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Approaches to Equality and Non-discrimination Legislation
inside and outside the EU

DISCUSSION PAPER - WORKSHOP 1
Positive action

By Dr Susanne Burri

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Introduction

The gender equality and non-discrimination directives allow Member States to maintain or adopt specific measures to prevent or compensate for disadvantages linked to sex, race or ethnic origin and the grounds covered by the Framework Directive (2000/78).¹ The concept of *positive action* is not further defined in EU legislation. In international and national law, the term *affirmative action* is also often used. This concept is, according to Marc Bossuyt, equivalent to positive action.² He proposed the following working definition of affirmative action:

“Affirmative action is a coherent packet of measures, of a temporary character, aimed specifically at correcting the position of members of a target group in one or more aspects of their social life, in order to obtain effective equality.”

The subject of positive action has been an attractive and contentious issue in the European Union and its Member States for over two decades.

¹ The European Network of Legal Experts in the field of Gender Equality is preparing a report on *Positive Action Measures to Ensure Full Equality in Practice between Men and Women, including on company boards*. Goran Selanec and Linda Senden are responsible for this report. Most of this discussion paper is based on the draft executive summary (written by Goran Selanec) of this draft report. The Gender Network also produced a report addressing positive action in 2009: S. Fredman, European Network of Legal Experts in the field of Gender Equality, *Making Equality Effective: the role of proactive measures*, available at: http://ec.europa.eu/justice/gender-equality/document/index_en.htm#h2-9, accessed 30 August 2011.

See also Marc de Vos, *Beyond Formal Equality – Positive Action under Directives 2000/43 and 2000/78*, European Commission, 2007 available at http://www.migpolgroup.com/public/docs/14.Thematic_report_BeyondFormalEquality_EN_06.07.pdf.

² See: *The concept and practice of affirmative action*, Final report submitted by Mr. Marc Bossuyt, Special Rapporteur, in accordance with Sub-Commission resolution 1998/5, p. 3. This report was presented on 8 August 2002 to the UN Sub-Commission on the Promotion and Protection of Human Rights and is available at: [http://www.unhchr.ch/Huridocda/Huridoca.nsf/e06a5300f90fa0238025668700518ca4/0aaa7775daf0bcebc1256c0c0031c5bd/\\$FILE/G0214014.doc](http://www.unhchr.ch/Huridocda/Huridoca.nsf/e06a5300f90fa0238025668700518ca4/0aaa7775daf0bcebc1256c0c0031c5bd/$FILE/G0214014.doc), accessed 30 August 2011.

Since the Court of Justice of the European Union (CoJ) delivered its well-known and still passionately debated *Kalanke* ruling, positive action has been one of the most provocative and antagonistic issues not only for those who are involved with the Union's sex equality law but also for European citizens in general.³

As of yet, the CoJ has only had to deal with prejudicial questions in relation to positive action measures for women in the field of employment.

Currently, the issue of quotas for women in company boards is being much debated in the EU, not in the least thanks to the initiatives taken by Viviane Reding, Vice-President of the European Commission and EU Justice Commissioner, and in particular the 'Women on the Board Pledge for Europe'.⁴ Several companies have signed the pledge that they will reach a target of 30 per cent female board members by 2015 and 40 per cent by 2020. In 2010, women made up on average 12 per cent of board members in the biggest publicly-listed companies across the EU. Only 3 per cent were board chairs. Commissioner Reding has announced that if there has not been credible progress by March 2012, she will take the necessary legislative steps at EU level.⁵

National legislation

The manner in which the Union dealt with the issue of positive action in the 2006/54 Recast Directive⁶ showed that the issue of positive action is still on the Union's agenda. By tying its Article 3 to Article 157(4) of the Treaty on the Functioning of the European Union, the Recast Directive strengthened the position of positive action in the EU legal order. However, it was not the Union's action that re-energised the debate about positive action in the Union but the action of a non-Member State. In 2006, Norway adopted a far-reaching model for positive action concerning the participation of women in the boards of commercial companies, requiring that a minimum of 40 per cent of members of the boards of all publicly listed companies be women. The rule had to be implemented within a two-year period. Companies that failed to comply faced serious consequences, including judicial decisions to dissolve the company.

The Norwegian experience reignited the positive action debate in the Union. More importantly, it influenced several of the Union's Member States, which have adopted similar positive action models. Belgium, France, Iceland, Italy and Netherlands thus decided to impose board quotas on both state-controlled and non-state-controlled companies.

³ C-450/93 *Eckhard Kalanke v Freie Hansestadt Bremen* ECR [1995] I-03051.

⁴ See http://ec.europa.eu/commission_2010-2014/reding/womenpledge/index_en.htm, accessed 30 August 2011.

⁵ See

<http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/11/487&format=HTML&aged=0&language=EN&guiLanguage=en>.

⁶ 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), *OJ L 204*, 26.7.2006, p. 23–36.

Greece adopted a similar path. Austria imposed quotas on state-controlled companies only. Finland took a similar path to Austria even before Norway adopted its model.

Member States also developed a variety of seemingly neutral measures that aimed at achieving the same goal, i.e. balanced representation of both sexes in companies at all levels. For example, a significant number of States adopted the nomination parity requirement asking employers to nominate two candidates of each sex for every position. However, the European Court of Justice, which has played a pivotal role in the development of positive action in the EU up to now, has not yet had to decide a case on the 'Norwegian' model or about the 'neutral' measures approach.

Controversial issue

Positive action has not only stirred controversy in Europe. Compared to some other jurisdictions, such as the United States of America, or India, the EU experience with this type of equality approach still seems relatively young. One reason why positive action is, and is likely to remain, such a contentious issue is that it appears normatively problematic to a significant number of people. The prevailing understanding of equality tends to identify sex inequality with unfavourable treatment motivated by a person's sex (a fact over which he or she has no control). Measures that give preferences to individuals belonging to a group of people of a particular sex tend to be regarded as necessarily unacceptable. At the same time, real-life data consistently show that protective rights-based measures, such as the prohibition of discrimination, are not enough.

Forms of positive action and quotas for women

Different forms of positive action on the ground of sex can be distinguished. 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 satisfy 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. The difference between strong and tie-break preferences is not merely practical. They serve profoundly different normative goals. Since they insist on equal qualifications, tie-break preferences primarily aim to circumvent and eliminate hidden prejudices and stereotypes that harm women. By contrast, strong preferences suggest that the problem lies in conventional evaluation criteria, which tend to place women at systematic disadvantage.⁷ *Flexible preferences* allow sex-based advantage which has been granted to be overridden by some other socially valuable motivation (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 a number of criteria of selection, each of which is more or less equally weighted.

⁷ Further on this point see Sandra Fredman, "Reversing Discrimination", 13 L. Q. R., p. 575 ", pp. 578-80.

The term '*quota*' essentially refers to a particular model of positive action.⁸ The model usually consists of numerical goals (targets) that must be achieved within a certain time-framework, and the measure designed to achieve the goal. It can, but does not have to, involve preferential treatment. The strength of a quota model essentially depends on the measure chosen to achieve the numerical goal. In this way we can distinguish between three basic types of quotas: strict, flexible and soft quotas.⁹

A *strict quota* essentially involves a specific number of reserved places for members of the underrepresented sex. Therefore, it involves absolute preferences. It is worth clarifying that strict quotas do not necessarily mean that belonging to the particular sex is enough (although it can be). Strict quotas frequently reserve places for those individuals of a particular sex who are the most qualified members of their group, or at least sufficiently qualified for a particular job.

Flexible quotas involve a combination of numerical targets and a strong or tie-break preference. This model will usually strive to achieve a certain level or representation of both sexes within a relatively defined timeframe. However, it will allow revisions of the numerical target or the timeframe for substantive reasons. For example, it will accept a lower representation than originally planned if it turns out that there are no sufficiently qualified candidates. To the extent that it does not insist on preferences as a means of achieving the intended numerical target but rather allows the responsible institution discretion to choose the appropriate measure to achieve the target, this type of quota is also sometimes called the result quota.

Soft quotas are essentially aspirational targets. They allow wide discretion to those responsible for their implementation, both in terms of chosen measures and in terms of chosen timeframe. Since they do not include serious penalties for failure, they are mostly used as an awareness-raising or self-improvement tool.

Discussion questions

- 1) *Could you provide some examples of positive action measures in employment in your country that have been successful in your view? Which factors were most relevant for this success?*
- 2) *Do you consider (national and/or EU) legislative initiatives on women quotas necessary to reach gender balance on company boards?*

⁸ See Erika Szyszczak, *Positive Action After Kalanke*, 59 Mod. L. Rev., p. 876.

⁹ See Anne Peters, *Women, Quotas and Constitutions – Comparative Study of Affirmative Action for Women under American, German, EC and International Law*, Kluwer, 1999, p. 25.