

Positive action and gender quota

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Theoretical conceptions

Gender equality concepts

- Formal v. substantive (*de facto*) equality
- Equality of opportunities
- Equality of results

Three-dimensional approach to gender equality

- 1) obligation to ensure that there is **no direct or indirect discrimination against women in their laws and that women are protected against discrimination** — committed by public authorities, the judiciary, organizations, enterprises or private individuals — in the public as well as the private spheres by competent tribunals as well as sanctions and other remedies (PROHIBITION OF DISCRIMINATION)
- 2) obligation **to improve the *de facto* position of women** through concrete and effective policies and programs (POSITIVE ACTION)
- 3) obligation **to address prevailing gender relations and the persistence of gender-based stereotypes** that affect women not only through individual acts by individuals but also in law, and legal and societal structures and institutions (ELIMINATION OF STRUCTURAL DISCRIMINATION).

International level

- Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), 1979
- Art. 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”.

Taking gender differences into account

In the view of the CEDAW Committee :

- a purely formal legal or programmatic approach is not sufficient to achieve women's de facto equality with men
- women shall be given an equal start and be empowered by an enabling environment to achieve equality of results
- **it is not enough to guarantee women treatment that is identical to that of men**
- **biological as well as socially and culturally constructed differences between women and men must be taken into account**
- under certain circumstances, non-identical treatment of women and men will be required in order to address such differences
- pursuit of the goal of substantive equality also calls for an effective strategy aimed at overcoming underrepresentation of women and a redistribution of resources and power between men and women.

General Recommendation (CEDAW) No. 25 on temporary special measures (TSM)

- **special** – linked to the special goal of TSM: **to achieve de facto equality** (equal participation of men and women)
- **not an exception to equal treatment**, but a part of the 3-dimensional strategy
- **temporary** (long term, duration in functional relation to a particular problem of underrepresentation) in contrast to permanent special measures aimed at protection of pregnancy or maternity
- **compensatory** (but no proof of past discrimination required)
- applicable to all areas (education, employment, economic, social, cultural and political life)
Note differences at the national constitutions/ EU level
- **mandatory** – the state parties are obliged to adopt and implement TSM **if such measures can be shown to be necessary and appropriate in order to accelerate the achievement of the overall, or a specific goal of, women's de facto or substantive equality.**

Terminology

- Temporary special measures
- Positive actions
- **Positive measures**
- Affirmative actions
- Reverse discrimination
- Positive discrimination
- ...
- Measure/action – legislative, executive, administrative and other regulatory instruments, policies and practices, such as outreach or support programs; allocation and/or re-allocation of resources; preferential treatment; targeted recruitment, hiring and promotion; numerical goals connected with time frames; and quota systems.

Justifications

- compensatory (remedial) justice
- distributory justice
- social inclusion
- transformative equality
- democratic participation (electoral gender parity and quota)

Types of positive actions

- (1) ‚purposely inclusionary policies‘ / equal treatment
- (2) outreach measures / equal opportunities
- (3) preferential treatment / substantive equality**

Types of positive actions (1)

- ,purposedly inclusionary policies' / equal treatment
- actions favoring the attainment of a certain balance between family and work responsibilities and a more efficient distribution of these responsibilities between the two sexes.
- apparently neutral, but benefit women more than men (targeted at disadvantage, otherwise could be construed as indirect discrimination against men)
- priority is given to **measures concerning the organization of working time, the development of childcare infrastructure, and the reintegration of workers in the labor market after a career-break**
- i.e. policies facilitating reconciliation of working and family life
- may be less effective if reinforce the existng division of social roles, and imbalance distribution of paid and unpaid work

Types of positive action (2)

- outreach measures / equal opportunities
- measures intended to remedy the disadvantageous situations which are characteristic of women's presence in the labor market.
- The objective is to eliminate the causes underlying the lesser employment or career opportunities still affecting women's work by intervening, in articular, at **the level of professional orientation and vocational training.**

Types of positive actions (3)

- preferential treatment / substantive equality
- **Preferential treatment is prescribed in favor of certain categories of persons. This may take the form of quota systems or targets.**
- Quotas may be more or less rigid.
- Rigid quotas are deemed to be those determining a certain threshold to be reached without taking into account the qualifications and merits of persons concerned, or those fixing minimum requirements to be fulfilled without any possibility of having regard to the particular circumstances of a case.
- Less rigid or flexible quotas are, on the contrary, those establishing preferential treatment in favor of a certain category provided that qualifications are of equal value in relation to the job to be done and that exceptional circumstances may be taken into account.

Other types of positive actions

- Eradicating prohibited discrimination (monitoring)
- Re-defining merits
- C. McCrudden, „Rethinking Positive Action” (1986), 15 Industrial Law Journal 219.

Quotas

Gender quotas (or gender parity – 50%)

- may be implemented on electoral party lists, corporate boards, in government bodies, civil service, sectors of labour or training positions
- imply that underrepresented gender (women) must occupy a particular percentage of places

„Quotas for women entail that women must constitute a certain number or percentage of the members of a body, whether it is a candidate list, a parliamentary assembly, a committee, or a government. The quota system places the burden of recruitment not on the individual woman, but on those who control the recruitment process“ (www.quotaproject.org)

- Hard quotas
explicit preference for persons belonging to the underrepresented category
- Soft quotas
no explicit preferences for persons belonging to the underrepresented category (i.e. no obligation to hire a woman with equivalent qualifications)
- Goals and timetables
setting a target and timeframe for achieving a balanced gender representation
- Rigid quotas
subject to sanctions for non-implementation

Positive action – the proper meaning

- in isolation, appears to form unequal treatment and breach of the formal prohibition of direct discrimination
- within a framework of strategy, policy or program, forms an exception to the requirement of equal treatment (formal equality)
- justified by the aim of achieving substantive equality and remedy structural discrimination (collective remedy)
- as an exception shall be understood narrowly – in accordance to the principle of proportionality

Positive action in the EU legal framework

Positive action in the EU

- present in the EC/EU from 1970s onwards

First Program of Action by the Commission of 14/12/1981 for 1982-1985;
Council Recommendation 84/635/EEC of 13 December 1984 on the promotion of positive action for women (OJ No L 331, 19.12.1984).

- „the concept of positive action embraces all measures which aim to counter the effects of part discrimination, to eliminate existing discrimination and to promote equality of opportunity between women and men, in particularly in relation to types of levels where members of one sex are significantly under-represented.”

Communication from the Commission to the European Parliament and the Council on the interpretation of the judgments of the Court of Justice on 17 October 1995 in Case C-450/93, Kalanke v Freie Hansestadt Bremen. COM (96) 88 final, 27 March 1996

Enhancing women's participation in decision-making

- 1995 Beijing World Conference on Women (special measures to ensure women's equal access and full participation in power-structures and decision-making)
- EC 1988 - goals and timetables – indicative targets (not quotas)
- EC/EP 1995 – goals and quotas
- EP Resolution of 15 November 1996 to prefer candidates of the under-represented gender in hiring to the civil service (AA plans, goals, quotas).

EU Strategy for equality between men and women 2010-2015 (2010)

- Equal economic independence
- Equal pay for equal work and work of equal value
- Equality in decision-making
- Dignity, integrity and an end to gender-based violence
- Gender equality in external actions
- Horizontal issues

EU Strategy: Equality in decision-making

- the Commission will:
- Consider targeted initiatives to improve the gender balance in decision making
- Monitor the 25% target for women in top level decision-making positions in research
- Monitor progress towards the aim of 40% of members of one sex in committees and expert groups established by the Commission
- Support efforts to promote greater participation by women in European Parliament elections including as candidates.

Equal Treatment Directive

- 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 (76/207/EEC)
- Article 1
- The purpose of this Directive is to put into effect in the Member States the principle of equal treatment for men and women as regards access to employment, including promotion, and to vocational training and as regards working conditions and, on the conditions referred to in paragraph 2, social security. This principle is hereinafter referred to as "the principle of equal treatment."
- Article 2(1)
- (...) the principle of equal treatment shall mean that there shall be no discrimination whatsoever on grounds of sex either directly or indirectly by reference in particular to marital or family status.
- Article 2 (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.**

Positive action in EU Treaties

- Treaty of Amsterdam (1997)
- Article 141 (4) of the EC Treaty (equal pay)
- „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.”
- Currently, Article 157 (4) TFUE
- Article of the Fundamental Rights Charter of the EU
- „The principle of equality shall not prevent the maintenance or adoption of measures providing for specific advantages in favor of the underrepresented sex”.

Anti-discrimination directives

- **Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin**
- Article 5 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.
- **Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation**
- Article 7 Positive action
- 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.

Goods and Services Directive

- **Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services**
- Article 6 Positive action
- 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.

Equal Treatment Directive (Recast)

- **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)**
- Preamble
- (21) The prohibition of discrimination should be without prejudice to the maintenance or adoption of **measures intended to prevent or compensate for disadvantages suffered by a group of persons of one sex. Such measures permit organisations of persons of one sex where their main object is the promotion of the special needs of those persons and the promotion of equality between men and women.**
- (22) In accordance with Article 141(4) of the Treaty, with a view to ensuring full equality in practice between men and women in working life, the principle of equal treatment does not prevent Member States 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.** Given the current situation and bearing in mind Declaration No 28 to the Amsterdam Treaty, Member States should, in the first instance, aim at improving the situation of women in working life.
- Article 3 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 in working life.**

CJEU case-law

Measures providing special advantages to women

- Both equal opportunity measures facilitating the reconciliation of work and family life and positive measures providing preferential treatment to women are considered as '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' –

Article 157(4) TFUE

- CJEU case-law evolved from the permissive approach towards work-related equal opportunity policies that provided advantages to women with regard to child-care to the strict scrutiny approach towards policies excluding male workers from the entitlement to such advantages.

C -450/93 *Eckhard Kalanke* [1995]

- Bremen Law on Equal Treatment for Men and Women in the Public Service
- „Appointment, assignment to an official post and promotion.
- In the case of an appointment (including establishment as a civil servant or judge) which is not made for training purposes, **women who have the same qualifications as men applying for the same post are to be given priority in sectors where they are under-represented.**
- There is under-representation if women do not make up at least half of the staff in the individual pay, remuneration and salary brackets in the relevant personnel group within a department. This also applies to the function levels provided for in the organization chart.”

Kalanke

- national rule that, **where men and women who are candidates for the same promotion are equally qualified, women are automatically to be given priority in sectors where they are under-represented, involves discrimination on grounds of sex.**
- **Article 2(4) (...) is 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.**
- It thus permits national measures relating to access to employment, including promotion, which give a specific advantage to women with a view to improving their ability to compete on the labor market and to pursue a career on an equal footing with men. (...)
- Nevertheless, as a derogation from an individual right laid down in the Directive, Article 2(4) must be **interpreted strictly.**
- **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.**
- in so far as it seeks to achieve equal representation of men and women in all grades and levels within a department, such a system 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.

Progeny of *Kalanke*

- Positive measures shall aim at providing equality of opportunities
- Permissible positive measures shall not provide equality of results (equal representation)

C-409/95 *Helmutt Marschall* [1997]

- Law on Civil Servants of the Land Nordrhein-Westfalen
- „Where, in the sector of the authority responsible for promotion, there are fewer women than men in the particular higher grade post in the career bracket, women are to be given priority for promotion in the event of equal suitability, competence and professional performance, **unless reasons specific to an individual [male] candidate tilt the balance in his favour.**”

Marschall

- unlike the provisions in question in *Kalanke*, the provision in question in this case contains a clause ('Öffnungsklausel', hereinafter 'saving 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.
- **it appears that even where male and female candidates are equally qualified, male candidates tend to be promoted in preference to female candidates particularly because of prejudices and stereotypes** concerning the role and capacities of women in working life and the fear, for example, that women will interrupt their careers more frequently, that owing to household and family duties they will be less flexible in their working hours, or that they will be absent from work more frequently because of pregnancy, childbirth and breastfeeding
- For these reasons, the mere fact that a male candidate and a female candidate are equally qualified does not mean that they have the same chances.
- It follows that a national rule in terms of which, subject to the application of the saving clause, female candidates for promotion who are equally as qualified as the male candidates are to be treated preferentially in sectors where they are under-represented may fall within the scope of Article 2(4) **if such a rule may counteract the prejudicial effects on female candidates of the attitudes and behavior described above and thus reduce actual instances of inequality which may exist in the real world.**

Marschall

- setting the standard for positive measures

- a national rule which, in a case **where there are fewer women than men** at the level of the relevant post in a sector of the public service, and **both female and male candidates for the post are equally qualified** in terms of their suitability, competence and professional performance, requires that **priority be given to the promotion of female candidates unless reasons specific to an individual male candidate tilt the balance in his favour** is not precluded by Article 2(1) and (4) of the Directive, provided that:
 - - in each individual case the rule 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, and
 - - **such criteria are not such as to discriminate against the female candidates.**
- criteria not relevant for the post such as 'breadwinner status' or company seniority shall be considered as discriminatory (due to indirect discrimination)

Positive action and proportionality test

- C-158/97 *Georg Badeck and Others* [2000]
- C-79/99 *Julia Schnorbus v. Land Hessen* [2000]
- C-407/90 *Abrahmsson and Anderson v. Fogelvist* [2000]
- C-476/99 *Lommers v. Minister van Landbouw, Natuurbeheer en Visserij* [2002]
- E-1/02 *EFTA Surveillance Authority v Norway* [2003]
- C-319/03 *Serge Briheche v. Ministre de l'Intérieur, Ministre de l'Éducation nationale and Ministre de la Justice* [2004]
- C-559/07 *Commission v. Greece* [2004]
- C-104/09 *Roca Álvarez v Sesa Start España ETT SA* [2010].

Badeck

- Permitted positive action:
- in sectors of the public service where women are under-represented, **gives priority, where male and female candidates have equal qualifications, to female candidates** where that proves necessary for ensuring compliance with **the objectives of the women's advancement plan**, if no reasons of greater legal weight are opposed, provided that that rule guarantees that candidatures are the subject of an **objective assessment** which takes account of the specific personal situations of all candidates,
- prescribes that **the binding targets of the women's advancement plan** for temporary posts in the academic service and for academic assistants 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**,
- in so far as its objective is to eliminate under-representation of women, in trained occupations in which women are under-represented and for which the State does not have a monopoly of training, **allocates at least half the training places to women, unless despite appropriate measures for drawing the attention of women to the training places available there are not enough applications from women**,
- **where male and female candidates have equal qualifications, guarantees that qualified women who satisfy all the conditions required or laid down are called to interview**, in sectors in which they are under-represented,
- relating to the composition of employees' representative bodies and administrative and supervisory bodies, recommends that the legislative provisions adopted for its implementation take into account the objective **that at least half the members of those bodies must be women**.

Abrahamsson

- Prohibited positive actions:
- when a **candidate for a public post who belongs to the under-represented sex and possesses sufficient qualifications for that post must be chosen in preference to a candidate of the opposite sex who would otherwise have been appointed**, where this is necessary to secure the appointment of a candidate of the under-represented sex and the difference between the respective merits of the candidates is not so great as to give rise to a breach of the requirement of objectivity in making appointments.
- and also when 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 allowing the application of positive discrimination measures.
- Permitted positive action
- when 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.

Lommers

- permitted positive action:
- 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 whilst male officials may have access to them only in cases of emergency, to be determined by the employer. 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.

Lommers – proportionality test

- [39.] (...) in determining the scope of any derogation from an individual right such as the equal treatment of men and women laid down by the Directive, 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.**

Briheche

- Prohibited positive action (disproportional)
- a national provision, such as that in question in the main proceedings, which reserves **the exemption from the age limit for obtaining access to public-sector employment to widows who have not remarried who are obliged to work, excluding widowers who have not remarried who are in the same situation.**

Corporate quotas

Enhancing women's representation in the corporate world

- Three approaches:
 - (1) gender quota legislation ('hard law')
 - (2) recommendations and targets for gender diversity at board level contained in Corporate Governance Codes ('soft law')
 - (3) non intervention.

Improving gender balance in economic decision-making

- Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on improving the gender balance among non-executive directors of companies listed on stock exchanges and related measures, 14.11.2012, COM(2012) 614 final
- Member States should ensure that the selection of the best qualified candidates for non-executive directors is based on a comparative analysis of the qualifications of each candidate on the basis of pre-established, clear, neutrally formulated and unambiguous criteria.
- Examples of types of selection criteria that companies could apply include professional experience in managerial and/or supervisory tasks, knowledge in specific relevant areas such as finance, controlling or human resources management, leadership and communication skills and networking abilities.
- Priority should be given to the candidate of the under-represented sex if that candidate is equally qualified as the candidate of the other sex in terms of suitability, competence and professional performance, and if an objective assessment taking account of all criteria specific to the individual candidates does not tilt the balance in favour of a candidate of the other sex.

Gender Corporate Quota Proposal

- Close reading of the standard of permissible positive action established in the CJEU case-law:
 - (1) the measures must concern a sector in which women are under-represented;
 - (2) they can only give priority to equally qualified female candidates over male candidates;
 - (3) they must not give automatic and unconditional priority to equally qualified candidates, but must include a "saving clause" which includes the possibility of granting exceptions in justified cases which take the individual situation into account, in particular the personal situation of each candidate.
- Facts: underrepresentation of women on corporate boards, in particular of the publicly listed companies across Europe
- Differences in national approaches (binding quota laws, voluntary quotas, „comply and explain“, publicly listed companies or large companies, executive and non-executive positions, sanctions for non-implementation)
- Divergent corporate governance regimes – barrier for internal market
- In accordance with the principle of subsidiarity and proportionality (not concerning executive posts, and SMEs)
- Minimum harmonization objective
- Temporal character (sunset clause – 31/12/2028)

Gender Corporate Quota Proposal

- a minimum objective of a 40% presence of the underrepresented sex among the **non-executive directors of companies listed on stock exchanges**
- companies with a lower share of the under-represented sex among the nonexecutive directors to introduce pre-established, clear, neutrally formulated and unambiguous criteria in selection procedures for those positions in order to attain that objective
- thus, introducing **not rigid, but procedural quantitative quota and transparent and objective selection proces**
- aim: to increase the gender diversity of boards, while respecting the need of minimum interference with day-to-day management of a company
- disclosure obligation and burden of proof
- justification of non-compliance
- reporting obligations (comply and explain)
- sanctions

•Thank you for your attention!