

# Positive Action and Gender Quotas



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## Definition(s)/Terminology

**Positive Action** (EU Law)

**Affirmative Action** (US law)

**(Temporary) Special Measures** (UN law)

**Positive Discrimination** (Doctrinal terminology)

### **(Personal) working definition:**

Positive action is an umbrella term for measures (binding/non-binding) undertaken with the purpose of achieving full and effective equality for members of groups that face the consequences of past or present discrimination, or that are otherwise socially or economically disadvantaged.

Includes things, such as: inclusive policies, targeted funding, outreach, preferential treatment (e.g. quotas).



## Underpinning Concepts

### 1) Formal Equality

« Treating like alike » - In principle NO to positive action measures

### 2) Equal Opportunities

« Levelling the playing field » - YES, but limitedly to *soft* positive action measures

### 3) Substantive Equality

« Achieve equal results » - YES, to conditional and unconditional measures, such as quotas

## Provisions (I) – EU Primary Law

### 1) Article 157(4) TFEU

“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”.

### 2) Article 23 EU Charter of Fundamental Rights

“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”.

## Provisions (II) – EU Secondary Law

### 1) Article 3 (Directive 2004/113/EC)

“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**”.

### 2) Article 3 (Directive 2006/54/EC)

“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”.

### 3) Article 5 (Directive 2000/43/EC)

“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**”.

### 4) Article 7 (Directive 2000/78/EC)

“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**”. [...]

## Provisions (III) – EU Secondary Law

### 5) Directive (EU) 2022/2381 on improving the gender balance among directors of listed companies and related measures

- Applies to listed companies and not to SMEs (Art. 2);
- Two alternative objectives: either (a) members of the under-represented sex hold at least 40 % of non-executive director positions; or (b) members of the under-represented sex hold at least 33 % of all director positions, including both executive and non-executive directors by **30 June 2026** (Art. 5(1));
- Information obligations to rejected candidates as well as **shifting of burden of proof** (?)(Art. 6(3) and (4));
- Reporting obligation once a year at national level (Art. 7));
- Effective, proportionate and dissuasive penalties (Art. 8(1));
  - More favourable measures allowed (Art. 9);
    - Designation of bodies (Art. 10);
  - Implementation by 28 December 2024 (Art. 11);
  - Sunset clause: 31 December 2038 (Art. 14).

## **Provisions (III) – International Human Rights Law**

### **1) Article 4(1) (UN CEDAW)**

“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 [...]; these measures shall be discontinued when the objectives of equality of opportunity and treatment have been achieved.[...]”.

### **2) Article 1(4) (UN CERD)**

“Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups [...] shall not be deemed racial discrimination, provided, however, that such measures do not [...] lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved.”

## **CJEU Interpretation (Positive Action Measures for Women (I))**

- 1) C-366/99 *Griesmar* (2001) (only French female civil servants with children entitled to a service credit added to their pension for each of their children);
- 2) C-476/99 *Lommers* (2002) (Dutch Ministry nursery places available in principle only to female employees; male employees only in “emergency” situations);
- 3) C-319/03 *Briheche* (2004) (French law exempting certain categories of women, including “widows who have not remarried”, from the maximum age limit of 45 years for obtaining access to public sector employment);
- 4) C-104/09 *Roca Alvarez* (2010) (Spanish law provided that working mothers were entitled to “breastfeeding leave”, while working fathers were only entitled to the leave if their spouse was also an employee).

### **CJEU Interpretation (Positive Action Measures for Women (II))**

- 5) C-173/13 *Leone* (2014) (French rule granting a service credit for pension purposes to civil servants who took career break for maternity/paternity/parental leave);
- 6) C-319/03 *Maïstrellis* (2015) (Greek legislation denying parental leave for childbirth to staff member whose wife does not work);
- 7) C-450/18 *WA v INSS* (2020) (Spanish law giving mothers with two or more children a supplement to incapacity pensions, when such a supplement was not available for fathers in a similar situation);
- 8) C-463/19 *Syndicat CFTC* (2020) (Extra post-maternity leave for female workers bringing up children on their own);

### **CJEU Interpretation (Positive Action Measures for Other Groups (III))**

- 9) C-406/15, *Milkova* (2017) (Bulgarian legislation granting employees with certain disabilities specific advance protection in the event of dismissal, without conferring such protection on civil servants with the same disabilities);
- 10) C-193/17 [GC], *Cresco* (2019) (Austrian regulations allowing Good Friday as special holiday only for a few Christian minority confessions).

### **CJEU Interpretation (I) (Gender Quotas)**

1) C-312/86 *Commission v France* (1988);

French Labour Code allowed granting of special rights to women (beyond pregnancy or maternity related rules) in collective agreements without mechanism to review such rights.

Para 15: It is impossible to conclude that the generalized special rights fall into the exceptions of the applicable directive designed to “allow measures which, although discriminatory in appearance, are in fact intended to eliminate or reduce actual instances of inequality”.

2) C-450/93 *Kalanke* (1995);

German regional law with a tie-break clause which automatically gave job to equally qualified female candidates in sectors where women were under-represented.

Para 16: “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 where they are underrepresented, involves discrimination on grounds of sex”.



### **CJEU Interpretation (II) (Gender Quotas)**

3) C-409/95 *Marschall* (1997);

German regional law gave priority to equally qualified female candidates in career brackets where women were under-represented, unless reasons specific to a male candidate tilt the balance in his favour.

Para 33: “saving clause” made this scheme EU law compatible because it ensured an assessment of the candidates’ individual circumstances.

4) C-158/97 *Badeck* (1999);

German public service rules gave priority to female civil servants in promotions, access to training and recruitment in sectors where women were under-represented, when the female candidate was equally qualified to the male candidate and only if no reasons “of greater legal weight” tilted the balance in favour of the male candidate.

Not precluded by EU law.



### CJEU Interpretation (III) (Gender Quotas)

5) C-407/98 *Abrahamsson* (2000);

Swedish regulation for university faculty appointments provided for preference to candidates of the under-represented sex (even if less qualified), if the difference in qualifications was limited and would not undermine the objectivity of the selection process.

Para 55: Even though EU law allows MS “to maintain or adopt measures providing for special advantages intended to prevent or compensate for disadvantages in professional careers in order to ensure full equality between men and women [...], **it cannot be inferred [...] that it allows a selection method of the kind at issue [...]** which appears [...] disproportionate to the aim pursued”.

6) C-79/99 *Schnorbus* (2000);

German statute accorded preference to applicants for bar exam training when they completed compulsory military/civil service

Para 47: Compatible with EU law “in so far as such provisions are justified by objective reasons and prompted solely by a desire to counterbalance to some extent the delay resulting from the completion of compulsory military or civilian service”.

[7] E—1/02 *EFTA Surveillance Authority v. Norway* (2003);

Norwegian rule permitting reservation of academic posts to members of underrepresented gender violates EEA Agreements and applicable EU law].



### CJEU Interpretation (IV) (Gender Quotas)

- **Summary** in Recital 38 to directive on gender quotas in corporate boards

“[P]riority may in certain cases be given to the under-represented sex in selection for employment or promotion, provided that the candidate of the under-represented sex is **equally qualified** as compared with the competitor of the other sex in terms of suitability, competence and professional performance, that the **priority is not automatic and unconditional** but may be overridden if reasons specific to an individual candidate of the other sex tilt the balance in that candidate's favour, and that the application of each candidate is the subject of an **objective assessment** which specifically applies all the selection criteria to the individual candidates”.



## Open Questions/Issues (II)

### 1) Gender quotas in EU universities (today)

#### a) University of Vienna (Austria)

“The University of Vienna is an equal opportunity employer and values diversity.

Given equal qualifications, preference will be given to female applicants”;

#### b) Bulgarian quota regulations in higher education **for students**

Bulgarian legislation provides for a 50/50 sex quota, that can be adapted by universities/programme;

Some legal challenges have been brought at the national level (e.g. against Military University where quota set was much lower for women);

#### c) Women only vacancies at Eindhoven University of Technology for a certain time period.



## Open Questions/Issues (III)

### 2) Disability quotas?

### 3) National minority quotas?

### 4) Racial/ethnic quotas or positive measures?

