EC Law on Equal Treatment Between Women and Men in practice

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Positive action in EC law

Hand-out

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I. Introduction

The Community law allows the member states to implement actions providing advantages to facilitate the professional activity or to avoid or compensate for disadvantages in the professional career. The European Court of Justice (ECJ) then decides what types of positive actions are in accordance with the EC law.

The decisions of the ECJ must also cope with

the different formal and substantive understanding of equality,

the tension between the equality of opportunities and the equality in results, or

with the verification of the legitimate aim and adequacy of the measures.

The equality is one of the basic aims that the mankind has been furthering for centuries. The requirement for equality is contained in many important documents of the international law, in constitutional and other national regulations of the democratic states. Establishing of the principle of equality in the legislation has different forms. It is most frequently manifested in the form of prohibition of discrimination and based on values such as human dignity and freedom of an individual.

Discrimination is any situation in which an individual is treated differently from the other individuals on the ground of his or her membership of certain social group or category. Discrimination is, then, a key-concept in the definition of equality and refers to any systematic detrimental treatment of an individual or a group based on its personal or social circumstances or conditions.

The content of the term „equality“ is not universal and explicit. It depends on many factors, especially historical, social, political and cultural, including traditions and character of the legal culture. Thanks to these and other factors the importance and content of the term „equality“ in the individual social and political formations was changing. From the global view we distinguish three development stages in the process of regulation of the legal principle of equality.

The first stage was characterized by adoption of legislation which removed formal legal obstacles in the exercise of personal, political and social rights, particularly in relation to women and members of racial/ethnic groups. At this stage, which was completed at beginning of the 20th century, slavery and serfdom were abolished, the voting right was awarded to women, the equality before the law was anchored and laws protecting women were adopted in the area of labour law.

The second stage was characterized by regulation of the prohibition of discrimination in the law, which should have contributed to the achievement of equality by obliging both the public and private actors. Although the importance of legally binding anti-discrimination provisions is uncontested, the discriminatory structures deeply rooted in the society and the prevailing stereotypes caused that the success of this stage had not resulted in a state where the society would be deprived of discriminatory practices.

Therefore many states entered the third stage. This reflects the need for the extension of the illegal reasons and forms of discrimination and areas of its prohibition, as well as the need for strengthening of instruments that will be able not only to deepen the implementation of anti-discrimination procedures, but also to extend the instruments for achievement of equality to positive duty to promote equality. (Fredman 2002)

In spite of some negative views the governments continue to adopt new regulations implementing the positive actions in favour of the disadvantaged groups, particularly in the area of employment (on the basis of gender, race or health condition), and in the recent period also in the area of decision-making.

Positive action represents a very controversial institute. Although it has been applied for decades throughout the world, discussions about its political and legal legitimacy and benefits for the society continue. The term itself is differently interpreted and evaluated.

In my contribution I will focus on:

- Explanation of the term „positive action“
- Regulation of positive actions in the Community law
- ECJ judgments

II. Term „positive action“

“Affirmative action” first appeared in the US and initially it was used only in the context of racial discrimination. In the EU positive action is primarily used to ensure women equality in

the work force. The first formal discussions on positive actions at EU level took place in 1976 during the discussion around the adoption of a directive dealing with equality between women and men in the labour market.

What is positive action

There are many different term used in this area. People can refer to

- positive action
- affirmative action
- positive discrimination
- reverse discrimination

in the EU the most commonly used term is positive action

- no definition
- more a process than concept (M. De Vos 2007)
- tool and concept (ENAR conference 2007)

Concept

The justification of positive action depends on the concept of equality, on the basis of which the advocates and opponents of positive action decide on its acceptance or refusal. As Sandra Fredman says, the choice between the individual concepts is not the matter of logic, but matter of values and attitudes. (Fredman 2002) The approach to positive actions is closely related to the understanding of equality, i.e. whether the basis is equality in the formal sense or equality in the substantive sense.

In relation to positive action three concepts of equality are distinguished in juristic theory

- concept of formal equality,
- concept of equality in results and
- concept of equality of opportunities. (Fredman 2000)

The concept of **formal equality** strengthens the liberal ideas of superiority of the neutrality of law, rights of the individual as personality and, and freedom of market. (Fredman 1997) For the formal equality the „ the equal should be treated equal and the unequal in an unequal way" principle is applied – i.e. equal treatment of formally equal subjects in formally equal cases. The formal equality does not take into account the actually existing differences between individuals, e.g. in gender, social origin, or circumstances of the situation, or the actual impact of an apparently neutral criterion. It requires strict neutrality of the state in relation to its citizens and equal treatment of each individual regardless of his or her personal characteristics and other circumstances determined by his or her membership of a group. Equality before the law means that the law should apply to all persons in an equal and consistent manner.

In case of **substantive equality** the factually different subjects are treated formally differently to compensate the factual inequality and achieve the factual equality. The substantive

equality not only tries to achieve equality de iure, it strives for the equality de facto. It is a conception of equality that is concerned with the ensuring ability of persons to compete on an equal basis, having regard to various obstacles, including discrimination, that may impede this equality of opportunity.

The question whether the positive action is aimed to achieve equality of opportunities or equality of results is also very important. If it is based on social reality, which is characterized by factual inequality of individuals due to the structurally and institutionally rooted discrimination, and gives certain benefits directly to a disadvantaged group, we talk about **equality in results.**

Equality of opportunities, which is a kind of compromise between the concept of formal equality and the concept of equality in results, means the effort of members of a disadvantaged group to achieve equal starting position with the majority. On one hand the equality of opportunities does not recognize the preferring one group of individuals over other group merely on the basis of the group characteristics and without actual effort at winning certain position or benefit (e.g. thanks to qualifications or experiences), but on the other hand it admits that starting positions of members of these groups are not identical and hence their chances to good results are not equal.

In the most general sense the positive action can be characterized as „giving intentionally an advantage to certain group which is not given to the remaining population". Giving an advantage is the condition. Disadvantaging by the denial of benefit or by imposition of burden would namely constitute discrimination. Advantaging may consist in the transfer of certain benefits up to releasing from a general obligation. The positive actions are mostly aimed at the increase of the involvement of the disadvantaged persons or under-represented groups in the social, political or economical area of activities.

A positive action can be only justified by the substantive understanding of equality. It is the achievement of equality in results and under certain circumstances also the achievement of equality of opportunities.

Another question regarding the relation of equality and positive actions is „whether a positive action is an exception from, or the content of the equality". In the European conditions positive actions are perceived as temporary derogation from a generally valid principle of equal treatment, particularly in the context of gender discrimination.

III. Regulation of positive actions in the Community law

Although both the EC legislation and the ECJ decisions formally support the concept of equality of opportunities, they occasionally manoeuvre towards the formal equality, now and then also towards the equality in results (even if this trend is very imperceptible and unambiguous).

Positive action constitutes a departure from the fundamental principle of formal equality, and because of that departure, requires further justification. Article 2(4) of the Equal treatment Directive explicitly allows deviation from formal equality. (Krstič 2003)

Article 2 (4) of the Directive 76/207/EEC was first to allow positive actions in the Community law. The quoted article in the first paragraph laid down the general principle of equal treatment and then defined three exemptions. The first exemption, which tends to the protection of women in employment, is historically oldest and based on the formal understanding of equality. The fourth paragraph of this article goes beyond the formal understanding of equality, when it recognizes the difference in the factual situation and regards women as a group.

ECJ interprets Art. 2 (4) as an exemption from equal treatment, which should be interpreted restrictively. However, if the substantive understanding of equality were consistently applied, positive actions would be a means for achievement of equality rather than temporary derogation from the principle of equality. From this view the said article would be a special provision specifying one of the means for the achievement of equality. The quoted paragraph has dispositive character and has not the direct effect.

Directive 2002/73/EC, which amend the Directive 76/207/EEC, put into operation Article 141(4) of the Treaty. It authorises Member States to maintain or introduce positive action measures to ensure full equality in practice between men and women (Article 2 (8)).

Since the Amsterdam Treaty positive actions are also laid down in the EC primary law. The formulation of Article 141 of SES recognizes that its purpose is the achievement of equality in the substantive sense. The formulation seems to allow a wider application of positive actions, because the term „equal opportunities“ is replaced for the term „full equality“ and the action can also serve for compensation of disadvantages. Unlike paragraph 1, paragraph 4 of Article 2 has only a dispositive character. The member states thus are not obliged to adopt legislation allowing the implementation of positive actions in the private sector, or to apply positive actions within the civil service. The employers may only take positive actions under the law of the member state, not under the Treaty.

Article 141(4) provides that: “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.”

As we have seen above, Article 141 EC and some of the gender equality directives allow for positive action. This concept is defined as follows:

in Directive 2006/54/EC : 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 3).

in Directive 2004/113/EC : 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. (Article 6)

Mention must also be made of Council Recommendation 84/635/EEC on the promotion of positive action for women. Referring expressly to Article 2(4) of the Directive 76/207/EEC,

the Council recommended that the Member States "should adopt a positive action policy designed to eliminate existing inequalities affecting women in working life and to promote a better balance between the sexes in employment, comprising appropriate general and specific measures, within the framework of national policies and practices, while fully respecting the spheres of competence of the two sides of industry". Measures designed to (i) eliminate or counteract the prejudicial effects on women in employment or seeking employment which arise from existing attitudes, behaviour and structures based on the idea of a traditional division of roles in society between men and women; and (ii) encourage the participation of women in various occupations in those sectors of working life where they are at present under-represented, particularly in the sectors of the future, and at higher levels of responsibility in order to achieve better use of all human resources, were recommended.

IV. ECJ judgments

The ECJ had the first opportunity to deal with a positive action and relation between paragraph 1 and paragraph 4 of Article 2 of the Directive 76/207/EEC in the case *Kalanke*[1]. The ECJ solved the situation, where the legislation of one of the countries of Germany determined that in case of selection of new employees or in case of their promotion to a higher post, where women traditionally have a lower representation, a female candidate should be chosen among candidates equally fulfilling the conditions.

The Advocate General Tesauro in his opinion considered both models of equality – formal and substantive. The ECJ arrived at the same result as the Advocate General. To the method at issue of solution of under-representation of women he said that equality of opportunities must not be confused with equality in results, which was the case. Subsequently he declared the national rule incompatible with the EC law.

The ECJ inclined to the formal understanding (to give equal treatment to everybody irrespective of the gender), strictly refused the possibility of taking measures ensuring equality in results and interpreted very restrictively the term of equality of opportunities. This narrow understanding of equality of opportunities is one of the most problematic aspects of the judgement.

In the case *Marshall*:[2] ECJ solved a similar situation. The difference was that female candidates could not have been promoted to a higher post automatically (again in cases involving posts where women are under-represented), but they could have been promoted only if no reason was found in the rival male candidate with equal qualifications, which would „deflect the balance pointer in his favour". Thanks to this difference ECJ was more supportive and with reference to the less advantageous position of women and their factual unequal position due to different social prejudices and stereotypes it permitted to maintain in force the Acts that allow the preferring of women in cases where „objective reasons deflecting the balance pointer in their favour" cannot be found in the male candidates. ECJ thus admitted that a rule can lead to unequal results in all cases equally.

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[1] C-450/93 *Kalanke v Freie und Hansestadt Bremen.*
[2] C-409/95 Marschall v Land Nordrhein-Westfalen.

The ECJ disagreed with the opinion of the Advocate General Jacobs who believed that the provisions of the Act were in contradiction with the Directive. A drawback of this decision was that ECJ did not specify what reasons could be regarded as reasons deflecting the balance pointer in favour of the male candidates. As ECJ significantly changed its interpretation of Article 2 (4) of the Directive 76/207/EEC, it stirred up much confusion among the advocates, but also in the ranks of opponents of positive actions.

The third preliminary question concerning positive actions was submitted to ECJ again from Germany in the case *Badeck*.[3] It confirmed again, that promotion of a women to a more prestigious and better paid post in an area where women are under-represented in comparison with men, did not constitute the breach of the EU regulations on equal treatment of men and women and on the provision of equal opportunities for members of both genders. Thus ECJ inclined to the proposed result, but it was not included to the argument of the Advocate General Saggio, who recognized all measures to be compatible with the EC law and who made statements to both conceptions of equality. Unlike his colleagues he interpreted them as two principles complementing each other. It is noteworthy that the court accepted the „hard quota".

In the Swedish case A*brahamsson*[4] the preliminary question concerned the assessment of a regulation solving the problem of a lack of female professors at universities by the creation of thirty new professor posts. These should have been preferentially filled by women as members of under-represented gender. The problem was that a female candidate should have been engaged as professor even if her qualifications had not achieved the level of qualifications of her rival candidate (although she fundamentally had fulfilled the requirements for the post), but this difference was not large enough to result in „non-fulfilment of the requirement of objectivity in appointment of professors". The European Court of Justice refused this method of selection of female candidates for professors.

Facts of the case *Lommers*[5] differed from the previous cases. The Dutch Ministry of Agriculture passed a regulation reserving subsidized places in the factory nursery for children of female employees and only exceptionally allowed the access to children of male employees. According to the Advocate General and ECJ it is a typical case of equality of opportunities, because it does not provide any jobs to women, but it only reserves the use of certain working conditions to facilitate their career development. ECJ dealt for the first time with adequacy of positive actions and gave instructions in this direction to the national court.

In the case *Bribeche* [6] the subject of inquiry was a French Act laying down that the maximum age limit of 45 years for the access to employment in the public sector does not apply to non-remarried widows.

The Advocate General Maduro in his opinion summarized the previous decisions and proposed the typology of three categories of measures. For the first time it deals with the analysis of the provision of Art. 141 of SES. On the basis of examination of the French Act he concluded

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[3] C-158/97 *Badeck v Hessischer Ministerpräsident and Landesanwalt beim Staatsgerichtshof des Landes Hessen.*
[4] C-407/98 *Abrahamsson*
[5] C-476/99 *Lommers*.
[6] C-407/98 *Abrahamsson*.

that it was incompatible with both the Directive and the provision of Art. 141 of SES. The ECJ agrees with the Advocate General, as regards the result, but he does not make any comments to the analysis and reasons submitted by the latter. The ECJ regards the positive actions as manifestation of the substantive, rather than formal equality.

From the cases referred to above we can see that the ECJ took a very cautious attitude to the possibility to decide on the scope of measures giving an advantage to women as on the compensation of their discrimination in the working area. Although it approved certain advantages given to women, these advantages can never be automatic and must take into account special circumstances concerning the rival male candidates. The ECJ also carefully works with quotas – i.e. with determination of certain number of posts to be filled exclusively by female candidates. The quotas are permitted exceptionally and never in the form of so-called "fixed quotas", i.e. exactly determined number of posts to be filled by women. Instead so-called "flexible quotas" appear – i.e. cases where the number of posts depends e.g. on the number of female postgraduates. Also for these flexible quotas the proper qualification requirements must be fulfilled. A slightly higher indulgence can be observed on the part of the ECJ in case of filling of different training posts or in case of invitation of female candidates to employment interviews. If a member (male or female) of under-represented gender is not selected for a specific post, but candidates are selected at stages which are only "preparatory" in relation to the final stage of selection of a candidate for certain post, the ECJ tends to be more indulgent.