

POSITIVE ACTION AND GENDER QUOTAS IN EU LAW

PROF. W.L. ROOZENDAAL



VU

VRIJE
UNIVERSITEIT
AMSTERDAM

Faculteit der
Rechtsgeleerdheid



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

DIFFERENT VIEWS ON EQUALITY

Formal equality

equality before the law

all rules apply equally to everyone regardless of their position; protection against stereotyping;

equality of opportunities – 'creating a level playing field'; equality at the start

Substantive equality

Equality in practice; equality of outcome; equity; promotion of disadvantaged groups

Adaptation of rules to special circumstances, solidarity, accommodation, facilitation of persons with special needs, diversity policy

Positive action (PA) is (an) expression of substantive equality

VU

VRIJE
UNIVERSITEIT
AMSTERDAM

Faculteit der
Rechtsgeleerdheid

WHAT IS PA?

Aim:

Redressing inequalities stemming from past or present discrimination; promote equality in practice

Measures:

Allocating some form of benefit or preference to members of disadvantaged and/or underrepresented group(s)

(similar concepts: affirmative action; positive discrimination)

POTENTIAL PA MEASURES FROM 'SOFT' TO 'HARD'

- Active encouragement or training of under-represented groups
 - Monitoring mechanisms
 - Inclusive definitions of merit

 - Quotas: flexible (tie-break between equally qualified candidates)
- or
- non-flexible (no interpersonal comparison of merit); preference for sufficiently qualified candidate

POSITIVE ACTION AND EU LAW

Positive action is not compulsory, always voluntary
Positive action is possible and encouraged

BUT

When positive action is an example of (direct) discrimination
It is only allowed in limited circumstances

CoJ EU in *Kalanke* (1995, par. 21): “a derogation [such as priority for women] from an individual right laid down in the Directive [such as the right to equal treatment], must be interpreted strictly”

A TYPICAL PA-CASE

PA is proposed/adopted by Member-States or employers
(e.g.: a preference for recruitment of women;
a parental leave benefit only for women)

The non-beneficiaries of PA might complain
(e.g.: male candidates)

Judges (the CoJ EU) can test the compatibility of the PA

EU LAW – HISTORIC DEVELOPMENT

Art. 2(4) original Equal Treatment Directive 1976/207

“This Directive shall be without prejudice to measures to promote equal opportunities for men and women, in particular by removing existing inequalities which affect women’s opportunities”

ECJ 1995 (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” [which is not allowed].

DEVELOPMENT IN EU-LAW

Art. 157(4) TFEU (origin. 141(4) EC (1997))

“With a view of 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 (origin. 2000; introduced 2009)

‘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.’

PA IN DIRECTIVES

Art. 7 (1) Directive 2000/78 [general framework directive]
religion or belief, disability, age or sexual orientation

Article 5 Directive 2000/43 [Race and ethnic origin]

Positive action

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.

Art. 3 Directive 2006/54/EC [Recast Equal Treatment] (origin. 2002/73, art. 2 (8)) "Positive action. 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."

CJEU PA CASE-LAW OVERVIEW

Access to job or training

C-450/93 Eckhard Kalanke v FreieHansestadt Bremen ECR [1995] I-03051;

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

C158/97 Georg Badeck and Others ECR [2000] I-01875;

C-79/99 Julia Schnorbus v Land Hessen [2000] ECRI-10997; access to education; counterbalance to delay caused by military service; not discriminatory

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

C-319/03 Serge Briheche v Ministres [2004] ECR I-08807

ACCESS TO JOB LEADING CASES

Kalanke 1995

Quotas reserving promotion to higher posts for women in sectors where they were underrepresented, priority when equally qualified

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 – not permissible under art. 2(4)

Marschall 1997

Preferential treatment to equally qualified female candidates, “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.

ACCESS TO JOB LEADING CASES

Badeck 2000

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) provided that [...] this rule has been found necessary for ensuring compliance with the objectives of the women’s advancement plan.

It is permissible to define merit with criteria beneficial to women.

ACCESS TO JOB LEADING CASES

Abrahamson 2000

Preference for sufficiently qualified candidates of the underrepresented 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".

CJEU: scheme not compatible

Compatible is a scheme with 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.

CJEU & POSITIVE DISCRIMINATION

Formal equality is the rule, positive discrimination the narrow exception .

- (1) the measures must concern a sector in which women are under-represented;
- (2) they can only give priority to equally qualified female candidates over male candidates;
- (3) they must not give automatic and unconditional priority to equally qualified candidates, but must include a "saving clause" which includes the possibility of granting exceptions in justified cases which take the individual situation into account, in particular the personal situation of each candidate.

PA CASE LAW BENEFITS AND PENSIONS

- * C 179/88 [1983] Commission v Italy, adoption leave only for women
 - * C 184/83 Hoffmann [1984], parental leave benefit only for mothers
 - C 312/86 Commission v France [1988] ECR 6315 parental leave and parenting benefits only for women
 - C-3 66/99 Joseph Griesmar v Ministres [2001] ECR I-09383 national provision which limits to female civil servants who have had children a service credit for the calculation of their retirement pension;
 - * C 476/99 H. Lommers v Minister van Landbouw, Natuurbeheer en Visserij ECR [2002] 02891 Subsidized nursery places restricted to female employees and single fathers in urgent need of a nursery place,
 - * C 219/98, Abdoulaye [1999], maternity leave benefit only for women,
 - C 104/09 Pedro Manuel Roca Álvarez [2010], Exclusion of the right to leave for an employed father,
 - C 173/13 Leon v Garde des Sceaux [2014] , adaptation of pension benefits after Griesmar
- * = permissible

BENEFITS & PENSIONS

- Positive action measures should be narrowly tailored and clearly and objectively aimed at redressing specific disadvantages
- Due regard must be had to the principle of proportionality, derogations must remain within the limits of what is appropriate and necessary

BOARD QUOTAS

EC proposal: COM(2012)614 final
Board Gender Balance Directive

Aim of a minimum of 40% of non-executive members of the underrepresented sex on company boards by 2020

Duty to disclose and report; comply or explain

Supported by EP, but not all MS

Commission President Ursula von der Leyen stated in her Political Guidelines for the next European Commission (2019-2024), that she will seek to build a majority to unblock the Directive.

DISCUSSION

Do you believe positive action is a good strategy?
Should it be made compulsory? (positive obligations)

Should positive action be a part of the European ideal of equality, in stead of an exception to this ideal?