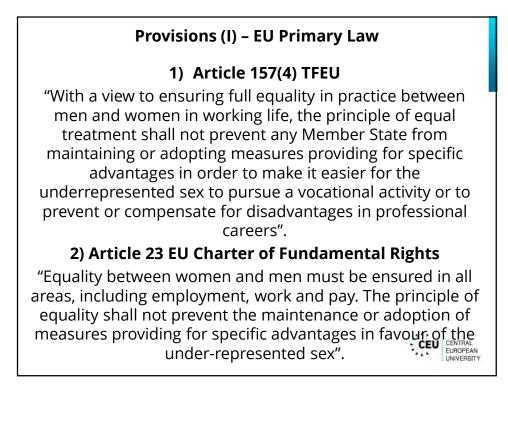


Underpinning Concepts 1) Formal Equality « Treating like alike » - In principle NO to positive action measures 2) Equal Opportunities « Levelling the playing field » - YES, but limitedly to *soft* positive action measures 3) Substantive Equality « Achieve equal results » - YES, to conditional and unconditional measures, such as quotas



Provisions (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 underrepresented 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))

 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);
C-476/99 Lommers (2002) (Dutch Ministry nursery places available in principle only to female employees; male employees only in "emergency" situations);
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);
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". 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 EUROPEAN sex".

