Positive Action in EU Gender Equality Law and Policy.

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Aim

- Analyze the concept of positive action in EU law (Focus on measures in favour of female workers)
  - A. Legal provisions
  - B. CJEU’s Case law interpreting the relevant provisions
  - C. Implementation at Member States level
  - D. New EU proposal for a Directive: Gender Quotas in company boards.
Debate on Positive Action

- **Proponents:** Because of prior discrimination in employment, women and minorities are handicapped when they try to enter employment, obtain a promotion or retain a job.
  
  Positive action *stricto sensu* (preferred treatment regarding entrance to jobs, promotion and retention of employment) = remedy for the effects of prior discrimination.

- **Opponents:** Why an individual must lose his chance of entrance to a particular job and bear the burden of redressing grievances made by the whole society?
  - Difficulties to set up the groups entitled to preferential treatment.
  - Problems connected to the idea of preference: may reinforce common negative stereotypes.

Historical Background

- **Origin of the concept of positive action:**
  USA Supreme Court – Associated to idea of fighting social discrimination

- **Aimed to combat:**
  1. Racial discrimination in education (*Brown, 1954*)
  2. Employment racial segregation (*Griggs, 1971*)
Positive action measures in EU law:

- Several related concepts: affirmative action, preferential treatment, **positive action**
- Broad range of proactive measures:
  - Equal opportunities policies (promotion of female employment, special educational/training programmes)
  - Positive action measures **stricto sensu**: quotas and targets (i.e. preferential treatment in job applications)

Equality Concepts:

- **Formal equality** (Aristotelian): ‘Equal should be treated equal and unequal in an unequal way.’
  Individual complaints led model - reactive
- **Protection against discrimination:**
  A. Direct discrimination (objective & non-justifiable)
  B. Indirect discrimination (collective & objectively justifiable/proportionality principle)

  Principle of proportionality - 3 conditions: (Case C-170/84, Bilka)
- They are appropriate with a view to achieving the objectives pursued;
- And they are necessary to that end.

- **Substantive ‘de facto’ equality:** assure equal opportunities and objective equality in the results.
- **Proactive model:** Promotion of disadvantage groups - Women
Approach to this issue:

- **Main Question:** Is the result pursued by EU law substantive or formal equality?
  - C-136/95, Thibault;
  - C-158/97, Badeck;
  - Case C-407/98, Abrahamsson;
  - C-342/01, Merino Gómez

- **Hypotheses:** The positive dimension of equality can be observed, even when restrictively shaped, in the EU legislation and in the CJEU’s case law interpreting it.

EU Legal Framework

- **Article 3 TEU** (The EU shall combat social exclusion and discrimination, and shall promote social justice and protection, equality between women and men...)

- **Article 8 Treaty on the Functioning of the EU, TFEU** In all its activities, the Union shall aim to eliminate inequalities, and to promote equality, between men and women.

- **Article 157.4 TFEU**

- **Article 3 Recast Directive 2006/54/EC**

- **Article 23 Charter of Fundamental Rights of the EU** (only promotion of female employment)
Gender Equality and Positive action in EU law

- Article 157.4 TFEU (Article 141.4 ECT before): ‘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 3 Directive 2006/54/EC: ‘Member States may maintain or adopt measures within the meaning of Article 141.4 of the Treaty (current Art. 157.4) with a view to ensuring full equality in practice between men and women in working life.’

- Article 23 - Charter of Fundamental Rights of the EU:
  - ‘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.’

Court of Justice of the EU - Case Law
First Approaches:

- Case C-450/93 Kalanke: National rules giving an ‘automatic priority’ on a promotion to women are not allowed.

- Case C-409/95 Marschall: If the candidatures are subject to an ‘objective assessment’ which will take into account all criteria specific to the individual candidates (‘saving clause’) the affirmative action measure complies with EU law.
Court of Justice of the EU - Case law

- Case C-158/97 Badeck: a rigid quota for women in the access to training, invitation to an interview and membership of the employees’ representative bodies and/or administrative and supervisory bodies is accepted, as long as it is not leading to an ‘absolute rigidity’.
- Case C-407/98, Abrahamsson, the appointment of a female worker who has sufficient qualifications for a post instead of a male candidate who is better qualified is precluded by EU law (Breach of proportionality principle – meritocracy prevails).

Other relevant cases:

- Case 476/99 Lommers: The argument that women interrupt their careers more often than men to take care of children is not so strong any longer. Focus on compliance with the principle of proportionality.
- Case C-319/03, Briheche
- Case C-559/07, Commission v. Greece
- Case C-104/09, Roca Alvarez (breastfeeding leave – accessible for male workers)
- Same quality of parent and comparable role on children’s education for male & female workers. Equal access to leaves and childcare arrangements.
CJEU - Case Law - Conclusions:
- The interpretation given by the Court to the concept of positive action is very strict.
- Requirements for the adoption of positive action measures are very stringent:
  - Existence of a homogeneous disadvantage group (under-represented sex)
  - No automatic priority – flexible application
  - Appropriate and necessary measures - compliance with principle of proportionality
  - Temporary duration (until societal discrimination is corrected)
- Use of undetermined expressions: ‘rigid quota’, ‘flexible result quota’, ‘saving or flexibility clause’
- Trend to focus on the observance of the principle of proportionality/respect to meritocracy
- In EU law the formal concept of equality still prevails over the substantive one.

Positive Action in domestic, international and EU law: from duty to narrow exception.
- Several Member States (Austria, Belgium, France, Greece, Germany, Italy, Spain, Sweden and the UK) Constitutional texts and/or legislation have provisions establishing a positive duty to promote equality of opportunity and de facto equality for men and women – Positive action necessary.
- Article 3 CEDAW (UN)- A positive duty to improve de facto position of women
- Clash with CJEU’s approach (positive action measures are an exception to the equality principle). In EU law to engage in positive action is only permitted (restrictively) but not required.
How to overcome the drawbacks of the compensatory theory?

- **Fundamental Right:** Positive action is a corollary of the Member States’ obligation to promote real equality among their citizens, from an individual as well as from a collective perspective, by the way of removing the obstacles that hinder their full participation in political, economical and social life.

- Is positive action a useful instrument to prevent women’s labour market segregation? (based on dignity, restitution and redistribution).

- Positive action measures: effective tools to assure social justice and economic welfare.

- Economic and business case for gender balance in economic decision-making positions. Controversial

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**EU proposal for a Directive – women quota on company boards - COM (2012) 614 final**

- Gender imbalance in decision-making positions is observed in various domains: politics, economics, science and research but it is really dramatic in business management.

- In EU-28, 17.8% of board members of the largest listed companies registered in the EU (610 companies covered) are women. Women represent 11.8% of executives and 18.8% of non-executives. 2.8% of CEOs are women.

- Commission’s proposal: 40% objective of the underrepresented sex in non-executive board-member positions in publicly listed companies by 2020 and by 2018 for public undertakings.

- Applies to companies which more than 250 persons and with an annual turnover of EUR 50 million or annual balance sheet exceeding EUR 43 million; (Exception of small and medium-sized enterprises, Article 3.)
- Article 4.3. follows CJEU’s case law: priority to female candidate if “equally qualified” unless “objective assessment” tilts the balance in favour of a male candidate.
- Disclosure obligation of qualification criteria for selection and objective comparative assessment, Article 4.4.


- Reversal in the burden of the proof in case of equal qualifications, Article 4.5.
- Objective 40% can be flexibilised by MS Art. 46:
  - exceptions for companies where women represent less than 10% of the workforce
  - Where listed companies can show that women hold at least one third of all director positions (executive and non-executive)
- Reporting and publishing obligations and sanctions (effective, proportionate and dissuasive).
- The law is a temporary measure. It will automatically expire in 2028.
National Measures

- Governments and business organisations in some member states have acted in response to the low level of women’s participation. Belgium, France, Italy, the Netherlands and Spain have introduced legislative quotas to increase women’s board representation (non-binding in some cases), while countries such as Denmark, Finland, and Sweden have adopted corporate governance codes and/or voluntary charters that appear to have helped increase female representation.

Special Eurobarometer 376 - 2012

- European citizens responded:
  - “The business community is dominated by men who do not have sufficient confidence in women. (76%)”
  - “Women do not always have the necessary qualities or skills to fill positions or responsibility.” (21%)
  - “Women should be equally represented in company leadership positions.” (88%)
Questions for debate:

- Are female workers a homogenous social group traditionally affected by discrimination and labour market segregation? Declaration in EC Treaty: under-represented sex = women
- How are positive action measures in favour or women currently encouraged at EU level?
  - 2012 EU Proposal: Directive on binding quota for women in company boards. Gender balance in economic decision making
  - Supported by EP- In new Commission’s agenda?
- How to overcome the differences between the national approaches and the UE legal framework on positive action? Is EU legislation the right tool?