

Positive Action

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THE LIMITS OF ANTI-DISCRIMINATION LAW

- Anti-discrimination law prohibits direct and indirect discrimination: however, it cannot stop discrimination where there is no clear evidence that discrimination has occurred, or where individuals are not willing to complain about the negative treatment they have suffered.
- The views and expectations of employers, public bodies and other organisations will often be shaped by dominant social assumptions and stereotypes, which may prove difficult to change.
- Disadvantaged groups may also lack the social capital and access to networks of influence that members of dominant groups may possess, again diluting the impact of anti-discrimination law on social practice.

WHAT IS POSITIVE ACTION?

- Eradicating Prohibited Discrimination
- Purposefully Inclusive Policies
- Outreach
- Preferential Treatment (such as quotas)
- Redefining Merit

Within the EU, there is a wide diversity of approaches to the use of positive action. Mainstreaming initiatives, ‘contract compliance’ requirements, ‘tie break’ arrangements in favour of women, gender quotas in respect of company boards or political party candidate selection are all relatively common. However, such measures continue to attract controversy, despite widespread academic and policy support for their implementation.

EU LAW AND POSITIVE ACTION A Constitutional Provisions

- **Article 157(4) TFEU** (ex-Article 141(4) TEC, as originally amended by the Treaty of Amsterdam 2 October 1997) :
 - ‘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.’
- **Article 23 EU Charter of Fundamental Rights:**
 - ‘The principle of equality shall not prevent the maintenance or adoption of measures providing for specific advantages in favour of the under-represented sex.’

EU LAW AND POSITIVE ACTION B Legislative Provisions

- Article 3 of Directive 2006/54/EC 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: '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'.
- See also Article 6 of the 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.

EU LAW AND POSITIVE ACTION C Case-Law of the CJEU

Case C-450/93, *Kalanke*, 17 October 1995

An absolute and unconditional priority for appointment or promotion goes beyond promoting equal opportunities and oversteps the limits of the exception in Article 2(4) of Directive 76/207/EEC...A rule seeking to achieve equal representation of men and women in all grades and levels within a department substitutes for equality of opportunity as envisaged in Article 2(4) the result which is only to be arrived at by providing such equality of opportunity.'

Case C-409/95, *Marschall*, 11 Nov. 1997

Priority is to be given to the promotion of female candidates unless reasons specific to an individual male candidate tilt the balance in his favour (*Offnungsklausel*): not disproportionate if objective assessment of all individual candidacies which will take account of all criteria specific to the individual candidates.

APPLICATION OF THE CASE-LAW

Case C-158/97, *Badeck*, 28 March 2000

- binding targets but without automatic determination of the outcome, but individual examination of each candidate: not disproportionate
- advancement plan for temporary posts in the academia providing for a minimum percentage of women which is at least equal to the percentage of women among graduates, holders of higher degrees and students in each discipline: not disproportionate.
- training places for which the State has no monopoly: not disproportionate since a) does not concern employment, but training with a view to obtaining qualifications and b) places also available in the private sector: no male candidate is definitively excluded.
- women who are qualified are guaranteed to be called to interview, in sectors in which they are under-represented: not disproportionate, as it promotes equality of opportunity rather than of result.

LIMITS OF THE CASE-LAW

- Case C-407/98, *Abrahamsson*, 6 July 2000
 A candidate belonging to an under-represented sex and possessing sufficient qualifications may be chosen in preference to a candidate belonging to the opposite sex who would otherwise have been chosen, unless the difference in their respective qualifications is so great this would be contrary to the requirement of objectivity in the making of appointments: disproportionate since this entails a risk of arbitrariness.
- Case C-319/03, *Serge Briheche*, 30 September 2004: a national provision, which reserves the exemption from the age limit for obtaining access to public-sector employment to widows (and not widowers) who have not remarried and who are obliged to work, is precluded.

UNCERTAINTIES

- But see opinion of AG Poiares Maduro in *Briheche* :
It cannot be ruled out that positive measures which do not fall within the scope of Directive 76/207 could be authorised under this provision [Article 141 (4) EC]. In effect ... one could argue that there is a distinction between measures aimed at reducing inequalities and measures aimed at compensating for past or existing inequalities suffered by a social group. It cannot be excluded that the reference in Article 141(4) EC to compensatory purposes is intended to provide the Member States with a broader discretion in adopting measures of positive discrimination. Such an interpretation must, however, always remain within the boundaries authorised by the general principle of equality...
- See now Case C-476/99, *Lommers* and Case C-104/09, *Pedro Manuel Roca Álvarez v Sesa Start España ETT SA* – positive action measures must be targeted at remedying specific forms of gender disadvantage.
- In general, does the CJEU’s case-law in this field provide sufficient legal certainty?

INTERNATIONAL HUMAN RIGHTS STANDARDS

- U.N. Human Rights Committee, General Comment 18, Non-discrimination (Thirty-seventh session, 1989), par. 10:
...the principle of equality sometimes requires States parties to take affirmative action in order to diminish or eliminate conditions which cause or help to perpetuate discrimination prohibited by the Covenant. (...) Such action may involve granting for a time to the part of the population concerned certain preferential treatment in specific matters as compared with the rest of the population. However, as long as such action is needed to correct discrimination in fact, it is a case of legitimate differentiation under the Covenant.
- See also for Articles 2(e), 3, 4(1), 5(1) and 7 of Convention on the Elimination of All Forms of Discrimination Against Women (‘CEDAW’), the provisions of the ILO Discrimination (Employment and Occupation) Convention (No. 111), also perhaps *Thlimmenos v Greece* (ECHR)?

CONCLUSION

- Positive action can be an important tool in combating inequality, even though its use can be controversial.
- EU law permits member states to introduce positive action measures in certain circumstances, both within and outside of the field of employment and occupation – but the case-law of the CJEU has imposed legal controls of sometimes uncertain scope upon its use.
- 2012 European Commission company board quota proposals – a new approach?