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Positive action in the EU

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Outline

- 1) Phenomenon of positive action
 - What, why, how, with what ultimate aim?
- 2) Lawfulness of national positive action measures under EU law
 - Evolving legal framework; case law and legislation
 - Assessment; what ultimate aim?
- 3) Proposed 'Gender-Balanced Company Boards' Directive

1) Phenomenon; notion

“measures that entail some type of preferential treatment for members of disadvantaged groups in overcoming obstacles and/or discrimination they face in society”...

or in a broader sense...

“all measures which seek by means of positive steps to alter existing social practices so as to eliminate patterns of group exclusion and disadvantage”

Drivers

- **Upholding equality/equal opportunities:**
 - Individual justice, fairness
 - Societal, fundamental value
 - Economic rationale
- **But persisting discrimination and factual inequality across many domains:**
 - Limits individual complaints model
 - Dominant social assumptions and stereotypes
 - Under-representation in networks, public bodies, organisations, lack of role models => institutional discrimination

Drivers in EU context

Council Recommendation 84/635/EEC :

(1) To adopt a positive action policy designed to **eliminate existing inequalities** affecting women in working life and to **promote a better balance between the sexes** in employment, comprising appropriate general and specific measures, within the framework of national policies and practices ..., in order:

- (a) **to eliminate or counteract the prejudicial effects on women** in employment or seeking employment which arise from **existing attitudes, behaviour and structures** based on the idea of **a traditional division of roles** in society between men and women;
- (b) to **encourage the participation of women in various occupations** in those sectors of working life where they are at present **underrepresented**, particularly in the sectors of the future, and at higher levels of responsibility in order to achieve **better use of all human resources**.

Categories of positive action

Ch. McCrudden:

- 1) Eradicating prohibited discrimination
- 2) Purposefully inclusive policies
- 3) Outreach
- 4) Redefining merit
- 5) Preferences => **most controversial...**

But different types of preferences...

- **Absolute preference:** reserving certain benefits exclusively for members of the underrepresented sex.
- **Strong preference:** granting advantage to members of the underrepresented sex who satisfies some minimum eligibility criteria for a particular position.
- **Tie-break preference:** granting an advantage to members of the underrepresented sex who are equally qualified for a particular position or equally deserving of particular benefit.
- **Flexible preference:** allows granted sex-based advantages to be overridden by some other socially valuable reason (e.g. long-term unemployment, single parenthood, etc.). Both strong and tie-break preferences can be flexible preferences.
- **Weak preference:** merely allows for sex to be one of various criteria of selection, each of which is of more or less equal weight. (Report Selanec-Senden)

=> **Legally acceptable or not?**

What underlying normative aim of equality law and policy?

Equality

Formal
Treating likes alike

Equal opportunities
Levelling the playing field

Substantive
Equality of results

Transformative
Tackling gender stereotypes

2) Lawfulness national positive action measures under EU law

- old art. 2(4) Directive 76/207:

4. This Directive shall be without prejudice to measures to **promote equal opportunity** for men and women, in particular by removing existing inequalities which affect women's opportunities in the areas referred to in Article 1 (1)

Leading cases

All relating to art. 2(4) Dir. 76/207:

- Case C-450/93 Kalanke v Freie Hansestadt Bremen
- Case C-409/95 Marschall v Land Nordrhein-Westfalen
- Case C-158/97 Badeck v Landesamt beim Staatsgerichtshof des Landes Hessen
- Case C-407/98 Abrahamsson v Fogelqvist
- Case C-476/99 Lommers v Minister Van Landbouw, Natuurbeheer en Visserij
- Case C-104/09 Roca Alvarez

Kalanke

- “national laws which guarantee women **absolute and unconditional priority** for appointments or promotion in sectors in which they are under-represented **go beyond the limits of the exception** provided by art 2(4)”

Marschall; no automatic preference

“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 in terms of their suitability, competence and professional performance**, requires that **priority** be given to the promotion of female candidates ***unless reasons specific to an individual male candidate tilt the balance in his favour*** is not precluded by Article 2(1) and (4) of Council Directive 76/207/EEC of 9 February 1976 provided that:

- a. [I]n each individual case the rule provides for male candidates who are **equally as qualified** as the female candidates a guarantee 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
- b. [S]uch criteria are **not such as to discriminate** against the female candidates.”

Badeck

- “Article 2(4) does not preclude a national rule which
 - in sectors of the public service where women are **under-represented**, gives priority, where male and female candidates have **equal qualifications**, to female candidates where that proves necessary for ensuring compliance with the objectives of the women's advancement plan, if no reasons of greater legal weight are opposed, provided that that rule guarantees that candidatures are the subject of **an objective assessment which takes account of the specific personal situations of all candidates**,
 - prescribes that the binding targets of the women's advancement plan for temporary posts in the academic service and for academic assistants must provide for a minimum percentage of women which is at least equal to the percentage of women among graduates, holders of higher degrees and students in each discipline,

- in so far as its objective is to eliminate under-representation of women, in trained occupations in which women are under-represented and for which the State does not have a monopoly of training, allocates at least half the training places to women, unless despite appropriate measures for drawing the attention of women to the training places available there are not enough applications from women,

- where male and female candidates have equal qualifications, guarantees that qualified women who satisfy all the conditions required or laid down are called to interview, in sectors in which they are under-represented,

- relating to the composition of employees' representative bodies and administrative and supervisory bodies, recommends that the legislative provisions adopted for its implementation take into account the objective that at least half the members of those bodies must be women.

Abrahamsson

- **Article 2(1) and (4) and Article 141(4) EC 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.**”

- "Article 2(1) and (4) of Directive 76/207 and Article 141(4) EC also preclude national legislation of that kind where it applies only to procedures for filling a predetermined number of posts or to posts created as part of a specific programme of a particular higher educational institution allowing the application of positive discrimination measures
- .
- Article 2(1) and (4) of Directive 76/207 does not preclude a rule of national case-law under which a candidate belonging to the under-represented sex may be granted preference over a competitor of the opposite sex, provided that the candidates possess equivalent or substantially equivalent merits, where the candidatures are subjected to an objective assessment which takes account of the specific personal situations of all the candidates.
- The question whether national rules providing for positive discrimination in the making of appointments in higher education are lawful cannot depend on the level of the post to be filled."

Lommers

- "Article 2(1) and (4) does not preclude a scheme set up by a Minister to tackle extensive under-representation of women within his Ministry under which, in a context characterised by a proven insufficiency of proper, affordable care facilities, a limited number of subsidised nursery places made available by the Ministry to its staff is reserved for female officials alone whilst male officials may have access to them only in cases of emergency, to be determined by the employer. That is so, however, only in so far, in particular, ***as the said exception in favour of male officials is construed as allowing those of them who take care of their children by themselves to have access to that nursery places scheme on the same conditions as female officials.***"

Briheche

- Article 3(1) and Article 2(4) must be interpreted as meaning that they preclude a national provision, such as that in question in the main proceedings, which reserves the exemption from the age limit for obtaining access to public-sector employment to widows who have not remarried who are obliged to work, excluding widowers who have not remarried who are in the same situation.

[27 As the Commission has correctly pointed out, such a provision automatically and unconditionally gives priority to the candidatures of certain categories of women, including widows who have not remarried who are obliged to work, reserving to them the benefit of the exemption from the age limit for obtaining access to public-sector employment and excluding widowers who have not remarried who are in the same situation.]

Article 157 TFEU

4. 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 **underrepresented sex** to pursue a vocational activity or to **prevent or compensate for disadvantages** in professional careers.

Article 23 CFREU

- Equality between men and women 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*.

Directive 2000/78

- Article 7 (Positive action)
 1. With a view to ensuring *full equality in practice*, the principle of equal treatment shall not prevent any Member State from maintaining or adopting specific measures to prevent or compensate for disadvantages linked to any of the grounds referred to in Article 1.

Recast Directive (2006/54)

- Art. 3: Member States may maintain or adopt measures within the meaning of Article 141(4) of the Treaty with a view to ensuring *full equality in practice* between men and women in working life.
- Replaced the old art. 2(4) of Directive 76/207

Testing framework

Key elements:

- Underrepresented sex
- Equal qualifications
- No automatic and unconditional priority => objective, individual merit assessment, taking account of the specific personal situations of all candidates (hardship clause)

Assessment

What equality conception:

- Formal?
 - *Same treatment of same/like cases*
- Equal opportunities
 - *Levelling the playing field*
- Substantive?
 - *Equality of results*
- Transformative?
 - *Tackling also gender stereotypes*

Roca Alvarez

- “33 As the Court has consistently held, Article 2(4) of Directive 76/207 is specifically and exclusively designed to authorise measures which, although discriminatory in appearance, **are in fact intended to eliminate or reduce actual instances of inequality which may exist in society**. That provision thus authorises national measures relating to access to employment, including promotion, which give a specific advantage to women **with a view to improving their ability to compete on the labour market and to pursue a career on an equal footing with men** (see Case C-450/93 *Kalanke* [1995] ECR I-3051, paragraphs 18 and 19; Case C-409/95 *Marschall* [1997] ECR I-6363, paragraphs 26 and 27; Case C-158/97 *Badeck and Others* [2000] ECR I-1875, paragraph 19; and *Lommers*, paragraph 32).
- 34 **The aim of Article 2(4) is to achieve substantive, rather than formal, equality by reducing de facto inequalities which may arise in society** and, thus, in accordance with Article 157(4) TFEU, to prevent or compensate for disadvantages in the professional career of the relevant persons (see, to that effect, *Kalanke*, paragraph 19; Case C-407/98 *Abrahamsson and Anderson* [2000] ECR I-5539, paragraph 48; and Case C-319/03 *Briheche* [2004] ECR I-8807, paragraph 25).

- 35 As stated in paragraph 21 of this judgment, the leave at issue in the main proceedings takes the form of permission to be absent during the working day or a reduction of its duration. Certainly, such a measure could have the effect of putting women at an advantage by allowing mothers whose status is that of an employed person to keep their job and to devote time to their child. That effect is reinforced by the fact that if the father of the child is himself an employed person, he is entitled to take this leave in the place of the mother, who would not suffer adverse consequences for her job as a result of care and attention devoted to the child.
- 36 However, to hold, as the Spanish Government submits, that only a mother whose status is that of an employed person is the holder of the right to qualify for the leave at issue in the main proceedings, whereas a father with the same status can only enjoy this right but not be the holder of it, **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, *Lommers*, paragraph 41)."

3) Proposed Gender-Balanced Company Boards Directive

From soft law to hard law =>

Proposal for EU-Directive of the European Parliament and the Council '**on improving the gender balance among *directors* of companies *listed* on stock exchanges and related measures'** (2012, as updated lastly in 2017)

- ***What obligations*** does it actually entail and what implications for the Member States?

Subject matter

Art. 1:

This Directive seeks to achieve a more balanced representation of men and women among the **directors of listed companies** by establishing measures aimed at accelerated progress towards gender balance while allowing listed companies sufficient time to make the necessary arrangements.

Substantive target

Article 4

Objectives with regard to gender balance on boards

1. Member States shall ensure that listed companies:
 - (a) aim to attain, by 31 December 2020, the objective that members of the under-represented sex **hold at least 40 % of non-executive director positions**
- Or**
- (a) aim to attain, by 31 December 2020, the objective that members of the under-represented sex hold at least **33 % of all director positions, including both executive and non-executive directors**

Procedural obligation 1: recruitment procedure

Article 4a

Means to attain the objectives

1. Member States shall ensure that, with the aim of attaining the objective laid down in Article 4(1), in listed companies which do not meet those objectives the **selection of candidates for appointment or election** to the positions referred to in Article 4(1) is carried out on the basis of a **comparative analysis of the qualifications of each candidate**, by applying **clear, neutrally formulated and unambiguous criteria** established in advance of the selection process.

Procedural obligation 2: priority rule

2. In the selection of candidates for appointment or election to the positions referred to in Article 4(1), Member States shall ensure that, when choosing between candidates who are **equally qualified** in terms of **suitability, competence and professional performance, priority** shall be given to the candidate of the **under-represented sex**, 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.

Procedural obligation 3; information duty

3. While respecting the provisions of Directive 95/46/EC, Member States shall ensure that, ***in response to a request from a candidate*** who has been considered in the selection for appointment or election, listed companies are obliged **to inform** that candidate of the following:

- (a) the *qualification criteria* upon which the selection was based,
- (b) the *objective comparative assessment* of the candidates under those criteria, and,
- (c) where relevant, the *considerations* tilting the balance in favour of a candidate of the other sex.

Procedural obligation 4: burden of proof

4. Member States shall take the necessary measures, in accordance with their national judicial systems, to ensure that **where a candidate of the under-represented sex establishes facts** from which it may be presumed that he or she was equally qualified as compares with the candidate of the other sex selected for appointment or election, ***it shall be for the listed company to prove that there has been no breach of Article 4a(2)***.

Discretion for Member States: flexibility clause

Art. 4b

1. A Member State in which, before [OJ to insert the deadline for implementation pursuant to Article 8(1)], **equally effective measures** have already been taken with the aim of attaining a more balanced representation of women and men among the directors of listed companies in line with the objectives set out in Article 4(1), **or progress coming close to these objectives** has been attained, may decide to suspend the application of Article 4a. In this case, the objectives set out in Article 4(1) shall be deemed to be met.

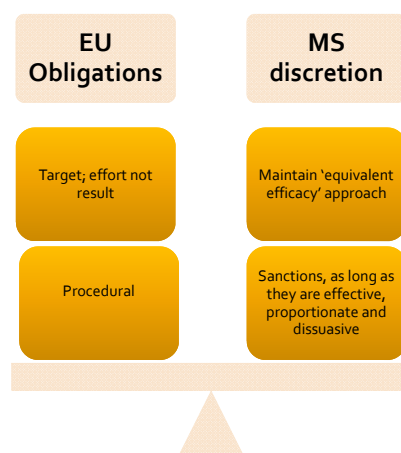
The conditions for the suspension shall be deemed fulfilled where, for example:

- a) national legislation requires that members of the under-represented sex hold at least 30 % of non-executive director positions or at least 25 % of all director positions no later than 31 December 2020 and effective, proportionate and dissuasive enforcement measures apply in the case of non-compliance with these requirements.
- b) members of the under-represented sex hold at least 30 % of the total number of all non-executive director positions or at least 25 % of the total number of all director positions.
- c) members of the under-represented sex hold at least 25 % of the total number of all non-executive director positions or 20 % of the total number of all director positions and the level of representation has increased by at least 7.5 percentage points over a recent five-year period ending before the deadline for implementation pursuant to Article 8(1).

Enforcement measures

1. Member States shall lay down rules on enforcement measures **applicable to infringements of the national provisions adopted pursuant to Articles 4a, 4b(1a)(a), 4c, and 5** of this Directive as applicable and shall take all necessary measures to ensure that they are applied.
2. The enforcement measures must be **effective, proportionate and dissuasive**.
3. Listed companies may be held liable only for acts or omissions which can be attributed to them in accordance with national law.

EU proposal balancing on a tightrope



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