

Making Equality Substantive: The burden of proof and positive action in EU Sex Equality Law

Olivier De Schutter

UCL and College of Europe

olivier.deschutter@uclouvain.be

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Mandatory positive action : the particularity of structural discrimination and the need to adopt positive action schemes

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PROVING DISCRIMINATION

Indirect discrimination I: ‘suspect measure’

Directive 2006/54/EC of the European Parliament and of the Council 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 (recast) (OJ L 204 of 26.7.2006, p. 23), Art. 2(1):

(a) "direct discrimination": where one person is treated less favourably on grounds of sex than another is, has been or would be treated in a comparable situation;

(b) "indirect discrimination": where **an apparently neutral provision, criterion or practice would put persons of one sex at a particular disadvantage compared with persons of the other sex,** unless that provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary

Indirect discrimination II: disparate impact

Council Directive 97/80/EC of 15 December 1997 on the burden of proof in cases of discrimination based on sex

- defines indirect discrimination as a situation where ‘an apparently neutral provision, criterion or practice disadvantages a substantially higher proportion of the members of one sex unless that provision, criterion or practice is appropriate and necessary and can be justified by objective factors unrelated to sex’ (Art. 2(2))
- provides that, ‘when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment’ (Art. 4(1))

Directive 97/80/EC repealed by the Gender Recast Directive (2006/54/EC), however see Preamble ‘(37) For the sake of a better understanding of the different treatment of men and women in matters of employment and occupation, comparable statistics disaggregated by sex should continue to be developed, analysed and made available at the appropriate levels’.

Indirect discrimination II: disparate impact

Group of departure : proportion XX / XY



Criterion, practice,... apparently neutral



Group of arrival : proportion XX' / XY'

Disparate impact requiring that the apparently neutral criterion / practice /...
be justified if $XX / XY \text{ } \textcircled{c} \text{ } XX' / XY'$

However, this raises a number of questions :

- 1° 'XY' tainted by the existence of discrimination (via the preferences expressed)
- 2° which 'disproportionate impact' is suspect? -- any situation in which $XX / XY \neq XX' / XY'$ is potentially a problem, particularly in a context in which a symmetric protection of equality is ensured

Two forms of indirect discrimination

Definition of indirect discrimination	As a suspect measure that is not justified (I)	As a disparate impact that is not justified (II)
Advantages	Victims must not bring statistics forward	Prohibition reaches measures whose discriminatory impact can only be revealed by statistics
Disadvantages	Discrimination that is purely statistical may not be possible to identify and challenge, in the absence of statistical measurement of impacts	Victims must bring statistics forward and show disproportionate impact

THE BURDEN OF PROOF IN THE (RECAST) GENDER EQUALITY DIRECTIVE

Directive 2006/54/EC of the European Parliament and of the Council 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 (recast)

Article 19- Burden of proof

1. Member States shall take such measures as are necessary, in accordance with their national judicial systems, to ensure that, when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment.
2. Paragraph 1 shall not prevent Member States from introducing rules of evidence which are more favourable to plaintiffs.
3. Member States need not apply paragraph 1 to proceedings in which it is for the court or competent body to investigate the facts of the case.

THE BURDEN OF PROOF IN THE (RECAST) GENDER EQUALITY DIRECTIVE

4. Paragraphs 1, 2 and 3 shall also apply to:

(a) the situations covered by Article 141 of the Treaty and, insofar as discrimination based on sex is concerned, by Directives 92/85/EEC and 96/34/EC;

(b) any civil or administrative procedure concerning the public or private sector which provides for means of redress under national law pursuant to the measures referred to in (a) with the exception of out-of-court procedures of a voluntary nature or provided for in national law.

5. This Article shall not apply to criminal procedures, unless otherwise provided by the Member States.

PROVING DISCRIMINATION: TWO OUTSTANDING QUESTIONS

Questions :

- Are statistics demonstrating a disparate impact of certain apparently neutral measures, criteria or policies, sufficient to justify shifting the burden of proof, and should victims be allowed to present such statistics before the competent authority ?
- Why is the shifting of the burden of proof not allowable in criminal law cases?

THE ROLE OF STATISTICS

Are statistics demonstrating a disparate impact of certain apparently neutral measures, criteria or policies, sufficient to justify shifting the burden of proof, and should victims be allowed to present such statistics before the competent authority ?

The Dual Purpose of Prohibiting Indirect Discrimination :

- (1) unmasking instances of wilful discrimination which hide behind the use of apparently neutral measures, or
- (2) adapting the structures to accommodate difference by obliging those adopting measures to justify such measures in the light of their differential impact

THE ROLE OF STATISTICS

Case 96/80, *J.P. Jenkins v Kingsgate (Clothing Productions) Ltd.* [1981] ECR 911 (judgment of 31 March 1981): does a difference in the level of pay for work carried out part-time and the same work carried out full-time amount to discrimination of a kind prohibited by Article 119 EEC (now Art. 141 EC) when the category of part-time workers is exclusively or predominantly comprised of women?

- This situation is not discriminatory ‘in so far as the difference in pay between part-time and full-time work is attributable to factors which are objectively justified and are in no way related to any discrimination based on sex’, for example where, by such pay policy, ‘the employer is endeavouring, *on economic grounds*, to encourage full-time work irrespective of the sex of the worker’

THE ROLE OF STATISTICS

Case 96/80, *J.P. Jenkins v Kingsgate (Clothing Productions) Ltd.*
[1981] ECR 911 (judgment of 31 March 1981):

- However there would be discrimination ‘where, regard being had to the difficulties encountered by women in arranging to work that minimum number of hours per week, the pay policy of the undertaking in question cannot be explained by factors other than discrimination based on sex’: the national courts should decide in each individual case ‘whether, regard being had to the facts of the case, its history *and the employer’s intention*, a pay policy [where the hourly rate of pay differs according to whether the work is part-time or full-time] although represented as a difference based on weekly working hours is or is not in reality discrimination based on the sex of the worker’.

THE ROLE OF STATISTICS

Case 170/84, *Bilka - Kaufhaus GmbH v Karin Weber von Hartz*, [1986] ECR 1607 (judgment of 13 May 1986).

- only the full-time workforce benefits from an occupational pensions scheme, 10% of that segment is female; altogether, the undertaking comprised 72% of men and 28% of women; 90% of the men are employed on a full-time basis (10% on a part-time basis); 61,5% of the women were working full-time (38,5% part-time).
- according to the Court, an employer may justify the adoption of a pay policy excluding part-time workers from its occupational pension scheme, irrespective of their sex, on the ground that it seeks to employ as few part-time workers as possible, ‘where it is found that the means chosen for achieving that objective correspond to a real need on the part of the undertaking, are appropriate with a view to achieving the objective in question and are necessary to that end’

THE ROLE OF STATISTICS

Case 109/88, *Handels- og Kontorfunktionærernes Forbund I Danmark v Dansk Arbejdsgiverforening, acting on behalf of Danfoss* [1989] ECR 3199 (judgment of 17 October 1989) ('Danfoss'):

'...it is for the employer to prove that his practice in the matter of wages is not discriminatory, if a female worker establishes, in relation to a relatively large number of employees, that the average pay for women is less than that for men'

SHIFTING THE BURDEN OF PROOF IN CRIMINAL PROCEDURES

- Why is the shifting of the burden of proof not allowable in criminal law cases? Two arguments :

First argument :

a) Presumption of innocence (Art. 6(2) ECHR) :

- ‘requires, *inter alia*, that when carrying out their duties, the members of a court should not start with the preconceived idea that the accused has committed the offence charged; the burden of proof is on the prosecution, and any doubt should benefit the accused (see the Barbera, Messegué and Jabardo v. Spain judgment of 6 December 1988, Series A no. 146, pp. 31 and 33, § § 67-68 and 77). Thus, the presumption of innocence will be infringed where the burden of proof is shifted from the prosecution to the defence (see the John Murray v. the United Kingdom judgment of 8 February 1996, *Reports of Judgments and Decisions* 1996-I, p. 52, § 54)’ (ECtHR, Telfner v. Austria, 20 March 2001)

SHIFTING THE BURDEN OF PROOF IN CRIMINAL PROCEDURES

- however ‘Presumptions of fact or of law operate in every legal system. Clearly, the Convention does not prohibit such presumptions in principle. It does, however, require the Contracting States to remain within certain limits in this respect as regards criminal law. (...) Article 6 para. 2 does not therefore regard presumptions of fact or of law provided for in the criminal law with indifference. It requires States to confine them within reasonable limits which take into account the importance of what is at stake and maintain the rights of the defence.’ (ECtHR, *Salabiaku v. France*, 7 October 1988)

SHIFTING THE BURDEN OF PROOF IN CRIMINAL PROCEDURES

Second argument :

- b) **Principle of legality (Art. 7 ECHR : Nulla poena, nullum crimen sine lege)** ('No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed') - **may exclude inferences from statistics (pure disparate impact discrimination) in criminal procedures**

‘Article 7 is not confined to prohibiting the retrospective application of the criminal law to an accused’s disadvantage: it also embodies, more generally, the principle that only the law can define a crime and prescribe a penalty (*nullum crimen, nulla poena sine lege*) and the principle that the criminal law must not be extensively construed to an accused’s detriment, for instance by analogy. From these principles it follows that an offence must be clearly defined in the law’ (*S.W. v. the United Kingdom* and *C.R. v. the United Kingdom* (judgments of 22 November 1995, Series A no. 335-B, pp. 41-42, § § 34-36, and Series A no. 335-C, pp. 68-69, § § 32-34, respectively))

**POSITIVE ACTION IN
EU GENDER EQUALITY LAW**

II. Positive Action in EU gender equality law

Defining positive action : conceptual issues and definitions

Positive action in EU gender equality law : legal framework

The limits to the adoption of positive action schemes which imply differential treatment and are a derogation from the principle of equal treatment

Mandatory positive action : the particularity of structural discrimination and the need to adopt positive action schemes

POSITIVE ACTION: CONCEPTS

ILO, Discrimination (Employment and Occupation) Convention 1958 (Convention No. 111)

Article 1

1. For the purpose of this Convention the term "discrimination" includes:
 - (a) Any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation;

Article 5

1. Special measures of protection or assistance provided in other Conventions or Recommendations adopted by the International Labour Conference shall not be deemed to be discrimination.
2. Any Member may, after consultation with representative employers' and workers' organisations, where such exist, determine that other special measures designed to meet the particular requirements of persons who, for reasons such as sex, age, disablement, family responsibilities or social or cultural status, are generally recognised to require special protection or assistance, shall not be deemed to be discrimination.

POSITIVE ACTION: CONCEPTS

Convention on the Elimination of All Forms of Discrimination against Women, GA Res. 34/180 of 18 Dec. 1979

Article 1

For the purposes of the present Convention, the term "discrimination against women" shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

Article 4

1. Adoption by States Parties of **temporary special measures** aimed at accelerating de facto equality between men and women shall not be considered discrimination as defined in the present Convention, but shall in no way entail as a consequence the maintenance of unequal or separate standards; these measures shall be discontinued when the objectives of equality of opportunity and treatment have been achieved.
2. Adoption by States Parties of **special measures**, including those measures contained in the present Convention, aimed at protecting maternity shall not be considered discriminatory.

POSITIVE ACTION: CONCEPTS

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.

POSITIVE ACTION: CONCEPTS

1. Legal technique : differential treatment between categories of persons on grounds otherwise suspect such as sex, race or ethnic origin disability, religion or belief, sexual orientation, or age

2. Objective : aims at “accelerating de facto equality” (Article 4(1) CEDAW) at “diminish[ing] or eliminat[ing] conditions which cause or help to perpetuate” prohibited discrimination (U.N. Human Rights Committee)

Positive action seeks to promote substantive equality (1) by taking into account existing de facto inequalities in order to combat those inequalities, (2) by compensating for past inequalities, or (3) by seeking to ensure proportionate representation of different groups.

POSITIVE ACTION AND SPECIAL MEASURES

Positive action implying preferential treatment	Positive action not implying preferential treatment	Special measures / reasonable accommodation
Exception to the principle of formal equality : requirement of proportionality	Is not an exception to the principle of formal equality	Required as a component of the requirement of non-discrimination
Quotas, guarantee to be interviewed, ...	Outreaching, public statement in favor of diversity, ...	Protecting maternity, facilitating conciliation between family and professional life, meeting religious dietary needs ...

The regime of positive action under EC gender equality law: legal framework

Council Directive 76/207/EEC 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 (OJ 1976 L 39, p. 40), Article 2(4) : the prohibition of discrimination on grounds of sex ‘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 to which the directive applies

The regime of positive action under EC gender equality law: legal framework

Article 141(4) EC (ex-Article 119 EEC, as amended by the Treaty of Amsterdam (2 October 1997, in force on 1 May 1999)) :

‘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 2(8) of Council Directive 76/207/EEC (as amended by Directive 2002/73/EC of 23 September 2002) :

‘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’ (formulation retained in 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 (recast))

OPTIONAL POSITIVE ACTION : THE LIMITS IMPOSED UNDER THE CASE-LAW OF THE ECJ

Case C-450/93, *Kalanke*, 17 October 1995 : equally qualified women are automatically given priority in appointments in sectors where they are under-represented (1990 Bremen Law on Equal Treatment for Men and Women in the Public Service)

- 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

OPTIONAL POSITIVE ACTION : THE LIMITS IMPOSED UNDER THE CASE-LAW OF THE ECJ

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

OPTIONAL POSITIVE ACTION : THE LIMITS IMPOSED UNDER THE CASE-LAW OF THE ECJ

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

- binding targets defined in accordance with the specificities of the sectors / departments concerned and without automatic determination of the outcome, but individual examination of each candidate : not disproportionate
- advancement plan for temporary posts in the academia must 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 : not disproportionate as using an actual fact as a quantitative criterion for giving preference to women
- 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 from training
- women who are qualified are guaranteed to be called to interview, in sectors in which they are under-represented: promotes equality of opportunity rather than of result

OPTIONAL POSITIVE ACTION : THE LIMITS IMPOSED UNDER THE CASE-LAW OF THE ECJ

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

Case C-79/99, *Schnorbus*, 7 December 2000: admission of applicants to practical legal training : applicants who have completed service which is obligatory only for men immediately admitted, others may be postponed for up to 12 months : not disproportionate as simply counterbalances to some extent the effects of the delay

OPTIONAL POSITIVE ACTION : THE LIMITS IMPOSED UNDER THE CASE-LAW OF THE ECJ

Case C-476/99, *Lommers*, 19 March 2002: limited number of subsidised nursery places reserved for female officials alone whilst male officials may have access to them only in cases of emergency, as determined by the employer : acceptable in so far as the said 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

Case E-1/02, *EFTA Surveillance Authority v. Kingdom of Norway* (EFTA Court), 24 January 2003:

Permanent and temporary academic positions earmarked for women either by direction of the Norwegian Government or by the University of Oslo : disproportionate as it gives absolute and unconditional priority to female candidates.

OPTIONAL POSITIVE ACTION : THE LIMITS IMPOSED UNDER THE CASE-LAW OF THE ECJ

Briheche, 30 September 2004, Case C-319/03

Legislation reserving to ‘widows who have not remarried’ the benefit of the exemption from the age limit for obtaining access to public-sector employment : disproportionate

‘...Article 2(4) of the Directive ... authorises national measures relating to access to employment which give a specific advantage to women with a view to improving their ability to compete on the labour market and to pursue a career on an equal footing with men. The aim of that provision is to achieve substantive, rather than formal, equality by reducing *de facto* inequalities which may arise in society and, thus, in accordance with Article 141(4) EC, to prevent or compensate for disadvantages in the professional career of the persons concerned’ (para. 25)

OPTIONAL POSITIVE ACTION : THE LIMITS IMPOSED UNDER THE CASE-LAW OF THE ECJ

But see opinion of AG Poiares Maduro :

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. ...

OPTIONAL POSITIVE ACTION : THE LIMITS IMPOSED UNDER THE CASE-LAW OF THE ECJ

...[Therefore, what Article 141(4) would add is the recognition of the idea that] the adoption of measures of a compensatory type is necessary in view of the fact that the non-discriminatory application of the current societal rules is structurally biased in favour of the members of the over-represented groups. What is believed is that measures often associated with substantive equality which compensate for the under-representation of certain groups (for example quotas, automatic preferences) are the only ones that can effectively bring about long-term equality of opportunities. Measures favouring the members of certain groups are therefore not conceived as a means to achieve equality among groups or equality of results but, instead, as an instrument to bring about effective equality of opportunities. The purpose of compensatory measures of this type becomes that of re-establishing equality of opportunities by removing the effects of discrimination and promoting long-term maximisation of equality of opportunities. Compensation refers in this case to reinstating a balance between the opportunities given by society to the members of the different groups

OPTIONAL POSITIVE ACTION : THE LIMITS IMPOSED UNDER THE CASE-LAW OF THE ECJ

Para. 31 of the *Briheche* judgment :

Irrespective of whether positive action which is not allowed under Article 2(4) of the Directive could perhaps be allowed under Article 141(4) EC, it is sufficient to state that the latter provision cannot permit the Member States to adopt conditions for obtaining access to public-sector employment of the kind in question in the main proceedings which prove in any event to be disproportionate to the aim pursued.

OPTIONAL POSITIVE ACTION : THE LIMITS IMPOSED UNDER THE CASE-LAW OF THE ECJ

Revising classical concepts of meritocracy

EFTA Court, 24 January 2003, para. 57

‘Under the present state of the law, the criteria for assessing the qualifications of candidates are essential. In such an assessment, there appears to be scope for considering those factors that, on empirical experience, tend to place female candidates in a disadvantaged position in comparison with male candidates. Directing awareness to such factors could reduce actual instances of gender inequality’

A FRAMEWORK FOR ANALYSIS

Positive action as an exception to the right to (formal) equality of treatment requiring a justification under three criteria :

1. The legitimacy of the aims pursued

- The backward-looking rationale : compensating for past discrimination
- The equal opportunities rationale : removing existing inequalities ('by removing existing inequalities which affect women's opportunities', 'with a view to ensuring full equality in practice')
- The forward-looking rationale : ensuring diversity (proportionate representation)

2. The adequacy of the means chosen

3. The proportionality of the means chosen

- Automaticity v. Flexibility
- Partial set-aside v. Complete set-aside
- Permanent v. Temporary

A FRAMEWORK FOR ANALYSIS

Obligatory character of positive action measures under international law
(Art. 18 ICCPR, Art 4(1) CEDAW):

Case E-1/02, *EFTA Surveillance Authority v. Kingdom of Norway*
(judgment of 24 January 2003), para. 58 :

The Defendant cannot justify the measures in question by reference to its obligations under international law. CEDAW, which has been invoked by the Defendant, was in force for Community Member States at the time when the Court of Justice of the European Communities rendered the relevant judgments concerning the Directive. Moreover, the provisions of international conventions dealing with affirmative action measures in various circumstances are clearly permissive rather than mandatory. Therefore they cannot be relied on for derogations from obligations under EEA law.