Positive Action and Gender Quotas in EU Law

ERA – Academy of European Law
October 2017
Trier

Dr Panos Kapotas
Senior Lecturer
Portsmouth Law School

Presentation Overview

Part A
- Definitions
- Conceptual background
- Positive action typology

Part B
- Normative framework
- EU policies
- CJEU case-law

Part C
- Do we really need gender quotas? Statistical data
Positive action in EU Law: Key points

- **Positive Action in EU Law**
  - Permissible – not compulsory
  - Quotas (as our principal focus)
  - Employment law (public decision-making bodies?)
  - Inequalities (under-representation / disadvantage)
  - Gender (permissible on other grounds as well)

What is positive action: Working definition

**Definition**
- Positive action is an umbrella term that accounts for a wide range of measures aimed at redressing inequalities stemming from past or present discrimination.
- It consists of “proportionate measures undertaken with the purpose of achieving full and effective equality in practice for members of groups that are socially or economically disadvantaged, or otherwise face the consequences of past or present discrimination or disadvantage”.

**Key elements**
- Measures that involve some form of benefit or preference...
- ...allocated to members of disadvantaged group(s) → under-representation often used as proxy for disadvantage
- Conceptual (and normative) link to discrimination (past or present) that resulted in existing inequalities
- Aim → full and effective equality in practice (Art. 157 TFEU)
### Conceptual background: Conceptions of equality and positive action

Conceptions of equality (classical conceptual framework) → approach to positive action

<table>
<thead>
<tr>
<th>Conception</th>
<th>Approach</th>
</tr>
</thead>
<tbody>
<tr>
<td>Formal equality</td>
<td>&quot;treating likes alike&quot;</td>
</tr>
<tr>
<td>NO to any form of positive action</td>
<td></td>
</tr>
<tr>
<td>Equal opportunities</td>
<td>&quot;levelling the playing field&quot;</td>
</tr>
<tr>
<td>YES only to soft forms of positive action</td>
<td></td>
</tr>
<tr>
<td>Substantive equality</td>
<td>de facto equality - outcomes matter</td>
</tr>
<tr>
<td>YES to positive action either conditionally (flexible result quotas) or unconditionally (strict quotas)</td>
<td></td>
</tr>
</tbody>
</table>

**NB:** One of the key questions in the EU equality / positive action literature is whether there has been a paradigm shift in EU law (and in CJEU case-law) from formal to substantive equality.

### Terminological clarifications

**Legally CORRECT**

- **Positive action**
  - Term of preference in EU law.

- **Affirmative action**
  - US equivalent of “positive action”.
  - Sometimes used in a European context to describe strict positive measures.

**Legally INCORRECT**

- **Positive discrimination**
  - The term is erroneous in that it describes a positive measure that is in fact **unlawful**.
  - Unlawful positive action = **discrimination**

- **Reverse discrimination**
  - Mutatis mutandis above.
Terminological clarifications

Positive action v reasonable accommodation / adjustments

• Reasonable accommodation / adjustments: steps that employer (or service provider) etc must take in order to ensure equality of treatment of disabled persons.
• Expression of substantive equality (disabled person may be treated more favourably), but not positive action (no need to demonstrate discrimination / disadvantage / under-representation).

Positive action v special treatment

• “Special treatment” = treatment afforded to specific groups regardless of comparisons (usually due to vulnerability of the group).
• E.g. protective rules for pregnant women – not positive action (mutatis mutandis above + pregnancy as a unique biological condition).

Positive action Typology

Monitoring (composition of workforce)

Strict quotas (no interpersonal comparison of qualifications)

Flexible quotas (tie-break)

Redefining (selection criteria – merit)

Outreach measures (general +individual)
Positive action

Typology

**Soft**
- Identify under-represented groups and improve their chances of competing in the labour market on equal terms
- Abstract-general (monitoring mechanisms and inclusive definitions of merit) or concrete-individual (active encouragement to apply; targeted training)

**Strict**
- Remove existing inequalities and reduce visible under-representation by favouring individual members of under-represented groups
- Use quotas to achieve results in the short term, either flexible (tie-break between equally qualified candidates) or non-flexible (no interpersonal comparison of merit)

---

**EU normative framework: Positive action**

**Article 157 (4) TFEU [ex Article 141(4) EC]**
- ‘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 23 EU Charter of Fundamental Rights**
- ‘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.’

**Article 3 Directive 2006/54/EC [Recast Equal Treatment]**

**Article 6 Directive 2004/113 [Goods and Services]**
EU policy developments: Draft Directive on “Women on Boards”

Minimum objective of 40% for members of the under-represented sex for non-executive members of the boards of publicly listed companies in Europe by 2020 (or 2018 for public undertakings).

“Flexi quota” → obligation for listed companies to set themselves individual, self-regulatory targets regarding the representation of both sexes among executive directors (by 2020 or 2018 for public undertakings) + annual reporting.

Qualification and merit will remain key criteria for selection.

Member States will have to lay down appropriate and dissuasive sanctions for companies in breach of the Directive.

CJEU positive action case-law

Overview

Case 312/86 Commission v France [1988] ECR 6315; C-450/93

Eckhard Kalanke v Freie Hansestadt Bremen

ECR [1995] I-03051; C-409/95 Helmut Marschall v Land Nordrhein-Westfalen ECR [1997] I-06363; C-

158/97 Georg Bastek and Others ECR [2000] I-01875;

C-79/99 Julia Schnorbus v Land Hessen [2000] ECR

I-10997; C-407/98 Karina Abrahamsson and Leif Anderson v Elisabet Fogelqvist ECR [2000] I-05539;


C-476/99 H. Lommers v Minister van Landbouw, Natuurbeheer en Visserij ECR [2000] I-02891;


Formal equality

Substantive equality

Limits of quotas
CJEU positive action case-law

Formal equality?

**Commission v. France (1988)**

- French law permitting collective agreements to include provisions "granting special rights to women" found to be incompatible with the ETD due to its *generality* and the absence of an appropriate *mechanism to review* the special rights periodically.
- **Para 14**: "[s]ome of the special rights preserved relate to the protection of women in their capacity as older workers or parents - categories to which both men and women may equally belong".

**Kalanke (1995)**

- German regional law with a tie-break clause in favour of equally qualified female candidates in sectors where women were under-represented was found to go beyond equality of opportunities, due to *automatic preference* to the female candidate amounting to unjustifiable reverse discrimination.
- **Para 16**: "A national rule that, where men and women who are candidates for the same promotion are equally qualified, women are automatically to be given priority in sectors where they are under-represented, involves *discrimination on grounds of sex*".

Substantive equality?

**Marschall (1997)**

- German regional law provided for preferential treatment to equally qualified female candidates in career brackets where women were under-represented, "unless reasons specific to an individual [male] candidate tilt the balance in his favour".
- CJEU: scheme was compatible with EU Law because the "saving clause" ensured that the selection process permitted for an ad hoc consideration of the candidates’ individual circumstances.

**Badeck (1999)**

- German public service rules gave priority to women in promotions, access to training and recruitment in sectors of the public service where women were under-represented, when the female candidate was equally qualified to her male counterpart and only if no reasons "of greater legal weight" did not tilt the balance in favour of the male candidate.
- CJEU: scheme compatible with ex Art. 141 (4) EC (now Art. 157 TFEU).
CJEU positive action case-law
Limits of substantive equality

Abrahamsson (2000)

- Swedish regulation for appointments to teaching posts in higher education institutions provided for preference to sufficiently qualified candidates of the under-represented sex (even when less qualified) under the proviso that the difference in qualifications “is not so great that application of the rule would be contrary to the requirement of objectivity in the making of appointments”.

- Para 52: “[T]he legislation at issue in the main proceedings automatically grants preference to candidates belonging to the under represented sex, provided that they are sufficiently qualified, subject only to the proviso that the difference between the […] is not so great as to result in a breach of the requirement of objectivity in making appointments.”

CJEU positive action case-law
Current position

Gender quotas in EU Law: Conditions of legitimacy

Flexible result quota

- Operate as a tie-breaker between equally qualified candidates.

Saving clause

- Proviso that allows for an ad hoc interpersonal comparison of individual situations.

Sunset clause

- Temporally limited application / periodic review.
CJEU positive action case-law
Current position

Conceptual boundaries: what is and what is not positive action

Griesmar (2001)
- Female civil servants with children entitled to a service credit added to their pension for each of their children (French Civil and Military Retirement Pensions Code).
- Whether the scheme depends on whether the system is designed to offset occupational disadvantages related to childbirth (uniquely female condition) or the upbringing of children.

Lommers (2002)
- Subsidised nursery places reserved for female employees (Dutch public sector scheme); male employees could take advantage of the scheme in “emergency” situations.
- CJEU: difference in treatment on grounds of gender legitimate under the ETD, insofar as it satisfied the standard criteria of legality.

Briheche (2004)
- French law exempted certain categories of women, including “widows who have not remarried”, from the maximum age limit of 45 years for obtaining access to public sector employment.
- “[The scheme in question] automatically and unconditionally gives priority to the candidatures of certain categories of women [...] excluding widowers who have not remarried who are in the same situation.” (para 27)

Maistrellis (2015)
- “[…] under national law, mothers who are civil servants are always entitled to parental leave, whereas fathers who are civil servant are entitled to it only if the mother of their child works or exercises a profession.” (para 49)
- “[…] a provision such as the one at issue in the main proceedings, far from ensuring full equality in practice between men and women in working life, is liable to perpetuate a traditional distribution of the roles of men and women by keeping men in a role subsidiary to that of women in relation to the exercise of their parental duties (see, to that effect, judgments in Lommers, C-476/99, EU:C:2002:183, paragraph 41, and Roca Álvarez, C-104/09, EU:C:2010:561, paragraph 36).” (para 50)

Gender Equality in the EU:
The Status Quo in Figures

DO WE REALLY NEED GENDER QUOTAS?
Gender Balance in Decision-making Bodies

National Parliaments (EU28 - 2017)


Gender Balance in Decision-making Bodies

National Governments (EU28 - 2017)

Gender Balance in Decision-making Bodies

National Supreme Courts (EU28 - 2017)


Gender Balance in Decision-making Bodies

Business – largest publicly listed companies (EU28 - 2017)

Dr Panos Kapotas
panos.kapotas@port.ac.uk