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## POSITIVE ACTION AND GENDER QUOTAS

- The concept of positive action in EU law
- Examples of positive action measures across the EU
- The special case of company board quotas. Women-On-Boards Directive?

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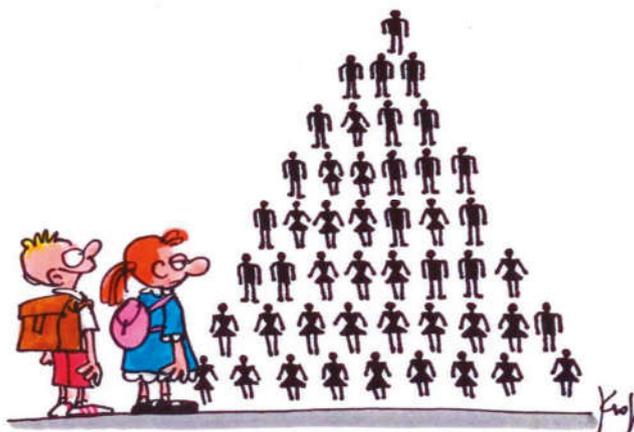
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“A Union of Equality: Gender Equality Strategy 2020-2025” (European Commission – COM (2020) 152 final)



EUROPEAN COMMISSION: [https://ec.europa.eu/info/sites/default/files/2\\_gender\\_equality\\_cartoon.pdf](https://ec.europa.eu/info/sites/default/files/2_gender_equality_cartoon.pdf)



The difference between women's and men's employment rate in the EU is **11.6%**.



Only **55.3%** of women born outside the EU are in employment, compared to **69.7%** of women born in the EU.

Only **16%** of Roma women are in paid employment in the EU.



**10%** of construction workers and **25%** of agriculture, forestry, fishing and transportation workers are **women**, while **25%** of workers in education and **20%** of workers in human health and social activities are **men**.



Women are only **7.5%** of board chairs and **7.7%** of CEOs in the EU's largest listed companies.



Only **32.2%** of members of national parliaments in the EU are women.

## The EU regulation of positive action measures

**Council Directive 76/207/EEC of 9 February 1976  
on the implementation of the principle of equal  
treatment for men and women as regards access to  
employment, vocational training and promotion,  
and working conditions**

### Article 2.4

“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) [the areas covered by the Directive title]”

**84/635/EEC: Council recommendation of 13 December 1984 on the  
promotion of positive action for women**

HEREBY RECOMMENDS MEMBER STATES:

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, while fully respecting the spheres of competence of the two sides of industry, 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 under-represented, particularly in the sectors of the future, and at higher levels of responsibility in order to achieve better use of all human resources.

**Communication from the Commission to the European Parliament and the Council on the interpretation of the judgment of the Court of Justice on 17 October 1995 in Case C- 50/93, Kalanke v Freie Hansestadt Bremen, COM/96/0088 FINAL**

There is no official definition of "positive action" at Community level. There is, however, widespread agreement across the Community that **the concept of positive action embraces all measures which aim to counter the effects of past discrimination, to eliminate existing discrimination and to promote equality of opportunity between women and men, particularly in relation to types or levels of jobs where members of one sex are significantly under-represented.** It is increasingly recognized to be not only a question of equity but also of efficiency in the management of human resources.

**Positive action can take different forms (Communication COM/96/0088 Final):**

“Positive action can take different forms: a first model consists of measures intended to remedy the disadvantageous situations which are characteristic of women's presence in the labour market. The objective is to eliminate the causes underlying the lesser employment or career opportunities still affecting women's work by intervening, in particular, at the level of professional orientation and vocational training

A second model of positive action can be traced in actions favouring the attainment of a certain balance between family and work responsibilities and a more efficient distribution of these responsibilities between the two sexes. In this case, priority is given to measures concerning the organization of working time, the development of childcare infrastructure, and the reintegration of workers in the labour market after a career-break”

“A third model is based on the idea that positive action should aim to make up for past discrimination. As a consequence, preferential treatment is prescribed in favour of certain categories of persons. **This may take the form of quota systems or targets.** Quotas may be more or less rigid. **Rigid quotas** are deemed to be those determining a certain threshold to be reached without taking into account the qualifications and merits of persons concerned, or those fixing minimum requirements to be fulfilled without any possibility of having regard to the particular circumstances of a case. **Less rigid or flexible quotas** are, on the contrary, those establishing preferential treatment in favour of a certain category provided that qualifications are of equal value in relation to the job to be done and that exceptional circumstances may be taken into account”.

## Consolidated version of the Treaty on the Functioning of the European Union

### Article 157 - (ex Article 141 TEC)

3. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, and after consulting the Economic and Social Committee, shall adopt measures **to ensure the application of the principle of equal opportunities** and equal treatment of men and women in matters of employment and occupation, including the principle of equal pay for equal work or work of equal value

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 of the Charter of Fundamental Rights of the EU, reproduces the wording of Article 157 TFEU with some minor deviations]

### Recast Directive 2006/54/EC

*DIRECTIVE 2006/54/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast)*

#### *Article 3*

#### **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.

### The concept of positive action in the case law of the Court of Justice of the EU

- **Judgment 17/10/1995, Case C-450/93, Kalanke. Matter: on the compatibility of Art. 2.4 of Directive 76/207 concerning the Law of the Land of Bremen (Germany) which gives automatic preference to women over men with the same qualifications in job recruitment in sectors where women are under-represented. The CJEU responded in the negative.**

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

*23. Furthermore, in so far as it seeks to achieve equal representation of men and women in all grades and levels within a department, **such a system substitutes for equality of opportunity as envisaged in Article 2(4) the result** which is only to be arrived at by providing such equality of opportunity.*

• **Judgment 11/11/1997, Case C-409/95, Marschall (Matter: whether legislation of the Land of Nordrhein-Westfalen is compatible with Directive 76/207. Confirmed by the Court of Justice):**

*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:*

- *in 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 [SAVING CLAUSE], and*
- *such criteria are not such as to discriminate against the female candidates.*

• **Judgment 28/03/2000, Case C-158/97, Badeck (Matter: Compatibility of the legislation of the Land of Hessen with Directive 76/207. Confirmed by the Court of Justice):**

*23. It follows that a measure which is intended to give priority in promotion to women in sectors of the public service where they are under-represented must be regarded as compatible with Community law if*

- *it does not automatically and unconditionally give priority to women when women and men are equally qualified, and*
- *the candidatures are the subject of an objective assessment which takes account of the specific personal situations of all candidates.*

28. On this point, it appears from the order for reference that the legislature of the Land of Hesse opted for what is generally known as a *flexible result quota (flexible Ergebnisquote)*. The characteristics of that system are, first, that the HGIg does not determine quotas uniformly for all the sectors and departments concerned, but states that the characteristics of those sectors and departments are to be decisive for fixing the binding targets. Second, the HGIg does not necessarily determine from the outset - automatically - that the outcome of each selection procedure must, in a stalemate situation where the candidates have equal qualifications, necessarily favour the woman candidate.

On the other hand, the Court of Justice of the European Union has acknowledged that the legislation of Hessen provides for public service which, *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.*

For the Court of Justice of the European Union, the Hessen legislature, by introducing a *strict result quota* as regards professional training to facilitate such access, intended to establish a balanced allocation of training places at least in the public service.

51 *That intention does not, however, necessarily entail total inflexibility. Paragraph 7(2) clearly provides that if, despite appropriate measures for drawing the attention of women to the training places available, there are not enough applications from women, it is possible for more than half of those places to be taken by men.*

52 *The provision at issue in the main proceedings forms part of a restricted concept of equality of opportunity. It is not places in employment which are reserved for women but places in training with a view to obtaining qualifications with the prospect of subsequent access to trained occupations in the public service.*

- **Judgment 06/07/2000, Case C-407/98, Abrahamsson: Matter: compatibility of Swedish legislation on “positive discrimination” with Directive 76/207.**

Under this Swedish legislation:

“A candidate sex who possesses sufficient qualifications... must belonging to an under-represented be granted preference over a candidate of the opposite sex who would otherwise have been chosen (positive discrimination) where it proves necessary to do so in order for a candidate of the under-represented sex to be appointed”.

“Positive discrimination must, however, not be applied where the difference **between the candidates' qualifications is so great that such application would give rise to a breach of the requirement of objectivity** in the making of appointments”

**Negative decision by the Court of Justice of the European Union:**

“...article 2(1) and (4) of the Directive 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**”

[The Court of Justice finds that Swedish legislation regulating preference in the appointment of a candidate on the basis of a difference in merit is incompatible with European Law. This is so even when such a difference may breach objective criteria, whether or not the difference is substantial (in other words, even when the difference in merit is slight)]

- **JUDGMENT 19 March 2002. Case C-476/99, Lommers. Compatibility with Directive 76/207 of the guidelines of a Dutch Ministry which stipulates that 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. Positive decision by the Court of Justice of the European Union.**

"...it cannot be maintained that the fact that the Circular does not guarantee access to nursery places to officials of both sexes on an equal footing is contrary to the principle of proportionality".

## Other judgments of interest:

JUDGMENT OF THE COURT. 19 November 2020. Case C-93/19 (Appel)., European External Action Service (EEAS), v. Chantal Hebberecht

JUDGMENT OF THE COURT 29 November 2001 . Case C-366/099. Joseph Griesmar and Ministre de l'Économie, des Finances et de l'Industrie, Ministre de la Fonction publique, de la Réforme de l'État et de la Décentralisation.

JUDGMENT OF THE COURT. 16 July 2015. Case C-222/14. Konstantinos Maïstrellis v. Ypourgos Dikaïosynis, Diafaneias kai Anthroponon Dikaïomaton.

JUDGMENT OF THE COURT. 30 September 2010 .Case C-104/09. Pedro Manuel Roca Álvarez v. Sesa Start España ETT SA.

Criteria that need to be met in order to reconcile the two concepts of formal equality of treatment and positive action aimed at bringing about de facto equality (European Commission: EU Proposal: Directive on Quotas for Women in Company Boards)

(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

[In addition to other considerations of interest, such as the need to focus on the observance of the principle of proportionality/respect to meritocracy]

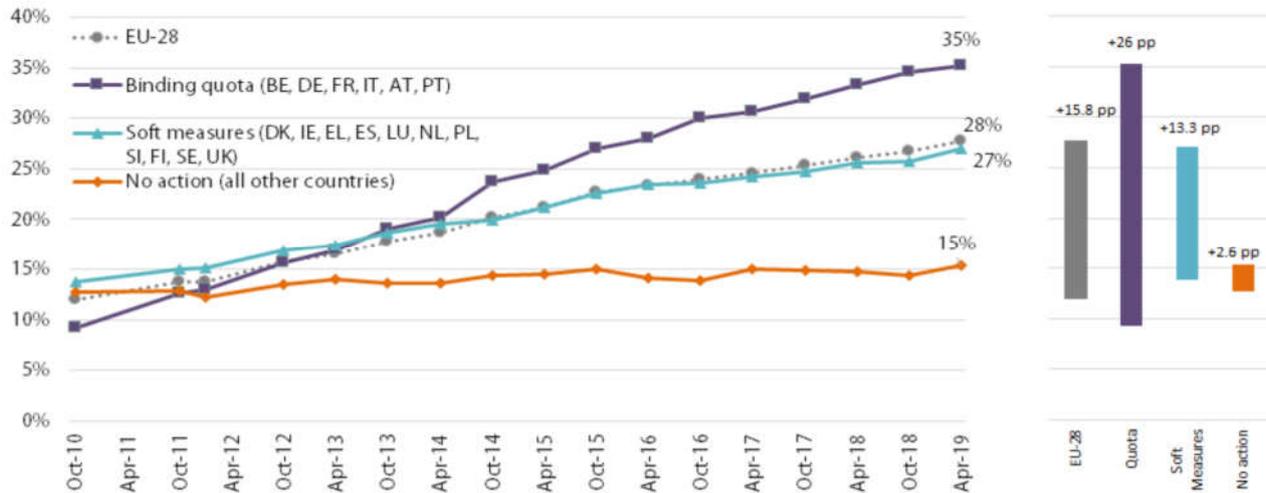
## EU Proposal: Directive on Quotas for Women in Company Boards

Reminder: The Communication from the European Commission of 5 March 2020 *A Union of Equality: Gender Equality Strategy 2020-2025* states that:

1. "To help break the glass ceiling, the Commission will push for the adoption of the 2012 proposal for a **Directive on improving the gender balance on corporate boards** which set the aim of a minimum of 40% of non-executive members of the under-represented sex on company boards"
2. "EU institutions and bodies should not be exempt from ensuring gender balance in leadership positions... The Commission aims to reach **gender balance of 50%** at all levels of its management by the end of 2024"

### EIGE: Gender Statistics Database

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.

Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on improving the gender balance among non-executive directors of companies listed on stock exchanges and related measures. Brussels, 14.11.2012. COM(2012) 614 final

The purpose of the proposal is to substantially increase the number of women on corporate boards throughout the EU **by setting a minimum objective of a 40% presence of the underrepresented sex among the non-executive directors of companies listed on stock exchanges** and by requiring companies with a lower share of the under-represented sex among the nonexecutive directors to introduce pre-established, clear, neutrally formulated and unambiguous criteria in selection procedures for those positions in order to attain that objective.

*Article 3*

*Exclusion of small and medium-sized enterprises*

This Directive shall not apply to small and medium-sized enterprises ('SMEs') [SME means company which employs less than 250 persons and has an annual turnover not exceeding EUR 50 million or an annual balance sheet total not exceeding EUR 43 million..., Article 2]

*Article 4*

*Objectives with regard to non-executive directors*

1. Member States shall ensure that listed companies in whose boards members of the under-represented sex hold less than 40 per cent of the non-executive director positions make the appointments to those positions on the basis of a comparative analysis of the qualifications of each candidate, by applying pre-established, clear, neutrally formulated and unambiguous criteria...
2. The number of non-executive director positions necessary to meet the objective laid down in paragraph 1 shall be the number closest to the proportion of 40 per cent, but not exceeding 49 per cent.

3. In order to attain the objective laid down in paragraph 1, Member States shall ensure that, in the selection of non-executive directors, priority shall be given to the candidate of the under-represented sex if that candidate is equally qualified as a candidate of the other sex in terms of suitability, competence and professional performance, 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.

...

5. Member States shall take the necessary measures, in accordance with their national judicial systems, to ensure that where an unsuccessful candidate of the underrepresented sex establishes facts from which it may be presumed that that candidate was equally qualified as the appointed candidate of the other sex, it shall be for the listed company to prove that there has been no breach of the rule laid down in paragraph 3

#### *Article 5*

##### *Additional measures by companies and reporting*

1. ...

2. Member States shall require listed companies to **provide information to the competent national authorities**, once a year as from *[two years after adoption]*, about the gender representation on their boards, **distinguishing between non-executive and executive directors** and about the measures taken in view of the objectives laid down in Article 4(1) and in paragraph 1 of this Article, and to publish that information in an appropriate and accessible manner on their website.

#### *Article 10*

##### *Entry into force and expiry*

1. This Directive shall enter into force on the *[twentieth]* day following that of its publication in the *Official Journal of the European Union*.

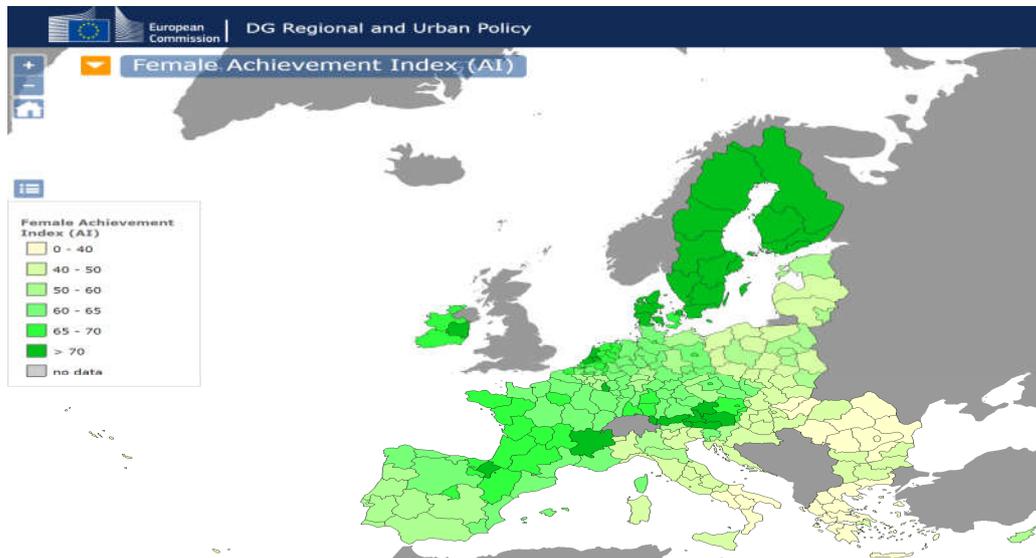
**2. It shall expire on 31 December 2028**

## Legislative initiatives promoted by EU Member States

In general, quota systems – voluntary or compulsory – have gradually been adopted in response to the low level of women’s participation in the following main areas: 1/ Party quotas (candidate lists); 2/ Legislated electoral quotas; 3/Public bodies quotas; 4/ Corporate board quotas; 5/Other domains (for example, in university bodies or government agencies etc.).

It should be mentioned that France, Belgium and Greece have been important cases for victories for legislated electoral gender quotas, which have served to boost this trend in other states such as Spain, Italy, Poland, Portugal, and Slovenia; and [Norway] and Germany, have been important actors in the unfolding of the wave of corporate board quotas

## European Commission: Mapping the glass ceiling: The EU regions where women thrive and where they are held back



[https://ec.europa.eu/regional\\_policy/en/information/maps/gender-equality-monitor](https://ec.europa.eu/regional_policy/en/information/maps/gender-equality-monitor)

## Some ideas for discussion

The complexity of the limits imposed by the CJEU and concepts such as merit, etc., combined with a global perspective in the fight against structural discrimination

The possible stigmatization of the “women quotas” concept and the evolution in the use of other ideas, such as: “equal opportunity in participation is essential for representative democracy at all levels – European, national, regional and local”.

The question of the beneficiaries of positive action (EU law remains neutral: the under-represented sex). The importance of the principle of intersectionality.

## Main bibliography used for this Power Point and oral presentation:

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2. EUROPEAN NETWORK OF LEGAL EXPERTS IN GENDER EQUALITY AND NON-DISCRIMINATION: *Gender-based positive action in employment in Europe A comparative analysis of legal and policy approaches in the EU and EEA. A special report*. Author Christopher McCrudden. Coordinator Linda Senden. October 2019: <https://www.equalitylaw.eu/downloads/5008-gender-based-positive-action-in-employment-in-europe-pdf-1-9-mb>
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5. RAPHAEL XENIDIS AND HÉLÈNE MASSE-DESSEN: "Positive action in practice: some dos and don't" in the field of EU gender equality law". *European Equality Law Review*. European Network of Legal Experts in Gender Equality and Non-discrimination. 2018/2.

6. ELÉONORE LÓPINARD; RUTH RUBIO MARIN. : "Completing the Unfinished Task? Gender Quotas and the Ongoing Struggle for Women's Empowerment in Europe". In *Transforming Gender Citizenship. The Irresistible Rise of Gender Quotas in Europe*. July 2018. Publisher: Cambridge University Press. ISBN: 9781108453356. [https://www.researchgate.net/publication/325872122\\_Transforming\\_Gender\\_Citizenship\\_The\\_Irresistible\\_Rise\\_of\\_Gender\\_Quotas\\_in\\_Europe](https://www.researchgate.net/publication/325872122_Transforming_Gender_Citizenship_The_Irresistible_Rise_of_Gender_Quotas_in_Europe)
7. MINISTERIO DE ASUNTOS EXTERIORES. GOBIERNO DE ESPAÑA. Consejo de Europa: Estrategia de Igualdad de Género 2018-2023.
8. DOLORES MORONDO: Appunti sul "Maschio, vittima innocente" nel Diritto Comunitario. *Giornale di diritto del lavoro e di relazioni industriali*, nº 94, 2002-2.
9. EUROPEAN COMMISSION: Mapping the glass ceiling: The EU regions where women thrive and where they are held back: [https://ec.europa.eu/regional\\_policy/en/information/maps/gender-equality-monitor](https://ec.europa.eu/regional_policy/en/information/maps/gender-equality-monitor)

Thanks for your attention!



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