Positive action and gender quotas

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Aim

- To analyse the concept of positive action in EU law (focus on measures in favour of female workers)
  A. Legal provisions
  B. CJEU case law
  C. Implementation in EU Member States
Positive social attitudes

and negative ones...
Statistical data – EUROSTAT, 2017

- In the EU one in three directors is a woman (65% men and 35% women in positions of responsibility in enterprises with more than 10 workers).
- In Latvia there are more women than men managing enterprises. In Bulgaria and Poland the percentage of women is 44%. There are around 40% of women directors in Ireland, Estonia, Lithuania, Hungary, Romania, France and Sweden. Spain has around 37%.
- At the bottom of the rankings with less than 25% representation of women: Germany, Italy, Cyprus, Belgium, Austria and Luxembourg.

http://ec.europa.eu/eurostat/documents/2995521/7896990/3-06032017-AP-EN.pdf/ba0b2ea3-f9ee-4561-8bb8-e6c803c24081

Statistics – EUROSTAT, 2017 - Pay

- Gender pay gap - European average of 23.4%.
- At the low end of the pay gap between directors of different genders: Romania, only 5%, followed by Slovenia (12.4%), Belgium (13.6%) and Bulgaria (15.0%).
- In Spain pay inequality in directoral positions stands at 16.2%. Similar percentages: Cyprus, Ireland and Sweden
- Above the European average are countries like the UK, Estonia, Portugal, Germany, Austria, Poland, Slovakia and the Czech Republic, with rates around 25-29%.
- The biggest pay gaps are in Italy and Hungary with some 33%. 
### Debate on positive action

**Proponents**: Because of prior discrimination in employment, women and minorities are disadvantaged when they try to enter employment, obtain a promotion or retain a job.

Positive action in the strict sense (preferential treatment regarding access to jobs, promotion and retention of employment) = remedy for the effects of prior discrimination.

**Opponents**: Why must an individual lose his chance of getting a particular job and bear the burden of redressing grievances created by society as a whole?

- Difficulties in deciding which groups are to receive preferential treatment.

Problems associated with the concept of preference: may possible **boomerang effect** that could reinforce negative stereotypes about groups or minorities.
Historical Background

- Origin of the concept of positive action: US Supreme Court – Associated with the idea of fighting social discrimination.
- Measures to combat:
  1. Racial discrimination (Brown, 1954)
  2. Racial segregation in employment (Griggs, 1971)
  3. Sex discrimination (Johnson, 1987)

Positive action in EU law:

- Separate concepts used: affirmative action, preferential treatment, positive action
- Broad range of measures:
  - Equal opportunities policies (promotion of female employment, special educational/training programmes)
  - Positive action measures stricto sensu: quotas and targets (e.g. preferential treatment in access to public employment – reserved job quota).
Concept of equality – EU law:

- **Formal equality** (Aristotelian): ‘Equal should be treated equal and unequal in an unequal way.’ Model - individual complaints raised by victims of discrimination.
  - Protection against discrimination:
    - Direct discrimination (objective & non-justifiable)
    - Indirect discrimination (collective & objectively justifiable/proportionality principle)

- **Real or substantive equality**: assure equal opportunities and objective equality in outcomes – Proactive model
  - Promotion of disadvantaged groups in the labour market

Issue for discussion:

- **Principal question**: Is the result pursued by EU law substantive or formal equality?
  - C-136/95, Thibault; C-158/97, Badeck; Case C-407/98, Abrahamsson; C-342/01, Merino Gómez

- **Hypothesis**: The positive dimension of equality can be observed, even when restrictively shaped, in the EU legislation and in the CJEU’s case law interpreting it.
Legal framework – EU law

- Article 3 TEU (The EU shall combat social exclusion and discrimination, and shall promote social justice and protection, equality between women and men…)
- Article 8 Treaty on the Functioning of the EU, TFEU: In all its activities, the Union shall aim to eliminate inequalities, and to promote equality, between men and women.
- Art. 157.4 TFEU (principle of equal treatment - measures that contribute to ensuring the practical application of equality between men and women in working life)
- Art. 3 Directive 2006/54/EC (equality between women and men)
- Art. 23 Charter of fundamental rights of the EU (Legitimacy of positive action measures in favour of the under-represented sex)

Principle of equal treatment for men and women and positive action in EU law

- Art. 157.4 TFEU: ‘With a view to ensuring full equality in practice between men and women in working life, the principle of equal treatment shall not prevent any Member State from maintaining or adopting measures providing for specific advantages in order to make it easier for the under-represented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers.’
- Article 3 Directive 2006/54/EC: ‘Member States may maintain or adopt measures within the meaning of Article 141.4 of the Treaty (current Art. 157.4) with a view to ensuring full equality in practice between men and women in working life.’
- Article 23 - Charter of Fundamental Rights of the EU:
  - Equality between women and men must be ensured in all areas, including employment, work and pay.
  - The principle of equality shall not prevent the maintenance or adoption of measures providing for specific advantages in favour of the under-represented sex.
Court of Justice of the EU - Case Law

C-450/93 Kalanke: Positive action measures giving an ‘automatic priority’ on a promotion to women breach Community law.

C-409/95 Marschall: A national rule which, in a case where there are fewer women than men at the level of the relevant post in a sector of the public service and both female and male candidates for the post are equally qualified, requires that priority be given to the promotion of female candidates is not not against EU law provided that it contains a saving clause that guarantees male candidates who are equally as qualified as the female candidates that the candidatures will be the subject of an objective assessment which will take account of all criteria specific to the candidates and will override the priority accorded to female candidates where one or more of those criteria tilts the balance in favour of the male candidate, and such criteria are not such as to discriminate against the female candidates.

C-158/97, Badeck: The Directive on equal treatment between men and women does not outlaw national legislation which, to the extent that its aim is to eliminate under-representation of women, reserves at least half the training places in occupations requiring specialised training in which women are underrepresented and for which the state does not have a monopoly on the provision of the training, unless, despite the adoption of suitable measures to inform women of the existence of available occupational training places, too few women apply. (fixed quota!)

C-407/98, Abrahamsson The Directive on equal treatment between men and women and article 157.4 TFEU preclude national legislation under which a candidate for a public post who belongs to the under-represented sex and possesses sufficient qualifications for that post must be chosen in preference to a candidate of the opposite sex who would otherwise have been appointed, where this is necessary to secure the appointment of a candidate of the under-represented sex and the difference between the respective merits of the candidates is not so great as to give rise to a breach of the requirement of objectivity in making appointments. (Breach of the proportionality principle - meritocracy).

Proportionality principle - 3 conditions: (C-170/84, Bilka)
- Measures – meet a real need of the enterprise (or legitimate objective of social policy);
- must be appropriate to meet the objective pursued;
- and must be necessary to achieve that aim.
Other relevant cases:
- C-476/99 Lommers: Arguments based on the fact that women are more likely to interrupt their careers to take on the care of their young children can only be taken into account with due respect to the proportionality principle.
- C-319/03, Briheche (need to respect the proportionality principle).
- C-559/07, Commission v. Greece: The Greek civil and military pension code breaches the principle of equal treatment by including measures which differentiate between male and female workers in terms of retirement age and minimum duration of service.
- C-104/09, Roca Álvarez
- The status of men and women in the care and education of their children is comparable.

CJEU Case Law - Conclusions:
- The interpretation given by the Court to the concept of positive action is very strict.
- Requirements for the adoption of positive action measures are very stringent:
  - Existence of an under-represented group (disadvantaged).
  - No automatic priority – flexible application
  - Appropriate and necessary measures - compliance with principle of proportionality
  - Temporary measure (until societal discrimination is overcome)
- Use of undefined expressions: ‘rigid quota’, ‘flexible result quota’, ‘saving or flexibility clause’
- From the judicial point of view, the concept of equality is closer to formal equality than to real or substantive equality.
Positive action: a duty of the public authorities or strict exception?

- Member States Belgium, France, Germany, Italy, Spain (Art. 9.2 of the constitution, substantive equality law 7/2007) have fundamental legal texts containing measures which impose a positive duty on the legislator to promote real or substantive equality of opportunities between women and men – Positive action is conceived as necessary.
- Arts. 2-5 Convention on the Elimination of All Forms of Discrimination against Women (UN): Duty of States to adopt suitable measures to produce de facto improvements to the situation of woman in society (“to ensure the full development and advancement of women”).
- Friction between the interpretation of the Court of Justice (positive action measures – exception to the principle of equality and must be limited in application) and national and international law.
- In EU law the adoption of positive action measures is only permitted to a limited extent and it is not conceived as a duty of public authorities.

Problems of the compensatory theory

Are positive action measures an effective tool to combat discrimination against women in the labour market?

- Equality limited to the concepts of dignity, social justice, compensation, and redistribution
- Economic argument: Do positive action policies which increase the presence of women in directorships improve European competitiveness and increase corporate profits? Contradictory studies
- Fundamental right: Positive action is a corollary of the obligation of Member States to promote real equality between citizens, from both individual and collective points of view, as a way of breaking down the barriers that prevent their full participation in political, economic and social life.

- Gender imbalance in decision-making positions is observed in various domains: politics, economics, science and research but it is really dramatic in business management.

- Commission proposal: Objective: 40% of the under-represented sex in non-executive board-member positions in publicly listed companies by 2020 and by 2018 for public undertakings.

Proposed Directive - improving the gender balance among non-executive directors of companies listed on stock exchanges

- Applies to companies employing more than 250 people and with an annual turnover of EUR 50 million or balance sheet value over EUR 43 million. (Small and medium-sized enterprises are exempted, Article 3.)

- Article 4(3) follows CJEU case law: “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 the qualification criteria upon which the selection was based, the objective comparative assessment of those criteria and the considerations tilting the balance in favour of a candidate of the other sex. Article 4(4)
Proposed Directive - improving the gender balance among non-executive directors of companies listed on stock exchanges

- Reversal of the burden of proof, article 4.5.
- Objective 40% is flexible for Member States - Articles 4(6) and 4(7):
  - listed companies where the members of the underrepresented sex represent less than 10 per cent of the workforce are not subject to the objective.
  - objective is met where listed companies can show that members of the under-represented sex hold at least one third of all director positions, irrespective of whether they are executive or non-executive.
- Reporting and publishing obligations and sanctions (effective, proportionate and dissuasive).
- Temporary measure Expires on 31 December 2028.

National measures

- Belgium, France, Italy and Germany have already set by law their own quotas for women on boards of directors.
- Austria, Denmark, Slovenia, Finland and Greece have legislation on the balance between women and men on the boards of administration of public enterprises.
- Spain and the Netherlands – voluntary systems
Questions for discussion:

- How can the adoption of positive action measures in favour of women be stimulated within the EU at present? Commission initiatives:

- Are female workers a homogeneous social group, traditionally affected by discrimination and segregation in the labour market? Declaration annexed to the TEC: under-represented gender = women

- How should the differences between national and European legal frameworks be overcome in the practical implementation of positive action measures?

Eurobarometer 376 - 2012

- European agreed that something needed to be done to address the imbalance caused by the mistrust of women in a male-dominated business world (76%).
- Nine out of ten respondents believed that, where qualifications were equal, women should have the same representation in corporate directorships.
- Three out of four supported the existence of legislation on gender administration on boards of directors.
Thanks for your attention

- Questions?
- Clarifications?