



# Positive action and gender quotas

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## Outline



- Phenomenon of Positive Action
- Definitions of 'Positive Action' and 'Gender Quotas'
- EU Legal Framework
- Examples
- EUCJ Case Law

# Models of Equality



- Two or three models of equality:
  - **Formal** (individual, symmetrical, procedural)
  - **Substantive** (group, asymmetrical, substantive)
    - Focus on group characteristics, group impact, actual results, material equality
  - 3rd model “**Equality of Opportunities**” - combination of formal and substantive equality

## Principle of non-discrimination and relation to positive action I

- **Discrimination** means application of different rules to comparable situations or the application of the same rule to different situations (eg. ECJ C-279/93 (Schumacker)),
  - **Formal, procedural approach** to equality
  - **Shortcomings**
    - comparison with a comparator required
    - not result-oriented and does not assure the equality as an outcome
    - disregards the collective dimensions of inequality

## Principle of non-discrimination and relation to positive action II

- **Positive action as tool** to address formal equality's shortcomings without abandoning it and the individual justice (*M.deVos "Gender Quotas and EU Discrimination Law"*)
  - Positive action - a **more** substantive, result-based notion of equality
- EU equality and non-discrimination law - mixture of formal equality (see definition) and substantive equality measures
- 3rd model - "equality of opportunity"

## Perception of positive action I

- **Positive actions:** measures (processes, actions, policies etc.) going beyond the basic negative prohibition of (direct and indirect) discrimination
  - **Purpose:** to achieve full and effective equality in practice
    - compensation for past discrimination (backward looking)
    - redistributing justice (forward looking)
  - **Form of measure:**
    - **of any form contributing to the goal of equality of women and men (broad perception)**
    - **the measure challenging the formal understanding of sex equality (narrow perception):** contributing to elimination or counteraction of the prejudicial effects on women which arise from existing attitude, behaviour and structures (traditional division of roles)
  - **Effect:** to change the group representation in a given legal environment
  - **Authors:** different state institutions and public and private actors

# Perception of positive action II

- **Diversity** and variety of 'proactive' measures
  - **soft** measures (policies, promotion of female employment, training, access to infrastructure) vs. **hard** measures (quotas)
    - Absolute preference (exclusive preference)
    - Strong preference (sex-advantage if minimum requirements are met)
    - Tie-break preference (sex-advantage if equally qualified)
    - Flexible preference (sex-advantage can be overridden)
    - Weak preferences (sex the same factor as other)
    - (Reserved quotas, Target quotas etc.)
- **Confusion of terminology**
- **Distinction from other provisions on favour of one sex**

# Distinction from other provisions in favor of one sex

- Directive 2006/54 is **without prejudice to provisions:**
  - protection of women, particularly as regards **pregnancy and maternity** (Art. 28 (1))
  - safety and protection of work of **pregnant workers** and workers who have recently **given birth or are breastfeeding** (Directive 92/85) (Art. 28 (2))
  - measures in the framework of **parental leave** (Directive 2010/18, ex 96/34) (Art. 28 (2))
  - measures in recognition of distinct rights to **paternity and/or adoption leave** (Art. 16)
- Relation to **indirect discrimination**

## Perception of positive action III

- Positive action - discrimination per se: *differential treatment in comparable situations*
- Positive (reverse) discrimination - still discrimination (C-366/99 Griesmar) regardless 'positive' motive
- Justification
  - By way of exception (exception with its own narrow limits(C-450/93 Kalanke)
  - Rules on justification
  - Assessment by ECJ of the contents and purpose of measures

## Perception of 'quotas'

- **Quota** - particular model of positive action
  - numerical goal (target) that must be achieved in certain period of time by applying certain measures design to achieve that goal
  - Strict quota (number of reserved places)
  - Flexible quota (numerical targets + strong preference)
  - Soft quota (aspirational target)
    - Rights based quotas, sanctions-based quotas

(G.Selanec)

# EU Legal Framework

## COUNCIL DIRECTIVE

of 9 February 1976

on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions

(76/207/EEC)

### Article 2

1. For the purposes of the following provisions, the principle of equal treatment shall mean that there shall be no discrimination whatsoever on grounds of sex either directly or indirectly by reference in particular to marital or family status.

4. This Directive shall be without prejudice to measures to promote equal opportunity for men and women, in particular by removing existing inequalities which affect women's opportunities in the areas referred to in Article 1 (1).

### Recommendation 84/635/EEC of 13 December 1984 on the promotion of positive action for women (OJ 1984 L 331, p. 34),

'existing legal provisions on equal treatment, which are designed to afford rights to individuals, are inadequate for the elimination of all existing inequalities unless parallel action is taken by governments, both sides of industry and other bodies concerned, to counteract the prejudicial effects on women in employment which arise from social attitudes, behaviour and structures'

## Treaty of Establishing of European Community (Amsterdam Treaty 1997)

### Article 141 (ex Article 119)

4. 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.

*Kalanke (1995) influence*

# Development of definition

## Art. 2 (4) Directive 76/207

This Directive shall be without prejudice to measures to promote equal opportunity for men and women, in particular **by removing existing inequalities** which **affect women's opportunities** in the areas referred to in Article 1 (1).

Council Recommendation **84/635/EEC** on the promotion of positive action for women

## Article 157 (4) TFEU (ex Art. 141 TEC)

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.



## Art. 3 of the Directive 2006/54

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.

## Article 23 of the Charter of Fundamental Rights (2000)

The principle of equality shall not prevent the maintenance or adoption of **measures providing for specific advantages** in favour of the under-represented sex.

### Other examples:

Art. 7 of the Directive 2000/43 (race and ethnic origin)

Art. 5 of the Directive 2000/78 (religion, beliefs, age, disability, sexual orientation)

# EU Case Law: Overview

1. *Commission vs. France* C-312/86
2. *Kalanke* (C-450/93)
3. *Marschall* (C-409/95)
4. *Badeck* (C-158/97)
5. *Abrahamsson* (C-407/98)
6. *EFTA* (E-1/02)
7. *Lommers* (C-476/99)
8. *Briheche* (C-319/03)
9. *Commission vs. Greece* (C-559/07)
10. *Alvarez* (C-104/09)



## Commission v. France C-312/86



- **French Labour Code:** Usages, terms of contracts of employment or collective agreements grant special rights to women (shortening of working hours, time off o Mother's Days , extra pension rights for 2nd and 3rd child etc.). Employers, groups of employers and groups of employed persons "shall proceed, by collective negotiation, to bring such terms into conformity"
- **ECJ:**
  - Article 2(4) *specifically and exclusively is designed* to allow measures which, although discriminatory in appearance, are in fact **intended to eliminate or reduce actual instances of inequality** which may exist in the reality of social life.
  - Generalized preservation of special rights for women in collective agreements do not meet those requirements.

### Conclusions

- Different treatment is permitted
- Measures shall be "specifically and exclusively designed" to eliminate or reduce actual inequalities

## Kalanke (C-450/93)



- **Germany:** quota system automatically favoured women if the candidates for a post were equally qualified
  - Landesgleichstellungsgesetz: In the case of an appointment women who have the same qualifications as men applying for the same post are to be given priority in sectors where they are under-represented.
  - There is under-representation if women do not make up at least half of the staff in the individual pay, remuneration and salary brackets in the relevant personnel group within a department
- **ECJ:**
  - National rules which guarantee women **absolute and unconditional priority** for appointment or promotion **go beyond** promoting equal opportunities and **overstep** the limits of the exception in Article 2(4) of the Directive.
  - such a system 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
- **Conclusions:**
  - Equality of Opportunity: measures which are designed to confer results rather than removing obstacles are inadmissible
  - derogation from an individual right laid down in the Directive, Article 2(4) must be interpreted strictly

## Marschall (C-409/95)



- **German** Beamtengesetz: Where, in the sector of the authority responsible for promotion, there are fewer women than men in the particular higher grade post in the career bracket, women are to be given priority for promotion in the event of equal suitability, competence and professional performance, **unless reasons specific to an individual [male] candidate tilt the balance in his favour.**
- **ECJ:** the provision in question in this case contains a clause ('Öffnungsklausel', 'saving clause') to the effect that women are not to be given priority in promotion if reasons specific to an individual male candidate tilt the balance in his favour
- **Conclusions:**
  - individual assessment of each equally qualified (in terms of their suitability, competence and professional performance) candidates
    - objective (non-discriminatory) assessment
    - female priority candidate may be overridden by male candidate (**but: what could be those reasons?**)
  - still - '**equality of opportunity**' and not 'equality of result'
  - it is for the national court to determine whether those conditions are fulfilled
    - **Question:** is there a distinction in assessment of distribution of types of benefits (access to employment vs other)

## Badeck (C-158/97)



- **German** flexible result quota (*flexible Ergebnisquote*).
- The law does not determine quotas uniformly for all the sectors and departments concerned, but states that the characteristics of those sectors and departments are to be decisive for fixing the binding targets. Law does not necessarily determine from the outset - automatically - that the outcome of each selection procedure must, in a stalemate situation where the candidates have equal qualifications, necessarily favour the woman candidate.
- women's advancement plan for temporary posts in the academic service and for academic assistants provide 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
- **ECJ:**
  - The priority rules are **not absolute** and unconditional (number or reserved position determined by the situation in the sector + sex is not decisive)
- **Conclusions:**
  - savings clause makes the positive discrimination conditional and therefore not inadmissible
  - assessment on case-by-case basis
    - Reasons to overcome: long term unemployment, part-time work due family, disability)..
  - Level of scrutiny lower for other benefits - no saving clause needed, no need to clarify that the candidates are equally qualified

## Abrahamsson (C-407/98)



- **Swedish Equality law:** a candidate belonging to an under-represented sex and possessing sufficient qualifications for the post may be chosen in preference to a candidate belonging to the opposite sex who would otherwise have been chosen, provided that **the difference in their respective qualifications is not so great** that application of the rule would be contrary to the requirement of objectivity in the making of appointments
- **ECJ:**
  - the scope and effect of that **condition cannot be precisely determined**
  - candidatures are **not** subjected to an **objective assessment** taking account of the specific personal situations
  - the **selection of a candidate** from among those who are sufficiently qualified is ultimately **based on the mere fact of belonging to the under-represented sex**
  - it allows a selection method which is **disproportionate** to the aim pursued.
- **Conclusions:**
  - Conformity with Art 2 (4) of the Directive 76/207 and Art 141 (4) TEC separately assessed
  - Proportionality test
  - ECJ did not dismissed idea of a lower qualification (evaluation process was not transparent and no saving clause)

## Lommers (C-476/99) I



- **Dutch Minister** is making available a certain number of nursery places to female staff. Those places are allocated between the directorates and services of the Ministry in proportion to the number of female employees working there, at a ratio of about one place for 20 female employees
- In principle, nursery places are available only to female employees of the Ministry of Agriculture, Nature Management and Fisheries, save in the case of an emergency, to be determined by the Director.
- **ECJ:**
  - a proven insufficiency of suitable and affordable nursery facilities is likely to induce more particularly female employees to give up their jobs
  - measure which forms part of the **restricted concept of equality of opportunity** in so far as it is **not places of employment** which are reserved for women **but enjoyment of certain working condition** designed to facilitate their pursuit of, and progression in, their career, **falls in principle into the category of measures designed to eliminate the causes of women's reduced opportunities** for access to employment and careers and are **intended to improve their ability to compete on the labour market and to pursue a career on an equal footing with men.**
  - **due regard must be had to the principle of proportionality**, which requires that derogations must remain within the limits of what is appropriate and necessary in order to achieve the aim in view and that the principle of equal treatment be reconciled as far as possible with the requirements of the aim thus pursued
  - the measure at issue **does not totally exclude male officials**- exception in favour of male officials is construed as allowing those of them who take care of their children by themselves to have access to that nursery places scheme on the same conditions as female officials

## *Lommers (C-476/99) II*

- **Conclusions:**

- **Proportionality** test - in determining the scope of any derogation from an individual right such as the equal treatment of men and women, due regard must be had to the principle of proportionality, which requires that derogations must remain within the limits of what is **appropriate** and **necessary** in order to achieve the aim in view and that the principle of equal treatment be reconciled as far as possible with the requirements of the aim thus pursued
- It is for the national court, to determine whether the factual circumstances mentioned are indeed established
- It is for the national court, to determine whether measures falls **into the category of measures designed to eliminate the causes of women's reduced opportunities** for access to employment and careers and are intended to improve their ability to compete on the labour market and to pursue a career on an equal footing with men.

## *Briheche (C-319/03)*

- **French** age limit for entry to a competitive examination is fixed at 45 years, unless specific provisions establish a higher age limit. However, the age limit for obtaining access to public-sector employment is not applicable to women who are obliged to work following the death of their husband.
- ECJ:
  - Distinction between widows (females) who have not remarried who are obliged to work, excluding widowers (males) who have not remarried who are in the same situation
  - provision, under which an age limit for obtaining access to public-sector employment is not applicable to certain categories of women, while it is to men in the same situation as those women, cannot be allowed under Article 2(4) of the Directive

## *Commission vs. Greece (C-559/07)*



- **Greek** Civil and Military Pension Code providing for different pension age for women and men and minimum length of service requirements
- **ECJ:**
  - The measures do not help women to conduct their professional life on an equal footing with men

## *Alvarez (C-104/99)*



- **Spanish law:** Female workers shall be entitled to take one hour off work, which they may divide into two parts, in order to breastfeed a child under the age of nine months. The woman may, if she wishes, replace this entitlement with a half-hour reduction in her working day for the same purpose. This time off work may be taken by the mother or the father without distinction, provided that they are both employed
- **ECJ:**
  - such a measure could have the effect of putting women at an advantage by allowing mothers whose status is that of an employed person to keep their job and to devote time to their child.
  - **only a mother whose status is that of an employed person is the holder of the right to qualify for the leave** at issue in the main proceedings, whereas a father with the same status **can only enjoy this right** but not be the holder of it, is liable to perpetuate a traditional distribution of the roles of men and women by keeping men in a role subsidiary to that of women in relation to the exercise of their parental duties
  - measure such as that at issue in the main proceedings **cannot be considered to be a measure eliminating or reducing existing inequalities in society** within the meaning of Article 2(4) of Directive 76/207, nor as a measure seeking to achieve substantive as opposed to formal equality by reducing the real inequalities that can arise in society and thus, in accordance with Article 157(4) TFEU, to prevent or compensate for disadvantages in the professional careers of the relevant persons.

# What next?



- New Art. 157(4) TFEU (ex Art. 141 (4) TEC) and new wording of Directive 2006/54 - change of paradigm?  
(*“ensuring full equality in practice”, “specific advantages”, “prevent and compensate”..*)
  - broader discretion to adopt positive action measures?
  - hard quotas vs. soft quotas
  - distinction between access to employment, access to training and other working conditions

# Conclusions



- Strict interpretation by the ECJ - exception to the equality principle
  - Formal conception prevailing over substantial one
  - Individual protection over group protection
- Strong requirements:
  - No automatic priority
  - Aim - elimination or reduction of existing inequalities in society, seeking to achieve substantive as opposed to formal equality by reducing the real inequalities that can arise in society, prevention or compensation for disadvantages in the professional careers
  - Temporary measure
- Proportionality test (legitimate, appropriate and necessary measure)
- Role of national courts