

# POSITIVE ACTION AND GENDER QUOTAS

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Academy of European Law  
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## Agenda

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1. Positive action and quotas - definitions
2. EU legal framework and case law
3. Focus on equality between women and men in employment: corporate boards
  1. State of play
  2. Ways of addressing gender imbalance on boards
  3. Proposal for a 'Quota directive'

## Positive action and quotas

### *Definitions*

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- Positive action measures include measures attempting to increase the participation of particular groups defined in group terms, such as race, gender or disability, in those contexts in which those groups are regarded as underrepresented.
- Objective of these measures is to 'ensure full equality'.
- Measures involving preferential treatment for members of one sex, and 'neutral' measures, that are equally applicable to both sexes.
- Preferential treatment measures range from absolute preferences, to strong preferences, tie-break preferences, flexible preferences and weak preferences.
- Gender quotas are a form of positive action, and may involve preferential treatment.
- Gender quotas include gender-based numerical targets that must be achieved in a certain timeframe.
- Quotas can be strict, flexible, or soft, depending on the measure(s) prescribed to achieve the target.

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## Positive action

### *EU legal framework*

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- Art. 2 TEU: Equality between women and men is one of EU's founding values
- Art. 3 TEU: EU shall combat social exclusion and discrimination and promote equality between women and men in the internal market
- Art. 8 TFEU: In all its activities the EU shall aim to eliminate inequalities and promote equality between men and women
- Art. 10 TFEU: In defining and implementing its policies and activities EU shall aim to combat discrimination based on sex
- Art. 157 (3) TFEU EP and Council shall adopt measures "to ensure the application of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation, including the principle of equal pay for work of equal value".

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## Positive action *EU legal framework*

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- art.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.”
- (Recast) 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 (replaced 76/207 Equal Treatment Directive)
- 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
  - Art. 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.

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## Positive action *EU legal framework*

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- Charter of Fundamental Rights of the European Union:
  - Art. 23: equality between women and men
  - Art. 15: freedom to choose an occupation
  - Art. 16: freedom to conduct a business
  - Art. 17: right to property
  - Art. 21 (1): prohibition of discrimination based on sex
  - Art. 23: principle of equality does not prevent the maintenance or adoption of measures providing for specific advantages in favour of the underrepresented sex

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## Positive action *EU case law*

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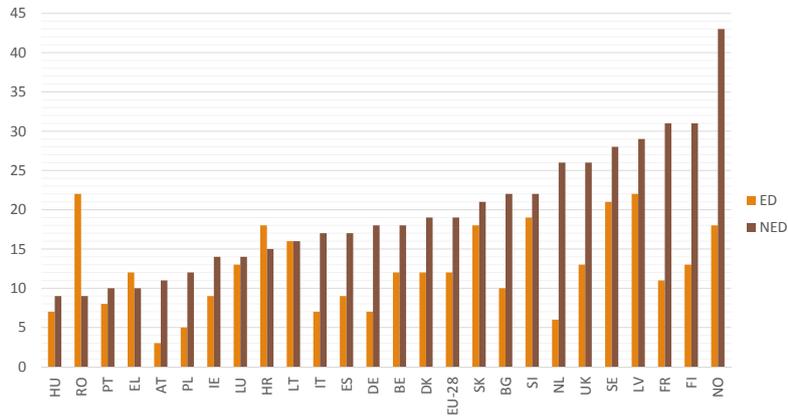
- C-450/93 Kalanke v Freie Hansestadt Bremen [1995] ECR I-3051
- C-409/95 Marschall v Land Nordrhein-Westfalen [1997] ECR I-6363
- C-158/97 Badeck [2000] ECR I-1875
- C-407/98 Abrahamsson v Fogelqvist [2000] ECR I-5539
- C-476/99 Lommers v Minister van Landbouw, Natuurbeheer en Visserij [2002] ECR I-2891
- C-319/03 [2004] ECR I-8807, Briheche vs Ministri de l'Interieur

## Criteria for positive action

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1. Measures must concern a sector in which women are **underrepresented**
2. Measures should only give priority to **equally qualified individuals** of the underrepresented sex over individuals of the overrepresented sex
3. Measures must not give an automatic and unconditional priority to equally qualified individuals, but must include a **“savings clause”** which includes the possibility of granting exceptions in justified cases which take the individual situation into account, in particular the personal situation of each individual.

## Women's representation on corporate boards *State of play (2013)*



Source: EC Database Women & Men in Decision-making, 11/10/2013-31/10/2013

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## Addressing gender imbalance on corporate boards *Diversity of approaches*

Country	Scope	Target	Law/self-regulation	Sanctions	Exec. (%)	Non-Exec. (%)
Norway (2003)	State-owned, publ. lim. priv. sector	40% by 2012	Law	Warnings, fines, delisting	18	43
Belgium (2011)	Listed co., economic public bodies, Nat.Lott.	1/3 of either sex	Law	Appt.void; adv.suspended	12	18
Finland (2010)	Publ.listed co.	At least 1 woman	Self-regulation	No	13	31
Sweden	State-owned co.	40% of each sex	Self-regulation	No	21	28
France (2011)	Priv., state-owned, > 500 emp., > € 50m	20% by 2014, 40% in 2017	Law	Nullity board elections	11	31
NL (2011)	Larger co's (criteria)	30% on EB and SB by 2013 (- 2016)	Law	Comply or explain	6	26
UK (2011)	Private sector	25% FTSE100 in 2015	Self-regulation	Comply or explain	13	26
Italy (2011)	Listed, state-owned	1/3 after 2 <sup>nd</sup> ren.	Law	Warning, fine, forf.	7	17

Source: EC Database on Women and Men in Decision-making, 11/10/2013-31/10/2013

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## Addressing gender imbalance on corporate boards

### *Non-legislative initiatives*

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- Individual company's programs: developing the business case, setting targets, tools (awareness raising, mentoring, training programs)
- Cross-company or sector initiatives, like Prizes, Awards, Charters
- Industry self-regulation instruments, like corporate governance codes

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## Industry self-regulation

### *Corporate governance codes*

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**Finnish Corporate Governance Code 2010:** Recommendation 9 – Number, composition and competence of the directors:

- ... A person to be elected to the board shall have the qualifications required by the duties and the possibility to devote a sufficient amount of time to the work. **Both genders shall be represented on the board.**

**Swedish Corporate Governance Code 2010:** 4. The size and composition of the board

- 4.1 The board is to have a composition appropriate to the company's operations, phase of development and other relevant circumstances. The board members elected by the shareholders' meeting are collectively to exhibit diversity and breadth of qualifications, experience and background. **The company is to strive for equal gender distribution on the board.**

**UK Corporate Governance Code 2010:** B.2 Appointments to the Board, Supporting principle

- The search for board candidates should be conducted, and appointments made, on merit, against objective criteria and **with due regard for the benefits of diversity on the board, including gender.**

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## Addressing gender imbalance on corporate boards

### *EU activities*

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- Council Recommendation 96/694/EC (1996) invited Member States to adopt a strategy to promote balanced participation of women and men in decision-making
- March 5, 2010: Adoption of the Women's Charter followed by meetings with business leaders
- March 1, 2011: Call for self-regulation: "Women on the Board Pledge for Europe"
- July 6, 2011 and March 13, 2012: European Parliament calls for legislation
- March – May 2012: public consultations
- **Nov. 14, 2012: Proposal for a directive of European Parliament and Council on improving the gender balance among non-executive directors of companies listed on stock exchanges and related measures**
- Nine national parliaments' chambers (6 countries) offered reasoned opinions, opposing the draft
- June 20, 2013: discussion in Council of Labour Ministers
- July 9 and Oct 15 2013: EP Committees (EMPL, IMCO, ECON and JURI, FEMM) voted in favour of proposal
- November 20 2013: European Parliament adopted amended version in plenary session
- December 9, 2013: Discussion in Council (first reading)
- **June 19 2014: Progress report by Greek Presidency tabled in EPSCO**

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## The proposal for a 'quota directive'

### *Content*

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- Proposal for a directive of the European Parliament and of the Council on improving the gender balance among non-executive directors of companies listed on stock exchanges and related measures (COM(2012)0614)
- Art. 4 (1): "Member States shall ensure that listed companies in whose boards members of the underrepresented sex hold less than **40% of the non-executive director** positions make the appointments to those positions on the basis of **comparative analysis of the qualifications of each candidate, by applying pre-established, clear, neutrally formulated and unambiguous criteria**, in order to attain the said percentage at the latest by 1 January **2020** or at the latest by 1 January 2018 in case of listed companies which are public undertakings".
- Art. 4 (3): "In order to attain the objective [...] MS shall ensure that, in the selection of non-executive directors, priority shall be given to the candidate of the underrepresented sex **if that candidate is equally qualified** as a candidate of the other sex in terms of suitability, competence and professional performance, **unless an objective assessment** taking account of all criteria specific to the individual candidates tilts the balance in favour of the candidate of the other sex".

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## The proposal for a 'quota directive'

### *Key elements*

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- Applicable to non-executive directors in principle, but possibility of "flexi-quota" for executive directors
- Not applicable to boards of companies in which less than 10% of the workforce is female
- Obligation for companies to revise their current selection procedure for board members in order to ensure qualified female candidates are given priority over equally qualified male candidates
- Applicable to publicly listed companies, due to their economic importance and high visibility; small and medium sized co.'s excluded
- Obligation to disclose (criteria, assessment, annual accounts)
- Member States obliged to implement effective, proportionate and dissuasive sanctions for companies that do not comply
- Temporary measure, expiration 31 Dec 2028

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## The proposal for a 'quota directive'

### *Debate*

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- "Matters of employment and occupation" referring to non-executive board members
  - C-232/09 Danosa [2010] ECR I-11405
- Main amendments by the European Parliament:
  - removal of exemption for industries with less than 10% female employees
  - sanctions to include exclusion from public call for tenders, and partial exclusion from the award of funding from EU Structural Funds
  - extension of scope to include boards of EU institutions
- Effectiveness of the measure
  - context
  - 'trickle down effect'

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Thank you for your attention!

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Any questions?

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