

POSITIVE ACTION AND GENDER QUOTAS IN EU LAW

ERA – ACADEMY OF EUROPEAN LAW

MAY 2019

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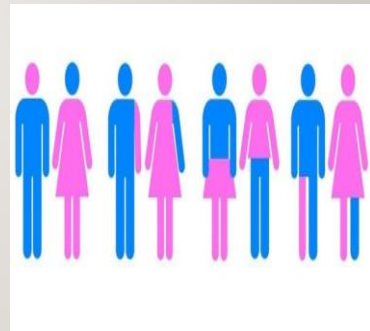
This training session is funded under the 'Rights, Equality and Citizenship Programme 2014-2020' of the European Commission.

Presentation Overview

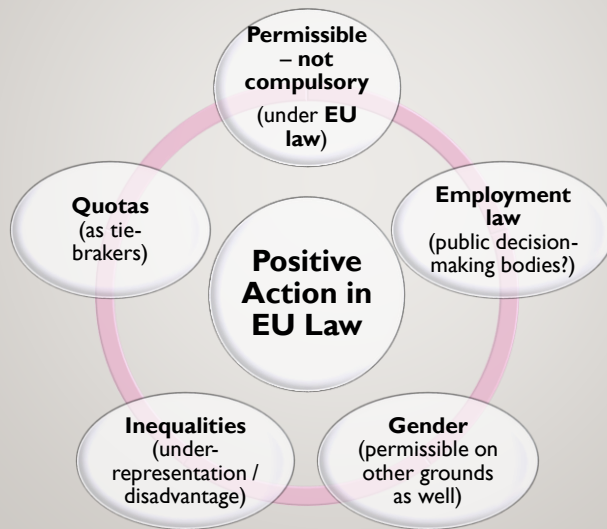
- Part A**
 - Definitions
 - Conceptual background
 - Positive action typology

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

- Part C**
 - Statistical data



POSITIVE ACTION IN EU LAW: KEY POINTS



WHAT IS POSITIVE ACTION: WORKING DEFINITION

Primary legal basis - Art. 157(4) TFEU

- "...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."

Working definition

- Positive action is an umbrella term that denotes 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(4) TFEU)

EQUALITY THEORY AND POSITIVE ACTION

Formal equality

- “Treating likes alike”
- **NO** to any form of positive action.

Equality of opportunities

- “Levelling the playing field”
- **YES only** to **soft** forms of positive action

Substantive equality

- *De facto* equality - outcomes matter
- **YES** to positive action either conditionally (flexible result quotas) or unconditionally (strict quotas)

TERMINOLOGICAL CLARIFICATIONS

LEGALLY CORRECT

Positive action / positive measures

- Term of preference in EU equality law and literature.
- The term "**specific measures**" is also commonly used in EU equality legislation.

Affirmative action

- US equivalent of “positive action” (although with different contextual connotations).
- 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 ≠ reasonable adjustments

- Reasonable 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 ≠ special treatment

- “Special treatment” = treatment afforded to specific groups **regardless of comparisons** (usually due to vulnerability or precarity of the individual / group). Compare recital 21 and recital 22 of the Recast Equal Treatment Directive.
- E.g. protective rules for pregnant women – **not positive action** (mutatis mutandis above + pregnancy as a unique biological condition).

POSITIVE ACTION TYPOLOGY



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)

POSITIVE ACTION EU GENDER EQUALITY LAW TYPOLOGY

Access to labour market

- Preference in appointment or promotion (e.g. flexible result quotas).
- Outreach programmes (e.g. targeted advertising / training).

Improvement of work-life balance

- Childcare allowances / benefits.
- Childcare facilities.
- Flexible working.

Balanced representation in decision-making

- Legislative measures to achieve balanced gender representation in the public sector (e.g. police force) or private sector (e.g. "Women on Boards" draft Directive).
- Voluntary schemes (employer-driven).
- Electoral rules (e.g. strict quotas; flexible quotas on electoral lists)

EU NORMATIVE FRAMEWORK

Article 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 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

'Women on Boards' Directive (proposal)

- **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.

Legislative process

- EP adopted its position (1st reading) by a substantial cross-party majority in November 2013.
- No agreement in Council yet (due to the reservations of several Member States).

CJEU POSITIVE ACTION CASE-LAW OVERVIEW

Formal (?) equality

- Case 312/86 **Commission v France** [1988]
- C-450/93 Eckhard **Kalanke** v FreieHansestadt Bremen [1995]

Substantive (?) equality

- C-409/95 Hellmut **Marschall** v Land Nordrhein-Westfalen [1997]
- C-158/97 Georg **Badeck** and Others [2000]
- C-79/99 Julia **Schnorbus** v Land Hessen [2000]

Normative limits - legitimate quotas

- C-407/98 Katarina **Abrahamsson** and Leif Anderson v Elisabet Fogelqvist [2000]

Conceptual limits – positive action

- C-366/99 Joseph **Griesmar** v Ministre de l'Economie, des Finances et de l'Industrie et Ministre de la Fonction publique, de la Réforme de l'Etat et de la Décentralisation [2001]
- C-476/99 H. **Lommers** v Minister van Landbouw, Natuurbeheeren Visserij [2002]
- C-319/03 Serge **Briheche** v Ministre de l'Intérieur, Ministre de l'Éducation nationale and Ministre de la Justice [2004]
- C173/13 Maurice **Leone**, Blandine Leone v. Garde des Sceaux, ministre de la Justice, Caisse nationale de retraite des agents des collectivités locales [2014]

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*".

CJEU POSITIVE ACTION CASE-LAW 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).

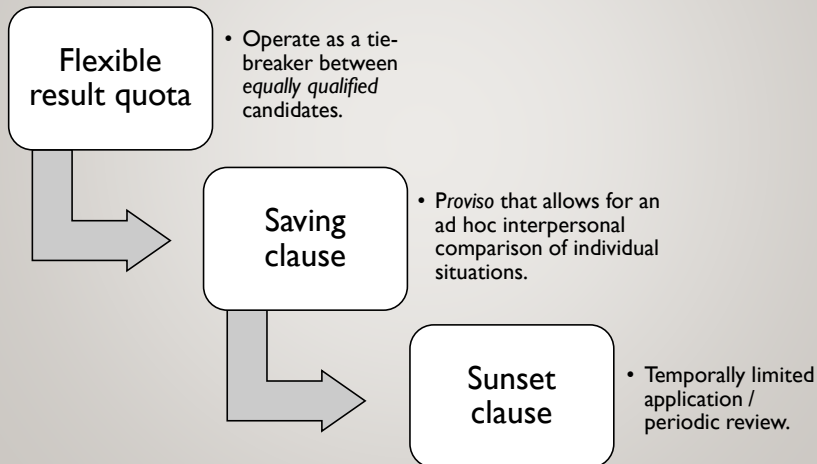
CJEU POSITIVE ACTION CASE-LAW LIMITS OF SUBSTANTIVE EQUALITY

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



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).
- CJEU: legitimacy of 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]

CJEU POSITIVE ACTION CASE-LAW

CURRENT POSITION

Conceptual boundaries: what **is** and what **is not** positive action

Leone (2014)

- Spanish law provided that working mothers were entitled to “breastfeeding leave” (which could amount to reducing their daily working time), while working fathers were only entitled to the leave if their spouse was also an employee.
- Such a measure “...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...” [para 36], hence it is not a measure aimed at “eliminating or reducing existing inequalities” or “seeking to achieve substantive as opposed to formal equality”. [para 38].

Maistrellis (2015)

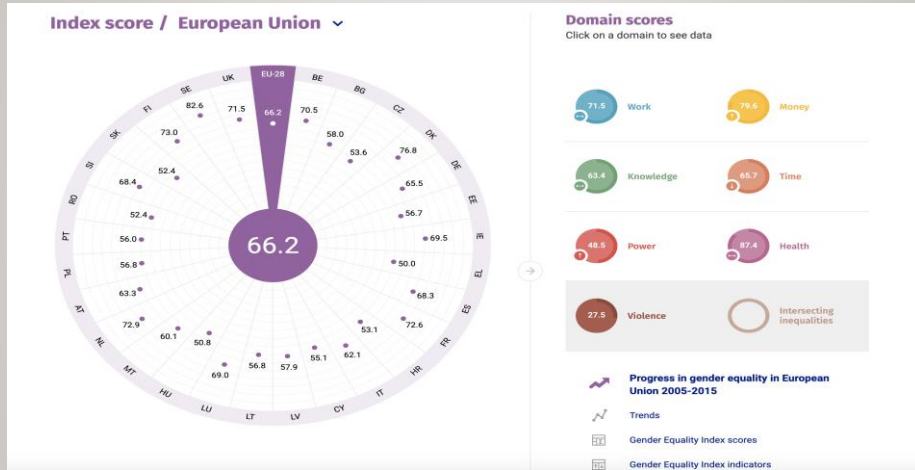
- “[...] under national law, mothers who are civil servants are always entitled to parental leave, whereas fathers who are civil servant are entitled to it only if the mother of their child works or exercises a profession.” [para 49]
- “[...] a provision such as the one at issue in the main proceedings, 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?

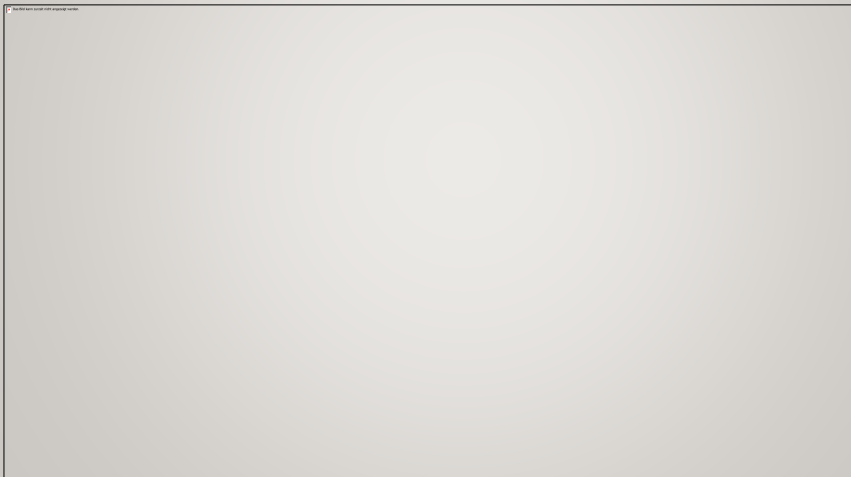
GENDER EQUALITY INDEX



Source: EIGE (<https://eige.europa.eu/gender-equality-index>)

GENDER BALANCE IN DECISION-MAKING BODIES

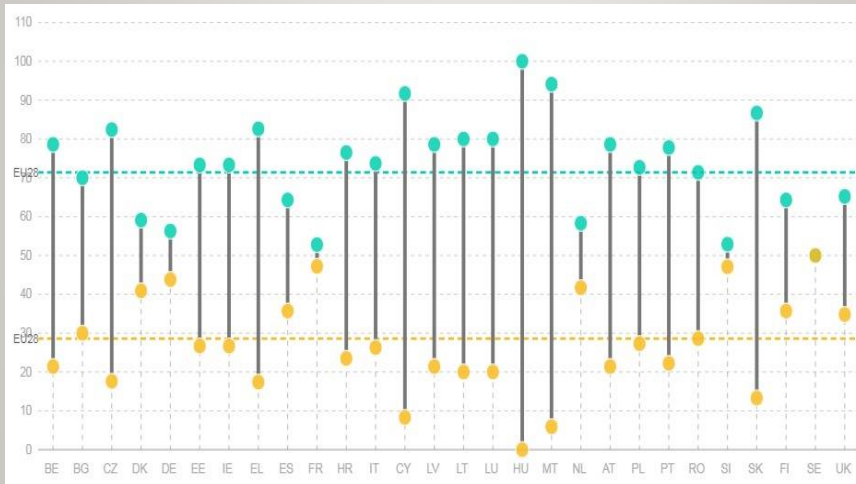
National Parliaments (EU28 - 2017)



Source: EIGE database (<http://eige.europa.eu/gender-statistics>)

GENDER BALANCE IN DECISION-MAKING BODIES

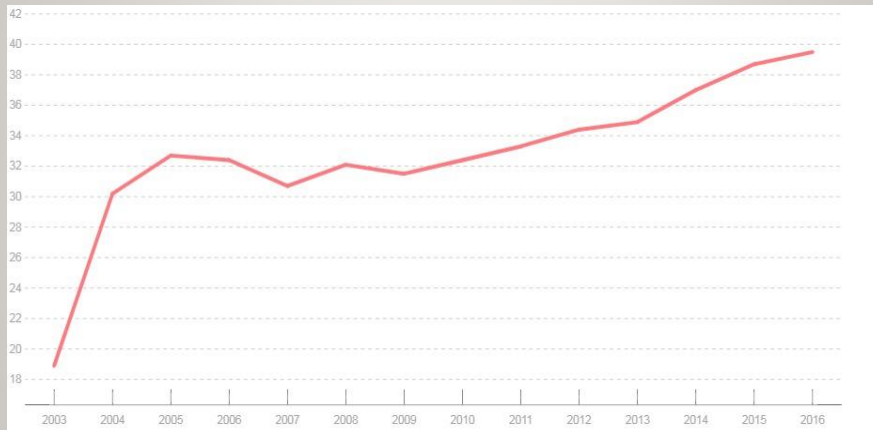
National Governments (EU28 - 2017)



Source: EIGE database (<http://eige.europa.eu/gender-statistics>)

GENDER BALANCE IN DECISION-MAKING BODIES

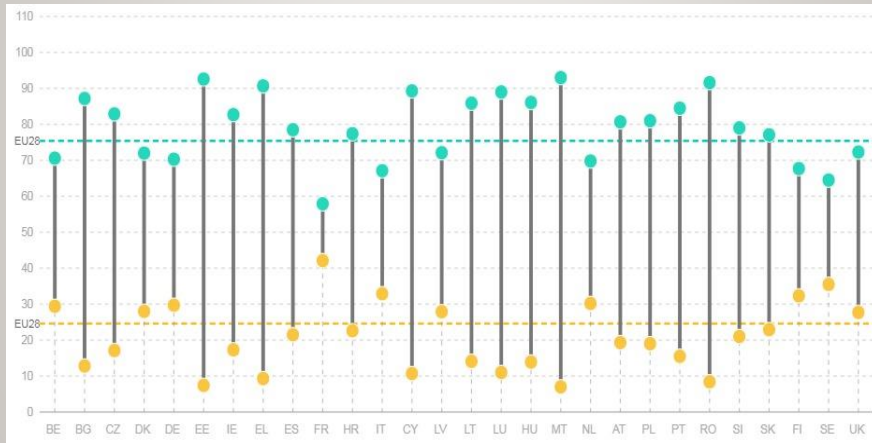
National Supreme Courts (EU28 - 2017)



Source: EIGE database (<http://eige.europa.eu/gender-statistics>)

GENDER BALANCE IN DECISION-MAKING BODIES

Business – largest publicly listed companies (EU28 - 2017)



Source: EIGE database (<http://eige.europa.eu/gender-statistics>)

THANK YOU

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