Legality of Positive Action Measures in EU Law

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Positive action - notion

- Measures that (openly or indirectly) ***employ suspect characteristic as a criterion of decision-making*** in order to
  - eliminate concrete (concealed or unrecognized) discriminatory barriers to actual *equality of opportunity*

  and/or

  - improve disadvantaged position of a particular social group that traditionally suffered *systemic* discrimination in a particular society (actual equality)

Positive action – practical understanding

- Directly or indirectly **sex** (/race/religion) **related** measures aiming to eliminate **exclusion** of members of (female) sex
  - identify and eliminate discriminatory practices (focus to great extent on disparate impact)
  - increase representation of members of underrepresented sex

- Sex related preferences
  - direct and indirect
    - evolution of positive action

- Not within the scope:
  - Measures aiming to *accommodate* particular gender-related needs and characteristics
    - Positive obligations

Types of Preferences

- Possible to distinguish several types of preferences in practice:
  - An ***absolute preference*** reserves certain benefits exclusively for members of the underrepresented sex.
  - A ***strong preference*** grants advantage to members of the underrepresented sex who satisfied some minimum eligibility criteria for a particular position.
  - A ***tie-break preference*** grants an advantage to members of the underrepresented sex who are equally qualified for a particular position or equally deserving of particular benefit.
  - ***Flexible preferences*** allow granted sex-based advantages to be overridden by some other socially valuable reason (e.g. long-term unemployment, single parenthood, health reasons, etc.). Both strong and tie-break preferences can be flexible preferences.
  - A ***weak preference*** merely allows for sex to be one of various criteria of selection, each of which is of more or less equal weight.

Types of positive action measures

- **Antidiscrimination Support Measures**
  - obligation to eliminate practices *concealing* direct and indirect discrimination
    - e.g. word of mouth hiring, nontransparent/discretionary decisionmaking
- **Outreach measures**
  - sex related measures encouraging members of underrepresented sex to apply for employment or participate in training programs
- **Redefining Merit**
  - altering job qualifications criteria by including sex or specific gender related characteristics
- **Indirect preferences**
  - facially neutral criteria designed to favor more members of one sex
- **Direct Preferences**
  - preferences that can be overridden - soft targets
    - weak ("one of") or stalemate preferences
  - firm preferences – quotas
    - unconditional or conditional

Conflicting Normative Background

- Procedural Fairness
  - road to hell is paved with good intentions:
    - selective use of „corrupted" criteria will eventually collapse decision-making into corruption
    - promotes „balkanization" and group-based conflict over limited resources
- Aristotelian Notion of Equality – „likes alike"
  - suspect characteristics are either relevant (different treatment just) or not (different treatment discriminatory)
  - lack of consistecy as injustice/harm *per se*
    - *denial of Citezenship Status – rule of law (equal rights, priveleges and obligations)*
- Individual Justice Model(s) –
  - individuals ought to be treated according to their personal (and socially beneficial) traits and skills
    - suspect (immutable) characteristics always unjust
  - denaial of individual agency
    - means to an end
  - limitation of (lexically) basic indivdual liberties

Practical reasons behind positive action measures

- stubborn persistence of negative inequality indicators across all areas of social life
  - higher unemployment, pay gap, horizontal and vertical segregation of the labor market, double burden, insignificant share of fathers of childcare leaves, underrepresentation in decision-making
- dubious success of the individual complaint model
  - procedural complexity, judicial inexperience, specific character of legal guarantees (conceptual discrepancy), high emotional costs, ineffective remedies
- recent European experiences and comparative "good practices"

Normative goals of positive action measures

- So called Immutable Criteria (Sex/ Race/Sexual Orientation) Matter
  - social constructs embedded with hierarchical structures of power distribution and markers of social worth

- Notion of substantive | real |equality in practice
  - counteract and circumscribe concealed discriminatory practices
  - respond to and break prejudices and stereotypes
  - increase representativeness and make decision-making more democratic
  - increase gender-fairness of standards of treatment

- The standard of legitimacy
  - normative and practical effectiveness of PAMs key for their legitimacy

Constitutional Foundations

- TEU Art 2
- TFEUArt 8; 10
- TFEU Art 157/(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.
- CFREU Art 23
  - Equality between men and women must be ensured in all areas, including employment, work and pay.
  - The principle of equality shall not prevent the maintenance or adoption of measures providing for specific advantages in favour of the under-represented sex.
- Directive 2000/78 Art 7
  - 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.

- Fundamental Value of the Equal Treatment Principle

- Case 43/75 Defrenne [1976]

- C144/04 Mangold [2005]
  - ***The principle of non- discrimination on grounds of age must thus be regarded as a general principle of Community law.*** Where national rules fall within the scope of Community law, …the Court must provide all the criteria of interpretation needed by the national court to determine whether those rules are compatible with such a principle.

- C-555/07 Kücükdeveci [2010]
  - It must be recalled here that… Directive 2000/78 merely gives expression to, but does not lay down, the principle of equal treatment in employment and occupation, and that the principle of non-discrimination on grounds of age ***is a general principle of European Union law in that it constitutes a specific application of the general principle of equal treatment*** In those circumstances, it for the national court…to provide, within the limits of its jurisdiction, **the legal protection which individuals derive from European Union law and to ensure *the full effectiveness of that law***, disapplying if need be any provision of national legislation contrary to that principle.

CJEU Established Framework

C-450/93 Kalanke

- NOT ALLOWED:
  - measures securing „***absolute and unconditional*** *(automatic) priority for appointment or promotion*"
  - measures seeking to achieve equal representation of men and women (in **all** grades and levels within a department) substitute for equality of opportunity the result which is only to be arrived at by providing such equality of opportunity
- Open questions:
  - what is equality of opportunity?
  - how „proportional" must be a sex-related preference?

C-409/95 Marschall

- the mere fact that a male and female candidates are equally qualified does not mean that they have the same chance
  - this real-life fact allows measures related to access to *employment/promotion* giving specific advantages to *women* aiming to improve their equality of opportunity (*ability to compete* on the labour market *and* to *peruse career* on equal footing with men)
- measures containing a ***saving clause*** not absolute and conditional
  - in each individual case provides for male candidates who are equally qualified a guarantee that their candidatures

    1) will be a subject of an objective assessment which will take account of all criteria specific to the individual candidates and

    2) will override the priority accorded to female candidates where one or more of those criteria tilts the balance in favour of male candidates;

    3) those criteria must not be such to discriminate against women

Balancing, Not Formulas

- C-158/97 Badeck
  - criteria which, although formulated in terms which are neutral as regards gender, in general favour women are allowed since they are manifestly intended to lead to an equality which is substantive rather then formal by reducing inequalities which may occur in practice in life
    - out: seniority, age, date of last promotion, family status, partner's income, part-time work, leaves related to childcare or parents-care
    - in: capabilities and experiences acquired by carrying out family work
  - sex-related preferences where the candidates have equal qualifications and which do not fix an absolute celling, but fix one by reference to the number of persons who have received appropriate training (actual fact as a quantitative criterion)
    - such underrepresentation clear proof of concealed discrimination?
  - strict result quotas as regards professional training allowed (if men can get them when there is no enough female applicants and if the provider dose not have a monopoly over that type of training)
  - quotas reserving number of interview opportunities for women who have showed to satisfy all the conditions required or laid down allowed
  - quota reserving "at least half" of the places in appointments to committees, advisory boards, boards, boards of directors and supervisory boards and other collective bodies is "not a mandatory provision"

Qualifications – the Central Question?

- C-407/98 Abrahamsson
  - at stake: a model of sex-related preferences for sufficiently qualified members of under-represented sex
  - the Court did not accept the model:
    - **the assessment of the qualifications** of candidates by reference to the requirements of vacant post is not based on **clear and unambiguous criteria such as to prevent or compensate for disadvantages** in the professional career
    - "the **scope** of the provision" could not be precisely determined,
      - with the result that the selection of a candidate from among those who are sufficiently qualified is ultimately based on the mere fact of belonging to the under-represented sex *even if* the merits of the candidates so selected are inferior to those of the candidate of the opposite sex
    - candidates were not subject to **objective assessment taking account of the specific personal situations** of all candidates
  - Open questions:
    - what counts as qualifications? does their scope extends beyond merely professional credentials?
    - who defines the qualifications? would the Court scrutinized only consistency?
    - would a saving clause save the model?

Contextual Flexibility

- C-476/99 Lommers:
  - at stake: child-care services quota for women
  - the Court approved the measure:
    - stressed both horizontal and vertical underrepresentation of women
    - stressed real-life fact that women are much more likely to interrupt their careers due to childcare
    - did not reserve places of employment
      - reserved enjoyment of certain workplace conditions designed to facilitate pursuit and progression in professional career
      - designed to eliminate the causes of women's reduced opportunities for access to employment and careers
    - proportionality test (**appropriate** and necessary)
      - insufficient supply (even waiting lists with female applicants existed)
      - men not absolutely excluded
        - » available market services
        - » urgent cases (saving clause)

CJEU's Equal Opportunity Sliding Scale

Formal Equal Opportunities PAMs

- Improving Formal Competitive Capacities
- Applied before a „cut of" point

- ***Intermediate Scrutiny***
  - reasonably agreeable barrier
  - no prejudice or crude stereotype motives
  - reasonable PAM effectiveness

Substantive Equal Opportunities PAMs

- Redistributing Power and Increasing Diversity
- Applied at the „cut of" point

- ***Stricter Scrutiny***
  - clearly identified barrier to real equalityy
    - social relevance of the distributed good
  - Individualism/meritocracy safeguards
    - thorough and strict analysis of qualifications
    - comprehensive „social" balancing
  - narrowly tailored
    - persuasive PAM effectiveness
    - necessity proof
      -

Does Positive Action fall within the scope of EU competences

- Strong support in the Treaties:
- Article 2 TEU identifies sex equality as one of the social values of fundamental importance common to the MS.
- Article 3(3) TEU provides that the Union shall combat social exclusion and discrimination and promote equality between men and women within its internal market.
- Article 8 TFEU explicitly mandates the Union to conduct all of its activities in a manner to eliminate inequalities and promote equality between men and women.
- Article 10 TFEU provides that the Union shall aim to combat discrimination based on sex in defining and implementing its policies and activities.

Appropriate Legal Basis

- Several apparent candidates:
  - Article 157(3) TFEU
  - Article 19 TFEU
  - Article 352 TFEU

- Art 157(3) TFEU provides the strongest support
  - explicitly provides the EU with the power to enact legislative measures to ensure the application of the principle of equal opportunities and equal treatment of men and women *in matters of employment and occupation*
    - Significant number of MSs do not perceive board membership as employment
    - *Danosa* judgement
  - The key issue of scope
    - Marschall-Badeck-Abrahamson doctrine
    - Specific “non-objective” character o company board employment

Proposed NonExec Quota Directive

- The Purpose
  - gender equality in econ decision-making across the Union
  - fully exploit the existing talent pool of candidates for more equal gender representation on company boards
- Motives
  - low representation (7:1), ineffectiveness of current measures, underutilization of highly qualified women's skill (60% of university graduates in the EU, more than 7000 'boardable' women who are highly qualified)
  - *The core of the problem*:

    multiple barriers that the constantly growing number of highly qualified and 'board-ready' women who are available for board seats face on their way to the top
- Subsidiarity & Proportionality
  - significant discrepancy across MSs, lack of public debate and political will, absence of leveled competitive playing field, reasons of scale
  - only publicly listed companies, only non-executive seats, temporary nature, flexibility, saving clause

Proposed PAMs

Quasi-substantive Equal Opportunity PAM

- A *tie-break preference for under-represented sex*
  - *Less than 40%*
  - *Comparative analysis of the qualifications*
    - *suitability, competence and professional performance*
    - *pre-established, clear, neutrally formulated and unambiguous criteria*
    - *saving clause (all criteria specific to individual candidates)*

Formal Equal Opportunity PAMs

- Disclosure Duty
  - Pre-established criteria
  - Objective comparative assessment
  - Consideration titling the balance
- Redistribution of the Burden of Proof
- Reporting Duty

Kind thanks for your attention