

Positive Action and Gender Quotas

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Outline

1. Definition and principles of positive action
2. Positive action in EU law
3. Positive action in international law
4. Gender quotas before the CJEU
5. Experience with positive action
6. Objectives, benefits and risks

1. Definition and principles of positive action

1.1. What is positive action?

A broad definition:

Measures undertaken with the purpose of achieving full and effective equality in practice for members of groups that are socially or economically disadvantaged, or otherwise face the consequences of past or present discrimination or disadvantage

(Archibong, International perspectives on positive action measures, 2009, p. 6)

1. Definition and principles of positive action

1.1. What is positive action?

- Difference between **soft** and **hard** measures
- Distinction between
 - Decision-making quotas
 - Reserved quotas
 - Target quotas

1. Definition and principles of positive action

1.2. Why positive action?

- Formal and substantial equality
 - “Irrespective of the person concerned” or blind to relevant differences?
- Equal opportunities and equal outcomes
 - Sustained inequality of outcomes as a result of the lack of equal opportunities
- Equality in law and equality in real life
 - Promise of equality and structural disadvantages

1. Definition and principles of positive action

1.3. Change of strategy in equality law

- From the vertical to the horizontal approach
 - Equal treatment for men and women
 - Combating discrimination on the grounds of ethnic origin, religion/belief, disability, age, sexual orientation
- From formal to substantial equality
 - Individual prohibitions on discrimination
 - Raising awareness of prejudices / making the benefits of diversity visible
 - Positive action designed to combat barriers and underrepresentation

2. Positive action in EU law

2.1. Article 2(4) of Directive 76/207/EEC

Article 2(4) of Directive 76/207/EEC:

*(4) 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).*

2. Positive action in EU law

2.2. Article 157(4) TFEU (ex-Article 141(4) TEC)

Article 157(4) TFEU (ex-Article 141(4) TEC):

*(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.*

2. Positive action in EU law

2.3. The new gender directives in working life

- Article 2(8) of Directive 76/207/EEC as amended by Directive 2002/73/EC
(8) 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.
- Article 3 RL 2006/54/EC: Positive action
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.

2. Positive action in EU law

2.4. The anti-discrimination directives

- Article 5 of Directive 2000/43/EC: Positive action
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 racial or ethnic origin.
- Article 6 of Directive 2004/113/EC: Positive action
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 sex.

2. Positive action in EU law

2.5. The Framework Directive: Art. 7 Directive 2000/78/EC

Positive action and specific measures

(1) 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.

*(2) With regard to disabled persons, the principle of equal treatment shall be without prejudice to the right of Member States to maintain or adopt provisions on the protection of health and safety at work or to measures aimed at creating or maintaining provisions or **facilities** for safeguarding or promoting their integration into the working environment.*

3. Positive action in international law

3.1. The Anti-Racism Convention (ICERD)

Article 1(4): Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved.

Article 2(2): States Parties shall, when the circumstances so warrant, take, in the social, economic, cultural and other fields, special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms. These measures shall in no case entail as a consequence the maintenance of unequal or separate rights for different racial groups after the objectives for which they were taken have been achieved.

3. Positive action in international law

3.2. Women's Rights Convention (CEDAW)

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 contained in the present Convention, aimed at protecting maternity shall not be considered discriminatory.

3. Positive action in international law

3.3. Convention on the Rights of Persons with Disabilities (CRPD)

Article 27(1) sentence 2

States Parties shall safeguard and promote the realization of the right to work, [...], by taking appropriate steps, including through legislation, to, inter alia:

- (h) Promote the employment of persons with disabilities in the private sector through appropriate policies and measures, which may include affirmative action programmes, incentives and other measures;
- (i) Ensure that reasonable accommodation is provided to persons with disabilities in the workplace;

4. Gender quotas before the CJEU

4.1. The *Kalanke* and *Marschall* cases

- Kalanke (Case 450/93) of 17 October 1995
 - absolute decision-making quota dependent on abilities
 - CJEU: Incompatible with Directive 76/207/EEC
- Marschall (Case 409/95)
 - Decision-making quota dependent on abilities, with escape clause
 - CJEU: Compatible with Directive 76/207/EEC

4. Gender quotas before the CJEU

4.2. From *Badeck* to *Briheche*

- **Badeck (Case 158/97)**
 - Binding but relative target quotas
 - Reserved quota for positions requiring qualifications
- **Abrahamsson (Case 407/98)**
 - Decision-making quota dependent on capabilities, excluding escape clause
- **Lommers (Case 476/99)**
 - Reserved quota as regards working conditions
- **Briheche (Case 319/03)**
 - Exemption from statutory age limit, without escape clause

4. Gender quotas before the CJEU

4.3. Summary

- Positive action is admissible if
 - the **aim** is to compensate for current or future disadvantages and if due regard is given to the principle of **proportionality**:
 - The measure must be **appropriate** to achieve the aim,
 - **No less severe means** must be available,
 - The measure must be **appropriate**:
 - Even if women are equally qualified, **no absolute priority** but objective assessment of specific personal situation
 - Distinction between access to employment, access to training and working conditions

5. Experience with positive action

5.1. In other EU Member States

- **Example of Sweden:** Legal obligation to adopt “active measures”; extensive regulation with detailed action plans; monitored by ombudsperson
- **Example of the United Kingdom:** Trend towards legal obligation: “positive duties” (involving collection of data and preparation of equality schemes); increasingly integrated into diversity policies
- **Example of Northern Ireland:** Overcoming religious segregation is a particular challenge; review and, if necessary, conclusion of binding agreements between employers and Equality Commission

5. Experience with positive action

5.2. Lessons learned

- While the **permission** to take positive action creates legal certainty, it does not lead to any sustainable activities.
- Hence, it is necessary to establish horizontal statutory **obligations to promote equality**, which will provide a **binding framework** for public authorities, private enterprises and organisations (only).
- Decisions on the **instruments** to be used to achieve the agreed equality aims should be taken “locally”.

6. Objectives, benefits and risks

6.1. Objectives and benefits of positive action

- Commitment to equal treatment
- Human resources management
- Removal of discriminatory structures
- Economic benefits
 - Image of the organisation
 - Opening up new markets
 - Customer satisfaction

6. Objectives, benefits and risks

6.2. Risks associated with positive action

- **Dilemma of the difference?** Thinking in terms of “groups” is supported and not overcome; people are reduced to their membership of a group / to specific characteristics
- **Stigmatisation?** The promoted group and persons belonging to this group are disadvantaged all the more because attention is focused on them (“quota woman”)
- **Who will benefit?** Experience has shown that sometimes those members of a group are promoted who least need it because multiple discrimination is not taken into account.

6. Objectives, benefits and risks

6.3. Challenges posed by implementation

- Beginning and end of a cycle: **stock-taking** and **evaluation**
- **Responsibility** of the **management level** concerned for achieving the aims
- **Offer of consulting service** with information about “good examples”
- Involvement of the **social partners**: conclusion of works council agreements
- In the event of conflicts: Federal Anti-Discrimination Agency as a **conciliator** and mediator