

# Positive Action in EC Law

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## SUMMARY

- I- The EU definition of positive action
- II- Conditions of compatibility with EU law

## The EU definition of positive action (1)

### *A simple option open to Member States*

- Article 157[4] TFEU (former Art. 141[4] TEC), “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. ”
- Dir. 2006/54/EC of the European Parliament and of the Council (“Recast” Directive): “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.” This wording somewhat modifies the status of previous law (Dir. 76/207/EEC), but positive action is still understood to be a *derogation*.

## The EC definition of positive action (2)

### *A derogation to the principle of equal treatment*

Positive action is understood by the Court as an “exception [...] specifically and exclusively designed to allow measures which, although discriminatory in appearance, are in fact intended to eliminate or reduce actual instances of inequality which may exist in the reality of social life” (*Commission v. France*, C-312/86 of 25 October 1988, pt 15).

“It thus permits 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.” (*Kalanke*, C-450/93 of 17 October 1995, pt 19).

### **The EC definition of positive action (3)**

This definition has two consequences :

- The criterion to test is proportionality: “according to settled case-law, in determining the scope of any derogation from an individual right such as the equal treatment of men and women, due regard must be had to the principle of proportionality, which requires that derogations must remain within the limits of what is appropriate and necessary in order to achieve the aim in view and that the principle of equal treatment be reconciled as far as possible with the requirements of the aim thus pursued” (*Lommers*, C-476/99 of 19 March 2002, pt 39).
- The test is only relevant if the principle of equal treatment itself applies, i.e. if men and women find themselves in a comparable situation (*Abdoulaye* C-218/98 of 16 September 1999).

### **Conditions of compatibility with EU law**

Three sets of conditions must be met. They relate to:

- the initial situation which needs correcting
- the goal being pursued
- the match between the means and the goal

### Conditions related to the initial situation

- Observed inequalities: the person taking the action must prove that women are under-represented in a particular sector or grade
- An imbalance: “the prejudicial effects on women in employment which arise from social attitudes, behaviour and structures” (*Kalanke*, C-450/93 of 17 October 1995, pt 20), or “prejudices and stereotypes concerning the role and capacities of women in working life” (*Marschall*, C-409/95 of 11 November 1997, pt 29).

### Conditions related to the goal being pursued

- The measure must be “*in fact* intended to eliminate or reduce actual instances of inequality which may exist in the reality of social life” (*Marschall*, C-409/95 of 11 November 1997, pt 26)
- “The measure under [Article 141 (4) TEC] must contribute to helping women to conduct their working life on an equal footing with men” (*Commission v. Italy*, C-46/07 of 13 November 2008, pt 57)

### Conditions related to the match between means and goal

- 1- Priority may only be granted where qualifications are the same or clearly similar
- 2- Priority must not be excessive

The judge must ensure that measures are “proportionate in balancing the benefits of the positive action in promoting equality for women against the costs imposed on other individuals. These requirements appear necessary to prevent equality between individuals from being overridden by concerns of substantive equality between groups” (Opinion Maduro on *Briheche*, C-319/03 of 30 September 2004, pt 41)

Example : *Lommers*, C-476/99 of 19 March 2002.

### Conditions related to the match between means and goal

- 3- Priority must be flexible

*Badeck*, C-158/97 of 28 March 2000, pt 23 :

“A measure which is intended to give priority in promotion to women [...] must be regarded as compatible with Community law if

- *it does not automatically and unconditionally give priority to women when women and men are equally qualified, and*
- *the candidatures are the subject of an objective assessment which takes account of the specific personal situations of all candidates.”*

Examples of absolute, unconditional priority: *Griesmar* (C-366-99 of 29 November 2001) or *Briheche* (C-319/03 of 30 September 2004)

### Conditions related to the match between means and goal

#### 4- Priority must be exercised with transparency

The application of recruitment criteria with the “clear aim [...] 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 persons belonging to the under-represented sex [...] must be transparent and amenable to review in order to obviate any arbitrary assessment of the qualifications of candidates” (*Abrahamson*, C-407/98 of 6 July 2000, pts 48 and 49)

### Three remarks by way of conclusion...

- on the blind spots of the ECJ review of measures of positive action
- on the gradual replacement of ECJ case-law by the Strasbourg judge
- on the extension of the review to other types of positive action