



# Positive Action, (Gender) Quotas & EU Law

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## Purpose

- Positive action *acquis* in gender
- (Positive action in the Race and Ethnic Origin Directive & Framework Directive)
- Gender quota for company boards: intro
- Light at the end of the tunnel? Age  
discrimination

## Purpose

- NOT:
  - disability, direct age discrimination
  - human rights law (right to property or to conduct a business)
  - MS experience

## What is PA?

- No definition – More a process than a concept
- *“Any measure contributing to the elimination of inequalities in practice”*
- Discrimination in EU Law:
  - *“the application of different rules to comparable situations, or the application of the same rules to different situations”*

## What is PA?

- Elements:
  - Promoting substantive equality: outcome v. opportunity
  - Group consideration v. individual merit
  - Dynamic v. static approach
- Harbours a whole range of potential measures!!
  - State or private actors
  - From encouragement (facilitation, promotion, outreach, accommodation, diversity) to reverse discrimination and soft or hard quotas
  - Backward-looking or forward-looking

## Positive Action/Discrimination

## Once and for all

- Positive action is so much more than positive discrimination
- Positive discrimination *is* discrimination

## Art. 2(4) original Equal Treatment Directive 1976/207

- “*This Directive shall be without prejudice to measures to promote equal opportunities for men and women, in particular by removing existing inequalities which affect women’s opportunities”*
- Seen as an exception rather than as a clarification to equality: ECJ development

## Art. 5 D2000/43 and Art. 7.1 D2000/78

- *“With a view of ensuring full equality in practice (between men and women in working life), the principle of equal treatment shall not prevent any Member State from maintaining or adopting specific 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) linked to any of the grounds.”*

## Art. 157(4) TFEU & amended and recast Equal Treatment Directive

- *“With a view of ensuring full equality in practice between men and women in working life, the principle of equal treatment shall not prevent any Member State from maintaining or adopting measures providing for specific advantages in order to make it easier for the under-represented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers.”*

👉 AIM is codified

## Analysis

- Textual comparison
  - Very similar
  - More restrictive: no specific advantages
  - More extensive: any specific measure and any disadvantage
- Genesis of the 2000 Directives

## ECJ - General

- Only a small fraction of PA is liable to generate conflict with EC law: reverse discrimination
- ECJ has not (yet) widened the scope for PA under 157(4) TFEU: uniform test
- No general duty of PA implicit in non-discrimination to avoid negative impact: indirect discrimination & its justification (*Bilka*)

## ECJ & Positive discrimination

- Formal equality is the rule, positive discrimination the narrow exception
- Objective contents:
  - Objectively address occupational difficulties of the favoured group
  - Clear and unambiguous criteria
- Proven and genuine group imbalance, even if the favoured individual is not harmed by it
- Appropriate and necessary PA – proportionality & thus intrinsically temporary
- No automatic quotas – ‘saving clause’

## The Key: Proportionality

- Legitimate aim:
  - May vary with the ground, but is codified for gender
  - Objective contents
  - Diversity per se is suspect
- Effective:
  - Proven and genuine imbalance – How much? Where? Gradual reduction or just temporary?
  - How effective? Perverse effects?
- Necessary:
  - Alternatives? Cost/benefit? Narrowly tailored?



## (Gender) Quotas

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## EU Law v EU Policy

- 2010-2015 EU Strategy for equality between men and women
- Board quotas: on a collision course?
  - MS initiatives
  - Softer EC proposal: COM(2012)614 final

## Board Gender Balance Directive

Member States shall ensure that **listed companies** in whose **boards** members of the under-represented sex hold **less than 40 per cent of the non-executive director positions** make the appointments to those positions on the basis of a *comparative analysis of the qualifications of each candidate, by applying pre-established, clear, neutrally formulated and unambiguous criteria*, in order to **attain the said percentage at the latest by 1 January 2020 or at the latest by 1 January 2018** in case of listed companies which are public undertakings.

## Board Gender Balance Directive

- Priority shall be given to the candidate of the under-represented sex if that candidate is **equally qualified as a candidate of the other sex in terms of suitability, competence and professional performance**, unless an objective assessment taking account of all criteria specific to the individual candidates tilts the balance in favour of the candidate of the other sex
- Obligation to disclose qualification criteria upon request
- Presumption of target violation if presumption of equal qualification

## Legal?

- Objective contents of objectively addressing occupational difficulties: self-fulfilling prophecy or more?
- Aim?
  - META: Functioning of the internal market
  - MACRO: Loss of economic growth potential
  - MICRO: Corporate governance and financial performance of the company
  - RESULT: achieve effective gender equality
- Effective? Proportionate? / Necessary?

## Age Discrimination: the new template?

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## **Age discrimination v Market: art. 6 D2000/78**

- “Notwithstanding (...) differences of treatment on grounds of age shall not constitute discrimination, if, within the context of national law, they are objectively and reasonably justified by a legitimate aim, including legitimate employment policy, labour market and vocational training objectives, and if the means of achieving that aim are appropriate and necessary.”

## **Court of Justice**

- “it must be observed that the clause on the automatic termination of employment contracts at issue in the main proceedings is the result of an agreement negotiated between employees’ and employers’ representatives exercising their right to bargain collectively which is recognised as a fundamental right.”

## Court of Justice

- “the clause on automatic termination of employment contracts is thus the reflection of a balance between diverging but legitimate interests.”
- “Accordingly, in the light of the wide discretion (...) **it does not appear unreasonable** for the social partners to take the view that a measure (of automatic termination upon reaching retirement age) **may be appropriate for achieving the aims** set out above.”

## Thank You

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