditions laid down in the relevant judgements (Van Gend en Loos, case 26/62, Franz Grad judgement of 6 October 1970, Ratti judgement of 5 April 1979, Van Duyn judgement of 4 December 1974, Marshall judgement of 26 February 1986), the ECJ has recognised the vertical direct effect of Directives (in disputes between the State and individuals) only after the deadline for transposition has expired, which is what has happened in this case.

A. 1st Survey

This survey was carried out on a sample of around 5,000 boys and 5,000 girls in all of Attica by the 1st Paediatrics Clinic of the University of Athens by Prof. G. P. Chroussos in 2000-2001 and its results are available on the Clinic's website. As the report states, its results are fully in line with recent analysis of the adult Greek population carried out on a sample of 16,000 people by the Hygiene and Epidemiology Laboratory of the University of Athens School of Medicine under the supervision of Prof. D. Trichopoulos and Prof. Antonia Trichopoulou (European Medicine and Society Cooperation Programme, www.nut.gr).

This survey shows that the current average height for 18 year old boys is 177 cm while for girls it is 163 cm. The relevant diagrams can be found on the Clinic's website.

B. 2nd Survey:

This survey is entitled 'National Anthropocentric Survey' and captures the body types of the Greek population. It was carried out on a sample of 2,000 people from Athens, Volos, Kalamata and Syros by the ELKEDE Technology and Design Centre S.A. in collaboration with the University of Piraeus and the Somatometry Institute. Its results were published in the *NEA* newspaper on 30.10.2009. The Ombudsman contacted ELKEDE and has a copy of the results of the survey in its possession.

According to this survey, the average Greek man is 176 cm tall and the average Greek woman is 163 cm tall. The younger generation appears to be comparatively taller than previous generations and in the 20-24 age group men have an average height of 178.1 cm and women 163.2 cm. In the younger age groups, as the survey points out, the height difference between men and women remains large and unwavering (at over 10 cm).

Consequently, the criterion set by the Hellenic Police Force of a minimum height of 170 cm is 7 cm **above** the average height of a Greek woman and requires any successful candidate to be particularly tall for a woman (a requirement which according to the ELKEDE diagrams is met by only 20% of the Greek female population). On the contrary, the same minimum height of 170 cm is 8 cm **below** the average height of Greek man (178 cm), meaning that to be successful a candidate must be of average to low height, which is a requirement met by more than 80% of the corresponding male population).

III. The Ombudsman's Views

A. The Ombudsman's findings from statistical analysis of the data provided by the Hellenic Police Force

Table 1. Applications submitted

Year	Applications from men	Applications from women	Percentage of applications from women compared to the applications from men	Total number of applications	Percentage of applications from women as a percentage of the whole
2003	7730	1606	20.7%	9336	17.2%
2004	7062	1675	23.7%	8737	19.1%
2005	10625	2289	21.5 %	12914	17.7%
2006	10388	2186	21%	12547	17.4%
2007	7493	1528	20.3%	9021	16.9%
2008	6047	1186	19.6%	7233	16.3%
2009	5985	1206	20.1%	7191	16.7%

The first conclusion which can be drawn from the total number of applications submitted is that the applications from women account for around 1/5 of applications from men and less than 1/15 of the total number of applications. This supports the assertions of one of the complainants that the provisions of Presidential Decree 90/2003 on minimum height and common performance levels for athletic trials discourage the majority of women wishing to take part in the entry exams for the Hellenic Police Force academies from doing so. Taking into account the fact that in order to participate in the special athletic trials, particularly harsh training is required in addition to intensive studying to successfully pass the Panhellenic school examinations, it is clear that a candidate who differs considerably from the height limit (most likely by more than 3 cm) will not submit an application to take part in those athletic trials.

Table 2. Percentage of persons excluded by sex after body measurements were taken and after athletic trials

Year	Total number of men excluded	As a % of applications	Total number of women excluded	As a % of applications
2003	114	1.47%	505	31.4%
2004	89	1.26%	420	25%
2005	316	2.97%	736	32.1%
2006	149	1.43%	400	18.2%
2007	70	0.93%	180	11.7%
2008	23	0.38%	123	10.3%
2009	167	2.7%	216	17.9%

In comparison with the previous table, here one can see that while the number of applications from women is much smaller than the number from men (1/5 and below), the number of women excluded after body measurements and after athletic trials is much higher than the figure for men (from a 2008 low when 0.38% of men were excluded and 10.3% of women were excluded, to a 2003 high when 1.47% of men were excluded and 31.4% of women were excluded).

Table 3. Successful candidates who entered the academies, by sex, compared to number of applications submitted

Year	Total number of applications	Male entrants	Percentage	Female entrants	Percentage
2003	9336	1073	11.4%	127	1.3%
2004	8737	1081	12.3 %	209	2.3 %
2005	12914	1688	13.0 %	292	2.26 %
2006	12547	1232	9.8 %	268	2.1 %
2007	9021	1566	17.3 %	319	3.5 %
2008	7233	1224	16.9 %	406	5.6 %
2009	7191	1875	26.0 %	325	4.5 %

This table shows a remarkably low percentage of female entrants out of the total number of applications submitted, a result which is due both to the small number of applications submitted by women and to the exclusion of a very large number of women during the body measurements procedure and the athletic trials procedure. There are many other conclusions which can be drawn from the data table sent by the Hellenic Police Force but for the time being we will limit ourselves to the

aforementioned points, which are sufficient given the stance the Ombudsman will adopt below.

B. Establishing indirect sex discrimination

European legislation prohibiting sex discrimination in relation to access to employment and vocational training has, since 1976, obliged the Greek State to ensure that women have access to occupations which were once considered to be male-dominated professions, such as the Police. At first the Greek public authorities appeared to be resistant to such changes, laying down legislative barriers in the form of negative quotas. Those barriers sought to place women in specific posts, primarily 'non-combatant' posts within the police where the 'gender' factor did not play a role, as the relevant legislation stated. On the contrary 'field' posts were initially reserved only for men on the grounds that they required "a more demanding level of muscle strength, speed and endurance, criteria which men meet because of their special biological characteristics, as common sense and common experience shows".

In 2003, the year in which quotas on the entry of women to the police academies were removed on the grounds cited above (Council of State judgement No. 1917/1998), a 5 cm increase in the minimum height of women was introduced while the minimum height for men remained at 170 cm, and the athletic trials were completely redesigned. As is clear from the comparison of criteria in Presidential Decree 4/1995 and Presidential Decree 34/1996 (which applied when quotas still existed) and those in Presidential Decree 90/2003 and Presidential Decree 76/2006, the common performance levels adopted in the pre-existing athletic trials are much higher than those which applied in the past for women and, indeed, even higher than those which applied in the past for men (the long jump figure rose from 3.5 m to 3.6 m, and the high jump limit from 1m to 1.05 m). In addition, a 100 m race in 16 seconds and shot put event were added. Note that the shot put event uses the men's shot put weight 7.275 kg compared to the women's shot put of 4 kg which is the one used worldwide by female shot-putters.

The Hellenic Police Force put forward the following arguments in its letter of response to the Ombudsman, claiming that, *"the provisions of Presidential Decree 90/2003 (a) set uniform performance levels for the athletics trials which the candidates undergo (sports events and performance requirements) and (b) set the minimum height limit at 170 cm (irrespective of sex). These adjustments were based primarily on the need to ensure actual equality between men and women and secondarily on the nature and mission of the Hellenic Police Force which, in order to confront modern crime, keep the peace in various segments of social life under difficult conditions relating both to time and place, with an alternating and continuous shift system round the clock in operation, requires personnel to have both academic qualifications and a higher level of physical strength and special physical qualifications in order to be able to successfully perform occupation-related tasks"*.

Taking the above points into consideration, **the Ombudsman is of the view** that the adoption of a common minimum height of 170 cm for both men and women and the increase in the performance levels for existing athletic trials to the performance levels which applied in the past for men, and the addition of new trials using the same criteria as those applicable to men (shot put event using the men's shot put) **constitute indirect sex discrimination** given that:

- An apparently neutral requirement (a provision setting the same height limit) clearly adversely affects a greater number of women than men as is clear

from the data set out above, because it places women in a more disadvantageous position compared to men.

- That disadvantageous position is clear from the fact that in order for a woman to pass the entry exams for Hellenic Police Force academies she must be more 170 cm tall which is 7 cm above the average height of 163 cm for a women aged 18, whereas it is sufficient for a man to be 7 cm below the average height for men of the same age which is 178 cm.

Given this discrimination, the number of applications from women to enter the police academies is around 1/5 of the corresponding number of applications from men and it should be noted that many more women are excluded from the procedure after their height is measured and the athletic trials are conducted. For example, note that in 2003 after the height measurement and athletic trials procedures, of the 7,730 men who submitted an application, 114 were excluded (i.e. 1.47%), while of the 1,606 women who submitted an application 505 were excluded (i.e. 31.4%). This situation was approximately similar in the other years examined, which shows that application of the minimum limits in Presidential Decree 90/2003 places women candidates for entry to the Hellenic Police Force academies in a much more disadvantageous position than that of men.

Year	Total number of men excluded	As a % of applications	Total number of women excluded	As a % of applications
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2005	316	2.97%	736	32.1%
2006	149	1.43%	400	18.2%
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- The requirement on common performance levels for the athletic trials for men and women candidates for military academies is also considered to be indirect sex discrimination which lies in the fact that the apparently neutral legislative provision setting the common performance levels for athletic trials does not reflect the abilities of both sexes in an equal way, a point to which the experts attest, but places emphasis on the abilities of men, with the result that women candidates are in a particularly disadvantageous position compared to the male candidates.
- In the case of the shot put, one could also argue that use of the men's shot put by women candidates (in contrast to what happens in the actual sporting event) is far removed from a neutral practice. The letter from the Hellenic Association of Amateur Athletics No. 14903/28.01.2009 states inter alia that, *"In classic athletics the boundaries between men and women are different, since the physical capabilities of the two sexes are different. Even the shot puts used are different at competitive level"*. Letter No. 14741/XT/πξ from the Greek Olympic Committee states that, *"The performance of athletes at Olympic level differs considerably between the two sexes. The requirements for admission to the military academies for men could be characterised as easy and achievable by healthy individuals. On the contrary, women are required to have skills in this regard, since they are required (a) to compete using men's shot puts and (b) to achieve average long jump performances which require special techniques for approaching the take-off board"*.
- In this way the principle of equal treatment of men and women in access to occupational training which ensures entry to the police profession (under

Article 4(1), Article 5 and Article 3(b) of Law 3488/2006) has been violated given that the legislator has introduced apparently neutral anatomical and other criteria (common height requirement and common athletic trial performance levels) which result in unfavourable treatment and eventual exclusion of a very large number of women candidates from the training leading to the occupation of police officer.

- As the European Court of Justice (ECJ)⁴ has pointed out, there is indirect discrimination against women and consequently a violation of EU law where an apparently neutral provision, criterion or practice proves to have a negative effect on a very large percentage of women compared to men, **unless the Member State manages to prove that the said provision, criterion or practice is justified by objective factors, irrespective of gender, and meets the criteria for the principle of proportionality, which is to say that it has been adopted to achieve a legitimate objective, and the means for achieving that objective are both appropriate and necessary.** In addition, the rule reversing the burden of proof in sex discrimination cases requires that the person adopting and implementing the said provision, criterion or practice to present adequate persuasive proof that the objective pursued is legitimate, and the means for achieving it are absolutely necessary and appropriate.

C. Inadequate justification for indirect sex discrimination provided by the public administration

In light of the foregoing points, the question which arises is to what extent **can** this indirect discrimination **be justified** (see Article 3(b) of Law 3488/2006) by the:

- a. Existence of a legitimate objective which is irrespective of sex, in other words whether those criteria serve a legitimate objective which justifies the sex discrimination and
- b. the principle of proportionality, in other words whether the criteria laid down
 - are suitable (appropriate) for achieving the legitimate objective
 - are necessary for achieving the legitimate objective
 - are relevant to the legitimate objective

C.1. Inadequate justification of the existence of a legitimate objective

As already mentioned, the Hellenic Police Force considers that the indirect discrimination arises from the common fact that men are taller than women and is justified on grounds of public interest related to the requirements of the occupation of police officer. The views of the Ombudsman on the issue of justification are that the reasoning provided is not adequate for the following reasons:

A. The case law cited by the leadership of the Hellenic Police Force (Judgement No. 1247/2008 of the Council of State) is not well established since it derives only from a single judgement which while recognising that the minimum height requirement of 170 cm actually introduces an indirect discrimination against women, it considered this discrimination justified for rather general “reasons of public interest which are irrespective of the gender of the candidates, but related to the requirements of the occupation of police officer”. However, there is also case law to the contrary from the courts (e.g. judgements Nos. 1255/2007 and 1256/2007 of the Athens Administrative Court of Appeal) which ruled that the existing indirect discrimination is not lawful in the case being examined since **it is not clear from specific provisions or other**

⁴See for example: case 170/84 Bilka-Kaufhaus [1986] ECR 1607, case C-278/93 Freers and Speckmann [1996] ECR I-1165, case C-243/95 Hill and Stapleton [1998] ECR I-3739 and the joined cases C-279/96 to C-281/96 Ansaldo Energia and Others [1998] ECR I-5025.

evidence, taken together with rules of common experience, that the specific minimum height requirement is a criterion suitable, necessary and appropriate for determining the suitability of candidates as police officers.

B. No reference is made to any specific public interest on which the specific provision is based. The Hellenic Police Force has not carried out any scientific research relating to the impact of the height requirement on the participation of women in the police force nor has it, to date, evaluated the relevance of this criterion to the effectiveness of how policing is performed. On the contrary, as is clear from the **Annex** to this document, international literature contains a wealth of information about policing being successfully carried out by women with much lower height requirements in countries where the presence of women in the police force dates back longer and is more extensive. In this regard, regard should be had to the **judgement of the plenary session of the Council of State No. 1917/1998** which provided the basis for abolishing the entry quotas for the Hellenic Police Force academies which negatively affected women, and which was expressly cited in the explanatory memorandum accompanying Article 20 of Law 3103/2003. That judgement states that the grounds of public interest cited are not, given their generality, when taken together with common experience, criteria which are specific and appropriate enough to be subject to judicial review by the courts. The rulings in plenary session judgements Nos. 1918/1998 and 1928/1988 of the Council of State are similar.

C. Reliance on the general and vague concept of 'common experience' is problematic to the extent that various principles and subjective factors can be brought under this umbrella concept such as "*thinking and judgements about the changes in relationships and circumstances, etc. derived by deduction from day to day observation, common scientific knowledge, the state of the art or professional activity, or involvement in a transaction or relationship in general*"⁵. It is clear that reliance on this concept is irrelevant if one considers that there are no precepts of common experience based on the definition above (changing relationship, circumstances derived by deduction from day to day observation, common scientific knowledge, the state of the art or professional activity, or involvement in a transaction or relationship in general) from which one can objectively determine the ability of women to effectively rise to the challenges to policing work (a) since the participation of women in policing is a recent thing and (b) because of quotas women have not been given the ability to participate in all forms of policing, but only in limited activities, and in particular office work. For these reasons, we consider that no common experience relating to the abilities of women to effectively police has been developed yet and consequently reliance on the precepts of common experience and reliance on grounds of public interest are dead letter justifications without any specific content which can be clearly identified and reviewed by a judge.

C2. Inadequate justification of compliance with the principle of proportionality

The principle of proportionality states that⁶, all means available for exercising public power (law, court judgements and administrative decisions) must meet the three criteria laid down by the principle, in other words they must be (a) **suitable**, namely appropriate for achieving the objective pursued, (b) **necessary**, so as to cause the least possible restriction on individuals or the public and lastly (c) **proportionate in the narrow sense**, meaning that there must be an internal link to the objective

⁵ G. Rammos, Manual of Civil Procedural Law, 1980, Vol. II. P. 743

⁶ In national law, proportionality as a general concept which has been widely recognised in the case law of the courts, governs all public activities and is binding on the legislator, judges and the public administration. In European law, the specific principle is considered to be a constitutional principle and a fundamental right and is referred to in a large number of ECJ judgements.

pursued so that the expected benefit is not less than the detriment arising from the measure taken (Hellenic Supreme Court Judgement No. 43/2005).

In the case being examined, in order for the specific provisions of Presidential Decree 90/2003 to be in accordance with the principle of proportionality, the criteria it lays down must be included in order to pursue a legitimate objective and be appropriate, necessary and relevant to the achievement of a specific objective. In effect, the questions which arise are as follows:

- How is the implementation of purely male standards both in terms of the minimum height requirement and in terms of the performance levels for the athletic trials associated with the nature and mission of the Hellenic Police Force? Is that adequately demonstrated so that it can be reviewed by a judge? ⁷
- Is the implementation of male standards the least possible restriction which can be used to achieve that objective?
- Is the benefit from the limitations on access imposed on women more important than the detriment they cause?

The Hellenic Police Force must be able to prove **using scientific methods and studies** the relevance of the 170cm height requirement as a minimum height and the use of male performance levels as common performance levels in athletic trials to the effective performance of policing activities, and must also justify the fact that the harm caused to society as a whole from the prohibition on access to the police academies for 80% of women is less important than the benefits to society as a whole from such exclusion. We consider that no such study exists because, if it did exist the Hellenic Police Force would certainly have submitted it since its results would vindicate the choices it had made. Moreover, the Hellenic Police Force did not even have rudimentary statistical data about the impact of the height requirement and the athletic trials by gender and was forced to collate that data following the Ombudsman's request. In all events, it is not sufficient to cite in a vague and general manner the precepts of common experience; instead diligently and specifically reasoned justifications are needed for the legislative choices made in order to correctly apply the proportionality criteria.

IV. The Ombudsman's Conclusions

In light of the points set out in detail above, the Ombudsman considers that:

1. The minimum height limit and athletic trials included in Presidential Decree 90/2003 are only apparently neutral criteria.
2. Those criteria are not at all neutral since they entail indirect discrimination against women seeking to enter the police academies by excluding 80% of women at least from accessing those academies, as is clear from both the relevant surveys and from the analysis of the statistical data submitted by the police itself.
3. This indirect discrimination is not adequately justified since it has not been proven:

⁷ Article 12(1) of Law 2713/1999 adopted the formulation that the police profession requires a more demanding level of muscle strength, speed and endurance, criteria which men meet because of their special biological characteristics, as common sense and common experience shows. In other words it is a precept of common sense and experience that because of special biological characteristics only men have higher levels of muscle strength, speed and endurance, which is a *conditio sine qua non* for effectively meeting the requirements of the police's mission.

- a. how it is associated with the legitimate objective of performing the Hellenic Police Force's mission and
 - b. how it meets the three criteria of the principle of proportionality: appropriateness, necessity and relevance.
- 4. The Hellenic Police Force did not submit any scientific data to support its assertions.
- 5. The Greek case law is only well established in relation to the fact that these criteria do in fact constitute indirect discrimination against women. On the issue of whether that discrimination is legitimate in the sense that it is adequately justified or whether it is not lawful, the case law is still fluid and there are judgements going both ways.
- 6. On the contrary, the case law of the ECJ is extremely clear about the obligation to comply with the principle of equal treatment for men and women in terms of access to vocational training to take up specific occupations, and in relation to the need to remove barriers to women accessing those occupations. The well-established case law states that:⁸ a) the provisions of Article 2(2) of Directive 76/207/EEC (now Article 14 of Directive 2006/54/EC), which permits derogations from the principle of equal treatment when gender is a factor of determining importance for carrying on the specific occupation, introduces a derogation from an individual right and must be narrowly interpreted and compliance with the principle of proportionality must be ensured, which is one of the general principles of Community law⁹ and b) women cannot be excluded from one type of work solely on the grounds that on average they are less tall or less strong than the average man (judgement in the Schnorbus case, C-203/03, para. 46).
- 7. International scientific research and literature about the access of women to military and police occupations is in the same vein, stressing the positive contribution of women and the need to make efforts to remove inequalities.
- 8. The majority of states internationally are also moving in the same direction, and the political will there is towards bolstering the presence of women in those occupations.

⁸ see for example case 222/84 (Marguerite Johnston, C-273/97C-285/98 Tanja Kreil v. Bundesrepublik Deutschland, C-79/99 Schnorbus v. Land Hessen, C-203/03 European Commission v. Austria

⁹ Marguerite Johnston, op cit. para. 36.

V. The Ombudsman's proposals

Acting as the body responsible for monitoring implementation of the principle of equal treatment of men and women in relation to access to employment, vocational training and career advancement, and the terms and conditions of employment, the Ombudsman proposes:

A. An amendment to the law concerning a common minimum height requirement for both sexes as a condition for entry to the Hellenic Police Force academies, so as to treat both sexes proportionately. The recent decision of the Hellenic Armed Forces General Staff to change the limits for entry to the military higher educational institutions and NCO academy where the minimum height requirement for women was lowered from 165 cm to 160 cm, could be taken as a paradigm.

B. The law should be amended relating to the performance levels in athletic trials by restoring those performance levels to the ones which applied before the quotas were removed, and by using the female shot-put.

C. Every effort must be made to ensure that this issue is redressed promptly given the pressure being exerted on Greece by the institutions of the European Union on this matter.

D. Interim arrangements must be adopted so that the reduced limits also apply to this year's entry procedures.

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Attachments: Annex (*The Cypriot Experience*) pp. 13-17

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ANNEX THE CYPRIOT EXPERIENCE

On **31.10.2006** the **Chief of the Cypriot Police** asked the **Commissioner for Administration** (an office similar to that of the Ombudsman) to set for its views on the issue of **amending the system for recruiting women to the police**. The Commissioner for Administration prepared a lengthy report in which she set out her views on the issue. **The views of the Cypriot Commissioner for Administration were accepted by the political leaders of the country and no changes were made** to the minimum height requirements and the performance levels for athletic trials.

An extract from the Cypriot Commissioner for Administration is set out below which contains important scientific data¹⁰:

«**3.2.** *The Chief of Police submitted his second proposal on the establishment of a uniform height requirement and the same level of difficulty in athletic trials for men and women candidates to the Minister of Justice & Public Order in a letter date 30.10.2006, requesting that the Minister make the relevant amendments to the 1989 to 2004 Police (General) Regulations.*

3.3. *Based on the current legislative rules¹¹ male candidates must have a height of no less than 165 cm and women 160 cm. Candidates are also required to pass athletic trials involving certain gymnastic sports¹² as follows:*

- *long jump: at least 2.5 m for men and 1.5 m for women (three attempts)*
- *high jump: at least 1 m for men and 0.70 m for women (three attempts)*
- *1000 m race for men and 800 m race for women, within a maximum time of 5 minutes and 20 seconds (one attempt)*

3.4. *The Chief of Police has recommended that the relevant Regulations be amended so that:*

- *The height requirement should not be less than 165 cm for both sexes*
- *A uniform long jump requirement of at least 2.5 m should apply to both sexes*
- *A uniform high jump requirement of at least 1 m should apply to both sexes*
- *A 1000 m race should be run by both sexes within the same maximum time of 5 minutes and 20 seconds.*

3.5. *This recommendation was of particular concern to me. Taking into account the arguments on which the recommendation was based (corresponding to paragraphs 2.1 to 2.5 above) it is clear that the recommendation was made to limit the number of women recruited by the Police or that the very least not to increase their number.*

3.6. *The biological differences between men and women are not disputed. The well-established case law of the European Court of Justice has stated that unfavourable treatment associated with the biological differences women have from men is direct sex discrimination¹³. Because of that biological difference, the records achieved by athletes in various sports differ according to their sex. According to data given to me from the Cyprus Sports Organisation, the Pancyprian record for the long jump for men is 7.86 m and 6.80 m for women (a difference of 1 metre). In the high jump the record for men is 2.28 m and for women 1.90 m (a difference of approximately 40 cm). In the 100 m race the record for men is 10.22 seconds and for women 11.34 seconds (there is no data available for 1000 m races). In other words,*

¹⁰ The full report is in the Ombudsman's disposal.

¹¹ Regulation 4(1)(e).

¹² Regulation (4(1)(i), Table B.

¹³ C-394/96.

it is clear that when adopting Table B of Regulation 4(1)(i) the legislator took into account the different performances of athletes in specific sports depending on their sex and established corresponding degrees of difficulty for the athletic trials for candidates wishing to be recruited by the police.

3.7. *The right not to be discriminated against is not only violated when there is no equal treatment of equals but also when States, without providing any objective or rational explanation, do not differentiate the treatment of individuals who are different from the others¹⁴. The current legislation which requires lower levels of performance for women candidates in the tests does not give them any advantage given that, because of their biological differences, they are in a less favourable position compared to their fellow male candidates. On the contrary, the current legislation places women on an equal footing given that it allows them to perform in line with their actual physical capabilities”.*

That report then goes on to set forth the scientific approach to the issue and includes data from relevant surveys and the case law.

“The academic approach to the problem of employing women in the police force”

6. *Similar concerns and worries to those of the Chief of Police have been expressed internationally by male police officers who, according to scientific findings, view their female colleagues in a negative light, considering them to be physically weak, overly emotional, easily moved, incapable of achieving respect from citizens and not aggressive enough¹⁵. In addition male police officers predict that female colleagues will fail and doubt the extent to which the latter can acquire the same skills and succeed in their work in the same way as male colleagues. These are views which conflict with a large body of academic studies and scientific findings, some of which I cite below.*

6.1. *There is strong evidence that both women and men are equally capable of policing,¹⁶ in relation to patrols for example,¹⁷ or satisfying citizen requests,¹⁸ physical*

¹⁴ Thlimmenos v. Greece [GC], n.34369/97, CEDH 2000-IV.

¹⁵ Balkin J., “*Why Policemen don’t like Policewomen*”, Journal of Police Science and Administration, 30, (1988): 16, Daniel J. Bell. “*Policewomen: Myths and Realities*”, Journal of Police Science and Administration 10, no.1. (1982): 112-120., Hunt, J. “*The logic of sexism among police*”, Women and Criminal Justice, 2, (1990):3-30, Martin, S. (1980) *Breaking and Entering: Policewomen on Patrol*, Berkeley: University of California Press, Martin, S. and Jurik, N. (1996) *Doing Justice, doing gender: Women in law and criminal justice occupations*, Thousand Oaks, CA: Sage, Palombo, J.B. (1992) “*Attitudes, training, performance, and retention of female and minority police officers*”, in G. Felkenes and P.C. Unsigner (eds), Diversity, affirmative action and law enforcement (pp.57-90).

¹⁶ Martin, S., Jurik, N. (1996), *Doing Justice, doing gender: Women in law and criminal justice occupations*, Thousand Oaks, CA: Sage.

¹⁷ Bloch, P. and Anderson, D. (1974) *Policewomen on patrol: Final Report*, Washington, DC: Police Foundation, Sherman, J.L. “*An evaluation of policewomen on patrol in a suburban police department*”, Journal of Police Science and Administration,3 (1975): 434-438, Townsey, R. (1982) “*Female patrol officers: A review of the physical capability issue*”, in B. Price and N. Skoloff (Eds), The Criminal Justice System and Women, (pp.431-426), New York: Clark Broadman.

¹⁸ Sherman, J.L. “*An evaluation of policewomen on patrol in a suburban police department*”, Journal of Police Science and Administration,3 (1975).

and bodily abilities,¹⁹ willingness to undergo physical training,²⁰ and handling of violent situations.²¹ Studies have also shown that in some sectors relating to law enforcement, women police officers are most suitable than their male colleagues.²²

6.2. Women usually differ from their male colleagues in how they police, but that does not mean that the policing female staff provides is poorer quality or less effective than that provided by their male colleagues. Women police officers generally avoid escalating a conflict with citizens into a violent episode and appear to be more capable as mediators in amicable disputes. Women are considered more capable of implementing forms of community policing such as neighbourhood policing where preventative forms of policing and cooperation with citizens is required, as is the development of a trust-based relationship between the two sides.²³ In addition, they are considered more capable of handling complaints relating to sensitive topics such as domestic violence, rape and sexual harassment, without negating the seriousness of the offences involved.²⁴ A higher number of women in the professions also reduces problems related to gender such as sex discrimination and sexual harassment.²⁵

6.3. The rise in the number of women police officers can also reduce the use of excessive violence and improve the effectiveness of policing and the quality of service provided to the public. For example, I would cite an analysis of complaints against police officers and complaints from citizens in the period 1990 to 1999²⁶ to the police forces of Los Angeles and Cincinnati, according to which the average male police officer was 8 ½ times more likely to receive a complaint than women colleagues and 2 to 3 times more likely to be the subject of a citizen complaint about the use of unjustified or excessive violence.

6.4. At the core of the sexism which has been noted lies the concern among male police officers over the difference in the level of muscle strength between men and women. Physical strength is not, however, any indication of the effectiveness of a police officer at work or his/her abilities to successfully handle dangerous situations.²⁷ To date no case has been recorded of a negative outcome of a case due to lack of

¹⁹ Townsey, R. (1982) "Female patrol officers: A review of the physical capability issue", in B. Price and N. Skoloff (Eds), The Criminal Justice System and Women, (pp.431-426), New York: Clark Broadman

²⁰ Moldon, J., "Female Police Officers – Training Implications", Law and Order: The Magazine for Police Management, 45(8), (1985): 10.

²¹ Grennan, A.S. "Findings on the role of officer gender in violent encounters with citizens", Journal of Police Science and Administration, 15, (1987): 78-85, Moldon, J., "Female Police Officers – Training Implications", Law and Order: The Magazine for Police Management, 45(8), (1985): 10.

²² Palombo, J.B. (1992) "Attitudes, training, performance, and retention of female and minority police officers", in G. Felkenes and P.C. Unsigner (eds), Diversity, affirmative action and law enforcement (pp.57-90).

²³ Grennan, A.S. "Findings on the role of officer gender in violent encounters with citizens", Journal of Police Science and Administration, 15, (1987): 78-85, Independent Commission on the Los Angeles Police Department (1991), p.83, Sherman, J.L. "A psychological view of women in policing", Journal of Police Science and Administration, 1, (1973): 383-394.

²⁴ R.J. Homant and D.B. Kennedy, "Police perceptions of spouse abuse – a comparison of male and female officers", Journal of Criminal Justice, 13 (1985): 29-47.

²⁵ National Center for Women and Policing (2003), Hiring and Retaining More Women: Advantages to Law Enforcement Agencies, p.9.

²⁶ National Center for Women and Policing (1992), Men, Women and Excessive Force: A Tale of Two Genders, p.2.

²⁷ Daniel J. Bell. "Policewomen: Myths and Realities", Journal of Police Science and Administration 10, no.1. (1982): 112-120.

muscle strength or aggressiveness on the part of a female police officer.²⁸ Scientific findings indicate that the main reason for this is extraneous factors which cannot be controlled or wrong judgement calls by the police officer at the specific point in time.²⁹

6.5. The height criterion adopted for entry to the police force and the disproportionately high criterion for physical exercise tests are, according to a surveying conducted by the National Center for Women and Policing, *Tearing Down the Wall: Physical Agility Testing in Police Selection*,³⁰ not indicative of the later successful performance of duties by a police officer or not, but may well entail indirect discrimination since scientific findings demonstrate the likelihood of those criteria being used primarily to reject a significant number of women. The US Supreme Court ruled that the height criteria entailed sex discrimination and ordered that they be abolished³¹.

6.6. According to guidelines provided by the Equal Employment Opportunity Commission (USA), if the physical exercise tests are such that they limit the success of women to less than 80% of that of men, then the burden of proof lies with the Chief of Police, who must prove that those tests are relevant to the police duties, proportionate to operational requirements and are the least discriminatory means for selecting the most suitable candidate.³²

6.7. Studies have also shown that other features of a police officer are more desirable and more effective than just muscle strength, such as the ability to defuse the potential escalation of a situation into a violent event³³ and the ability to keep his/her calm in conflicts that might arise.³⁴ The insistence on muscle strength as the main and basic qualification for effectively performing police duties, especially taking into account that 80-90% of policing consists of services and functions which have no direct relationship with active crime suppression, is not justified, and can lead to indirect sex discrimination in the employment sector.

6.8. In the case *United States v. Virginia*,³⁵ which related to non-acceptance of women in a military academy, the US Supreme Court ruled that this was a breach of the principle of non-discrimination and constituted direct sex discrimination. In particular, it ruled that the state must prove using genuine reasons, and not generalisations or assumptions about the roles and abilities of women, the argument it is putting forward. The crucial question was to what extent the state could refuse women who wanted to and were able, to study at the military academy. The court answered that question in the negative".

²⁸ Michael, T. Charles, "Performance and socialization of female recruits in the Michigan State Police training academy," *Journal of Police Science and Administration* 10(1981): 209-223. For a short overview of the international research on this topic see Joseph Balkin, "Why policemen don't like policewomen", *Journal of Police Science and Administration*, 16, no.1 (1988):29-38.

²⁹ Michael, T. Charles, "Women in Policing; The Physical Aspect," *Journal of Police Science and Administration* 10, no.2 (1982): 194-205.

³⁰ Published at *Police Quarterly*, 3 (2003).

³¹ *Dothard v. Rawlinson*, 433 U.S. 321(1977).

³² Equal Employment Opportunity Commission, 29 CFR Ch. XIV, Subpart D, 7-1-01 Edition.

³³ Daniel J. Bell. "Policewomen: Myths and Realities", *Journal of Police Science and Administration* 10, no.1. (1982): 112-120.

³⁴ Marlene W. Lehtinen, "Sexism in Police Departments", *Trial Magazine*, September 1976, 52-55.

³⁵ *United States v. Virginia*, 519 U.S. 515, 116 S.Ct. 2264, 135 L.Ed.2d. 735 (1996).