

POSITIVE ACTION, GENDER QUOTAS, AND THE WOMEN ON BOARDS DIRECTIVE

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PLAN OF THE PRESENTATION

1. Origins of the concept of positive action and positive measures in international law
2. Aims, functions, and types of positive measures
3. Positive action and positive measures in the EU law and selected case-law
4. Women on Boards Directive

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THE ORIGIN OF THE CONCEPT

- UN Convention on Elimination of All Forms of Racial Discrimination, **CERD** (1966):
used the term „special measures”
- UN Convention on Elimination of All Forms of Discrimination against Women, **CEDAW** (1979):
used the term „temporary special measures”
- European Economic Community (1970-80s):
referred to „measures to promote equal opportunity,” „positive action” and „positive measures,” but also „positive action measures”
 - Article 2 para. 4 of the Directive 76/207/EEC – „measures to promote equal opportunity for men and women”
 - Council Resolution of 12 July 1982 on the promotion of equal opportunities for women – „positive action”
 - Council Recommendation 84/635/EEC of 13 December 1984 on the promotion of positive action for women – „positive action” and „positive measures”
- US, India: „affirmative action” (ie. in school admissions).

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I. ORIGINS OF THE CONCEPT OF POSITIVE ACTION AND POSITIVE MEASURES IN INTERNATIONAL LAW

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CERD

- Article 1 (4) **Special measures** taken for the sole purpose of ensuring the adequate development of certain racial or ethnic groups or individuals in need of such protection as may be necessary to ensure the exercise or enjoyment on an equal basis of human rights and fundamental freedoms by such groups or individuals shall not be considered racial discrimination, provided, however, that such measures do not have the effect of maintaining separate rights for different racial groups as a consequence and do not remain in force after the objectives for which they were taken have been achieved.
- Article 2(2) States Parties to the Convention shall, if circumstances so require, take **special and specific measures** in the social, economic, cultural and other fields to ensure the adequate development and protection of specific racial groups and individuals belonging to them in order to guarantee to them, on an equal basis, the full enjoyment of human rights and fundamental freedoms. These measures should in no way entail the maintenance of unequal or separate rights for different racial groups after achieving the goals for which they were taken.

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CERD GENERAL RECOMMENDATION NO. 32(2009)

- 12. The terms 'special measures' and 'special and specific measures' used in the Convention can be considered functionally equivalent and have autonomous meaning to be interpreted in light of the Convention as a whole, which may differ from the usage in individual states parties. (...) **The term 'positive discrimination' is, in the context of international human rights standards, is contradictory and should be avoided.**
- 13 **Measures include the full range of legal, executive, administrative, budgetary and regulatory, at every level of the state apparatus state, as well as plans, policies, programs and preferential schemes in areas such as employment, housing, education, culture and participation in public life of discriminated groups, developed and implemented on the basis of such instruments. States parties should incorporate, as necessary to fulfill their obligations under the Convention, provisions for special measures into their legal systems, whether through general legislation or legislation aimed at specific sectors in light of the scope of human rights human rights referred to in Article 5 of the Convention, as well as through plans, programs and other policy initiatives referred to above at the national, regional and local levels.(...)**

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CERD GENERAL RECOMMENDATION NO. 32(2009)

- 15. **Special measures should not be confused with special rights pertaining to certain categories of persons or communities, such as, for example, the rights of persons belonging to minorities to enjoy their own culture, to profess and practice their own religion and use their own language, the rights of indigenous peoples, including rights to land traditionally occupied by them occupied land, and the rights of women to non-identical treatment with men, such as maternity leave, due to biological differences relative to men. Such rights are permanent rights, recognized as such in human rights instruments, including those adopted in the context of the United Nations and its agencies. States parties should carefully observe the distinction between measures of special measures and permanent human rights in their law and practice. The distinction between special measures and permanent rights means that persons entitled to permanent rights can also enjoy the benefits of special measures.**"

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CEDAW

- Article 4(1) Adoption by States parties of **temporary special measures** aimed at accelerating **de facto equality** between men and women shall not be considered discrimination as defined in the present Convention, but shall in no way entail as a consequence the maintenance of unequal or separate standards; these measures shall be discontinued when the objectives of equality of opportunity and treatment have been achieved.
- Article 4 (2) Adoption by States parties of **special measures**, including those measures contained in the present Convention, aimed at protecting maternity shall not be considered discriminatory.

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CEDAW GENERAL RECOMMENDATION NO. 25(2004)

- 8. In the Committee's view, a purely formal legal or programmatic approach is not sufficient to achieve women's de facto equality with men, which the Committee interprets as substantive equality. In addition, the Convention requires that women be given an equal start and that they be empowered by an enabling environment to achieve equality of results. It is not enough to guarantee women treatment that is identical to that of men. Rather, biological as well as socially and culturally constructed differences between women and men must be taken into account. Under certain circumstances, non-identical treatment of women and men will be required in order to address such differences. Pursuit of the goal of substantive equality also calls for an effective strategy aimed at overcoming underrepresentation of women and a redistribution of resources and power between men and women.

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CEDAW GENERAL RECOMMENDATION

- 15. (...) the purpose of article 4, paragraph 1, is to accelerate the improvement of the position of women to achieve their de facto or substantive equality with men, and to effect the structural, social and cultural changes necessary to correct past and current forms and effects of discrimination against women, as well as to provide them with compensation. These measures are of a temporary nature.
- 16. Article 4, paragraph 2, provides for non-identical treatment of women and men due to their biological differences. These measures are of a permanent nature, at least until such time as the scientific and technological knowledge referred to in article 11, paragraph 3, would warrant a review.

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CEDAW INTRODUCES THE STATE'S OBLIGATION TO ADOPT TEMPORARY SPECIAL MEASURES

- 18 (...) The Committee views **the application of these measures not as an exception to the norm of non-discrimination, but rather as an emphasis that temporary special measures are part of a necessary strategy** by States parties directed towards the achievement of de facto or substantive equality of women with men in the enjoyment of their human rights and fundamental freedoms.
- **Temporary ...**
- **Special ...**
- **Measures ...** The term “measures” encompasses a wide variety of legislative, executive, administrative and other regulatory instruments, policies and practices, such as outreach or support programmes; allocation and/or reallocation of resources; preferential treatment; targeted recruitment, hiring and promotion; numerical goals connected with time frames; and quota systems.

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OTHER INTERNATIONAL „SOFT LAW” SOURCES

- **The concept and practice of affirmative action : final report / submitted by Marc Bossuyt, Special Rapporteur, in accordance with Sub-Commission resolution 1998/5 (2002)**
- Recommendation CM/Rec(2018)4 of the Committee of Ministers to member States on the participation of citizens in local public life (Adopted by the Committee of Ministers on 21 March 2018 at the 1311th meeting of the Ministers' Deputies)

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COUNCIL OF EUROPE

- PACE Resolution 1366(2004) Candidates for the European Court of Human Rights
- ECtHR in the case **Zevnik and others v. Slovenia**, Application No. 54893/18 (2019)
 - Decision on inadmissibility
 - Rejection of electoral lists drawn up contrary to section 43(6) of the National Assembly Election Act because women represented less than 35% of the total number of candidates of the lists (one list included 6 men and 2 women, and the other 5 men and 2 women) in two constituencies.
 - Applicants were included on these lists and alleged a violation of Article 3 of Protocol 1 .
- See also *Horvath and Kiss v. Hungary*, Application No. 11146/11 (2013) – State's obligation to adopt special measures in Roma education.

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ZEVNIK AND OTHERS V. SLOVENIA

Question:
whether the rejection of the lists of candidates for non-compliance with the gender quota requirement was proportionate to the legitimate aim pursued. Helpful guidance can be obtained from the relevant instruments adopted by the Council of Europe institutions, in which they not only allow but also encourage member States to adopt gender quotas into their electoral systems coupled with strict sanctions for non-compliance.

Balancing:
The outcome of the balancing between the right to stand for election and ensuring observance of the gender quota depended on whether the list had been composed diligently and whether the proposer had knowingly composed it in breach of the gender quota (see paragraph 18 above). However, in the present case, as the domestic courts convincingly established, the proposer (coalition party) of the lists acted without due diligence. The proposer was the only one to blame for the breach of the gender ratio requirement and was sanctioned for conduct within its control

Outcome
In the light of the foregoing considerations and the wide margin of appreciation enjoyed by the Contracting States in organising and running electoral systems, the Court is of the view that the rejection of the lists of candidates in the present case cannot be considered disproportionate.

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2. AIMS, FUNCTIONS AND TYPES OF POSITIVE MEASURES

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AIMS OF POSITIVE MEASURES

Positive measures aim to:

- level the playing field for persons belonging to discriminated groups,
- eliminate the effects of systemic discrimination, or
- compensate for past injustices suffered by these groups.

In some cases, positive measures may serve not only to create equal opportunities, but also to ensure equal results.

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FUNCTIONS OF POSITIVE MEASURES

- Reparative justice - redress past wrongs: reparative policies give preferential treatment to groups that have been discriminated against or persecuted in the past.
- Compensatory justice - level the playing field: compensatory policies eliminate the disadvantages of a discriminated group in a given area of life. Compensatory policies in the labor market aim to eliminate the causes of limited employment opportunities through intervention, in particular at the level of professional orientation and vocational training.
- Social inclusion - ensure full participation in a given area of life (in politics, in public life/public administration, in professional life/labour market): inclusion policies aim to combat underrepresentation. Inclusion policies in labour market may concern the organization of working time, the development of childcare infrastructure and the reintegration of workers into the labor market after a career break.

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TYPES OF POSITIVE MEASURES

- soft and hard;
- preferential and non-preferential.

The division into hard and soft measures depends on the inclusion of a derogation clause and the introduction of sanctions for failure to apply the measures

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PREFERENTIAL MEASURES

- **absolute preferences** - reserving benefits exclusively for members of the discriminated group;
- **strong preferences** - reserving benefits for members of the discriminated group who have met certain minimum conditions (e.g., qualification criteria for a particular job);
- **tie-break preferences** - reserving benefits for members of the group discriminated against who are equally eligible for a particular position as persons not belonging to that group;
- **flexible preferences** - granting certain benefits based on evaluation criteria other than protected characteristics (e.g., long-term unemployment, single parenthood, health reasons, etc.);
- **weak preferences** - allow a protected characteristic to be one of many evaluation criteria, each of which has more or less equal weight.

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PREFERENTIAL MEASURES

- quota systems (rigid or flexible);
- preferences related to access to childcare services.

Rigid quotas set a certain ceiling to be achieved regardless of a person's qualifications or achievements of the person in question, or set minimum requirements, but do not allow the special circumstances of the case to be taken into account.

Flexible quotas establish preferential treatment in favor of a certain category of persons provided that their professional qualifications are of equal value to the group not benefiting from preferential treatment, and allow for taking into account the special circumstances of the case.

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NON-PREFERENTIAL MEASURES

In the context of employment:

- part-time work
- flexible hours/work
- training programs
- mentoring programs
- encouraging job applications
- offering childcare services.

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POSITIVE MEASURES IN BRIEF

- Positive measures serve the principle of **substantive (actual, de facto) equality**.
- In contrast, the principle of equal treatment constitute the realization of formal (arithmetical) equality.
- In essence, the application of positive measures conflicts with the principle of equal treatment when it entails preferential treatment of a person due to the protected characteristic.
- However, positive measures do not amount to a violation of the prohibition of discrimination if they serve a legitimate aim and are appropriate and necessary to attain this goal.
- By definition, positive measures are intended to be temporary in nature unless they are specific to a certain group (like breastfeeding mothers, persons with disabilities).

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3. POSITIVE ACTION AND POSITIVE MEASURES IN THE EU LAW AND SELECTED CASE-LAW

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DIRECTIVE 76/207/EEC

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 (access to employment, including promotion, vocational training and working conditions)

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TREATY OF AMSTERDAM (EQUAL PAY PROVISIONS)

- Article 119 (4) of the Treaty establishing the European Community

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.

- Later as Article 141 (1) TEC
- now Article 157(4) TFEU

SAMEWORDING

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CHARTER OF FUNDAMENTAL RIGHTS

1. Equality between women and men must be ensured in all areas, including employment, work and pay.
2. **The principle of equality shall not prevent the maintenance or adoption of measures providing for specific advantages in favour of the under-represented sex.**

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EQUALITY DIRECTIVES

Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin

Article 5 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 racial or ethnic origin.

Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation

Article 7 Positive action

1. 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.

2. With regard to disabled persons, the principle of equal treatment shall be without prejudice to the right of Member States to maintain or adopt **provisions on the protection of health and safety at work or to measures aimed at creating or maintaining provisions or facilities for safeguarding or promoting their integration into the working environment.**

EQUALITY DIRECTIVES

Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services

Article 6 Positive action

With a view to ensuring full equality in practice between men and women, 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 sex.

EQUALITY DIRECTIVES

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)

Preamble

(21) The prohibition of discrimination should be without prejudice to the maintenance or adoption of measures intended to prevent or compensate for disadvantages suffered by a group of persons of one sex. Such measures permit organisations of persons of one sex where their main object is the promotion of the special needs of those persons and the promotion of equality between men and women.

(22) In accordance with Article 141(4) of the Treaty, with a view to ensuring full equality in practice between men and women in working life, the principle of equal treatment does not prevent Member States 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. Given the current situation and bearing in mind Declaration No 28 to the Amsterdam Treaty, Member States should, in the first instance, aim at improving the situation of women in working life.

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.

NO OBLIGATION !!!

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EQUALITY DIRECTIVES

Directive (EU) 2019/1158 of the European Parliament and of the Council of 20 June 2019 on work-life balance for parents and carers and repealing Council Directive 2010/18/EU

- Member States shall take the necessary measures to ensure an equal sharing of caring responsibilities between women and men by means of parental, paternity and carers' leave, alongside the existing maternity leave.
- provides for the right to request flexible working arrangements.

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POSITIVE MEASURES CASE-LAW

Gender quotas address the problem of underrepresentation:

- C-450/93 *Kalanke*
- C-409/95 *Marshall*
- C-158-97 *Badeck*
- C-407/98 *Abrahamsson*

Other positive (special) measures aimed at *de facto* equality

(often overlapping with the work-life balance perspective):

- C-312/86 *Commission v France*; C-79/99 *Schorbus*; C-366/99 *Griesmar*; C-476/99 *Lommers*; E-1/02 *Surveillance Authority v. Norway*; C-319/03 *Briheche*; C-104/09 *Roca Alvarez*; C-173/13 *Leone*; C-319/03 *Maistrellis*; C-450/18 *WA v. INSS*; C-463/19 *Syndicat CFTC*.

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C-450/93 KALANKE

- measures aimed at achieving equal representation of women and men in the civil service granting women absolute and unconditional priority in employment and promotion;
- underrepresentation - a situation in which women do not make up at least half of the staff in specific salary ranges in the relevant group of employees in a given department;
- under the provisions of the Law on Equal Treatment of Women and Men in the Public Service in Bremen in the case of appointment, assignment to a position and promotion, **women who have the same qualifications as men applying for the same position have priority in sectors in which they are underrepresented**;
- ECJ found that a provision giving automatic and unconditional priority in hiring and promotion to women who have the same qualifications as men constitutes sex discrimination;
- **measure deemed impermissible**;
- the national legislation went beyond the scope of the exception contained in Article 2(4) of Directive 76/207/EEC;
- Article 2(4) must be interpreted strictly.

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C-409/95 MARSCHALL

- under the provisions of the Civil Service Act in the state of Nordrhein-Westfalen "if in the area of competence of the authority responsible for official promotion, the number of women in a given official position is less than the number of men, in a situation of equal abilities, competence and performance, **promotion to a higher position shall apply to women first, unless considerations related to the person of one of the candidates speak in their favor.**"
- **measure deemed permissible** because it did not give automatic priority to women in cases where they had the same qualifications as men, and additionally:
 - 1) candidates were subject to an objective evaluation, which took into account criteria related to their individual situations;
 - 2) the preference for women did not preclude the selection of a man if considerations other than sex supported such a choice;
 - 3) the decision to choose a man could not be, however, based on criteria that discriminate against women.
- the main difference was the "derogation clause," which provided that in special cases, men could be promoted.

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MARSHALL TEST

- Article 2(1) and (4) of the Directive does not preclude national regulation requiring, in the public sector, in areas in which the number of women at a particular level in the hierarchy of positions is lower than the number of men, to promote women first in situations of equal ability, competence and performance of female and male candidates, unless considerations related to the person of the male candidate favor his favor, provided that:
 - it guarantees in each individual case to male candidates having the same qualifications as female candidates that the applications will be evaluated objectively, taking into account all criteria relating to the person of the candidate and with the possibility of overlooking the priority vested in women when one or more criteria tips the scales in favor of their favor of the male candidate, and
 - these criteria are not discriminatory against women.

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C-158/97 BADECK

- Permissible
- Gender Equality Act in the Land of Hessen provided for the adoption of women's development plans with binding targets in sectors of public service where women were underrepresented.
- It provided that in these sectors preference is given to female candidates, if male and female candidates have the same qualifications, and if it is necessary to ensure the implementation of the women's development plan, and there are no other more important reasons, provided that the rule ensures that female candidates are subjected to an objective evaluation that takes into account the particular personal situation of all candidates.

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C-407/90 ABRAHMSSON AND ANDERSON

- Impermissible
- the national legislation concerning the evaluation of qualifications of candidates for public service positions did not provide clear criteria for this evaluation, and thus did not ensure that the selection of a candidate would be made in an objective manner.
- It provided that if a candidate for a public position belongs to the underrepresented sex and has sufficient qualifications for the position, he or she shall be given preference over a candidate of the opposite sex, who would otherwise be employed, if it is necessary to ensure the appointment of a candidate of the underrepresented sex and the differences between the candidates' achievements are not so great as to constitute a violation of the requirement of objectivity in hiring.
- These provisions were also applied with regard to the employment of a predetermined number of positions or positions created as part of special programs at institutions of higher education institutions.
- ECJ ruled that such legislation was precluded by Article 2(4) of Directive 76/207 because the selection procedure was "ultimately based solely on the fact of belonging to an underrepresented sex.

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OTHER POSITIVE (SPECIAL) MEASURES AIMED AT *DE FACTO* EQUALITY

- an exception to the principle of equality / equal treatment / non-discrimination
- need to pass the proportionality test
- **The proportionality test requires that:**
 - the exception serve to achieve genuine equality between women and men;
 - and remain within the limits of what is appropriate and necessary to achievement of this goal.

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C-476/99 LOMMERS

- **a scheme for access to subsidized places in crèches created by the ministry for the employees;**
- a response to the clear underrepresentation of women in the ministry in the absence of accessible childcare facilities;
- a limited number of subsidized nursery places were reserved exclusively for female employees, while children of male employees had access to these places only in an emergency situation to be determined by the employer.
- ECJ held that the above **exception is formulated in such a way that it allows men who have custody of children to access places in nurseries under the same conditions as women.**
- **the measure was permissible** as it passed the proportionality test.

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C-319/03 BRIHECHE

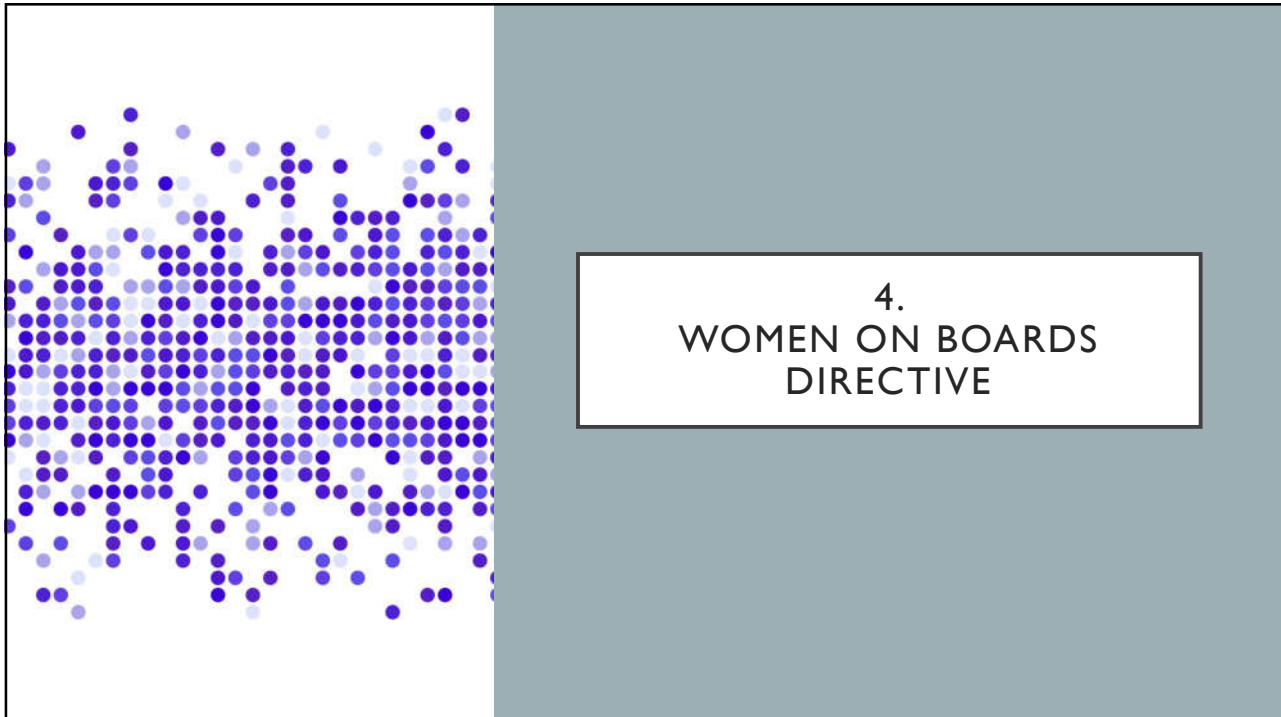
- The legislation introduced an unequal treatment of widows and widowers because it exempted only widows who did not remarried from the age limit (of 45 years) established in access to public administration.
- In this situation, privileging women as widows was not intended to abolish existing inequalities or to compensate for them.
- **measures deemed impermissible.**

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C-463/19 SYNDICAT CFTC

- Collective agreement providing for an additional maternity leave (up to 1 year after the maternity leave) available only to women who bring up their children alone
- Refusal to grant the leave to fathers.
- CJEU: conditions, duration and modalities of leave must be directly linked to the protection of biological and psychological condition of a woman and the relationship between a woman and the child after birth, while legal protection related to this leave need to be in conformity with the statutory maternity leave (set by Directive 92/85).
- For the referring court to determine whether the leave is intended to protect female workers in connection with the effects of pregnancy and motherhood and the above-mentioned conditions are met.

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THE ROAD TO ... THE WOMEN ON BOARDS DIRECTIVE

- Proposal for a Directive of the European Parliament and the Council on improving the gender balance among directors of non-executive directors of companies whose shares are listed on a stock exchange and related measures, 14.11.2012, COM(2012) 614 final.
- Harmonization of national regulations on gender quotas on the boards of listed companies

Adopted as

- **DIRECTIVE (EU) 2022/2381 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 23 November 2022 on improving the gender balance among directors of listed companies and related measures**
- sets minimum requirements with regard to positive action in the form of binding measures

See: Corporate gender quotas at the national level (2022):
[Overview-Gender-balance-quota-and-targets-in-Europe-April-2022.pdf \(europeanwomenonboards.eu\)](#)

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PREAMBLE

- to ensure the application of the principle of equal opportunities between women and men and achieving a gender-balanced representation among top management positions by establishing a set of procedural requirements concerning the selection of candidates for appointment or election to director positions based on transparency and merit.
- Union institutions, bodies, offices and agencies lead by example when it comes to gender equality by, inter alia, setting objectives for a gender-balanced representation at all levels of management (European Parliament, European Commission, Council, not CJEU).
- According to the European Institute for Gender Equality, in 2021, women accounted for an average of 30,6 % of the members of boards in the largest listed companies and for only 8,5 % of chairpersons. That indicates unfair and discriminatory under-representation of women, thereby clearly undermining the Union principles of equal opportunities and equal treatment of women and men in the fields of employment and occupation.

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AIMS

- (32) All board systems distinguish, de jure or de facto, between executive directors, who are involved in the daily management of the company, and non-executive directors who perform a supervisory function and are not involved in the daily management of the listed company. This Directive aims to improve the gender balance among both categories of directors. In order to strike the right balance between the need to increase the gender balance of boards and the need to minimise interference with the day-to-day management of a company, this Directive distinguishes between those two categories of directors.
- (34) Member States should subject listed companies either to the objective of having boards on which members of the underrepresented sex hold at least 40 % of non-executive director positions by 30 June 2026 or, alternatively, since it is important that listed companies increase the proportion of the underrepresented sex in all decision-making positions, to the objective of having boards on which members of the underrepresented sex hold at least 33 % of all director positions by 30 June 2026, regardless of whether they are executive or non-executive, with a view to promoting a more balanced gender representation among all directors

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MARSHALL TEST

- (39) Member States should ensure that those **listed companies** on whose boards members of the underrepresented sex hold less than 40 % of non-executive director positions or less than 33% of all director positions, including both executive and non-executive directors, as applicable, **select the best qualified candidates for appointment or election to those positions on the basis of a comparative assessment of the qualifications of candidates by applying clear, neutrally formulated and unambiguous criteria established in advance of the selection process, with a view to improving gender balance on boards.** Examples of types of selection criteria that listed companies could apply include professional experience in managerial or supervisory tasks, international experience, multidisciplinary, leadership, communication skills, networking abilities and knowledge in specific relevant areas such as finance, financial oversight or human resources management.

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MARSHALL TEST

- (40) **When selecting candidates for appointment or election to director positions, priority should be given to the equally qualified candidate of the underrepresented sex. Such priority should not, however, constitute an automatic and unconditional preference. There might be exceptional cases where an objective assessment concerning the specific situation of an equally qualified candidate of the other sex might override the preference which should, otherwise, be accorded to the candidate of the underrepresented sex.** Such an overriding of preference could take place, for instance, where broader diversity policies apply at national or company level for the selection of directors. The overriding of the application of positive action should nevertheless remain exceptional, be based on a case-by-case assessment and be duly justified by objective criteria which should not, in any event, discriminate against the underrepresented sex.

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APPLICATION

- listed companies, not SMEs;
- Two objectives, to be reached **by 30 June 2026**:
 - (a) members of the underrepresented sex hold **at least 40 % of non-executive director positions**;
 - (b) members of the underrepresented sex hold **at least 33 % of all director positions, including both executive and nonexecutive directors**.
- listed companies which are not subject to the objective laid down above set individual quantitative objectives with a view to improving the gender balance among executive directors.

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NEW INDIVIDUAL RIGHTS AND OBLIGATIONS OF THE COMPANIES

- Companies to ensure objective selection process, based on clear, neutrally formulated and unambiguous criteria applied in a non-discriminatory manner (objectivity).
- Companies to publish their annual reports about gender balance on their boards (transparency)

Article 6(3)

- Candidate can request information on:
 - qualification criteria,
 - objective comparable assessment,
 - specific considerations tilting the balance in favour of a candidate who is not of underrepresented sex.
- In court, the company needs to justify the choice.

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OBLIGATIONS OF THE MEMBER STATES

- MS's obligation to use administrative and judicial sanctions (effective, proportionate and dissuasive), including fines, annulment of the selection decision or its invalidation.
- MS's obligation to establish bodies for promotion of gender balance in listed companies.
- MS's obligation to communicate periodic reports on the implementation of the Directive.

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DATES

- Transposition by 28 December 2024
- Suspension of Article 6 where
 - (a) members of the underrepresented sex hold at least 30 % of the non-executive director positions or at least 25 % of all director positions in listed companies; or
 - (b) Member State's national law:
 - (i) requires that members of the underrepresented sex hold at least 30 % of non-executive director positions or at least 25 % of all director positions in listed companies;
 - (ii) includes effective, proportionate and dissuasive enforcement measures in the event of non-compliance with the requirements referred to in point (i); and (
 - (iii) requires that all listed companies not covered by that national law set individual quantitative objectives for all director positions.
- Reporting by Member States – 25 December 2025 and every two years
- Expiration by 31 December 2038.

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THANK YOU FOR YOUR
ATTENTION

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