

# Positive Action Measures in EU Law

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# Ambiguous concept

- Wider meaning:  
ALL "***positive steps*** taken to ***increase the representation*** of women and minorities in areas of employment, education, and culture from which they have been historically excluded"  
(Stanford Encyclopedia of Philosophy)
- Wide normative spectra
  - antidiscrimination support measures
    - obligation to eliminate practices concealing direct and indirect discrimination
      - e.g. word of mouth hiring, nontransparent/discretionary decisionmaking
  - measures aiming to *accommodate* particular gender-related needs and characteristics
    - Positive obligations

# Positive action – focused notion

- Measures that (openly or indirectly) ***employ suspect characteristic as a criterion of decision-making*** in order to
  - eliminate concrete discriminatory barriers to actual *equality of opportunity*
  - and/or*
  - improve disadvantaged position of a particular social group that traditionally suffered systemic discrimination in a particular society (actual equality)

# Affirmative Genesis of the Notion

- 1964 US Civil Rights Act - “affirmative action” a remedy federal courts could impose on violators of the Act
- 1965 President Johnson's Executive Order 11246 - requiring federal contractors to take “affirmative action” to make sure they were not discriminating
  - “plans” in which they committed themselves to numerical hiring goals
- 1972 US Secretary of Labor's Revised Order No. 4
  - a one-size-fits-all system of “underutilization analyses,” “goals,” and “timetables” on all institutions that did business with the government
  - Since 1972 the question was whether the “goals” amounted to “quotas,” requiring use of racial or gender preferences in selection processes (*Stanford Encyclopedia of Philosophy*)
    - affirmative action did not require or even permit the use of preferences
    - affirmative action allowed preferences
- 1978 SCOTUS *Bakke*
  - the legitimacy of racial preferences was to be measured by how fast using them moves us toward a society where race doesn't matter (SEoP)

# Value of Representation

- Is representation of members of certain social groups:
  - inherent good
    - social groups value per se; group membership as distribution currency; tension between individual agency and group identity
  - utilitarian means
    - purposeful process implementing some final normative goal
      - (restorative) justice
      - meritocracy
      - real equality of opportunity
  - proxy
    - democratic decision-making
      - mimic social diversity; pluralism; mutual respect and cooperation within processes with power to distribute valuable social goods
  - yardstick
    - Indication of neutrality and objectivity of decision-making process

# Conflicting Normative Background

- Open Conflict:
  - Aristotelian Notion of Equality – „likes alike”
    - suspect characteristics are either relevant (different treatment just) or not (different treatment discriminatory)
  - Individual Justice Model –
    - suspect (immutable) characteristics always unjust
    - individuals ought to be treated according to their personal (socially desired) traits and skills
  - Procedural Fairness
    - road to hell is paved with good intentions:
      - selective use of „corrupted” criteria will eventually collapse decision-making into corruption
      - promotes „balkanization” and group-based conflict over limited resources

# Doctrinal Origins of Ambiguity

- Dominant position of “individualized” concept of discrimination
  - individual right
    - universality reduced to social de-contextualization
      - Aristotelian consistency (sameness)
        - » right to equal consideration
      - right to equal opportunity
    - Meritocracy
      - “the right of the maximally competent to an open position” (SEP)
  - Individualized enforcement responsibility
    - receipt/target/victim has a legal mandate to initiate legal proceedings and demonstrate its claim against a decision-maker
    - the burden of intent

# From Banning Discrimination to Mandating AA Indirectly

*Griggs v. Duke Power Company*, 401 U.S. 424 (1971)

- striking down facially neutral rules that carried through the effects of an employer's past discrimination, regardless of the original intent or provenance of the rules
  - *“The objective of Congress in the enactment of Title VII...was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees. Under the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to “freeze” the status quo of prior discriminatory employment practices. What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to exclude on the basis of racial or other impermissible classification.”*
- In order to make its monitoring and revising effective, an institution ought to predict, as best it can, how many minorities and women it would select over time.
  - the predictions constitute the affirmative action “goals,”
  - failure to meet the goals signals the need to revisit its efforts at eliminating exclusionary practices

# Positive action – substantive understanding

- Directly or indirectly **sex** (/race/religion) **related** measures aiming to eliminate **exclusion** of members of (female) sex
  - identify and eliminate discriminatory practices (focus to great extent on disparate impact)
  - increase representation of members of underrepresented sex
- Sex related preferences
  - direct and indirect
    - evolution of positive action
- Not within the scope:
  - antidiscrimination support measures
  - Positive obligation

# Types of Preferences

- Possible to distinguish several types of preferences in practice:
  - An ***absolute preference*** reserves certain benefits exclusively for members of the underrepresented sex.
  - A ***strong preference*** grants advantage to members of the underrepresented sex who satisfied some minimum eligibility criteria for a particular position.
  - A ***tie-break preference*** grants an advantage to members of the underrepresented sex who are equally qualified for a particular position or equally deserving of particular benefit.
  - ***Flexible preferences*** allow granted sex-based advantages to be overridden by some other socially valuable reason (e.g. long-term unemployment, single parenthood, health reasons, etc.). Both strong and tie-break preferences can be flexible preferences.
  - A ***weak preference*** merely allows for sex to be one of various criteria of selection, each of which is of more or less equal weight.

# Types of positive action measures

- **Outreach measures**
  - sex related measures encouraging members of underrepresented sex to apply for employment or participate in training programs
- **Redefining Merit**
  - altering job qualifications criteria by including sex or specific gender related characteristics
- **Indirect preferences**
  - facially neutral criteria designed to favor more members of one sex
- **Direct Preferences**
  - preferences that can be overridden - soft targets
    - weak (“one of”) or stalemate preferences
  - firm preferences – quotas
    - unconditional or conditional

# Practical reasons behind positive action measures

- stubborn persistence of negative inequality indicators across all areas of social life
  - higher unemployment, pay gap, horizontal and vertical segregation of the labor market, double burden, insignificant share of fathers of childcare leaves, underrepresentation in decision-making
- dubious success of the individual complaint model
  - procedural complexity, judicial inexperience, specific character of legal guarantees (conceptual discrepancy), high emotional costs, ineffective remedies
- recent European experiences and comparative good practices

# Normative goals of positive action measures

- So called Immutable Criteria (Sex/ Race/Sexual Orientation) Matter
  - social constructs embedded with hierarchical structures of power distribution and markers of social worth
- Notion of substantive | real | equality in practice
  - counteract and circumscribe concealed discriminatory practices
  - respond to and break prejudices and stereotypes
  - increase representativeness and make decision-making more democratic
  - increase gender-fairness of standards of treatment
- The standard of legitimacy
  - normative and practical effectiveness of PAMs key for their legitimacy

# Positive Action – legislative concept

- Special measures/treatment – sex related preferences
- Limited duration
- Aiming for “real equality” – promote equality of opportunity
  - remove existing barriers
    - prejudices and stereotypes
    - implications of structural/systemic discrimination
  - compensate for past discrimination (on group level)
- De facto inequality (existence of barriers) tightly related to underrepresentation
- Only some of the States insists on the “equal merits” requirement in their legislative definitions
- Surprisingly high number of States do not insist on the proportionality requirement

# Main Common Characteristics

- In principle, permissive not mandatory
  - mandatory positive action measures (PAMs) more likely to be used in public sector (employment and political participation)
  - Most frequent forms of mandatory PAMs
    - equality plans
    - target related preferences
    - quotas
  - Wide scope of application (employment, education, social benefits, housing, health care, culture, etc.)
    - positive action most often used in employment
    - almost a complete absence of “goods and services” positive action
  - Significant number of States perceive positive action as an “aspect” of, rather than exception from, the equal treatment principle

# Positive Action in Employment (some general features)

- In principle, optional
  - “Mandatory” positive action more frequent in relation to public sector employment
    - often imposed through executive ordinances
- Wide range of *reported* positive action measures
  - most **do not** involve sex related preferences
    - **clear confusion in classification**
      - although *proactive* great majority of these measures hardly falls within the scope
      - accommodate gender roles rather than directly address exclusion

# Public Sector Employment

- Government/administrative institutions (national and local), public institutions, state-controlled enterprises
- Three groups of PAMs
  - **Soft** positive action (antidiscrimination support)
  - Positive action involving **preferences** (outreach positive action, weak direct preferences in employment/promotion)
  - Positive action involving **quotas**

# Soft Positive Action in Public Sector

- Leave **wide discretion** to an individual institution;  
**weak sanctions** for non-fulfilment
- Reported examples:
  - equality/action plans
    - analysis, statistics, goals, measures
    - primarily focused on (under) representation
  - the principle of balanced participation
    - aspirational targets (either government imposed or self-imposed)
    - balanced representation in hiring and appointments
  - obligation to promote equality of opportunity
    - explicit permission to use preferences
  - encourage applications from sufficiently qualified women & nominate qualified women

# Positive Action Involving Preferences in Public Sector

- Their strength (flexible – firm) depends primarily on the saving clause option and sanction following the measure
  - no absolute and strong preferences reported
  - tie-break and weak preferences dominate
- Reported examples:
  - duty to justify selection of equally qualified member of the over-represented sex
  - target driven preferences
    - in management appointments
    - in the appointments to decision-making bodies (boards, committees, etc.)
    - nomination parity
  - preferences for members of the underrepresented sex in relation to training participation
  - training preferences for employees who were absent from work for some time due to childcare or family obligations

# Quotas in Public Sector

- Quota strength depends both on accompanying sanctions and the “saving clause” option
- Examples from the practice:
  - quotas for the executive/supervisory boards of state controlled companies
  - quotas for decision-making bodies in public administrations
  - composition quota for hiring/promotion committees
  - “equitable” targets (balanced representation) supported by nomination parity

# Private Sector Employment

- Mandatory PAMs rare
- Existing mandatory PAMs rather “soft”
  - leave considerable discretion to individual employers
- six types of PAMs
  - measures favoring encouragement
  - measures favoring self-empowerment
  - self-imposed positive action
  - measures favoring labor pressure
  - imposed flexibility measures
  - preferences & quotas

# Positive Action Favoring Encouragement

- Reported examples from practice:
  - Equality Prizes
  - Joined commitment programs
    - encourage self-commitment to
      - a set of measures designed by the state or some other competent public institutions
      - monitoring
    - no sanctions
    - do not involve firm PAMs
  - Financial support for employers using positive action
  - Positive action efforts as state subsidies/public procurement criterion

# Measures Favoring Self-empowerment

- Reported examples:
  - Favorable loans for self-employed women
  - Subsidies for enterprises with 50+% of female employees

# Self-imposed Positive Action

- Reported examples:
  - Recommendations by various business associations
    - balanced boards, targets
    - no monitoring mechanism, no sanctions
  - Non-preferential measures: part-time work, flexible hours/working arrangements, training programs, mentorship programs, job application encouragement, gender-neutral/conscious employment/promotion calls
  - Progressive measures: offering childcare services, preferences related to the access to childcare services

# Positive Action Favoring Labour Pressure

- Attempt to involve workers and their organizations
- Reported examples:
  - employer's duty to periodically negotiate positive action efforts with relevant unions
  - the right of workers' councils to inquire/consult with an employer about positive action
  - the right to disclose salary and other contract conditions

# Imposed Flexibility

- Obliges employers to adopt positive action, leaving them with a discretion to design measures they find appropriate
- Reported examples:
  - Equality plans
    - used by a significant number of States
    - analyze current situation, determine problems, set goals, design measures, report
    - can insist on the union involvement
  - Duty to promote equality “in purposeful and systemic manner”
  - Duty to eliminate pay gap

# Preferences & Quotas in the Private Sector

- Reported examples:
  - training programs for members of the underrepresented sex
  - obligation to eliminate under-representation in particular group/department using “all available means”, including preferences
  - quotas for decisionmaking bodies within the enterprise
    - board quotas

# The Special Case of Company Board Quotas

- 9 States so far (Austria, Belgium,, France, Greece, Iceland, Italy, (the Netherlands), Norway Germany)
- Two groups of States which adopted this measure
  - States that imposed the company board quota on state-controlled enterprises only (Austria)
  - States that imposed the company board quota on private and public enterprises (Belgium, France, Greece, Iceland, Italy, (the Netherlands), Norway)
- Hard targets
  - achieve certain % during a certain period under a threat of (substantive) sanction
    - in principle, target is 1/3 or 40% representation
    - some states favored incremental approach (e.g. France)
    - some states used the nomination parity rule or the possibility of the saving clause
- Showed very effective in practice

# The Special Case of Executive Board Quotas

- Similarities with the political representation quotas
  - bodies of considerable social power
  - successful participation in executive boards not contingent on purely objective professional selection criteria
- Result of these characteristics:
  - differences in view/experiences of men and women as social groups matter
    - as a way of social (democratic) control over the use of their power
    - as a business effectiveness insurance
- Sex equality is not the primary justification
  - Possible Directive would make clear that this type of positive action is tightly related to the goal of eliminating concealed or structural sex discrimination

# Some Lessons Regarding the Positive Action in Employment

- The main focus is on (numerical) distribution of places in employment
- Most measures are designed to facilitate, not question, the existing system of opportunity distribution
  - equip women to compete according to existing criteria
  - accommodate conventional gender roles related to childcare and family responsibilities
  - “employers know best” attitude
  - even quotas partially rest on the implicit assumption that women and men are in some respect “essentially” different in terms of their needs and perspectives, which businesses must recognize to stay successful

# Constitutional Foundations

- TFEU Art 157/(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 **underrepresented** sex to **pursue** a vocational activity or to **prevent or compensate for disadvantages** in professional careers.
- CFREU Art 23
  - Equality between men and women 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.
- Directive 2000/78 Art 7
  - With a view to ensuring full equality in practice, 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 any of the grounds referred to in Article 1.
- Fundamental Value of the Equal Treatment Principle
- Case 43/75 Defrenne [1976]
- C144/04 Mangold [2005]
  - *The principle of non-discrimination on grounds of age must thus be regarded as a general principle of Community law.* Where national rules fall within the scope of Community law, ...the Court must provide all the criteria of interpretation needed by the national court to determine whether those rules are compatible with such a principle.
- C-555/07 Küçükdeveci [2010]
  - It must be recalled here that... Directive 2000/78 merely gives expression to, but does not lay down, the principle of equal treatment in employment and occupation, and that the principle of non-discrimination on grounds of age *is a general principle of European Union law in that it constitutes a specific application of the general principle of equal treatment* In those circumstances, it for the national court...to provide, within the limits of its jurisdiction, **the legal protection which individuals derive from European Union law and to ensure the full effectiveness of that law**, disapplying if need be any provision of national legislation contrary to that principle.

# CJEU Established Framework

## C-450/93 Kalanke

- NOT ALLOWED:
  - measures securing „**absolute and unconditional** (automatic) priority for appointment or promotion”
  - measures seeking to achieve equal representation of men and women (in **all** grades and levels within a department ) substitute for equality of opportunity the result which is only to be arrived at by providing such equality of opportunity
- Open questions:
  - what is equality of opportunity?
  - how „proportional” must be a sex-related preference?

## C-409/95 Marschall

- the mere fact that a male and female candidates are equally qualified does not mean that they have the same chance
  - this real/life fact allows measures related to access to *employment/promotion* giving specific advantages to *women* aiming to improve their equality of opportunity (*ability to compete* on the labour market *and to peruse career* on equal footing with men)
- measures containing a **saving clause** not absolute and conditional
  - in each individual case provides for male candidates who are equally qualified a guarantee that their candidatures
    - 1) will be a subject of an objective assessment which will take account of all criteria specific to the individual candidates and
    - 2) will override the priority accorded to female candidates where one or more of those criteria tilts the balance in favour of male candidates;
    - 3) those criteria must not be such to discriminate against women

# Balancing, Not Formulas

- C-158/97 Badeck
  - criteria which, although formulated in terms which are neutral as regards gender, in general favour women are allowed since they are manifestly intended to lead to an equality which is substantive rather than formal by reducing inequalities which may occur in practice in life
    - out: seniority, age, date of last promotion, family status, partner's income, part-time work, leaves related to childcare or parents-care
    - in: capabilities and experiences acquired by carrying out family work
  - sex-related preferences where the candidates have equal qualifications and which do not fix an absolute ceiling, but fix one by reference to the number of persons who have received appropriate training (actual fact as a quantitative criterion)
    - such underrepresentation clear proof of concealed discrimination?
  - strict result quotas as regards professional training allowed (if men can get them when there is not enough female applicants and if the provider does not have a monopoly over that type of training)
  - quotas reserving number of interview opportunities for women who have shown to satisfy all the conditions required or laid down allowed
  - quota reserving “at least half” of the places in appointments to committees, advisory boards, boards, boards of directors and supervisory boards and other collective bodies is “not a mandatory provision”

# Qualifications – the Central Question?

- C-407/98 Abrahamsson
  - at stake: a model of sex-related preferences for sufficiently qualified members of under-represented sex
  - the Court did not accept the model:
    - **the assessment of the qualifications** of candidates by reference to the requirements of vacant post is not based on **clear and unambiguous criteria such as to prevent or compensate for disadvantages** in the professional career
    - “the **scope** of the provision” could not be precisely determined,
      - with the result that 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 *even if* the merits of the candidates so selected are inferior to those of the candidate of the opposite sex
    - candidates were not subject to **objective assessment taking account of the specific personal situations** of all candidates
  - Open questions:
    - what counts as qualifications? does their scope extends beyond merely professional credentials?
    - who defines the qualifications? would the Court scrutinized only consistency?
    - would a saving clause save the model?

# Contextual Flexibility

- C-476/99 Lommers:
  - at stake: child-care services quota for women
  - the Court approved the measure:
    - stressed both horizontal and vertical underrepresentation of women
    - stressed real-life fact that women are much more likely to interrupt their careers due to childcare
    - did not reserve places of employment
      - reserved enjoyment of certain workplace conditions designed to facilitate pursuit and progression in professional career
      - designed to eliminate the causes of women's reduced opportunities for access to employment and careers
    - proportionality test (**appropriate** and necessary)
      - insufficient supply (even waiting lists with female applicants existed)
      - men not absolutely excluded
        - » available market services
        - » urgent cases (saving clause)

# CJEU's Equal Opportunity Sliding Scale

## Formal Equal Opportunities PAMs

- Improving Formal Competitive Capacities
- Applied before a „cut of” point
- **Intermediate Scrutiny**
  - reasonably agreeable barrier
  - no prejudice or crude stereotype motives
  - reasonable PAM effectiveness

## Substantive Equal Opportunities PAMs

- Redistributing Power and Increasing Diversity
- Applied at the „cut of” point
- **Strict Scrutiny**
  - clearly identified barrier to real equality
    - social relevance of the distributed good
  - Individualism/meritocracy safeguards
    - thorough and strict analysis of qualifications
    - comprehensive „social” balancing
  - narrowly tailored
    - persuasive PAM effectiveness
    - necessity proof

# Does Positive Action fall within the scope of EU competences

- Strong support in the Treaties:
- Article 2 TEU identifies sex equality as one of the social values of fundamental importance common to the MS.
- Article 3(3) TEU provides that the Union shall combat social exclusion and discrimination and promote equality between men and women within its internal market.
- Article 8 TFEU explicitly mandates the Union to conduct all of its activities in a manner to eliminate inequalities and promote equality between men and women.
- Article 10 TFEU provides that the Union shall aim to combat discrimination based on sex in defining and implementing its policies and activities.

# Appropriate Legal Basis

- Several apparent candidates:
  - Article 157(3) TFEU
  - Article 19 TFEU
  - Article 352 TFEU
- Art 157(3) TFEU provides the strongest support
  - explicitly provides the EU with the power to enact legislative measures to ensure the application of the principle of equal opportunities and equal treatment of men and women *in matters of employment and occupation*
    - Significant number of MSs do not perceive board membership as employment
    - *Danosa* judgement
  - The key issue of scope
    - Marschall-Badeck-Abrahamson doctrine
    - Specific “non-objective” character of company board employment

# Proposed Directive

- The Purpose
  - gender equality in econ decision-making across the Union
  - fully exploit the existing talent pool of candidates for more equal gender representation on company boards
- Motives
  - low representation (7:1), ineffectiveness of current measures, underutilization of highly qualified women's skill (60% of university graduates in the EU, more than 7000 'boardable' women who are highly qualified)
  - *The core of the problem:*
    - multiple barriers that the constantly growing number of highly qualified and 'board-ready' women who are available for board seats face on their way to the top
- Subsidiarity & Proportionality
  - significant discrepancy across MSs, lack of public debate and political will, absence of leveled competitive playing field, reasons of scale
  - only publicly listed companies, only non-executive seats, temporary nature, flexibility, saving clause

# Proposed PAMs

## Quasi-substantive Equal Opportunity PAM

- *A tie-break preference for under-represented sex*
  - *Less than 40%*
  - *Comparative analysis of the qualifications*
    - *suitability, competence and professional performance*
    - *pre-established, clear, neutrally formulated and unambiguous criteria*
    - *saving clause (all criteria specific to individual candidates)*

## Formal Equal Opportunity PAMs

- Disclosure Duty
  - Pre-established criteria
  - Objective comparative assessment
  - Consideration titling the balance
- Redistribution of the Burden of Proof
- Reporting Duty

Kind thanks for your attention