

How to attain the goals of the WoB-Directive? COM(2012)614

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1

Women on Boards

- Deal (EP) to boost gender balance in (top of) Companies
- Agreement reached in June 2022 (draft from 2012)
- Directive aims to introduce transparent recruitment procedures in companies, so that at least 40% of non-executive director posts or 33% of all director posts are occupied by the under-represented sex.
- Companies must comply with this target by 30 June 2026.
- If goal not attained, preference for the underrepresented sex mandatory

2

Why? (Recital 10 and 10a)

- Better use of human capital
 - Diversity leads to better decisions
 - Encourages innovation and long term economic growth
 - Women on highest level attract women on all levels in the undertaking.
- (2) Equality between men and women is a fundamental principle of Community law

3

Compare Recital D 2006/54/EC

- (2)
Equality between men and women is a **fundamental principle** of Community law under Article 2 and Article 3(2) of the Treaty and the case-law of the Court of Justice. Those Treaty provisions proclaim equality between men and women as a 'task' and an 'aim' of the Community and impose a positive obligation to promote it in all its activities.

4

WoB -agreement

- Listed Companies. SME excluded (250+, and the demands are not made if women are less than 10% of the workforce: Explanatory memorandum (E.M.))
- Aim of the directive (art. 4) 40% women non-e, not more than half , cq 30 executive

5

Means: art. 4

- 1. selection procedures objective, criteria, all candidates
- 2. mandatory priority for underrepresented sex (unless...): positive action
- 3. information for turned down candidate
- 4. burden of proof on company (especially as concerns the specific qualifications (EM 28).

6

Art. 4(2):Positive action

- Mandatory when not meeting the objective
- no longer exception on equal treatment rule.

7

Positive action

- 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**)

8

In EU-Law: Actual legal frame: 157(4) TFEU,
art. 3 Directive 2006/54/EC,

- Character of positive action: (under circumstances) *allowed exception*.
To be interpreted strictly (Kalanke, Marschall)

Goal: (Actual)

art. 157 TFEU equal opportunities and equal treatment

Art. 3 2006/54/EC Full equality in practice

9

Measures should be within the demands of
the ECJ:

- In EM 25, reference is made to the case law of the Court of Justice
C450/93: Kalanke
- C409/95 Marschall [...] ECR I6363,
- C158/97 Badeck [...] ECR I1875,
- C407/98 Abrahamsson [...] ECR I5539.

10

Is positive action, as framed by the ECJ, enough to attain the results?

- Demands from the ECJ caselaw (Kalanke etc.):
- 1. legitimate aim (see texts legislation) : **promoting equal opportunities**
WOB: fixed percentage
- 2. under-representation, 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. Kalanke) **WOB: do not meet the quota**
- 3. All candidates have to be considered, in order to avoid absolute and unconditional priority for appointment . **WOB All candidates have to be considered**
- 4a WOB: preference for women who are “equally qualified” Kalanke: **equally qualified**

11

Difference between art. 4a WOB and actual law on positive action:

- Directive 2006/54/EV 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.
- WOB art. 4a(2): Member States **shall ensure** that, when choosing between candidates who are equally qualified in terms of suitability, competence and professional performance, priority is given to the candidate of the underrepresented sex,
- Exception on the mandatory positive action is possible, but: The overriding of the application of positive action should nevertheless (EM26a):
- remain exceptional and based on a casebycase assessment,
- and should be duly justified by objective criteria which should not, in any event, discriminate against the underrepresented sex.

12

Aim of the positive measure:

- Kalanke: The ECJ held that Article 2(4) (now art. 3 D. 2006/54/EC) is an *exception* on the non-discrimination rule and must be **read restrictively**. National rules such as those in the Bremen Law which guarantee women **absolute and unconditional priority for appointment** or promotion go beyond promoting equal opportunities and are outside the ambit of the **exception** in Article 2(4).
- WOB: art. 4a: still comparison necessary. But application of positive action is the *rule* if the target is not (yet) attained. Restrictive interpretation?

13

Criticism on the Kalanke etc case law:

- The actual texts of Treaty and Directives are about attaining equality (as is WOB), the caselaw of the Court is based on equal opportunities
- the rule that prescribes evaluating each candidate is not effective for attaining full equality when there is a big backlog
- The UN Treaty on the elimination of discrimination against Women demands full equality. That can in situations of severe backlog not be attained by observing the Kalanke-rules.

14

Discussion:

- HAVE CONSEQUENCES BEEN CONNECTED TO THE SHIFT IN TERMINOLOGY FROM EQUAL OPPORTUNITIES TO FULL EQUALITY?
- IS IN YOUR COUNTRY THE POSSIBLE CONFLICT BETWEEN THE CEDAW-DUTIES AND THE STRICT APPROACH OF THE COURT IN KALANKE ETC. AN ISSUE?