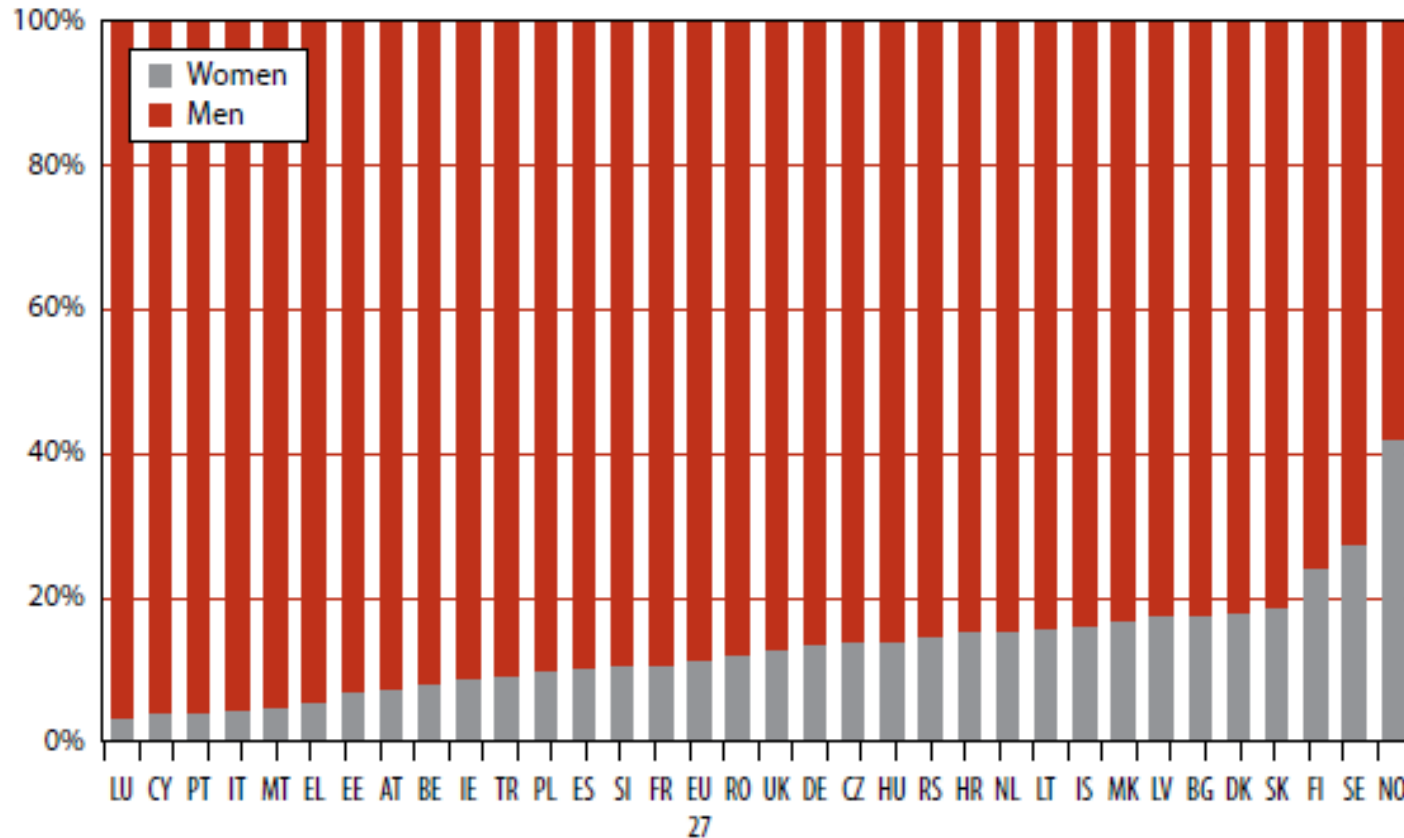




# Gender Quotas & EU Law

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# Boards of largest listed companies (2009)



Source: European Commission, DG EMPL, Database on women and men in decision-making.

“(...) all EU policies now need to focus on making a stronger contribution to economic recovery, sound management practices and higher growth potential. For me, this brings the issue of enhancing female participation in the decision making of companies to the forefront of the political agenda in the coming years. **I firmly believe that having more women in boardrooms will enhance economic productivity. I am also convinced that the global financial crisis would not have happened with “Lehman sisters”.**”

# Context

- EC's Strategy for equality between women and men 2010-2015: equality in decision-making
- "I pledge to reach the target of 30% female board members by 2015 and 40% by 2020 by actively recruiting qualified women to replace outgoing male board members."
- EP Resolution 06.07.2011
- Board Quota in several MS

# National Legal Dimensions

- **Scope and method** – our focus: board quotas
- **National discrimination law**
- **National constitutional law**: equality + freedom of association and the sovereignty of the general assembly of share holders

# EU Law Dimensions

- EU gender equality:
  - A general principle of EU-law
  - A fundamental EU-right (art. 21 & 23 Charter)
  - Equality directives, both in employment and for the self-employed

# Key Issue

- Principle of formal equal treatment



- Obligation to favour one sex



# Quotas as Positive Action



# What is PA?

- No definition – More a process than a concept
- *“Any measure contributing to the elimination of inequalities in practice”*
- Discrimination in EU Law:
- *“the application of different rules to comparable situations, or the application of the same rules to different situations”*

# What is PA?

- Elements:
  - Promoting substantive equality: outcome v. opportunity
  - Group consideration v. individual merit
  - Dynamic v. static approach
- Harbours a whole range of potential measures!!
  - State or private actors
  - From encouragement (facilitation, promotion, outreach, accommodation, diversity) to reverse discrimination and soft or hard quotas
  - Backward-looking or forward-looking

# To be clear

- Positive action is so much more than positive discrimination
- Positive action is no duty under EU-law
- Positive discrimination *is* discrimination

# Art. 157(4) TFEU & amended and recast Equal Treatment Directive

- *“With a view of 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.”*

# ECJ & Positive discrimination

- Formal equality is the rule, positive discrimination the narrow exception
- Objective contents:
  - Objectively address occupational difficulties of the favoured group
  - Clear and unambiguous criteria
- Proven and genuine group imbalance, even if the favoured individual is not harmed by it
- Appropriate and necessary PA – proportionality & thus intrinsically temporary
- **No automatic quotas**

# Quotas and the *acquis*

- Soft quotas that do not amount to discrimination: OK
- Hard quotas that allow for exception based on merit: conditionally OK
- Formal hard quotas: by definition not OK
- Female quotas: systemic + individual
- Gender neutral quotas: individual

# If discriminatory: Proportionality!

- **Legitimate aim:**
  - May vary with the ground
  - Objective contents
- **Effective:**
  - Proven and genuine imbalance – How much? Where? Gradual reduction or just temporary?
  - How effective?
- **Necessary:** Alternatives (e.g. Corporate governance)? Cost/benefit?

# Conclusion

- Formal quota with no escape clause are on a collision course
- In any event, for all hard gender quota:
  - Scrutiny of the merits and impact required under proportionality
  - Reliable alternatives should be unavailable





# Thank You

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