

# Positive Action in EC Law

1. Legal provisions concerning positive action
  - Article 2(4), Directive 76/207/EC
  - Article 157(4), Treaty on the Functioning of the EU (ex Article 141(4) EC)
    - Introduced by Amsterdam Treaty,
      - Signed by Heads of State on 2 October 1997
      - Entered into force 1 May 1999
  - Directive 2002/73/EC, amending directive 76/207/EEC
    - Recast Directive 2006/54/EC
2. Case law
  - Pre-Amsterdam Treaty
  - Post-Amsterdam Treaty
3. Conclusions

# Directive 76/207/EC and Article 157(4) TFEU

- Article 2(4), Directive 76/207/EC
  - 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).
- Article 157(4) TFEU
  - 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.

# Directive 2002/73/EC, amending Directive 76/207/EEC

- Article 1(2)(adding a paragraph 8 to Article 2 of Directive 76/207)
  - Member States may maintain or adopt measures within the meaning of Article 141(4) of the Treaty...
- Article 2(3)
  - Member States shall communicate to the Commission, every four years, the texts of laws, regulations and administrative provisions of any measures adopted pursuant to article 141(4) of the Treaty as well as reports on these measures and their implementation.

# Recast Directive 2006/54/EC

- Implementation deadline August 15, 2008
- No changes in the substance of the provisions concerning positive action.
  - Article 2(8) is now Article 3.
  - Article 2(3) is now Article 31(3).

# Pre-Amsterdam Treaty case law

- Commission v France, Case 312/86 [1988] ECR 6315
- Kalanke, Case C-450/93 [1995] ECR I-3051
- Marschall, Case C-409/95 [1997] ECR I-6363

# Post-Amsterdam Treaty Case Law

1. Badeck, Case C-158/97 [2000] ECR I-1875
2. Abrahamsson, Case C-407/98 [2000] ECR I-5539
3. Lommers, Case C-476/99 [2002] ECR I-2891
4. Briheche, Case C-319/03 [2004] ECR I-8807  
(Second Chamber)

# Commission v. France, Case 312/86

## Facts

- French Labour Code allowed employers to maintain terms of employment contracts or collective agreements granting special rights to women:
  - Extended maternity leave
  - Reduction in working hours for women aged 59
  - Early retirement
  - Time off for sick children,
  - Extra days' holiday each year per child
  - Day off on the first day of the school term
  - Hours off on Mother's Day
  - Daily breaks for women working on computer equipment or as typists or switchboard operators
  - Bonuses from the birth of the second child for calculating pensions
  - Payment of allowances to mothers who have to pay costs of nursery or child minders

# Commission v France, Case 312/86

## Reasoning

- As regards the exception provided for by Article 2(4) [of Directive 76/207] it has the precise, limited object of authorising measures which, although discriminatory in appearance, actually aim to eliminate or reduce *de facto* inequalities which may exist in actual working life...there [was nothing] to indicate that the general retention of [special] rights for women in collective agreements may correspond to the situation envisaged by this provision. (para 15)

# Commission v. France, Case 312/86

## AG Sir Gordon Slynn

- “It is not permissible to argue, as France appears to argue, that because women in general have been discriminated against then any provisions in favour of women in the employment field are *per se* valid as part of an evening-up process.”

# Kalanke, Case C-450/93

## Ruling

- 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. (para 22)

# Marschall, Case C-409/95

## Reasoning

- Unlike the provisions in question in *Kalanke*, the provision in question in this case contains a [savings 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. (para 24)

# Marschall, Case C-409/95

## Ruling

- ...a national rule which...contains a saving clause does not exceed [the limits of Article 2(4)] if, in each individual case, it provides for male candidates who are equally as qualified as the female candidates a guarantee that the candidatures will be the subject of an objective assessment which will take account of all criteria specific to the individual candidates and will override the priority accorded to female candidates where one or more of those criteria tilts the balance in favour of the male candidate. In this respect, however, it should be remembered that those criteria must not be such as to discriminate against female candidates.

# Badeck, Case C-158/97

## Facts

- Hessen Act on Women's Equality
  1. In sectors of the public service where women were underrepresented, female candidates were given priority over men with equal qualifications where necessary to meet binding targets in the women's advancement plan, if no reasons of greater legal weight were opposed.
  2. Binding targets for temporary posts in the academic service and for academic assistants.
  3. In trained occupations in the public service, in which women are underrepresented, and for which the state does not have a monopoly of training, at least half the training places are to be allocated to women.
  4. Guarantee that where male and female candidates have equal qualifications, women who are qualified are called to interview, in sectors in which they are underrepresented.
  5. Requirement that at least half the members of representative bodies and administrative and supervisory bodies must be women

# Badeck, Case C-158/97

## Ruling on measure #1 (priority in hiring)

- The measure ensures that a candidate's sex is never decisive for the purposes of a selection procedure where that is not necessary in the particular case. That is so in particular where the initial evidence that a situation is unfavourable to women, based on the fact that they are under-represented, is disproved.
- It is for the national court to assess, in the light of the above, whether the rule at issue in the main proceedings ensures that candidatures are the subject of an objective assessment which takes account of the specific personal situations of all candidates.

# Badeck, Case C-158/97

## Ruling on measure # 2 (binding targets)

- Compatible with Community law because it does not fix an absolute quota on the number of women to be appointed.
- The number was instead fixed by reference to the number of persons who had received appropriate training, and was therefore dependent on a factual situation.

# Badeck, Case C-158/97

## Ruling on measure #3 (training places)

- Not contrary to Community law.
- Does not entail total inflexibility.
  - If there are not enough applications from women, it is possible for more than half to the places to be taken by men.
- Not allocating places of employment, but places in training with a view to obtaining qualifications with the prospect of subsequent access to trained occupations.
- The quota applies only to training places for which the State does not have a monopoly.
  - Therefore, places are also available in the private sector, so that no male candidate is definitively excluded from training.

# Badeck, Case C-158/97

## Ruling on measure # 4 (call to interview)

- Does not imply an attempt to achieve a final result, but merely affords women who are qualified additional opportunities to facilitate their entry into working life and their career.
- The provision also provides that a preliminary examination of the candidatures must be made and that only qualified candidates who satisfy all the conditions required or laid down are to be called to interview.
- Consequently, this is a provision which...is intended to promote equal opportunity for men and women within the meaning of Article 2(4).

*Badeck, Case C-158/97*

Ruling on measure #5 (representative, administrative and supervisory bodies)

- It is a non-mandatory provision which recognizes that many bodies are established by legislative provisions and that full implementation of the requirement of equal membership of women on those bodies would in any event require an amendment to the relevant law.
- Does not apply to elected offices.
- Since not mandatory, it permits, to some extent, other criteria to be taken into account.

# Abrahamsson, Case C-407/98

## Facts

- Swedish law required the University to give automatic priority to a sufficiently qualified member of the underrepresented sex, unless this would give rise to a breach of the requirement of objectivity in making appointments.
- 8 candidates applied for a vacancy at University of Göteborg, including Ms. Abrahamsson, Ms. Destouni, Ms. Fogelqvist, and Mr. Anderson.
- Section board voted twice:
  1. Mr. Anderson ranked first; Ms. Destouni second; based solely on qualifications.
  2. Ms. Destouni came first, Mr. Anderson second, Ms. Fogelqvist third, based on qualifications and positive action rules.
- Ms. Destouni withdrew her application.
- The Rector appointed Ms. Fogelqvist based on the positive action rules.

# Abrahamsson, Case C-407/98

## Ruling

1. The Swedish positive action measure is precluded by Article 141(4) and the Directive.
2. The fact that it applies only to procedures for filling a predetermined number of posts or to posts created as part of a specific programme of a particular higher educational institution is immaterial.
3. National case-law under which a candidate belonging to the under-represented sex may be granted preference over a competitor of the opposite sex, provided that the candidates possess equivalent or substantially equivalent merits, where the candidatures are subjected to an objective assessment which takes account of the specific personal situations of all the candidates.
4. The level of the post to be filled is likewise immaterial to the requirements of Community law with regards positive action measures.

# Lommers, Case C-476/99

## Reasoning

- The argument that women are more likely to interrupt their career in order to take care of their young children no longer has the same relevance.
- Mr. Lommers's wife's difficulty in pursuing her career because of the necessity to take care of the couple's young children is of no relevance for the assessment of the validity of the measure at issue in relation to Article 2(1) and (4) because in the case of working conditions determined by one particular employer, the principle of equal treatment can only apply as between the employees working for that employer.

# Lommers, Case C-476/99

## Ruling

- Article 2(1) and (4) do not preclude a scheme set up by a Minister to tackle extensive under-representation of women within his Ministry under which, in a context characterised by a proven insufficiency of proper, affordable care facilities, a limited number of subsidised nursery places made available by the Ministry to its staff is reserved for female officials alone while male officials may have access to them only in cases of emergency, to be determined by the Ministry.
- That is so, however, only in so far, in particular, 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.

# Briheche, Case C-391/03

## Facts

- Law No. 2001-397 abolished the age limit for competitive examinations organised by the French public administration, but only for certain categories of women :
  - Mothers with 3 or more children
  - Widows who have not remarried
  - Divorced women who have not remarried
  - Legally separated women
  - Unmarried women with at least one dependent child.
- Mr. Briheche, a 48-year-old widower, not remarried, one dependent child, applied to sit various competitive examinations organised by the French public administration.
- Application denied on the grounds that he exceeded the age limit of 45 years for entry to the examinations.

# Briheche, Case C-391/03

## Ruling

- Such a provision automatically and unconditionally gives priority to the candidatures of certain categories of women, including widows who have not remarried who are obliged to work, reserving to them the benefit of the exemption from the age limit for obtaining access to public-sector employment and excluding widowers who have not remarried who are in the same situation.
- Cannot be allowed under Article 2(4).
- Nor can it be allowed under Article 141(4) EC because the provision is disproportionate to the aim pursued.

# Conclusions

1. Positive action in favour of women aimed at achieving equal “opportunity” cannot pursue equal “results”.
2. The ECJ has categorized hiring and promotion as results, thus precluding the possibility of giving preference to the under-represented sex in hiring or promotion cases, where the preference is given automatically and absolutely.
3. Vocational training and calls to job interviews are considered to be opportunities, and therefore preferential treatment accorded to the under-represented sex in these situations are considered with less severity.

# Conditions for Lawful Positive Action

1. There is existing inequality, i.e. one sex is under-represented.
2. The positive action is directed at rectifying that particular existing inequality and target the conditions giving rise to the inequality, e.g. *Commission v France, Briheche*.
3. No automatic absolute preference may be given to one sex in regards to hiring or promotion. *Abrahamsson, Marschall*.
4. Preference may be given to the under-represented sex in regards to hiring or promotion if there is a “saving” clause, i.e. possibility of bringing individual arguments forward that may tilt the decision in favour of a person of the over-represented sex.
5. Automatic preferences may be given in the context of allocating training places and calls to interviews, where the over-represented sex are not completely excluded from the possibility of getting training or being called to interview when they have equal qualifications.