

POSITIVE ACTION AND GENDER QUOTAS

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1

PRESENTATION OVERVIEW

- Definitions
- Part A**
 - Conceptual background
 - Positive action typology
- Part B**
 - EU legal framework
 - CJEU case-law
 - Women on Boards Directive



2

Positive action in EU law: Key points



3

Positive action in EU law: Working definition

Primary legal basis - Art. 157(4) TFEU

- "...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."

Working definition

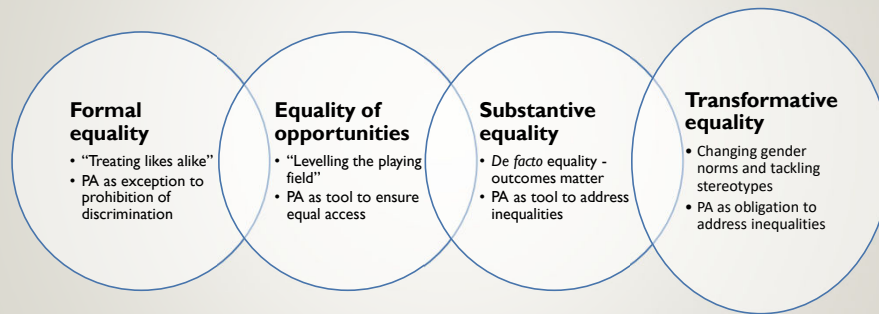
- Positive action is an umbrella term that denotes proportionate measures undertaken with the purpose of achieving full and effective equality in practice for members of groups that are socially or economically disadvantaged, or otherwise face the consequences of past or present discrimination or disadvantage.

Key elements

- Measures that involve some form of **benefit** or **preference**...
- ...allocated to members of **disadvantaged** group(s) → *under-representation* often used as proxy for disadvantage
- Conceptual (and normative) link to **discrimination** (past or present) that resulted in **existing inequalities** → **temporal dimension**
- Aim → **full and effective equality in practice** (Art. 157(4) TFEU)

4

Positive action and equality theory



5

Positive action and legal terminology in EU law

CORRECT in (EU) law

Positive action / positive measures

- Term of preference in EU equality law and literature.
- The term "**specific measures**" is also commonly used in EU equality legislation.

[Affirmative action]

- US equivalent of "positive action" (although with different contextual connotations).
- Sometimes used in a European context to describe strict positive measures, but no basis for this distinction in EU law.

INCORRECT in (EU) law

Positive discrimination

- The term is erroneous in that it describes a positive measure that is in fact **unlawful**.
- Unlawful positive action = direct **discrimination**

Reverse discrimination

- Mutatis mutandis above.

6

Positive action and distinct concepts

Positive action ≠ reasonable adjustments

- Reasonable adjustments = steps that employer (or service provider) etc must take in order to ensure **equality of treatment of disabled** persons.
- Expression of substantive equality (disabled person may be treated **more favourably**), but **not positive action** (no need to demonstrate discrimination / disadvantage / under-representation).

Positive action ≠ special treatment

- “Special treatment” = treatment afforded to specific groups **regardless of comparisons** (usually due to vulnerability or precarity of the individual / group). Compare recital 21 and recital 22 of the Recast Equal Treatment Directive.
- E.g. protective rules for pregnant women – **not positive action** (mutatis mutandis above + pregnancy as a unique biological condition).

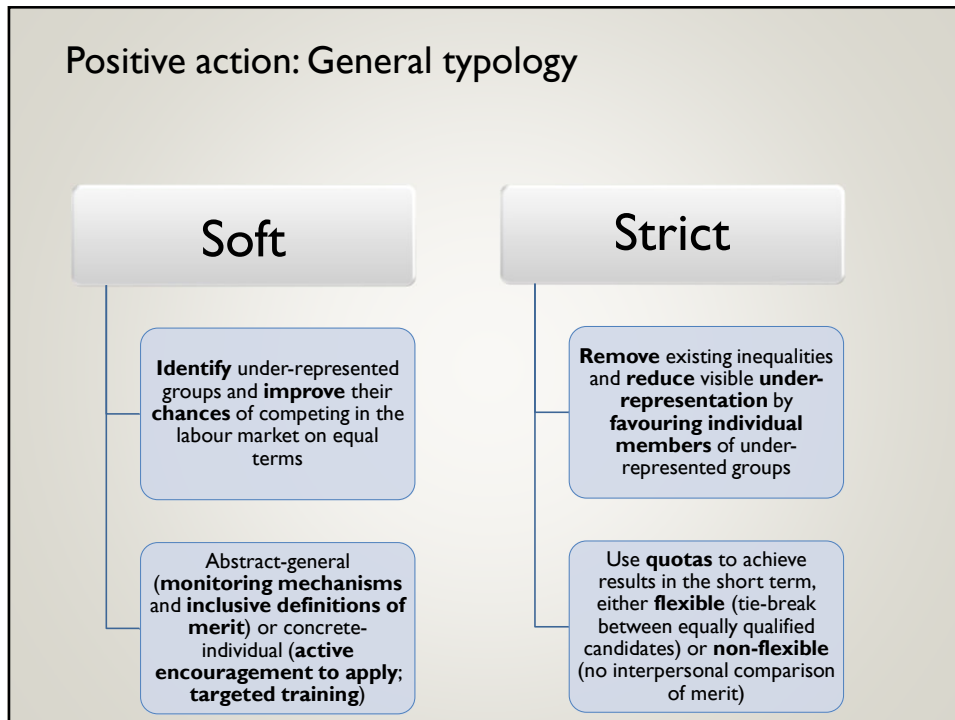
7

Positive action: General typology



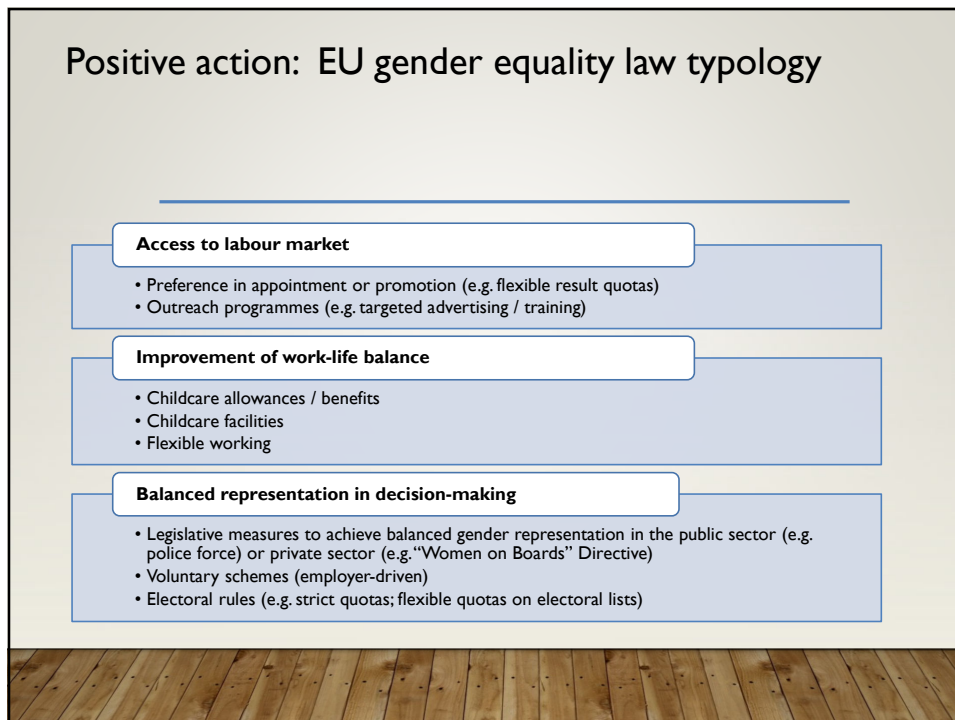
8

Positive action: General typology



9

Positive action: EU gender equality law typology



10

Positive action: Domestic employment law of EU MS

Voluntary across labour market

- Possibility of positive action by public and private sector employers to achieve the aim of gender equality law (e.g. Cyprus, Czechia, Denmark, Estonia, Ireland etc).

Compulsory in public sector (within limits)

- Positive obligation of (some) public sector bodies to use positive action in order to address gender inequalities (e.g. Austria, Spain, Greece).

Compulsory across labour market (within limits)

- Positive obligation of public and private sector employers to use positive action in order to address gender inequalities (e.g. Finland).

11

EU legal framework on positive action

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 **under-represented sex** to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers.'

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**.'

Article 3 Directive 2006/54/EC [Recast Equal Treatment]

Article 6 Directive 2004/113 [Goods and Services]

12

CJEU positive action case law: Overview

Formal (?) equality

- Case 312/86 **Commission v France** [1988]
- C-450/93 Eckhard **Kalanke** v Freie Hansestadt Bremen [1995]

Substantive (?) equality

- C-409/95 Hellmut **Marschall** v Land Nordrhein-Westfalen [1997]
- C-158/97 Georg **Badeck** and Others [2000]
- C-79/99 Julia **Schnorbus** v Land Hessen [2000]

Normative limits - legitimate quotas

- C-407/98 Katarina **Abrahamsson** and Leif Anderson v Elisabet Fogelqvist [2000]

Conceptual limits – positive action

- C-366/99 Joseph **Griesmar** v Ministre de l'Economie, des Finances et de l'Industrie et Ministre de la Fonction publique, de la Réforme de l'Etat et de la Décentralisation [2001]
- C-476/99 H. **Lommers** v Minister van Landbouw, Natuurbeheeren Visserij [2002]
- C-319/03 Serge **Briheche** v Ministre de l'Intérieur, Ministre de l'Éducation nationale and Ministre de la Justice [2004]
- C-173/13 Maurice **Leone**, Blandine Leone v. Garde des Sceaux, ministre de la Justice, Caisse nationale de retraite des agents des collectivités locales [2014]

13

CJEU positive action case law: Formal (?) equality

Commission v. France (1988)

- French law permitting collective agreements to include provisions "granting special rights to women" found to be incompatible with the ETD due to its *generality* and the absence of an appropriate *mechanism to review* the special rights periodically.
- **Para 14:** "[s]ome of the special rights preserved relate to the protection of women in their capacity as older workers or parents - categories to which both men and women may equally belong".

Kalanke (1995)

- German regional law with a tie-break clause in favour of equally qualified female candidates in sectors where women were under-represented was found to go beyond equality of opportunities, due to *automatic preference* to the female candidate amounting to unjustifiable reverse discrimination.
- **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 in sectors where they are under-represented, involves *discrimination on grounds of sex*".

14

CJEU positive action case law: Substantive (?) equality

Marschall (1997)

- German regional law provided for preferential treatment to equally qualified female candidates in career brackets where women were under-represented, “unless reasons specific to an individual [male] candidate tilt the balance in his favour”.
- CJEU: scheme was compatible with EU Law because the “saving clause” ensured that the selection process permitted for an ad hoc consideration of the candidates’ individual circumstances.

Badeck (1999)

- German public service rules gave priority to women in promotions, access to training and recruitment in sectors of the public service where women were under-represented, when the female candidate was equally qualified to her male counterpart and only if no reasons “of greater legal weight” did not tilt the balance in favour of the male candidate.
- CJEU: scheme compatible with ex Art. 141 (4) EC (now Art. 157 TFEU).

15

CJEU positive action case law: Limits of substantive equality

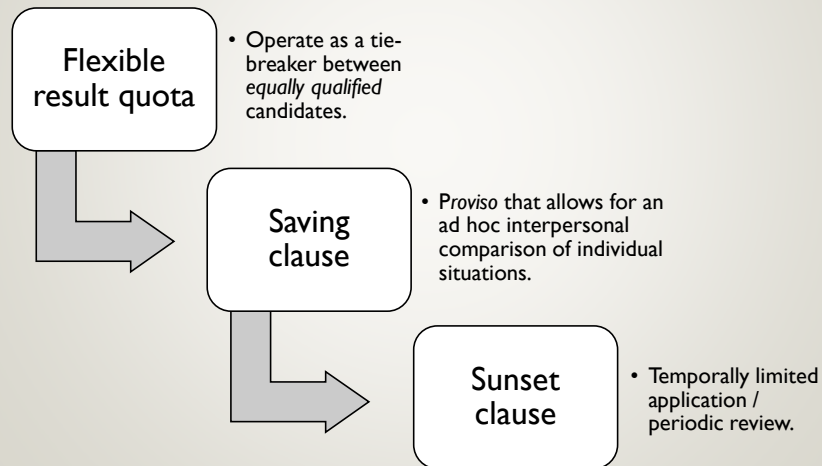
Abrahamsson (2000)

- Swedish regulation for appointments to teaching posts in higher education institutions provided for preference to *sufficiently qualified* candidates of the under-represented sex (even when *less qualified*) under the *proviso* that the difference in qualifications was “not so great that application of the rule would be contrary to the requirement of objectivity in the making of appointments”.
- **Para 52:** “[T]he legislation at issue in the main proceedings **automatically** grants preference to candidates belonging to the under represented sex, provided that they are sufficiently qualified, subject only to the proviso that the difference between the [...] is not so great as to result in a breach of the requirement of objectivity in making appointments.”

16

CJEU positive action case law: Current position

Gender quotas in EU Law: Conditions of legitimacy



17

CJEU positive action case law: Current position

Conceptual boundaries: what **is** and what **is not** positive action

Griesmar (2001)

- Female civil servants with children entitled to a service credit added to their pension for each of their children (French Civil and Military Retirement Pensions Code).
- CJEU: legitimacy of the scheme depends on whether the system is designed to offset occupational disadvantages related to **childbirth**, (uniquely female condition) or the **upbringing** of children.

Lommers (2002)

- Subsidised nursery places reserved for *female* employees (Dutch public sector scheme); male employees could take advantage of the scheme in “emergency” situations.
- CJEU: difference in treatment on grounds of gender legitimate under the ETD, insofar as it satisfied the standard criteria of legality.

Briheche (2004)

- French law exempted 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.
- “[The scheme in question] automatically and unconditionally gives priority to the candidatures of certain categories of women [...] excluding widowers who have not remarried who are in the same situation”. [para 27]

18

The new Directive 2022/2381 ('Women on Boards')

Legislative process timeline

2012	2013	2013-2022	2022
<ul style="list-style-type: none"> • European Commission presents "Women on Boards" Directive proposal. • Binding targets for balanced gender representation in (non-exec) Board of Directors of publicly listed companies. 	<ul style="list-style-type: none"> • EP adopted its position (1st reading) by a substantial cross-party majority (November 2013). 	<ul style="list-style-type: none"> • Deadlock -- no agreement in Council for more than a decade due to the reservations of several Member States. 	<ul style="list-style-type: none"> • June: Provisional agreement reached in Council (7 June 2022) on amended draft. • November: Adoption of Directive 2022/2381 on improving the gender balance among directors of listed companies and related measures

19

The new Directive 2022/2381 ('Women on Boards')

Aim and scope

Purpose (Article 1)

- ...achieve a more balanced representation of women and men among the directors of listed companies [...] (Article 1)

Scope (Article 2) and definitions (Article 3)

- Listed companies but not SMEs
- Listed = registered office in a MS + shares admitted to trading on a regulated market
- SMEs = up to 249 employees + annual turnover up to 50 mil € or annual balance sheet total up to 43 mil €

20

The new Directive 2022/2381 ('Women on Boards')

Key provisions

Objectives with regard to gender balance on Boards (Article 5)

By June 2026 members of the underrepresented sex hold at least:

- either **40% of non-executive directors**
- or **33% of all directors** (exec and non-exec)

21

The new Directive 2022/2381 ('Women on Boards')

Key provisions

Means to achieve the objectives (Article 6) (cont'd)

- bear the burden of proof in legal challenges by unsuccessful candidates, once initial burden has been discharged (para 4)
- (if selection by vote of shareholders or employees) ensure that voters are aware of the measures of this Dir, including penalties (para 5)
- adjust the process for selecting candidates for appointment or election to director positions (para 1)
- give **preference to an equally qualified member of the under-represented sex** (para 2)
- inform candidates of qualification criteria, objective comparative assessment and, where relevant, exceptional considerations / savings clause (para 3)

22

The new Directive 2022/2381 ('Women on Boards')

Key provisions

Reporting (Article 7)

- Listed companies must provide information to the competent authorities, once a year, about the gender representation on their boards, including reasons for not achieving the objectives.

Penalties (Article 8)

- Adequate administrative or judicial procedures available for enforcement of Dir.
- Effective, proportionate and dissuasive; may comprise fines or the possibility for a judicial body to annul a decision concerning the selection of directors.

23

The new Directive 2022/2381 ('Women on Boards')

Key provisions

Suspension of the application of Article 6 (Article 12)

Conditions (by 27 December 2022):

- (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) that Member State's **national law 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 (plus effective, proportionate and dissuasive enforcement measures and requirement that all listed companies not covered by that national law set individual quantitative objectives for all director positions).

24

THANK YOU / DANKE

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