



## ***Positive Action in EU Gender Equality Law and Policy.***

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### **Aim**

- Analyze the concept of positive action in EU law (Focus on measures in favour of female workers)
  - A. Legal provisions
  - B. CJEU's Case law interpreting the relevant provisions
  - C. EU proposal for a Directive: Gender Quotas in company boards.
  - D. Measures at Member States level

## Women empowerment movements - #MeToo - Time's up!... Social perceptions are changing – Legal responses?



### Statistics – Eurostat 2017

- In the EU only 1 manager out of 3 is a woman. In enterprises with 10 employees men are 65% of all managers and women 35%.
- The largest share of women among managerial positions is recorded in Latvia (53%). It is followed by Bulgaria and Poland (both 44%) and Ireland (43%). In Estonia, Lithuania, Hungary and Romania as well as France and Sweden is around 40%.
- At the opposite end of the scale: Germany, Italy and Cyprus (all 22%), Belgium and Austria (both 23%) as well as Luxembourg (24%).
- <http://ec.europa.eu/eurostat/documents/2995521/7896990/3-06032017-AP-EN.pdf/ba0b2ea3-f9ee-4561-8bb8-e6c803c24081>

## Statistics – Eurostat 2017

- Women in managerial positions in the EU earn 23.4% less on average than men;
- The gender pay gap in managerial positions is the narrowest in Romania (5.0%).
- In contrast, a female manager earns about a third less than her male counterpart in Hungary (33.7%), Italy (33.5%) as well as the Czech Republic (29.7%), and about a quarter less in Slovakia (28.3%), Poland (27.7%), Austria (26.9%), Germany (26.8%), Portugal (25.9%), Estonia and the United Kingdom (25%).

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## Debate on Positive Action

- **Proponents:** Because of prior discrimination in employment, women and minorities are handicapped when they try to enter employment, obtain a promotion or retain a job.  
Positive action *stricto sensu* (preferred treatment regarding entrance to jobs, promotion and retention of employment) = remedy for the effects of prior discrimination.
- **Opponents:** Why an individual must lose his chance of entrance to a particular job and bear the burden of redressing grievances made by the whole society?
  - Difficulties to set up the groups entitled to preferential treatment.
  - Problems connected to the idea of preference: may reinforce common negative stereotypes.

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## Historical framework

- Origin of the concept of positive action: Case law of Supreme Court of the USA - Associated with the idea of fighting against social discrimination.
- Measures aimed to combat:
  1. Racial discrimination in education (**Brown, 1954**)
  2. Racial segregation in employment (**Griggs, 1971**)
  3. Gender discrimination (**Johnson, 1987**)

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## Positive action measures in EU law:

- Several related concepts: affirmative action, preferential treatment, **positive action**
- Broad range of proactive measures:
  - Equal opportunities policies (promotion of female employment, special educational/training programmes)
  - Positive action measures *stricto sensu*: quotas and targets (i.e. preferential treatment in job applications)

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### Equality Concept:

- **Formal equality (Aristotelian):** 'Equal should be treated equal and unequal in an unequal way.' Individual complaints led model - reactive
- **Protection against discrimination:**
  - A. Direct discrimination (objective & non-justifiable)
  - B. Indirect discrimination (collective & objectively justifiable/proportionality principle)

Principle of proportionality - 3 conditions: (Case C-170/84, *Bilka*)

- The measures are related to a real need or a legitimate aim;
- They are appropriate with a view to achieving the objectives pursued;
- And they are necessary to that end.

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### Equality Concept:

- **Substantive/‘de facto’ equality:** assure equal opportunities and objective equality in the results.
- Proactive model: Promotion of disadvantage groups – Women
- Which model do we find in EU law?

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## Approach to this issue:

### ■ Main 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*

### ■ Hypotheses:

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.

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## EU Legal Framework

- 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.
- Article 157.4 TFEU
- Article 3 Recast Directive 2006/54/EC
- Article 23 Charter of Fundamental Rights of the EU

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## Gender Equality and Positive action in EU law

- **Article 157.4 TFEU (Article 141.4 ECT before):** '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**.'

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## Court of Justice of the EU - Case Law First Approaches:

- **Case C-450/93 Kalanke:** National rules giving an 'automatic priority' on a promotion to women are not allowed.
- **Case C-409/95 Marschall:** If the candidatures are subject to an 'objective assessment' which will take into account all criteria specific to the individual candidates ('saving clause') the affirmative action measure complies with EU law.

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## Court of Justice of the EU - Case law

- **Case C-158/97 Badeck**: a rigid quota for women in the access to training, invitation to an interview and membership of the employees' representative bodies and/or administrative and supervisory bodies is accepted, as long as it is not leading to an 'absolute rigidity'.
- **Case C-407/98, Abrahamsson**, the appointment of a female worker who has sufficient qualifications for a post instead of a male candidate who is better qualified is precluded by EU law (Breach of proportionality principle – meritocracy prevails).

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## Other relevant cases:

- **Case 476/99 Lommers**: **The argument that women interrupt their careers more often than men to take care of children is not so strong any longer.** Focus on compliance with the principle of proportionality.
- **Case C-319/03, Briheche**
- **Case C-104/09, Roca Alvarez (breastfeeding leave – accessible for male workers)**
- Same quality of parent and comparable role on children's education for male & female workers. Equal access to leaves and childcare arrangements.
- **Case C-222/14, Konstantinos Maïstrellis**

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## 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 a homogeneous disadvantage group (under-represented sex)
  - No automatic priority – flexible application
  - Appropriate and necessary measures - compliance with principle of proportionality
  - Temporary duration (until societal discrimination is corrected)
- Use of undetermined expressions: 'rigid quota', 'flexible result quota', 'saving or flexibility clause'
- Trend to focus on the **observance of the principle of proportionality/respect to meritocracy**
- In EU law the formal concept of equality still prevails over the substantive one.

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## EU proposal for a Directive – women quota on company boards - COM (2012) 614 final

- Gender imbalance in decision-making positions is observed in various domains: politics, economics, science and research but it is really dramatic in business management.
- In EU-28, the number of women in business leadership is low: in April 2016, women accounted for just 23.3% of board members of the largest publicly-listed companies registered in EU countries.
- Commission's proposal: 40% objective 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 - gender balance on company boards.**

- Applies to companies which more than 250 persons and with an annual turnover of EUR 50 million or annual balance sheet exceeding EUR 43 million; (Exception of small and medium-sized enterprises, Article 3.)
- Article 4.3. follows CJEU's case law: priority to female candidate if "equally qualified" unless "objective assessment" tilts the balance in favour of a male candidate.
- Disclosure obligation of qualification criteria for selection and objective comparative assessment, Article 4.4.

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## **Proposed Directive - gender balance on company boards.**

- Reversal in the burden of the proof in case of equal qualifications, Article 4.5.
- Objective 40% can be flexibilised by MS Art. 46:
  - exceptions for companies where women represent less than 10% of the workforce
  - Where listed companies can show that women hold at least one third of all director positions (executive and non-executive)
- Reporting and publishing obligations and sanctions (effective, proportionate and dissuasive).
- The law is a temporary measure. It will automatically expire in 2028.

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## Progress at EU level

- The European commission is still pushing for a quota for women on company boards to address the slow progress to gender equality in the senior ranks of publicly listed businesses.
- Progresses at national level:
- The proportion of women on the boards of the largest listed companies across the EU has more than doubled, from 10% in 2005 to 23% in 2016. However, women account for only 7% of board chairs and presidents and 6% of chief executives in the largest companies.

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## National Measures

- Governments in some member states have acted in response to the low level of women's participation. Germany, Belgium, France, Italy, the Netherlands and Spain have introduced legislative quotas to increase women's board representation (non-binding in some cases), while countries such as Denmark, Finland, and Sweden have adopted corporate governance codes and/or voluntary charters that appear to have helped increase female representation.

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### Positive Action in domestic, international and EU law: from duty to narrow exception.

- Several Member States (Austria, Belgium, France, Greece, Germany, Italy, Spain, and Sweden) have legislation establishing a positive duty to promote equality of opportunity and *de facto* equality for men and women – Positive action **necessary**.
- **Article 3 CEDAW (UN)**- A positive duty to improve *de facto* position of women
- Clash with CJEU's approach (positive action measures are an exception to the equality principle). In EU law to engage in positive action is only **permitted** (restrictively) but not **required**.

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### How to overcome the drawbacks of the compensatory theory?

- Positive action measures: effective tools to assure social justice and economic welfare?
- Economic and business case for gender balance in economic decision-making positions – Non-conclusive results
- **Fundamental Right:** Positive action is a corollary of the Member States' obligation to promote **real equality** among their citizens, from an individual as well as from a collective perspective, by the way of removing the obstacles that hinder their full participation in political, economical and social life.
- Is positive action a useful instrument to prevent women's labour market segregation? Equality linked with **dignity, restitution and redistribution**.

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### Questions for debate:

- Are female workers a homogenous social group traditionally affected by discrimination and labour market segregation? Declaration in EC Treaty: under-represented sex = women
- How are positive action measures in favour of women currently encouraged at EU level?
  - 2012 EU Proposal: Directive on binding quota for women in company boards. Gender balance in economic decision making
  - Supported by EP & Commission/blocked at Council
- How to overcome the differences between the national approaches and the UE legal framework on positive action? Is EU legislation the right tool?



### Thanks for your attention!

- Questions? Remarks?