

Positive action and gender quotas in EU law

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Objectives

- Analyze the concept of positive action in EU law (Focus on measures in favour of female workers)
 - A. Legal framework.
 - 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

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



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Statistics – Eurostat 2019

- In the EU only 1 manager out of 3 is a woman.
- The largest share of women among **managerial positions** is recorded in **Latvia (56%)**. It is followed by Bulgaria and Estonia (both 49%) as well as Poland and Slovenia (both 47%).
- At the opposite end of the scale, women account for less than a third of managers in **Luxembourg (15%)**, followed by **Cyprus (23%)**, **Czechia, Denmark, Italy** and the **Netherlands** (all 29%), **Germany (30%)**, as well as **Greece and Austria** (both 32%).

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Statistics – Eurostat

- The **gender pay gap** in the EU is still approximately **16%** and is only very slowly decreasing or is even increasing in some Member States.
- There are considerable differences between EU countries, with the gender pay gap ranging from less than 8% in Belgium, Italy, Luxembourg, Poland, Romania, and Slovenia to more than 20% in Austria, the Czech Republic, Germany, Estonia and United Kingdom.

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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.’

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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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Case C-450/93 Kalanke

- At the final stage of recruitment to a post of Section Manager in the Bremen Parks Department, two candidates, both in BAT pay bracket III, were shortlisted:
- Mr Kalanke, the plaintiff in the main proceedings, holder of a diploma in horticulture and landscape gardening, who had worked since 1973 as a horticultural employee in the Parks Department and acted as permanent assistant to the Section Manager; and
- Ms Glissmann, holder of a diploma in landscape gardening since 1983 and also employed, since 1975, as a horticultural employee in the Parks Department.

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Case C-450/93 Kalanke

- The national court asks, essentially, whether Article 2(1) and (4) of the Directive precludes national rules such as those in the present case which, where candidates of different sexes shortlisted for promotion are equally qualified, **automatically give priority to women in sectors where they are under-represented**, under-representation being deemed to exist when women do not make up at least half of the staff in the individual pay brackets in the relevant personnel group or in the function levels provided for in the organization chart.

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Case C-450/93 Kalanke

- 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.**
- Nevertheless, as a derogation from an individual right laid down in the Directive, **Article 2(4) must be interpreted strictly.**

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Case C-409/95 Marschall

- According to the order for reference, Mr Marschall works as a tenured teacher for the Land, his salary being that attaching to the basic grade in career bracket A 12.
- On 8 February 1994 he applied for promotion to an A 13 post ('teacher qualified for teaching in a first-grade secondary school and so employed') at the Gesamtschule Schwerte. The Bezirksregierung (District Authority) Arnsberg informed him, however, that it intended to appoint a female candidate to the position.

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Case C-409/95 Marschall

- For these reasons, **the mere fact that a male candidate and a female candidate are equally qualified does not mean that they have the same chances.**
- Unlike the rules at issue in Kalanke, a national rule which, as in the case in point in the main proceedings, contains a saving clause does not exceed those limits if, in each individual case, it 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 individual 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. In this respect, however, it should be remembered that those criteria must not be such as to discriminate against female candidates.

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Case C-158/97 Badeck

- The answer must therefore be that Article 2(1) and (4) of the Directive 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 rule guarantees that candidatures are the subject of an **objective assessment** which takes account of the specific personal situations of all candidates.

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Case C-407/98, Abrahamsson

- The national court seeks to ascertain whether Article 2(1) and (4) of the Directive 76/207/EEC preclude national legislation, such as the Swedish legislation at issue in the main proceedings, which provides, in the sector of higher education, for positive discrimination in recruitment in favour of candidates of the under-represented sex.
- In contrast to the national legislation on positive discrimination examined by the Court in its Kaianke, Marschall and Badeck judgments, the national legislation at issue in the main proceedings enables **preference to be given to a candidate of the under-represented sex who, although sufficiently qualified, does not possess qualifications equal to those of other candidates of the opposite sex.**
- The national regulation **is disproportionated** to the aim pursued.

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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
- Cases C-142/17 and C-143/17, Maturi
- Case C-192/18, European Commission v. Republic of Poland (Opinion)

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Case 476/99 Lommers

- The question has been raised in proceedings between Mr Lommers and the Minister heading the Netherlands Ministry which employs him, the Ministry of Agriculture, Nature Management and Fisheries (hereinafter 'the Minister for Agriculture') concerning the latter's refusal to give Mr Lommers' child access to the subsidised nursery scheme on the ground that access is in principle reserved only for female officials of that Ministry.
- At the time when the Circular was adopted and at the material time in the main proceedings, the employment situation within the Ministry of Agriculture was characterised by a significant under-representation of women, both in terms of the number of women working there and their occupation of higher grades.

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Case 476/99 Lommers

- In view of all the foregoing considerations, the answer to be given to the question referred for a preliminary ruling must be that Article 2(1) and (4) of the Directive does not preclude a scheme set up by a Ministry to tackle extensive under-representation of women within it 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.

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Case C-319/03, Briheche

- Mr Briheche was a widower who had not remarried, aged 48 with a 12 year-old dependent child. He applied to sit four competitive examinations for recruitment to various departments of the administration for which the **age limit** was set at 45 years.
- The age limit for obtaining access to **public-sector employment** is not applicable to women who are obliged to work following the death of their husband.

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Case C-319/03, Briheche

- 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.
- It is sufficient to state that the latter provision cannot permit the Member States to adopt conditions for obtaining access to public-sector employment of the kind in question in the main proceedings which prove in any event **to be disproportionate to the aim pursued**.

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Case C-104/09, Roca Alvarez

- Mr Roca Álvarez has been employed by the company Sesa Start España ETT SA since July 2004. On 7 March 2005 he requested his employer that he be granted the right to take the leave provided for under Article 37(4) of the Workers' Statute. He was refused leave on the ground that the mother of Mr Roca Álvarez's child was not employed but self-employed and **the mother's employment was an essential condition of entitlement to that leave.**
- **The aim of Article 2(4) of Directive 76/207 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.

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Case C-104/09, Roca Alvarez

- 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.
- It could have as its effect that a woman, such as the mother of Mr Roca Álvarez's child, who is self-employed, would have **to limit her self-employed activity and bear the burden resulting from the birth of her child alone**, without the child's father being able to ease that burden.

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Case C-104/09, Roca Alvarez

- It follows from all those considerations that Article 2(1), (3) and (4) and Article 5 of Directive 76/207 must be interpreted as precluding a national measure such as the one at issue in the main proceedings, which provides that female workers who are mothers and whose status is that of an employed person are entitled, in various ways, to take leave during the first nine months following the child's birth, whereas male workers who are fathers with that same status are not entitled to the same leave unless the child's mother is also an employed person.

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Case C-222/14, Konstantinos Maïstrellis

- It follows from the wording of the Framework Agreement and from its objectives and context that **each parent is entitled to parental leave**, which means that Member States cannot adopt provisions under which a father exercising the profession of civil servant is not entitled to parental leave in a situation where his wife does not work or exercise any profession.
- It follows that, 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**. Thus, the mere fact of being a parent is not sufficient for male civil servants to gain entitlement to that leave, whereas it is for women with an identical status
- In those circumstances, it should be held that the provision at issue in the main proceedings constitutes **direct discrimination** on grounds of sex, within the meaning of Article 14(1) of Directive 2006/54, read in conjunction with Article 2(1)(a) of that directive, in respect of fathers who are civil servants, as regards the granting of parental leave.

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Case C-222/14, Konstantinos Maïstrellis

- Nor do the Greek provisions constitute **positive action** with a view to promoting equal treatment within the meaning of Article 3 of the Equal Treatment Directive. It is not evident that the restriction on parental leave to the detriment of fathers could be appropriate as a measure in women's favour to eliminate or reduce existing factual inequalities. Instead, there even **exists a risk** that a rule of that kind could entrench a **traditional distribution of the family roles** of men and women and make it more difficult for non-working wives to take up or resume an occupational activity.
- Moreover, in recital 11 of the Equal Treatment Directive, with a view to facilitating the reconciliation of family and work commitments, Member States are specifically encouraged to adopt parental leave arrangements that *either* parent can take and, in that regard, there is no mention of any distinction on grounds of sex.

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Cases C-142/17 and C-143/17, Maturi

- National rules providing for the temporary possibility for performing artists having reached retirement age to continue to perform until the age previously laid down for entitlement to a pension, fixed at 47 years old for women and 52 years old for men.
- The Italian regulation establishes direct discrimination based on sex which is prohibited by that directive.

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Case C-192/18, European Commission v. Republic of Poland (Opinion)

- In 2017, Poland lowered the retirement age for judges of the common law courts, public prosecutors, and judges of the Supreme Court to 60 for women and 65 for men from 67 for both.
- Furthermore, with regard to Poland's arguments concerning positive discrimination, the Advocate General observes that it is embedded in the Court's case law that the purpose of positive discrimination measures is to 'give a specific advantage to women with a view to improving their ability to compete on the labour market and pursue a career on an equal footing with men'. Given that retired women judges are no longer competing on the labour market or pursuing a career, on no account can the measures challenged by the Commission amount to measures of positive discrimination. Moreover, rules that perpetuate the traditional division of roles into the future should not be viewed as measures to promote equality.

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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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CJEU - Case Law - Conclusions:

- Only 30% of the judgments conclude that the positive action comply with the European regulation.
- Some judgments contribute to extend the same protection for men. No effects on the women.

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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.

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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.
- The proportion of women on the boards of the largest listed companies across the EU is **27%**. Over the last five years, this share has **increased by 9 percentage points** (18% in 2013).

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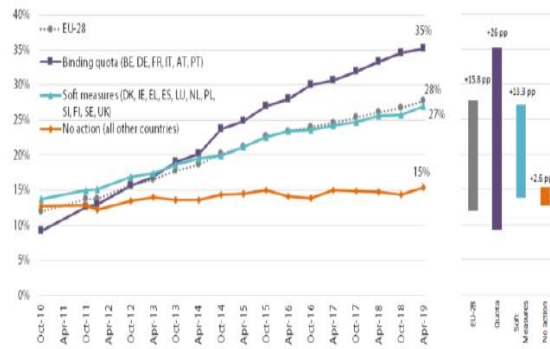
National Measures

- 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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Binding quotas v. soft-law quotas

Figure: change in the share of women on boards of the largest listed companies October 2010- April 2019 by type of action taken.



Source: EIGE Gender Statistics Database – largest listed companies.

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Some figures...

- SPAIN V. ITALY
- Italy (mandatory quotas):
 - 6%....34%.
- Spain (soft-law quotas):
 - 11,6% (2013)....17,2% (2017)
 - 26% companies have adopted measures against the gap. The most important measure was to implement a policy on recruitment of directors.

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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?

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Questions? Remarks?

Thanks for your attention!

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