



Gender Quotas and Other Positive Action Measures to Ensure Full Equality in Practice between Men and Women

The transposition of EU provisions on positive action and gender quotas in employment, in access to and supply of goods and services, and in decision-making and political bodies in 33 European countries

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Part I

Executive Summary

*Goran Selanec**

1. The Report – Purposes and Aims

The subject of positive (affirmative) action has been an attractive and contentious issue in the European Union and its Member States for over two decades. Since the European Court of Justice delivered its well-known and still passionately debated *Kalanke* ruling positive action has been a 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.¹ Admittedly, at some point during the first decade of the new Millennium it seemed that the issue of positive action stopped being a topic of ardent debates. However, in retrospect, we may see this was only a period for recuperating and regrouping. The manner in which the Union dealt with the issue of positive action in the 2006/54 Recast Directive showed that the issue of positive action is still on the Union's agenda. By tying its Art 3 to Art 157(4) of the Treaty on 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-energized the debate about positive action in the Union but the action of one of the non-Member States. In 2006, more than two years after the initial proposal, Norway adopted a far-reaching model of positive action concerning the participation of women in the executive boards of commercial companies, requiring a minimum of 40% of women on all executive boards of publicly listed companies. The rule had to be implemented within a two-year period. Companies that failed to comply faced serious consequences, including the judicial decision to dissolve the company. Furthermore, the Norwegian example was interesting also because it was sponsored and adopted at the initiative of a Government led by the most prominent Norwegian conservative party, which had traditionally opposed sex based preferences as an instrument of equality promotion.

The Norwegian experience re-ignited the positive action debate in the Union. More importantly, it influenced several of the Union's Member States who have adopted similar positive action models (France, Iceland, Netherlands, Greece, Austria and Finland imposed quotas on the state-controlled companies). Yet, this was not the only important development. During the period of relative quiescence on positive action, the Member States "discovered" that positive action did not have to be confined to the more contentious sex-based preferences that gave rise to a whole line of judicial disputes throughout the EU legal order at the end of the last century. Instead, they developed a variety of seemingly neutral measures that aimed at achieving the same goal. For example, as pointed out below, a significant number of States adopted the nomination parity requirement asking from employers to nominate two candidates of the sex for every position. However, the European Court of Justice, which played a pivotal role in the development of positive action in the EU up to now, had not yet have to decide a case on the "Norwegian" model, and about the 'neutral'

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¹ C-450/93 *Eckhard Kalanke v Freie Hansestadt Bremen* ECR [1995] I-03051.

measures approach so far; we all await a contribution from one of the key EU actors with considerable interest.

It is difficult to say what makes positive action such a provocative issue. One thing is certain. Positive action has not stirred controversy only in Europe. Compared to some other states, 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 significant number of people. Prevailing understanding of equality tends to identify sex inequality with unfavorable treatment motivated by the person's sex (the fact over which he or she has no control), they tend to regard measures that give preferences to individuals belonging to a group of people of a particular sex 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. Real-life equality between sexes in Europe is still not within our reach. Sex inequality is our everyday reality. There is ample evidence that women are paid less. They are paid less not only in terms of lower salaries for the same work men do but also in terms of the lower market value of the work in which they predominate. The EU statistics show that the gender pay gap remains intolerably and stubbornly high at 18% across Europe.² We are also aware that employment is segregated both horizontally and vertically. Recent EU research shows that about 25.3% of all people employed in the EU would need to change occupation in order to bring about a gender-balanced distribution of employment.³ Women still carry a disproportionately large share of responsibility for care within the family (for children and the elderly). As another piece of EU research found "across successive generations women's involvement in employment has increased but the increase in men's participation in childcare and housework has been modest...domestic labour – housework and care for children and elders – is still predominantly the responsibility of women."⁴ Moreover, Eurostat statistics shows that, at the European level, the employment rate for women without children is 75% whereas it only reaches 54% for women with three children or more. In contrast, the employment rate for a man without children is 80% and 85% for a man who has three children or more.⁵ On top of this, women are underrepresented in almost all relevant decision-making bodies in our societies, including our national parliaments. For example, in national parliaments across the European Union, slightly less than one in four members of parliament are women (24%).⁶ Data such as these strongly suggest that although the existing

² Eurostat: Gender pay gap statistics, Data from October 2010, available at http://epp.eurostat.ec.europa.eu/statistics_explained/index.php/Gender_pay_gap_statistics. See also Petra Foubert, Susanne Burri and Ann Numhauser-Henning, The report of the European Network of Legal Experts in the Field Of Gender Equality: *The Gender Pay Gap in Europe from a Legal Perspective (including 33 country reports)* available at <http://ec.europa.eu/social/main.jsp?catId=641&langId=en>.

³ European Commission's Expert Group on Gender and Employment (EGGE): Gender Segregation in the Labour Market Root causes, implications and policy responses in the EU available at <http://ec.europa.eu/social/main.jsp?catId=748&langId=en&pubId=364&type=2&furtherPubs=yes>.

⁴ European Commission *Analysis note Men and Gender Equality - tackling gender segregated family roles and social care jobs*, available at ec.europa.eu/social/BlobServlet?docId=5532&langId=en.

⁵ Eurobarometer special (EB 75.1), '100th anniversary of Women's day: Fighting against gender discriminations in the EU' available at http://ec.europa.eu/public_opinion/archives/eb_special_280_260_en.htm.

⁶ European Commission *Women in European politics – time for action* 2009, available at ec.europa.eu/social/BlobServlet?docId=2052&langId=en.

legislation was a significant step in a right direction, a more proactive approach is needed to get the EU and its Member States to the final goal of sex equality.⁷

This discrepancy between the prevailing popular understanding of the ideal of sex equality and the fact that sex inequality is still a fact of life is a cause of many headaches for the European governments and political elites. A recent public opinion poll conducted across Europe showed that 53% of Europeans think that the gender discrimination is rare, while 40% think it is widespread. At the same time, when confronted with data and concrete questions, their opinion tends to change significantly. The most recent EU wide research conducted on the Women's Day showed that 76% of European respondents think that women encounter significant difficulties in accessing positions of responsibility inside big companies, while 70% of them think that these obstacles apply also inside the higher levels of public administration.⁸ Accordingly, 77% of the Europeans are of the opinion that we need more women in management positions in the workplace, while 72% believe that we need more women MPs.⁹ At the same time, however, Europeans are rather skeptical about strong positive action measures. The Eurbarometer survey found that "44% of European respondents (44% W, 44% M) consider that the most efficient measures consist of encouraging enterprises and public administrations to take measures to foster equality between women and men ("code of good practice") and to fight against stereotypes" while "concerning the imposition of quotas by law, it is favoured by 19% of European respondents (20% W, 18% M) for boards of directors in enterprises and electoral lists (19% W, 18% M)."¹⁰

Such variations in public opinion suggest that politicians as well as intellectual elites have not been successful in explaining to European citizens what the ideal of sex equality actually entails, probably because they too have doubts about what conception and mechanisms of sex equality the EU ought to follow.¹¹

This Report hopes to contribute to this still evolving discussion about positive action in the European Union. The Report provides an overview of the positive action rules and practices in 33 European states (27 EU Member States, 3 EU Candidate States and 3 EEA States). It will also place these rules and practices in the broader context of EU sex/gender equality law.

The Report is divided into four different Sections. Section I, Section II and Section III comprise the Executive Summary Report. Part 2 includes 33 national reports. Each part is divided into specific sections. Section I provides an overview of EU sex equality law provisions defining positive action in the EU legal order. It also provides a critical overview of the positive action case law of the European Court of Justice. Section II provides a summary overview of national legislation concerning positive action as well as examples of positive action practices found at the national level. The Report attempts to give some sense of the type of positive action measures that can be found on the national level; however, this is only a limited insight. Identifying all or even most of the positive action measures that exist in practice is a

⁷ See also Sandra Fredman, The report of the 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/social/main.jsp?catId=641&langId=en>.

⁸ Id. supra fn. 4.

⁹ Special Eurobarometer 263, 'Discrimination in the European Union', available at http://ec.europa.eu/public_opinion/archives/eb_special_280_260_en.htm.

¹⁰ Id. supra fn. 4.

¹¹ On the various conception of equality in the EU legal order see Christopher McCrudden 'Theorising European Equality Law' in *Equality in Diversity*, eds. CathrynCastelo& Ellis Barry, Irish Center for European Law, 2003.

task that requires much more extensive field research than this research could undertake. In that respect, the Report primarily focuses on the examples of positive action measures and the areas where we can find positive action measures on the national level.

Section III discusses the issue of possible EU legislation requiring positive action measures. Part 2 includes specific national reports for each of the 33 States.

The Report is concerned with the positive action in general. However, due to the recent developments prompted by the Norwegian experience, the Report will pay particular attention to the issue of the participation quotas in various decision-making bodies, including the executive boards of commercial companies, which are given special consideration due to their topicality.

SECTION I

2. Positive action: the framework of analysis

2.1. *The conceptual framework*

The meaning of the term positive action is far from obvious even to an expert. It is therefore useful to provide a basic explanation of the term at the very beginning. This is certainly not an easy task, primarily because there is wide variety of opinions of what that term ought to mean. In that respect, the explanation provided in this Report is meant to serve merely for orientation. Risking a gross oversimplification, one could say that there are two general groups of views regarding the term positive action.

The first one favours a very wide meaning of the term. On this view, the term basically includes any measure going beyond the basic negative prohibition of (direct and indirect) discrimination. The form of the measure is irrelevant. What matters is that the measure contributes to the goal of equality of men and women¹² In that respect, the term includes not only measures involving sex-based preferences but also any other neutral measures whose effects are such as to remove existing barriers to equality.¹³ The example of such a neutral measure would be providing childcare facilities to all employees, which will be particularly favourable to women. Moreover, this view tends to include parental rights and benefits, including pregnancy related benefits within the scope of the term.

The other view favours a much narrower meaning of the term. On this view, positive action includes only measures that entail some type of preferential treatment for members of the group in socially disadvantaged position.¹⁴ It is based on the implicit assumption that positive action must challenge the formal understanding of sex equality, which insists on the principle that men and women ought to be treated consistently according to the same standard of treatment. Positive action measures must be intended to benefit members of the disadvantaged group. In that respect, they always entail, at least implicitly, a sex-based preference. Measures, which do not entail even an implicit sex-based preference are not in violation of the formal equality principle and cannot be truly considered an affirmation of substantive, real-life

¹² See 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.

¹³ See in that respect Anne Peters, *Women, Quotas and Constitutions – Comparative Study of Affirmative Action for Women under American, German, EC and International Law*, Kluwer, 1999, Chapter II.

¹⁴ See Sandra Fredman, “Reversing Discrimination”, 13 L. Q. R., p. 575.

equality. For example, offering childcare facilities to all employees cannot be a positive measure if its author did nothing to ensure that its overall effect will favour women more than men. Proponents of this view also have a rather ambivalent view of pregnancy and maternity rights. Not only are these rights not a clear challenge to the notion of formal equality -- after all, they can theoretically be justified by the principle “likes alike, different differently”. More importantly, some benefits described as pregnancy or maternity rights quite frequently rest on a problematic assumption regarding the women’s gender role of primary care-providers; in that respect, they tend to perpetuate the same status protected by the notion of formal equality.

A more practical explanation of the term positive action distinguishes between, on the one hand, measures involving preferential treatment for members of one sex and, on the other hand, apparently neutral measures. Apparently neutral measures are equally applicable to both men and women. However, in practice they often tend to favour members of one sex. Preferential treatment (preferences) involves explicit sex-based benefits for members of one sex. As noted by the Dutch expert, it is possible to distinguish several types of preferences in practice. An *absolute preference* reserves certain benefits exclusively for members of underrepresented sex. A *strong preference* grants advantage to members of underrepresented sex who satisfied some minimum eligibility criteria for a particular position. A *tie-break preference* grants an advantage to members of 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. In contrast, strong preferences tend to suggest that the problem lies in conventional evaluation criteria, which tend to place women at systematic disadvantage.¹⁵ *Flexible preferences* allow granted sex-based advantage 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 more or less equally weighty.

The national reports show that the States rarely use absolute preferences. When they use this type of positive action they mostly opt for tie-break preferences and much more rarely for strong preferences.

The European Court of Justice has developed its own typology of preferential treatment. As discussed below, in the *Kalanke* case the Court used the terms “automatic” priorities and “absolute and unconditional” priorities.¹⁶ Absolute and unconditional priorities are essentially absolute preferences. In other words, sex is the only relevant criterion of distribution of benefits between men and women. Automatic priorities do not seem to be as simple. The Court uses this term seemingly for those situations where members of the underrepresented sex are given priority after they have satisfied certain qualifying threshold. In other words, sex is not the key criterion throughout the selection procedure. Rather it becomes a tie-breaker after the procedure reached a certain point. The term automatic priority seems to include both strong and tie-break preferences. The two types of priorities overlap to some extent. Absolute and unconditional priorities are always automatic. However, automatic priorities are not necessarily absolute and unconditional. As discussed below, the

¹⁵ Further on this point see Fredman, “Reversing Discrimination”, pp. 578-80.

¹⁶ C-450/93 *Eckhard Kalanke v Freie Hansestadt Bremen* ECR [1995] I-03051.

Court will look favorable to automatic priorities only if it finds them “proportional”. Otherwise, it will treat them as absolute and unconditional.

In addition to ‘preferences’, one can also often find the term ‘quota’ as being tightly related to the idea of positive action. The term has recently become almost synonymous with the notion of positive action due to the Norwegian model of positive action that has probably become the best-known sex equality positive action measure in Europe. The model involves sex based numerical targets for company boards that had to be achieved in a specific time period under a threat of severe civil penalty.

The term “quota” essentially refers to a particular model of positive action.¹⁷ The model usually consists of numerical goals (targets) that must be achieved in certain time-framework and the measure designed to achieve the goal. They can, but do 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 three basic types of quotas: strict, flexible and soft quotas.¹⁸

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 quota does 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 in a relatively defined timeframe. However, it will allow revisions of the numerical target or the timeframe due to some set of substantial 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 they do not insist on preferences as a means of achieving the intended numerical target but allow the responsible institution discretion to choose the appropriate measure to achieve the target, this type of quotas is also sometime called the result quota.

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

It is worth mentioning that strict and flexible quotas may have variations. Variations depend on the consequences that have been prescribed where relevant institutions fail to achieve the intended numerical target. Rights-based quotas allow a member of the under-represented sex to enforce quotas in judicial proceedings and to be granted some type of compensation. Sanction-based quotas do not grant individual rights. Rather they prescribe an administrative sanction for the failure to meet the target, enforceable by the relevant administrative agency.

National reports show that all three types of quotas are used in practice. Strict quotas are most frequently used in relation to political participation, more precisely in relation to the sex composition of various election lists. Flexible quotas seem to be most frequently used in the context of appointed decision-making bodies regardless of their political, educational or commercial nature. Soft quotas, although not frequent, are mostly used in the context of employment.

¹⁷ See Erika Szyszczak, Positive Action After Kalanke, 59 Mod. L. Rev., p. 876.

¹⁸ See also Peters, *Women, Quotas and Constitutions*, p. 25.

This Report tends to favour the practical approach to positive action. The Report does recognize that different States and their national legal orders perceive positive action in different ways. This is obvious from the variety of positive action measures (especially those that are sex-neutral) reported by national experts. However, the Report does not support the view that any measure that somehow benefits women necessarily constitutes positive action. As the Dutch national expert noted, not all kinds of measures benefiting women fall within the scope of positive action, many belong to various social policies. The authors of the Report are particularly skeptical towards the view that pregnancy and maternity benefits going beyond the prescribed minimum constitute positive action. They are also doubtful whether measures aiming to reconcile work and family life, such as part-time or flexible-hours work or home/tele – working, necessarily constitute positive action rather than proactive measures. The problem with such measures is that they often rest on the implicit assumptions that they help women by allowing them to find a more acceptable balance between *their* family obligations and professional work. To that extent, such measures often tend to perpetuate rather than reform one of the most significant barriers to real sex equality - sex/gender biased distribution of childcare and family responsibilities.

This Report supports the view that positive action consists primarily of measures involving preferences that are somehow sex-related. Strong or tie-break preferences and strict and flexible quotas are the most obvious example of such measures. However, it should also be taken into account that a significant number of sex-neutral measures are only apparently neutral. Many of them are consciously designed with the clear intent to benefit women. To the extent that they contribute to the removal of relevant barriers to women's real-life equality they cannot be excluded from the scope of the term positive action.

2.2. Normative goals

Positive measures can be used for different normative goals. National reports reveal that the States tend to use positive action for three goals in particular. Positive action is frequently used to improve the ability of the disadvantaged group to compete for the available opportunities, especially those in the labour market. Positive action measures available for this purpose are varied. They can include sex neutral measures such as opening childcare facilities available to men and women, revising evaluation criteria or using gender-neutral language for hiring or promotion calls, etc. However, positive action used for this normative goal can also take the form of preferences or quotas. It can thus include measures such as organizing interviews or training programmes for members of the under-represented sex, mentoring programmes, etc. It can even include hiring/promotion preferences, if such measures are needed to circumvent concealed discrimination.

On the other hand, the States also often use positive action to limit the negative effects on women's position in the labour market of the unequal distribution of responsibilities in the family. Again, positive action used for this normative purpose can include neutral measures such as providing full compensation of lost salaries to parents if both parents stay at home during a period of their child's early life, part-time work or flexible hours, etc. However, it can also include preferences such as advantages for women in relation to available childcare, reintegration programmes for mothers returning to work, and preferences in relation to childcare service. Some consider that measures such as extended maternity leave, longer sick-leaves for

parents with higher number of children, and similar parenthood measures fall within this category of positive action.

In addition to these two normative goals we can also find that the States use positive action for a third normative goal. Significant numbers of European States started using positive action to ensure the balanced representation of men and women in bodies with significant decision-making powers. These bodies are most often of a political character. However, this is not the rule. States use positive action to ensure balanced participation in non-political bodies as well, such as educational and cultural committees or executive boards. In principle, the purpose of balanced participation is to ensure a democratic legitimacy for the decisions of bodies that are of such social relevance that they are capable of influencing the manner in which society organizes its affairs. In that respect, they aim to ensure that the decision-making process includes a wide range of different perspectives, experiences and normative commitments. It is possible to argue that preference and quotas facilitating balanced representation in executive boards could be justified by goals such as diversity and economic effectiveness. This certainly may be the reason why commercial enterprises may favour this type of measure. However, as explained later, diversity and commercial effectiveness are rather problematic as a justification of mandatory positive action measures of this kind.

3. The EU Legal Framework

3.1. The European Treaties and EU Legislation

Positive action has been part of the EU sex equality law since the very beginning. The first Directive regulating the issue of sex discrimination in employment provided a provision explicitly allowing positive action. Art 2(4) of the 76/207 Equal Treatment Directive thus stated “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 [access to employment, including promotion, and to vocational training and as regards working conditions and social security].” The text of Art 2(4) appeared to allow a very generous interpretation of positive action. It tolerates almost any measure, including sex-based preferences that in any way promote women’s opportunities in the labour market. The text seemed particularly favourable to measures aiming to circumvent the effects of so called structural or systemic inequality, such as traditional distribution of childcare and family responsibilities between the sexes, on the position of women in employment. As discussed below, the ECJ did not seem to agree with such interpretation.

Art 2(4) was the only provision regulating positive action in the EU for almost two decades. Eventually, it was supplemented by Art 141(4) of the Amsterdam Treaty. Art 141(4) provided that “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 women (as under-represented sex) to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers.” It would seem that Art 141(4) was included into the Treaty as a reaction to the ECJ’s Kalanke ruling, and was intended to ensure a wider scope for positive action than the one favoured by the Court. After the Lisbon Treaty reform, the provision can be found under the new numbering as Art 157(4) of Treaty on Functioning of the European Union (TFEU).

During the last decade, EU sex equality legislation went through a thorough reform. The Equal Treatment Directive was first amended and eventually replaced by Directive 2006/54 (Equal Opportunity and Equal Treatment Directive – the Recast Directive). To avoid any potential conflicts between this Directive and the Treaty, Art 3 of the Recast Directive replaced the old positive action provision. Art 3 essentially defined positive action by tying it directly to Art 157(4) TFEU. It provides that “member states may maintain or adopt measures within the meaning of Article 141(4) [today 157(4)] of the Treaty with a view to ensuring full equality in practice between men and women in working life.”

Art 3 of the Recast Directive is not the only positive action provision that can be found in EU secondary sex equality acts. Directive 2004/113 (Goods and Services) also includes a positive action provision. Art 6 of the Goods and Services Directive states that “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.”

Obviously, the sex equality positive action provisions are not identical. While Art 6 of the Goods and Services Directive simply refers to a more general term “specific measures”, Art 157(4) TFEU is somewhat more specific and refers to “measures providing for specific advantages...for the under-represented sex”. Art 6 defines the purpose of positive action as to “prevent or compensate for disadvantages linked to sex”, while Art 157(4) sees its purpose to “make it easier for the under-represented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers.” These differences may be simply differences of style. However, differences in text allow interpretation according to which Art 6 appears to allow a narrower reading of positive action.

Positive action provisions can also be found in the other EU Equality Directives not related to sex. Both Directive 2000/43 (Race Equality) and Directive 2000/78 (General Framework) include positive action provisions. Both of these provisions are essentially the same as Art 6 of the Goods and Services Directive. For example, Art 7 of the General Framework Directive provides that “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 [religion or belief, disability, age or sexual orientation].” Art 5 of the Race Equality Directive provides essentially the same with the obvious difference in relation to the ground of discrimination.

It is useful to note the place of the positive action provisions within the structure of the EU Equality Directives. Each of the Directives deals with the positive action in a special independent article. None of the Directives defines positive action as an exception to the equal treatment principle. On the contrary, their text is rather explicit about positive action being an instrument for promoting real-life equality. Since the equal treatment principle serves essentially the same purpose, these provisions suggest that positive action can be understood either as a parallel legal expression of the equality ideal or an exception to the equal treatment principle.

3.2. ECJ's Approach to Positive Action

The European Court of Justice faced the issue of positive action on nine different occasions.¹⁹ This Report will focus on those cases that were crucial for the development of the Court's positive action doctrine that is still valid today.

The Court faced the issue of positive action for the first time in the infringement case *Commission v. France* over two decades ago.²⁰ In its first positive action case, the Court seemingly assumed a rather favourable view of positive action measures. The Court held that “*the exception provided for in Article 2(4) [of Directive 76/207/EEC] 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.*”²¹ However, this ruling was rather general and it left open a range of questions related to positive action.

The next time the Court confronted the issue of positive action was a decade later in the well-known *Kalanke* case. The *Kalanke* decision established the basic framework of the ECJ's positive action doctrine that is still valid today. The dispute concerned a positive action measure consisting of employment preference granted to female candidates who were equally qualified to men competing for the position where women were underrepresented. The *Kalanke* Court held that the sex-based preferences in question violated the prohibition of discrimination on grounds of sex prescribed by Art 2(1) of Directive 76/207 (Equal Treatment) to the extent that they were “automatic” and “absolute and unconditional”. As such they substituted “*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.*”²² The *Kalanke* ruling was strongly criticized for its supposedly narrow approach to positive action. The decision was particularly confusing since the challenged measure could not be easily described neither as automatic nor as absolute and unconditional. On the contrary, the employment preference applied only under two conditions. First, the preference could not be granted if women were not underrepresented. Second, a female candidate was granted the preference only if she satisfied the condition of being equally qualified. Moreover, since the male candidate did not have better qualifications for the job, he could not be deprived of something that he did not acquire.

Its confusing character allowed two opposing interpretations of the *Kalanke* ruling. On the one hand, it was possible to read *Kalanke* as suggesting that the Equal Treatment Directive allowed only an extremely limited scope of sex based preferences, such as those aiming to compensate for past discrimination. This view had a strong support in the Opinion of AG Tesouro in *Kalanke*.²³ AG Tesouro was of the opinion that the Directive allowed only those positive action measures aiming to

¹⁹ Case 312/86 *Commission v France* [1988] ECR 6315; C-450/93 *Eckhard Kalanke v Freie Hansestadt Bremen* ECR [1995] I-03051; C-409/95 *Hellmut Marschall v Land Nordrhein-Westfalen* ECR [1997] I-06363; C-158/97 *Georg Badeck and Others* ECR [2000] I-01875; C-79/99 *Julia Schnorbus v Land Hessen* [2000] ECR I-10997; C-407/98 *Katarina Abrahamsson and Leif Anderson v Elisabet Fogelqvist* ECR [2000] I-05539; *Joseph Griesmar v Ministre de l'Economie, des Finances et de l'Industrie et Ministre de la Fonction publique, de la Réforme de l'Etat et de la Décentralisation* [2001] ECR I-09383; C-476/99 *H. Lommers v Minister van Landbouw, Natuurbeheer en Visserij* ECR [2002] I-02891; C-319/03 *Serge Briheche v Ministre de l'Intérieur, Ministre de l'Éducation nationale and Ministre de la Justice* [2004] ECR I-08807.

²⁰ Case 312/86 *Commission v France* [1988] ECR 6315.

²¹ Case 312/86 *Commission v France*, para. 15.

²² For the critique of this doctrinal approach see Fredman fn. 14

²³ C-450/93 *Eckhard Kalanke v Freie Hansestadt Bremen* ECR [1995] I-03051.

improve women's *capacity to compete* in the EU labour market "on equal footing" with men. On the other hand, the language of the reasoning made it possible to read *Kalanke* along the line of Justice Powell's opinion in the US Supreme Court's famous affirmative action decision in *Bakke*.²⁴ According to this reading, the criterion of sex could be a legitimate tie-breaker if it was merely one of several socially sensible criteria that could be used as selection criteria. The European Commission seemed to have favoured some version of this interpretation of the *Kalanke* ruling.²⁵

The Court provided an answer to this dilemma in its subsequent positive action ruling in the *Marschall* case.²⁶ *Marschall* is arguably the ECJ's most important positive action ruling. It is a cornerstone of the Court's positive action doctrine that established a comprehensive system of scrutiny of positive action measures. The dispute involved a system of preferences for equally qualified women competing for employment in public offices where women were underrepresented. The system was similar to the one scrutinized by the *Kalanke* Court. However, what distinguished the positive action policy under scrutiny in *Marschall* was the so-called "saving clause" [*Öffnungsklausel*]. The "saving clause" was the explicit rule allowing the employer to override a preference given to an equally qualified female candidate for some other reason of social policy such as disability, single parenthood, or army duty. The Court found this system of preferential treatment acceptable. According to the Court, the system of sex based preferences containing a saving clause did not guarantee absolute and unconditional priority for women in the event of a promotion "*if, in each individual case, it 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*".²⁷

However, the savings clause was not the only condition that a system of preferential treatment had to satisfy in order to pass the Court's equal treatment scrutiny. The *Marschall* Court reaffirmed the *Kalanke* argument that the EU legal order favours the notion of equality of opportunity instead of equality of results. Accordingly, the Court argued that the system of preferential treatment may be used "*if such a rule may counteract the prejudicial effects on female candidates*" of prejudices and stereotypes "*concerning the role and capacities of women in working life*".²⁸ The Court explicitly admitted that "*the mere fact that a male candidate and a female candidate are equally qualified does not mean that they have the same chances*" due to employers' rational or irrational fears 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*".²⁹ Since these prejudices and stereotypes often remain well concealed during a decision-making process and cannot be easily proven, preferential treatment may be needed to "*reduce actual instances of inequality which may exist in the real world*".³⁰

²⁴ *Regents of the University of California v. Bakke*, 438 U.S.265 (1978).

²⁵ Communication from the Commission to the European Parliament and the Council on the interpretation of the judgment of the Court of Justice on 17 October 1995 in Case C-450/93, *Kalanke v Freie Hansestadt Bremen* COM/96/88.

²⁶ C-409/95 *Hellmut Marschall v Land Nordrhein-Westfalen* ECR [1997] I-06363.

²⁷ *Marschall*, para.33.

²⁸ *Marschall*, para 29.

²⁹ *Id.*

³⁰ *Marschall*, para. 31.

The *Marschall* ruling left open some important questions. The first one concerned the “savings clause” itself. Although it insisted that the savings clause was of central importance for legitimacy of preferential treatment, the Marschall Court did not provide even an exemplary list of reasons sufficiently important to override a preference granted to women as members of underrepresented sex. Consequently, this question remained within the discretion of national legislators and courts. The discretion was not unqualified. The Court explicitly stressed that “*it should be remembered that those criteria must not be such as to discriminate [directly or indirectly] against female candidates*”.³¹ A second question concerns the relationship between the types of benefits distributed through preferential treatment and its intensity. A clear distinction that the Court made between the positive action measures promoting “equality of opportunity” and those promoting “equality of results” suggested that the level of the Court’s scrutiny would not be the same in cases involving preferences aimed at increasing women’s capacity to compete for employment positions and those involving distribution of actual employment positions.

The Court answered, at least partially, these questions in the subsequent positive action decisions such as *Badeck*, *Abrahamson* and *Lommers*. In *Badeck* the Court scrutinized a rather complex system of positive measures in the public sector, involving several different types of quotas and preferential treatment measures.³² One of the models under scrutiny involved the so-called *flexible result quota* (*flexible Ergebnisquote*). The flexible result quotas had two essential features. First, the number of designated places was determined on the basis of the actual circumstances characteristic of each particular employment sector (it was contextualized). Second, the outcome of each selection procedure did not necessarily end up favouring the equally qualified female candidate. The sex-based preference could be overridden for “*reasons of greater legal weight*”.³³

The Court approved this system. It stressed two reasons showing that the system was not “absolute”.³⁴ It first pointed out the relevance of the fact that the public authorities determined the number of reserved positions on the ground of actual circumstances of each particular employment sector. Second, the Court stressed that the candidate's sex is never decisive for the purposes of a selection procedure. In other words, the system allowed enough room for disproving that a situation is unfavourable to women even though the initial evidence (the fact of underrepresentation) suggested otherwise. The relevance that the Court accorded to the contextualization of preferential treatment suggests that the underrepresentation *per se* (more precisely, its size) is not the center of the Court’s interest. The underrepresentation is relevant only to the extent that it indicates the existence of sex-based prejudices and stereotypes.

The *Badeck* Court provided partial answers to the two questions left open by the *Marschall* ruling. The Court did not provide some defined list of reasons capable of overriding the granted preferences to women nor did it provide clear guidelines related to their content or strength. However, the *Badeck* ruling did provide some sense of their scope, since the Court implicitly embraced the reasons that the local authorities used to override the gender preferences.³⁵ Those reasons included long-

³¹ *Marschall*, para. 33.

³² C-158/97 *Georg Badeck and Others* ECR [2000] I-01875.

³³ *Badeck*, para 33.

³⁴ *Badeck*, paras 27-36.

³⁵ *Badeck*, para 35.

term unemployment or part-time work due to family work, voluntary army service, disability and long term unemployment.

Badeck also clarified that the Court's level of scrutiny depends on the type of benefits distributed through preferential treatment. One of the positive action measures scrutinized in *Badeck* involved a strict results quota. The local authorities allocated at least half of the available places in their training programmes to women in those professions where women were underrepresented. Since men were fully excluded from accessing at least 50% of the training places, the measure was clearly "automatic". Hence, *Marschall* and especially the *Kalanke* ruling suggested that it was discriminatory. However, the Court held that such automatic preferences were not a violation of the equal treatment principle.

The Court found that the measure did not exclude men from places in employment. It merely improved the chances of female candidates to acquire employment in the public sector.³⁶ Moreover, the measure provided that if there were not enough applications from women, despite appropriate measures for drawing the attention of women to the training places available, it was possible for more than half of those places to be taken by men. Therefore, the Court pointed out that it was not completely "inflexible".³⁷ It also stressed that the measure concerned types of training for which places were also available in the private sector.³⁸ Consequently, no male candidate was absolutely excluded from the training. Based on these considerations the Court concluded that the measure primarily improved women's ability to compete on the labour market and to pursue a career on an equal footing with men.

Such reasoning clearly shows the Court's willingness to apply a lower level of scrutiny to positive action measures involving preferences for women in relation to benefits not involving actual employment places. Two features marked the reduced level. First, there was no savings clause requirement. Second, the purpose of the measure was broader. The measure went beyond eliminating concealed prejudice and stereotypes, which are tightly related to direct sex discrimination. It was designed to eliminate structural barriers to equality of women in the labour market, such as lower qualifications or professional experience due to unequal distribution of family and childcare responsibilities. Consequently, there was also no need to demonstrate that the candidates were equally eligible (qualified).

The Court reaffirmed this reduced level of scrutiny in the *Lommers* case.³⁹ *Lommers* concerned a positive action measure involving preferences for women in relation to subsidized places in childcare facilities operated by a public sector employer. Relying on its *Badeck* approach, the Court found that this measure was acceptable.

One could argue that since it allows employers to override women's preferences, relying on some rather problematic, if not dubious, reasons the savings clause requirement is potentially the weakest part of the Court's approach to positive action. Although there is no doubt that this requirement can be easily misused, the savings clause is not the main problem. If used properly, the savings clause can be a very useful support to the argument that positive action is a socially balanced and fair policy of promoting equality. Potentially the most restrictive feature of the Court's positive action doctrine lies buried in the requirement of the *equal* qualifications of

³⁶ *Badeck*, para 52.

³⁷ *Badeck*, para 51.

³⁸ *Badeck*, para 53.

³⁹ C-476/99 *H. Lommers v Minister van Landbouw, Natuurbeheer en Visserij* ECR [2002] I-02891.

the competing candidates. The implications of this requirement were nicely illustrated by the *Abrahamsson* case.⁴⁰

The *Abrahamsson* dispute revolved around the employment positive action policy in academic institutions that granted a strong preference to female candidates (being the under-represented sex) and possessing *sufficient* qualifications for the specific post. The only condition was that the difference in their respective qualifications was not so great that application of the rule would be contrary to the principle of objectivity in selection. The principle of objectivity was essentially an expression of the society's interest to have sufficiently qualified individuals performing important social tasks. Accordingly, the principle required that for the purpose of appointments (hiring, promotion) to public sector positions, primarily objective criteria were to be taken into account. These criteria consisted of "merits" determined by the length of previous periods of service. However, they also valued "abilities" to respond to the requirements of a particular post. This allowed the employer to hire a person not only on the grounds of her proven achievements but also on the basis of her potential to turn into a valuable asset.

The Court rejected the specific measure under scrutiny. However, although it is easy to read the *Abrahamsson* reasoning in this manner, the Court did not categorically reject the positive action measure that granted preferences to women who are not as equally well qualified as male candidates in terms of traditional professional criteria.

The Court held that the specific measure could not be justified under the Equal Treatment Directive, Art 2(4) positive action exception because the evaluation process was not transparent and the measure did not provide a savings clause. The Court stressed that in *Badeck* it already permitted the criteria of evaluation not to be based exclusively on traditional "purely objective" professional criteria. On the contrary, since these criteria disadvantaged women due to systematic barriers to equality the Court held that it is "*legitimate for the purposes of that assessment for certain positive and negative criteria to be taken into account which, although formulated in terms which are neutral as regards sex and thus capable of benefiting men too, in general favour women.*" This arguably allows employers to consider as "equally qualified" those candidates of the opposite sex who are not equal in terms of traditional professional qualification as demonstrated through their past experience and achievements. A female candidate with inferior traditional professional qualifications can still be considered "equally qualified" for the purpose of the preferential treatment if the employer finds that her talents, which she could have not demonstrated in a traditional fashion due to systemic barriers to real equality of women, could potentially turn into assets. However, the Court stressed that any such positive system of qualification evaluation must be based on clear and unambiguous evaluation criteria and must be transparent. These requirements were not merely a protection against arbitrary misuse. They also allowed the Court to fully evaluate the proportionality of the disputed measure.

The *Abrahamsson* and *Badeck* reasoning seem to suggest that the Court is aware of the limitations entailed by the "equal qualifications" condition. As discussed, the *Badeck* Court already permitted the evaluation of the candidates' qualification not to be limited to conventional criteria of professional competence and expertise. On the contrary, it can take account of much more subjective criteria related to personal skills usually acquired and developed through work outside employment. This fact alone

⁴⁰ C-407/98 *Katarina Abrahamsson and Leif Anderson v Elisabet Fogelqvist* ECR [2000] I-05539.

toned down the sternness of the equal qualifications requirement. However, this is not the only indication that the Court is willing to make this requirement more flexible. In *Badeck* the Court was asked to evaluate the measure involving strict quota that reserved 50% of places in employee's representative bodies as well as on executive and supervisory boards for women. The Court *de facto* avoided the question. It argued, as "*it appears from the order for reference*," that the measure was in fact not mandatory because in some cases its implementation would require "amendment of the relevant law". Therefore, the Court assumed, "*it permits, to some extent, other criteria to be taken into account*." This assumption allowed it to conclude that the measure was acceptable. There is no doubt that the Court could equally have assumed, if it had wanted, that the quota could be implemented straightforwardly. The fact that the Court avoided this option suggests that the Court was not sure that it was prudent to apply the same approach that it used in the context of conventional employment to the issue of participation quotas for decision-making bodies of commercial companies. Participation in decision-making bodies cannot be easily identified with conventional types of work requiring some standardized set of skill and knowledge acquired through professional education and training. In that respect, the Court's reluctance was understandable.

However, the fact that the Court chose not to get engaged in the dilemma of executive board quotas has an important consequence that the Court could have hardly predicted when it was deciding the *Badeck* dispute. It casts a shadow of doubt on the currently best-known positive action measures in Europe – sex based quotas for executive boards of commercial companies.

SECTION II

4. Positive Action Measures at the National Level

4.1. Legal Sources and Normative Justification of National Positive Action Measures

The national reports show that the 33 States that are part of this Report are quite familiar with the issue of positive action. This does not mean that the States have committed themselves to the notion of positive action. It does not even mean that positive action measures are used in practice to a satisfactory degree. It means primarily that most of them have legally regulated the issue in one way or another.

In principle, the States have followed a pattern similar to the one set by the Treaty on Functioning of the European Union (art 157(4)). Although significant number of them proscribed some type of mandate for public authorities to promote equality between women and men (Norway, Finland, Germany, Iceland, Denmark, Portugal, Spain, UK, Luxembourg, Austria, Croatia and Italy in relation to the franchise right), most of them refrained from making positive action legal obligation. In principle, States have merely provided legal permission for positive action.

A number of States even allow positive action, in their Constitutions (Malta, Turkey, Austria, Greece, Spain, Finland, France and Portugal). Some of these Constitutions provide explicit permission, while others, in the opinion of national experts, provide provisions that can be easily interpreted as allowing or even requiring positive action. Many of these States were clearly influenced by the requirements of the UN Convention on Elimination of Discrimination against Women (the CEDAW) Art 4 (1) of the CEDAW explicitly provides that adoption of temporary special measures aimed at accelerating de facto equality between men and women shall not

be considered discrimination. However, it also stresses that these measures shall be discontinued when the objectives of equality of opportunity and treatment have been achieved. Art 4(2) defines measures aimed at protecting maternity as special measures that do not constitute discrimination.

A great majority of States regulates positive action in their equality/antidiscrimination legislation (Belgium, Bulgaria, Cyprus, Croatia, Czech Republic, Estonia, Germany Ireland, Island, Italy, Liechtenstein, Luxembourg, Macedonia, the Netherlands, Poland, Rumania, Slovenia, UK). Some of them, such as France, regulated positive action in their labour code.

Some States merely provide a statutory permission of positive action, without actually defining the term. Those States that provided statutory definition of positive action (Norway, Sweden, France, Germany, Portugal, Spain, Netherlands, Ireland, UK, Luxembourg, Austria, Poland, Croatia) define positive action in term of special advantages or preferential treatment. Some States, such as the Netherlands or France define positive action exclusively as preferential treatment for women. A significant number of States (Norway, Finland, Iceland, Denmark, France, Portugal, Belgium, Spain, Poland) insist on temporary character of such measures.

Some states also define the purpose of positive action measure. In principle, such temporary advantages aim to remove factual obstacles to real equality of opportunity for women and men. National reports suggest that in most States factual obstacles to equality are primarily perceived in terms of concealed stereotypes about women and their role in a society. However, there are two reasons why this premise ought to be viewed with some caution.

First, some States, such as Germany, explicitly tie the permission for preferential treatment provided for by their legal provisions to unbalanced representation of men and women. Many of them even define the underrepresentation threshold, usually at 40% (e.g. Bulgaria, Greece, Austria, Luxembourg). The fact that underrepresentation is integral part of their legal definitions of positive action raises an interesting question. It is not clear whether these States perceive underrepresentation as a form of inequality *per se* or merely as an indication of concealed discrimination based on stereotypes. As discussed above, the ECJ's doctrine of positive action seems not favourable to the former premise.

Second, judging by the variety of positive action measures found in the national reports it is fair to assume that a significant number of States also recognizes that conventional social arrangements (e.g. sex-related distribution of family responsibilities or traditional manner of evaluating qualifications) are an equally effective obstacle to real equality as concealed stereotypes. As the Greek expert has explained, the goal of positive action is to eliminate gender inequality, which consists of "de facto situations affecting mainly women, due to 'prejudices and stereotypes' which, by infiltrating socio-economic structures, made these inequalities structural and systemic". Many of the measures found in national reports clearly aim to circumscribe negative implications of this systemic or structural inequality of sexes.

Bearing in mind the importance of the proportionality requirement in the ECJ's positive action case law it is somewhat surprising that the States do not pay more explicit attention to that requirement in their legal provisions defining positive action. Only Germany, the Netherlands, Norway, Sweden, Spain and UK insisted on the proportionality of positive action measures. Similarly, only few states (Norway, Sweden, Spain, Finland, Austria and UK) insisted that sex-related preferences could be used only when candidates are equally qualified (as tie-breakers).

As noted already, most States define positive action as permission, not a legal obligation. In most States, a statutory provision allowing positive action is sufficient ground for adopting positive action measures in practice. However, in some States, such as Denmark, the statutory permission *per se* is not enough. Rather, both public institutions and private actors who plan to use positive action measures involving sex-based preferences must acquire additional special approval from a competent governmental agency.

National reports show that many States relied on positive action permissions provided by their equality laws and adopted some form of positive action in practice. Some States, notably Ireland, Liechtenstein and Macedonia, have used policy documents, such as national gender equality strategies, to commit themselves to various positive action measures, including (soft) targets and goals. Turkey prescribed its positive action measures through administrative policy documents. These commitments have merely a political value and are not legally enforceable, however.

As seen below, a minority of the national experts reported that their States adopted measures based on sex preferences. At the same time, national reports show, as a relatively recent development, a steady trend in adopting compulsory positive action measures. Most likely inspired by the Norwegian experience, the trend concerns primarily firm positive action measures such as quotas and preferences. Besides Norway, notable examples of such trend can be found in other Nordic states such as Sweden or Iceland. However, the trend has clearly spilled over to other EU states, as can in the Netherlands, Spain and France.

At the same time, reports show that there is also a noticeable number of States that allowed positive action in law but have ignored this option in practice, especially in relation to the area of employment (Cyprus, Czech Republic, Croatia, Macedonia, Poland, Rumania). There are also few States that apparently disfavour the idea of positive action. Although none of the States explicitly prohibits positive action altogether, there is a small number of States that remained conspicuously silent about the issue (Latvia, Slovakia). Moreover, some Member States have allowed positive action but have also more or less explicitly prohibited sex based preferential treatment (e. g. Lithuania). Some of these States even adopted rather dubious positive action measures. For example, the Latvian expert reported that Latvia's only positive action measure concerns appointments for the highest judicial positions currently dominated by women to the advantage of male judges.

4.2. Positive Action in Relation to Political Participation

National reports show that political participation is an area in which the States are most likely to use positive action measures involving preferential treatment.

For analytical purposes it is useful to distinguish representative (elected) and appointed political bodies from the activities of political parties. National reports show that positive action measures are most frequently used in relation to appointed political bodies. For the purposes of this Report, the term appointed political bodies refers to those bodies of political decision-making that are not subject to direct democratic election. Rather, their members are appointed either by Parliament or by the Government (or some of its Ministries). Moreover, the reports show two additional things. First, States are more likely to adopt positive action measures involving preferences here than in any other regulatory area. Second, quotas are the most frequent type of positive action used in this area (e. g. Belgium, Greece, Italy, Denmark, Spain, Iceland, the Netherlands, and Slovenia).

For example, Finland adopted the 40% flexible quota requirement for all public administration bodies and bodies exercising public authorities. A relevant body can justify the failure to achieve the numerical target if there are “special reasons”. The consequence of an unjustified breach can lead to the appointing decision being overturned by an administrative court. Norway adopted a similar model of flexible quota requiring a minimum of 40% representation of both sexes in all public boards and committees. A failure to achieve the 40% target can be justified only if “special circumstances make it obviously unreasonable to fulfill the target”. However, the absence of any accompanying sanctions for the failure to achieve the target makes the Norwegian model significantly weaker compared to the Finish one. Some states opted for quota models providing some additional safeguards to their numerical targets. Iceland opted for a quota model consisting of a 40% target accompanied by the requirement to nominate candidates of both sex for each available position in all national and local government committees, councils and boards. A failure to achieve the target can be justified only if it was not possible to nominate candidates of both sexes due to “objective circumstances”. Again, the Icelandic expert warned that the lack of sanctions for the failure makes this flexible quota system rather ineffective. The Danish soft quota model has the same problem.

Non-Nordic States seems to be more likely to adopt even softer quota models. For example, all local authorities in Ireland have the duty to promote appropriate gender balance in making appointments to all committees. However, the absence of any precise numerical targets and sanctions makes this more of a consciousness-raising tool than an actual quota system. The Spanish model of “balanced participation” in all managerial and representative positions appointed by the Government or the Italian “at least one third” model of self-imposed recommendations face a similar critique.

It is interesting to note that some States imposed stricter targets requirement on particular public bodies. France has, for example, imposed the 1/3 representation target for “juries and commissions” deciding on recruitment and promotions of civil servants. A similar practice can be found in Italy. The French expert warned that the target is not a particularly strong requirement since decisions of those bodies that were not appointed in accordance with this rule are not void. Nevertheless, the fact that the State insisted on the special quota rule only for a particular public body is interesting. Ireland adopted the 40% quota for executive boards of public services broadcasting companies. Italy also found it appropriate to adopt the special positive action rule in relation to Radio and Television Sector providing that public and private broadcasting companies shall promote positive action measures so as to eliminate unequal opportunities. These measures seem to suggest that balanced representation of women and men is greater for some public bodies than the others. In that respect, it is interesting to note that both the employment committees and decision-making bodies of media broadcasting companies have a considerable social power. The former are not only relevant in terms of distribution of available employment opportunities. Their employment decisions are tightly related to the distribution of control over social power entailed by the state administration. The latter have the power to influence and shape public opinion.

States are not as keen in imposing mandatory positive action on political parties. This reluctance is particularly noticeable in relation to Nordic States. Nevertheless, a considerable number of States have opted for this approach (Belgium, Croatia, Spain, Poland, France, Greece, Macedonia and Portugal). Some States, such as Greece, opted for a minimum quota and imposed a 1/3-quota rule for election lists proposed by political parties. Slovenia, Macedonia and Poland followed a similar path. Others

have adopted higher representation quotas. Spain, for example, proscribed that the overall list of candidates proposed by a political party must have at least 40% of members of each sex. The rule applies to almost all elections. France proscribes a 50% quota rule for election lists participating in the elections to the National Assembly. Since quotas *per se* cannot guarantee more equal representation some states have also insisted on the so-called zipper rule, requiring one-for-one distribution of places on the list. Thus, France requires a strict alternation between men and women on the election list for the Senate elections. Portugal and Macedonia opted for their own versions of the zipper rule. Some states developed different effectiveness safeguards. Spain, for example, adopted the rule that the “balanced participation” requirement applies to the election list sections consisting of 5 election places.

Most States proscribed financial consequences for political parties that failed to satisfy quota requirements. In principle, political parties that do not comply with the prescribed positive action requirement lose a part of the funds provided by the state as a support for their public service. Such sanctions can be found in France, Italy, Croatia or Portugal. Some states opted for a stricter approach. Poland thus refuses registration of all lists failing to satisfy the 35% quota rule.

In most cases, however, political parties use quotas as a self-imposed equality tool. Quotas are used either for ensuring balanced representation of women in party’s decision-making bodies (Czech Republic, Estonia, Italy) or for ensuring a sufficient number of women on election lists (Germany, Cyprus, Turkey, UK, Netherlands, Poland, Italy, Austria, Luxembourg).

4.3. Positive Action in the Area of Employment

While political participation may be the area where the States are most likely to use obligatory positive action measures, employment seems to be the area with greatest variety of positive action measures. This is not surprising since in the EU positive action is primarily thought of as a tool of advancing women’s position in the labour market. It is certainly an area where the issue of positive action turned out to be most dynamic and most controversial. National reports show that positive action in employment includes both voluntary and mandatory measures as well as non-preferential and preferential measures. However, they also show that the States clearly favour some positive action measures over others in this area.

The reports show that national legislators are rather reluctant to adopt mandatory positive action measures in the area of employment. In principle, national laws simply provide permission to take positive action and leave the actual decision to employers. Although mandatory positive action measures are far from being widespread in the public sector, the reluctance is noticeable more in relation to private sector. National reports show that States are more likely to impose mandatory positive action measures, especially those involving sex related preferences, on state-controlled employers (national and local governmental agencies and state-controlled companies) than private employers (Spain, Austria, Netherlands, Greece). States that do opt for mandatory positive action in this area usually prefer neutral positive action measures such as awareness-raising programmes, gender-neutral recruitment tenders, increased recruitment efforts or reporting. Only a small number of States require state-controlled employers to implement some type of mandatory preference (Bulgaria, Greece, Spain, Slovenia, Italy). Mandatory positive action measures involving preferences are most often focused on increasing women’s competitive ability and include measures such as vocational training for underrepresented sex or mentoring.

Moreover, positive action measures involving mandatory preferential treatment most often concern appointments to employer's decision-making bodies. They are very rarely applicable to recruitment or promotion.

To make it easier for a reader to acquire an overview of a wide range of positive action measures used in employment that are reported in national reports it is possible to classify positive action measures in particular groups. This classification is primarily an analytical tool devised for the purposes of this report. It is not imagined as some generally applicable classification of positive action measures.

Public Sector Employment

In the public sector employment (consisting of national and local government and administrative institutions, institutions with public powers and state-controlled enterprises) it is possible to distinguish three groups of positive action measures: soft positive action measures, positive action measures involving preferential treatment and quotas. Although most of these reported measures are mandatory, this is not a necessary characteristic.

Soft positive action measures used by the States in relation to public sector employment have two common characteristics. They leave employers with wide discretion in choosing concrete action and they are not accompanied by a threat of sanction in the case of failure. The principle of balanced participation is a good illustration of this type of positive action. The principle is essentially an obligation of administrative and public institutions to take into account the goal of balanced representation of men and women in employment. Since it usually does not entail a concrete numerical target or sanction the principle of balanced participation is essentially an aspirational measure. Another version of this measure is a very general obligation to promote equality of opportunity. For example, Estonia simply provided that state and local authorities are required to promote gender equality systematically and purposefully. No specific goals or sanctions were provided. Another measure belonging to this type of positive action used by States is the nomination parity rule. The nomination parity rule requires from the employer's nominating body to propose at least two similarly qualified candidates of different sex for the same position. (Finland, Denmark) Although this is not necessarily the case, the measure usually comes without a sanction for failure. Another soft positive action measure found in the national reports is the employer's obligation to encourage employment/promotion applications from members of the underrepresented sex.

The most frequent soft positive action measure is the so-called Equality/Action Plan. A significant number of States has opted for Equality Plans as a mandatory positive action measure in employment (e.g. Spain, the Netherlands, Austria, Italy). Although Equality Plans differ in scope in different Member States, they share the basic structure. They usually require an employer to conduct some type of situation analysis while at the same time they provide it with considerable discretion in choosing concrete measures to address identified problems. They need to be developed periodically. Many of them require an employer to explain the reasons why it failed to realize goals set by the previous Plan. Some States, such as UK or Italy, explicitly allow Equality Plans to include preferences as one of the practical measures. In implementing this measure, employers often adopt some sort of soft quotas. It is not clear how effective Equality Plans are in achieving concrete goals. However, this measure can be used as a tool of pressuring employers to keep re-evaluating and

improving their practices. Some legal scholars have even suggested that employers tend to identify with their Equality Plans, which facilitates their implementation.⁴¹

The second type of positive action measures in public sector employment found in national reports is measures involving sex related preferences. Strength of these measures varies depending on two features: the employer's ability to justify the failure to respect the preference requirement and the accompanying sanction. Target driven preferences in relation to hiring/promotion or training programs are standard example of this type of positive action. The measure requires from public sector employers to grant access preferences to candidates of the underrepresented sex (in most cases women) until they achieve some specific representation target. This type of positive action measures can be found in different forms in various states. For example, in Netherlands different ministries and public institutions use preferences (for equally qualified candidates) to achieve self-imposed targets. Since these preferences are self-imposed and are not supported by any sanction they are basically. Italy adopted a milder version of this type of measure. Public sector employers in Italy have the obligation to justify their decision to hire/promote equally qualified male candidate if they are over-represented. We can find a similar measure in Spain and in Germany in relation to state-controlled companies. Spanish public sector employers have the duty to ensure balanced composition in hiring/promotion committees unless there is a "well-founded and objective reason" that can justify the exception. In Norway, employment preferences for near-equally qualified candidates belonging to underrepresented sex can be found in some public sector collective agreements. The Norwegian Government has also used sex-related preference to increase the number of female judges. Few States such as Italy or Spain require from public sector employers to grant access preferences in relation training programs to women or workers who were absent from work due to childcare responsibilities.

It seems that only Germany, Austria and Bulgaria adopted mandatory (hard) preferences for their public sector employers. Austrian governmental agencies thus must grant hiring or promotion preferences to equally qualified women whenever they constitute less than 45% of employees in a relevant department. Bulgaria followed a similar path. At the same time, while Bulgaria kept the same approach in relation to state-controlled companies, Austria opted for an approach relying on soft targets. Similar flexible approaches can be found in Ireland. Ireland has set soft targets in recruitment and hiring aiming to ensure proportional representation of women and men in the workforce of state-controlled companies.

Germany has the most developed system of preferences in public sector employment by far. The system does not apply to state-controls companies. German public sector employers have the obligation to adopt Equality Plans for Women (Frauenförderpläne, Gleichstellungspläne) aiming to increase the representations of women as the underrepresented sex on all levels of employment. Plans must contain numerical targets and time limits, as well as supporting measures, such as for improving the balance between professional and private life and training. Moreover, they must include a duty to hire or promote a member of the underrepresented sex instead of an equally qualified member of the overrepresented sex, unless there are exceptional reasons to decide in favour of the latter. In addition, recruitment and promotion criteria must be redefined in order to eliminate conventional negative connotations of 'typical female' life-styles. In that respect, the laws and internal regulations provide that family work must be taken into account as a positive factor.

⁴¹ Dagmar Schiek, "*Sex Equality Law after Kalanke and Marschall*", 4 ELJ No. 2, pp. 148-66.

Similarly, uninterrupted work experience or mere length of employment are no longer decisive criteria but only if and to the extent that they constitute indispensable qualifications for the position in question.

Quotas are the third type of positive action measures used in the public sector employment found in national reports. This type of positive action will be in close focus in the following section.

Private Sector Employment

States seem particularly reluctant to impose mandatory positive action measures on private employers. Consequently, only a few national experts reported that their States imposed positive action measures such as quotas or some type of preferential treatment on private employers (e.g. Spain, Norway). At the same time, national reports clearly show that private employers are far from being enthusiastic about positive action measures as a tool of promoting equality of women and men. Only a few national experts reported that employers used positive action completely of their own accord. Moreover, even these reports accept that these cases are more of an exception than the rule (e.g. the Netherlands).

To help one acquire an overview of a wide range of positive action measures in employment reported in national reports it is possible to classify positive action measures into six groups: measures favoring encouragement; measures favoring self-empowerment; self-imposed positive action; measures favoring workers involvement; imposed flexibility measures; preferences & quotas.

The first group of measures includes measures that encourage employers to design and adopt proactive measures promoting greater equality of their male and female employees they find most appropriate for their working environment. Standard example of this type of measure is the Equality Prize Programs (Portugal, Hungary, Croatia). These Programs are usually designed as competitions promising some type of a prestigious title and financial reward to employers that satisfied most effectively predetermined competition criteria. Another standard example of this type of positive action is financial support offered by the state to those employers that autonomously adopted some type of positive action measures. For example, Luxembourg offers financial support to employers who hire members of the underrepresented sex. Italy offers financial subsidies to employers who allowed flexible working hours, part-time work, tele/home-working, etc. Similar measure can be found in Austria. Some autonomous provinces in Spain have adopted a more proactive measure of this type. They use so-called “hard recommendations” to encourage private employers to adopt some form of quota system for executive boards. Those employers that follow the recommendation are promised an advantaged position in public procurement competitions.

Joined commitment programs are particularly interesting form of encouragement. They encourage employers to commit to some set of proactive measures designed by the state or by some competent public institutions. They also often require employers to commit to monitoring by these institutions. These programs usually do not include preferences or quotas or any sanctions for those employers who failed to fulfill their commitment. Interesting example of this measure can be found in Denmark. The Danish Government has encouraged private employers to join the “Charter for More Women in Management”. The Charter requires its members to commit themselves to soft targets that ought to be achieved through positive action measures. These measures do not use sex-based preferences. Rather, they include measures such as equality plans, consciously designed recruitment practices capable of identifying

qualified female candidates, human resource policies promoting greater equality of opportunities for women, mentoring programmes, etc. More than 100 companies joined the Charter so far. Although only 16 of them are not state controlled, they are among Denmark's most significant employers. The Dutch "Corporate Governance Code" or "Talents to the Top" programs or the Polish Warszawa Stock Exchange Recommendations program (involving recommendation of "balanced participation" in executive and supervisory bodies) are another version of this measure.

The second group of positive action measures in private employment includes measures encouraging women to participate more proactively in the labour market. For example, Italy and Croatia, offer financial subsidies to female entrepreneurs (self-employed women).

The third group includes measures that are autonomously adopted by private employers. These measures are rather conventional non-preferential measures such as encouraging women to apply for positions where they are underrepresented, organizing training courses for female employees, funding postgraduate education or seminar participation, mentoring, allowing part-time work or flexible working hours, tele-working or working from home, preferences in relation to available childcare facilities (e.g. Belgium, Italy, Norway, Denmark, the Netherlands). More progressive measures belonging to this group are the opening of childcare services to employees or access preferences in relation to available childcare services granted women.

The fourth group of positive action measures in private sector involves measures aiming to employ organized labour to motivate employers to improve position of women. For example, France requires from employers to include the issue of positive action measures in their negotiations with labour unions. Moreover, in order to facilitate these negotiations employers are required to prepare equality report concerning the current position women and men in their enterprise. Austria granted workers councils the right to consult and require from employers information regarding the issue of positive action measures and measures aiming to reconcile work and family.

The fifth group favors the policy of imposed flexibility. It involves measures that impose positive action duty on employers. However, these measures leave employers with discretion to choose measures they find most appropriate for their enterprise. For example, Finland requires from employers to promote equality of women and men in "purposeful and systematic manner". Finish employers responded by adopting various positive action measures, most of which have been mentioned above in relation to the third group. France has imposed on its employers the duty to eliminate equal pay gap (by the end of 2010). Estonia obliged employers to "promote equality" between men and women, which also includes the duty to ensure that the number of employed women and men is as equal as possible. The failure to comply with this duty does not entail any sanctions. A significant number of States has opted for mandatory Equality Plans. This measure can thus be found in Sweden (both in relation to employment and equal pay), Finland (for employer with over 30 employees) or Austria (aiming to eliminate underrepresentation of women).

The sixth group of positive action measures in private sector employment includes sex related preferences and quotas. States are very reluctant to impose this type of positive action on private sector employers. Accordingly, not a single State requires from their private sector employers to grant preferences to women (as underrepresented sex) in relation to hiring or promotion. Portugal and Austria require from their employers to grant access preferences to members of underrepresented sex in relation to training programs. Swedish expert reported that (presumably flexible)

hiring/promotion preferences for equally qualified candidates of underrepresented sex are considered “natural” practice. However, they are not state imposed. Employers usually use them as a tool of their goal-oriented equality plans. Quotas will be the focus of the following section.

In principle, national reports show a lack of interest in positive action as an equality tool in private sector employment. However, this lack of interest is not limited to employers. For example, only the Spanish and French experts reported that labour unions play a relevant role as promoters of positive action measures in their states. In light of such lack of interest among key actors on the labour market, it is surprising not only that the States do not use mandatory positive action measures more often. It is equally surprising that they do not use other alternative tools. For example, only the Spanish and UK national experts reported that their States used public procurement as an incentive for employers to take positive measures.⁴²

Furthermore, although the unequal distribution of family responsibilities is widely recognized as one of the key causes of women’s disadvantaged position in employment, very few national experts reported that their States devised positive action measures aiming to redistribute the burdens of family responsibilities. Some States did show some initiative in this area. The Dutch expert reported that some employers in Netherlands, mostly governmental agencies, provide preferences for women in relation to childcare services. On the other hand, Turkey opted for a highly dubious version of this measure. Turkish law prescribes that every employer with 100-150 female employees must provide a nursery, while those over 150 female employees must also provide a daycare facility. As the Turkish expert suggests, the measure discourages employers from employing women. Portugal opted for a different approach and provided full salary compensation for fathers who take parental leave immediately following the end of maternity/paternity leave during the first 10 days of the leave. Greece subsidizes employers who hire mothers with two or more children. However, most States preferred conventional measures aiming at reconciliation of work and family obligations. These most often involve measures such as part-time work or flexible working hours (Italy). Whether such reconciliation measures actually improve the position of women in employment rather than perpetuate traditional inequality in distribution of childcare and family responsibilities between the sexes is a question.

Overall, the national reports show that the States have been rather uninventive in relation to the use of positive measures in employment. For example, none of the national experts, except the Spanish expert, reported that their State considered budgetary policy as a possible means of promoting equality. Some have reported that their States provide subsidies for female entrepreneurs (Turkey, Croatia, Italy) or have developed Equality Prizes for companies with good sex equality practices (Liechtenstein, Portugal, Hungary). Italy subsidizes those firms and organizations that implement gender equality projects approved by the National Opportunities Committee. Similar measure can be found in Austria and Luxembourg. However, the extent to which measures such as these contribute to real equality remains a mystery.

Unfortunately, it is impossible not to notice a striking absence of two sets of positive action measures of crucial importance from the national reports. The first set involves measures encouraging men to assume greater share of responsibility for childcare. The second set involves measures aiming to reassess and redesign

⁴² On public procurement as an equality tool see Christopher McCrudden, *Buying Social Justice - Equality, Government Procurement, & Legal Change*, OUP, 2007.

conventional recruitment and hiring criteria and practices. This is certainly an area where the European states can and must do more.

4.4. Special Case of Quotas in Employment

As noted above, States have shown a clear reluctance in using firm positive action measures in the area of employment. More precisely, they have been unwilling to impose any type of preferences and quotas on employers in relation to “standardized” employment.

For the purposes of this Report the term “standardized” employment will refer to those jobs the successful performance of which depends on the set of proficiency skills usually acquired through professional education and/or training. In principle, these jobs are distributed on the basis of a standardized and supposedly objective set of professional criteria as opposed to subjective personal characteristics particular to a specific candidate. In contrast, the term non-standardized employment will refer to those jobs that are not limited to standardized professional knowledge and set of professional skills. Rather, their successful performance depends also on subjective talents and aptitudes characteristic of a particular person. Membership in various executive bodies is an example of non-standardized employment. There is no doubt that professional knowledge and experience matter for successful participation in executive boards. However, there is little doubt that commercial governance also depends on very subjective talents such as instinct, nerve, communication abilities, interpersonal relations, aptitude for professional networking, or comprehension of social surroundings.⁴³

As seen in the previous section, not many experts reported that their States adopted mandatory positive action measures involving any type of preferences applicable to standardized employment, especially in relation to privately owned businesses. Unsurprisingly, the same goes for quotas. States that use quotas in the context of traditional standardized employment prefer soft and flexible over strict quotas. In contrast, national reports show that the States are becoming increasingly more willing to adopt stricter quotas in relation to non-standardized employment such as participation in executive decision-making bodies of commercial corporations. The Norwegian model of executive board quotas is well known and it is fair to assume that it has inspired some of the EU Member States. The most recent of these is France, which has enacted a far-reaching model of executive board quotas. The measure was adopted after a long period of struggle between the legislative and judicial branches of the government. The French model of strict quotas requires both private and state-controlled companies to ensure a minimum of 20% of women on executive boards within the period of 3 years from the enactment of the law and 40% within the period of 6 years. Moreover, companies employing more than 500 employees and with over 50 million Euros of revenues must ensure 50% representation of women within the period of 6 years.

Other States have recently followed a similar path. For example, Iceland has adopted the strict quota model for executive boards of all state-controlled and private companies. The measure imposed the 40% quota for public limited companies employing more than 25 workers and private limited companies employing more than 50 workers. The Netherlands is waiting for the Second Chamber of the National

⁴³ The distinction between standardized and non-standardized employment is primarily an analytical tool devised for the purposes of this report. Its primary purpose is to facilitate discussion concerning the differences in the use of quota. As such it recognizes that there will be many jobs that will not neatly fit this dichotomy.

Parliament to approve 30% quota measure for executive boards of all (state-controlled and private) public limited companies. Places are reserved for female candidates who satisfied certain proscribed criteria. However, since the failure to achieve the numerical target does not trigger any significant sanction, the measure is more similar to the soft quota model. Greece has adopted the strict quota model for state-controlled companies. The model imposes 1/3 quota requirement for all executive bodies consisting of members appointed by the state. The measure also applies to the state appointed portion of a board in the companies where the state is only one of the shareholders. Places are reserved for women who satisfy certain legally prescribed qualifications. The appointment decisions failing to respect the quota requirement are subject to annulment by administrative courts. Moreover, decisions adopted by those boards that were not formed in accordance with the quota rule are subject to annulment by civil courts.

Although it is not entirely clear why States use positive action measures involving any type of preferences or quotas (especially strict quotas) more reluctantly in the context of standardized employment than in relation to participation in decision-making bodies, it appears that quotas seem to be more acceptable in those areas where distribution of valuable opportunities is not tightly related to the notion of objective distributive criteria. The fact that the fairness of political decision-making is often judged through the notion of representation of all relevant social groups and their specific interests could explain why quotas do not seem to be particularly controversial in the context of political bodies. Similarly, the fact that many tend to perceive fairness in distribution of employment opportunities through supposedly objective criteria of professional proficiency tends to explain, at least to some extent, why preferential treatment is still a rarely used tool for promoting sex equality in employment.

Assuming that one is willing to accept the proffered explanation, one ought to notice a particular inconsistency in the manner in which the use of sex-based quotas and preferences tends to be justified in these areas. The use of quota in political decision-making seems to be tightly related to the perception of women and men as separate social groups having different social experiences, views and interests. In that respect to ensure democratic legitimacy of political decisions it is important that they both be proportionally represented in the political process. Yet, at the same time, the same group-based approach to distribution of valuable social opportunities is not well received in the context of employment where the notion of individual fairness has a dominant role. The ECJ case law is a clear illustration of this last point.

The inconsistency described between the group-based representative approach and the individualistic approach based on the notion of personal merit may be one of the reasons why the use of quotas at the level of executive boards in commercial corporations has become such a captivating case in EU sex equality discourse. As noted, within the context of employment, quotas and preferences have been most often applied to executive boards participation. This has particularly been the case with the executive boards and other decision-making bodies of the state controlled companies. Although national reports do not explicitly explain why the States are more inclined to use firm positive action measures in relation to participation in executive boards than for standardized categories of employment, there are several plausible explanations.

The first explanation concerns the manner in which we tend to perceive executive board participation as an employment relationship. Although the national reports do not explicitly state this, it is possible that many States do not consider board

membership to be a form of “employment”. If it does not constitute employment, it falls outside the reach of constraints entailed by the ECJ’s positive action doctrine (and consequently of the national legal constraints). Therefore, there is more freedom to apply strict positive action measures. National reports provide some support for this explanation. A considerable number of them show that States are aware of the ECJ’s positive action doctrine and that many made a conscious effort to adjust existing positive measures to its requirements (e.g. Sweden, Norway, the Netherlands). However, this explanation seems somewhat simple. For one, it is far from clear that board membership does not constitute employment. On the contrary, in the *Danosa* decision the ECJ found that the executive board members fall within the scope of the term employees for the purposes of the former Art 39 ECT and Art 10 of the Pregnant Workers Directive.⁴⁴ According to the Court, they will be considered employees to the extent that they perform their work for remuneration and are at least to some extent subordinated to company’s other decision-making bodies. Moreover, even if specific board members fail to satisfy these criteria this would still not mean that their work would not fall within the scope of the term employment for the purposes of Art 157(4) TFEU or Art 3 of the Equal Opportunities and Equal Treatment Directive.

A second possible explanation concerns the specific character of participation on executive boards. In that respect, it is difficult to ignore the fact that, similar to the issue of participation in political decision-making, the ability successfully to participate in commercial governance cannot be easily reduced to a set of objective professional skills that are usually used as a justification of distribution of employment opportunities. Moreover, it is hard to ignore the possibility that ability to recognize and relate to interests and needs of members of a particular social group is clearly a valuable asset for any company, especially if that group makes up over 50% of the population. In that respect, the use of firm positive measures is not restrained by the notion of objective distributive criteria and individual fairness that usually dominate the standardized employment context.

The struggle between supposedly objective and neutral criteria of distribution favouring the abstract notion of individual fairness and subjective criteria favouring the idea of better group-based representation is illustrated by the recent French experience. In 2006 the Constitutional Council invalidated several quota requirements related to administrative boards. The Council held that the Constitution did not allow distributive criteria based on sex. In a similar manner, the Council of State held in 2007 that positive measures in the form of soft quotas are not illegal because they imposed only a principled objective, which meant that the criterion of sex could not prevail over the distributive criteria of competence and skill. Prompted by this narrow approach, the French legislative branch amended the Constitution in 2008 explicitly to allow quotas in relation to political decision-making bodies and employment. In January 2011 the French Parliament adopted a law proscribing mandatory executive broad quotas for women. As the French expert elucidates, despite the fact that quotas are dominantly perceived as an exception to the equal treatment in France, their recent success can be explained by the conviction that they contribute to better representation in a democratic society. This view goes hand in hand with the recent movement of “democratization” of commercial governance that has been growing in the EU for some time. The notion of democratization of commercial governance usually refers to the notion that interests of employees ought to be represented in decision-making within executive bodies. However, it can also refer to the idea that

⁴⁴ C-232/09 *DitaDanosa v. LKB Lizings* SIA [2010] ECR nyr.

commercial decision-making ought to take account of values and interests important to the society in which the commercial corporation operates. From this perspective, just as with participation in political decision-making, any notion of decision-making being seen as legitimate cannot be taken seriously without the participation of women.

Some national reports (e. g. UK) have pointed out that there are arguments suggesting that executive board quotas can be justified by their positive effect on commercial effectiveness of companies favoring balanced composition of their decision-making bodies. When proposing its model of executive board quotas to the Parliament, the Norwegian government justified the measure as a matter of “diversity”.⁴⁵ Apparently, the diversity justification is based on the perception that men and women are profoundly different and accordingly perceive things in very different terms. From this perspective, balanced composition of decision-making bodies is prudent policy for any company that desires to understand needs and interests of their customers. However, this seems a somewhat problematic legislative justification strategy. In the market-based democracy the issue of commercial effectiveness falls within the scope of employer’s autonomy that is protected from the state interference. It would be problematic if a democratic legal system started justifying its measures restraining commercial decision-making autonomy of market entrepreneurs arguing that such restrains are necessary for their more effective functioning. In that respect, diversity and commercial effectiveness could be possibly used to justify executive board quotas in state-controlled companies. However, this is hardly a convincing justification of executive board quotas in private companies. It is possible that this may be the reason why the official position of Norwegian government found on the web site of Norwegian Ministry of Children, Equality and Social Inclusion uses commercial effectiveness only as an auxiliary justification of the Norwegian quota model. The primary justification is found in the argument that “reaching a balanced participation is a question of democracy” and that “the Government regards the legislation on women in boards as an important step towards equality between the sexes, a fairer society and a more even distribution of power, and as an important factor in the creation of wealth in society.”⁴⁶

The willingness of the States to use sex based quotas for executive decision-making bodies can also be explained by their contribution to the effective enforcement of classic antidiscrimination guarantees. The representation of women in executive boards has consistently been embarrassingly low across the EU. According to research by the European Professional Women’s Network women accounted for 11.7 per cent of board seats at the top 300 European companies in 2010.⁴⁷ This date is even more worrying bearing in mind the fact that women have equaled men in higher education for some time. This fact alone makes it highly likely that sex-based prejudices and stereotypes have played a significant role in the selection of board members. Consequently, it offers strong support to the “glass ceiling” argument. As some scholars argued, various committee members involved in selection procedures for higher positions tend to select candidates that are similar to themselves (the

⁴⁵ See the interview with Siri Øyslebø Sørensen, the author of the Ph.D. Thesis *Women on board. Changing balance – Changing beliefs*, available at <http://eng.kilden.forskningsradet.no/c52778/nyhet/vis.html?tid=52820> (last accessed on June 6th, 2011).

⁴⁶ See the explanation of the executive board quotas found on web site of the Ministry for Children, Equality and Social Inclusion at <http://www.regjeringen.no/en/dep/bld/Topics/Equality/Rules-on-gender-representation-on-compan.html?id=416864> (last accessed on June 6th, 2011).

⁴⁷ The results are available at http://www.europeanpwn.net/files/europeanpwn_boardmonitor_2010.pdf (last accessed on June 6th, 2011).

gatekeepers phenomena).⁴⁸ Executive board quotas thus find strong support in the argument that participation of women in executive boards would help break down those barriers. Moreover, constant presence of some representative number of women on executive boards would likely encourage women to take more interest in these positions and apply for this type of employment in greater numbers. Quotas would thus not only help break the “glass ceiling” but should also address the so-called “chilling effect” that persistently low participation of women in particular type of employment has on women who are considering this career path.

Sex-based preferences and quotas also enjoy very practical justification. National reports suggest that, in contrast to other positive action measures, sex based preferences and quotas indeed tend to open up opportunities for women and consequently bring a fairer distribution of valuable benefits. For example, the Spanish expert reports that in those companies that had an obligation to implement the principle of balanced participation in executive boards the participation of women rose from 36% in 2008 to almost 56% in 2010. The same report shows that participation of women in executive boards of the companies that were not asked to follow the same mandatory requirement remained low. The French experience shows that the participation of women in political bodies remains at the consistently low level of under 20% for those bodies in relation to which political parties were not required to implement firm quota requirement. At same time, in those bodies that were subject to the quota requirement the representation rose to 47.5%. The Portuguese and Belgian experts draw similar conclusions.

The preceding arguments suggest that finding a normative validation of the use of quotas in relation to women’s participation in executive boards of commercial companies is not a very difficult task. At the same time their “return” may be considerable, which certainly makes it easier for political elites to justify the use of quotas.

The question remains, however, whether positive action for executive boards taking the form of sex-based quotas satisfies the requirements of the ECJ’s positive action doctrine. The Court has consistently held that it will allow sex-based preferences in relation to standardized jobs only to the extent that they will be used in tie-break situations. Hence, the answer depends not only on whether the ECJ perceives board membership as a type of job involving some particular set of objective professional skills but also on a more general question of whether the Court is willing to use different doctrinal criteria for non-standardized jobs. The Court had an opportunity to answer this question in the *Badeck* case. As noted above, it chose not to use it. Nevertheless, the manner in which the Court avoided the question whether sex-based quotas for appointments to employee’s representative bodies as well as the executive and supervisory boards violates the equal treatment guarantee suggests that the Court may be willing to consider a different approach to positive action related to participation in decision-making bodies from the approach it applied to positive action related to access to standardized employment. In that respect, the Court’s current positive action doctrine simply does not provide an answer to question of legality quotas in the context of executive decision-making. However, the next time the Court find itself in an opportunity to answer this question it is doubtful that it will ignore the fact that this type of positive action gained a significant support among

⁴⁸ About this phenomena see Marieke van den Brink, the Ph.D. Thesis: “*Behind the Scenes of Sciences: Gender Practices in the Recruitment and Selection of Professors in the Netherlands*”.

some EU Member States or the fact that it proved rather successful in a non-EU state such as Norway.

4.5. Positive Action in Education

Only a minority of national reports report that their States adopted some positive action measures in the area of education (Austria, Netherlands, Spain, Norway, Sweden, Finland, Iceland, Poland, Slovenia). At the same time, those States that have done so have used a very diverse set of measures. Moreover, most of the positive action measures in this area are mandatory. They include: motivation campaigns, the obligation of gender mainstreaming in all educational policymaking, designing sex-conscious personnel policies, incorporation of sex equality issues in curriculums, revisions of educational materials with the aim of eliminating sex stereotypes and other discrimination. In the Netherlands, the Dutch Foundation of Science designed a programme to stimulate and support women's academic careers by subsidising universities that promote the careers of their female staff members. Similar programs encouraging female researchers can be found in Austria. Interesting measure can be found in Poland where women who interrupted their research studies to care for a child younger than 4 years of age are provided special grants. The same grant is offered to fathers who spent more than 6 months caring for a child. Some States have also introduced quotas for decision-making bodies in education (Austria, Greece, Poland, Slovenia).

4.6. Positive Action in Relation to Goods and Services

Access to goods and services is clearly an area where positive action measures are least used and least developed. Most of the states allow positive action measures in relation to access to goods and services. However, none of the national experts reported a measure, enacted by a public or private person, which could be straightforwardly considered a positive action measure.

The Belgium expert wondered whether reserved swimming pool hours for women could be considered a form of positive action. As the expert suggests, this would to a great extent depend on the purpose of this measure, especially since we can hardly conclude anything from its effects on women's position in relation to a particular service. Some experts have raised similar questions about the "women only" promotion programmes usually favoured by bars or dance clubs. To the extent that these programmes rest on the stereotypical assumption about women's financial independence concealed within the notion of chivalry, they can hardly be considered a form of positive action. Equally unconvincing would be a justification that rejects any connection between the action and stereotypical views about women and their financial independence. Rather the purpose of the measure is to attract more male customers, who tend to spend more. To the extent that it uses women as "baits", this justification perpetuates a degrading view of women.

It is worrying that the examples found in national reports seem rather marginal if not dubious. This suggests that the States have not started dealing with the issues of equally available access to medical care, athletics programmes, old age care facilities or other services of similar importance. The only measure mentioned in national reports that came close to this type of concern involves the already-mentioned preferences granted to women in relation to childcare services.

4.7. Effective Implementation of the National Policy Measures

National reports suggest that, in principle, States have not developed specific systems for monitoring and encouraging implementation of positive action measures. A significant number of national experts reported that their national legal systems do not explicitly define an institution as responsible for monitoring positive action measures in their legal systems. Many of them assumed that these issues fall within the responsibility of a general equality body responsible for monitoring the implementation of sex equality guarantees. Such absence of a developed monitoring system is not surprising since most of the States merely permit positive action leaving its implementation fully within discretion of individual actors. Austria seems to be an exception since it developed a complex network of implementation units consisting of the Ombudsperson, Equality Commissioner, and intra-ministerial working groups.

However, the lack of monitoring systems is clearly related to the issue of ineffective implementation. For example, the Bulgarian report shows that most of Bulgaria's rather progressive positive action measures in relation to employment remained merely on a paper due to the absence of any monitoring and enforcement system. The Iceland example is equally telling. Iceland has recently adopted the 40% quota rule for the appointed political bodies. However, since it did not establish any monitoring system or proscribe any sanctions for noncompliance, women's representation in these bodies remains low. In contrast, Slovenia adopted a similar model of positive action measures that has been shown to be rather effective, so far; a functioning administrative system of monitoring and implementation of the positive action measures in question has certainly contributed to this achievement. The Norwegian executive boards quota model has been so successful in part due to the fact that the fulfillment of the quota requirement has been defined as one of the registration conditions. Companies that failed to satisfy the requirement could not be registered in the Commercial Register. Similarly, in Finland courts control the fulfillment of quota requirements imposed on state-controlled companies.

SECTION III

5. Positive action measures at the EU Level

The Court of Justice has so far dealt with positive action on the *national* level. In that respect, it is not clear to what extent the previous jurisprudence is relevant to the question of possible positive action at the *EU* level, mandated by current EU law. There are no obvious reasons why the basic framework of the Court's positive action doctrine would not apply to EU mandated positive measures. Just like any national positive action measure, a EU measure would certainly have to be proportional to the goal it is trying to achieve. In that sense, it would have to be capable of achieving its declared goal and be necessary instrument for its completion. Moreover, it is highly unlikely that the ECJ would give up its protective position towards the notion that in principle men and women ought to be treated according to the same standard. Consequently, it is rather likely that any EU mandate positive action measure involving sex-based preferential treatment would have to be balanced against the interests of the disfavored (most likely male) individual. In other words, the measure would be subject to some version of the saving clause requirement.

What makes the possibility EU mandated positive action particularly interesting is the question of a legitimate goal. Is there a sufficiently important goal that would justify the EU in enacting preferential treatment across the whole of the EU legal

order? Considered from this perspective, the question of a legitimate goal is primarily a question of competence.

The founding Treaties offer strong support to the argument that positive action in the area of employment falls within the scope of EU powers. Art 2 TEU identifies equality between men and women as one of the social values common to the EU Member States and therefore of fundamental importance for the Union. Art 3(3) EUT goes further and provides that the Union shall combat social exclusion and discrimination and promote equality between men and women within its internal market. The Treaty on the Functioning of the European Union is even more concrete. Art 8 TFEU explicitly provides that Union has a duty to conduct all of its activities in a manner to eliminate inequalities and promote equality between men and women. Art 10 TFEU provides that the Union shall aim to combat discrimination based on sex in defining and implementing its policies and activities. These provisions place the ideal of equality between the sexes unquestionably within the scope of the Union's interest. Moreover, it is one of the Union's most important values and goals. However, this still does not necessarily mean that the Union was given the power to realize that goal through mandatory measures requiring profound harmonization of national legal provisions regulating this notion in accordance with a particular understanding of sex equality. They require the Union to use whatever powers have been conferred on it in a manner that will most effectively contribute to the attainment of real equality between men and women.

To answer the question whether the Union has the specific power to mandate positive action at the EU level we would have to look at other Treaty provisions. There are several potentially relevant provisions.

Art 157(3) 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. The text of this provision certainly supports the argument that the EU has the power to enact positive action measures in the area of employment as long as such measures are needed to ensure that the ideas of equal opportunities and equal treatment do not remain empty promises. In that respect, the interesting question is not whether Art 157(3) allows EU mandated positive action. It does. Rather, the more interesting question concerns the permitted scope of such positive action. For the purposes of this summary report it seems enough to suggest that the permitted scope of EU-mandated positive action is proportionately related to the ECJ's inclination to interpret these principles extensively. In any case, the fact that the provision seems to promote the actual, real-life significance of the notions of equal opportunities and equal treatment makes it likely that any EU-mandated positive action measure satisfying the Court's doctrine developed through cases such as *Marschall*, *Badeck* or *Abrahamson* would pass the legitimacy bar.

Art 19 TFEU provides that the EU may enact appropriate legislative measures to combat discrimination based on sex if such action is without prejudice to the other provisions of the Treaties and within the limits of the powers conferred by them upon the Union. The provision basically provides the Union with the competence to enact legislative measures combatting sex discrimination in regulatory areas falling within the scope of its competence other than employment. Judging only by the text of Art 157(3) and Art 19, it is difficult to see a convincing reason allowing the EU to enact positive action under Art 19. One could argue that Art 19 is a more appropriate legal ground for the EU mandated positive action measures due to the controversial character of such measures. In other words, since some Member States perceive sex

equality primarily in terms of consistent application of the same standards of treatment, it would be more desirable to enact positive measures on the EU level by unanimous voting in the Council. This is a highly problematic argument. It is essentially based on the assumption that the notion of formal equality takes precedence over the notion of actual, real-life equality of women and men in the EU legal order. It is hard to reconcile this assumption with the Treaty provisions, the ECJ's case law and the history of evolution of the ideal of sex equality in the EU.

Art 352 TFEU provides the EU with the necessary legislative power to enact, within the framework of the policies defined by the Treaty, appropriate measures that can achieve one of the goals set by the Treaty in case that the Treaty failed to provide it with an explicit power needed for such task. Since the Treaty provides the EU with the necessary power through Art 157(3) and Art 19, Art 352 is more of an auxiliary than an actual candidate.

The proceeding arguments suggest that Art 157(3) would be the most appropriate legal ground for the possible EU positive action legislation.

Of course, the preceding arguments do not provide the answer to one of the most interesting questions raised in this Report. Are measures involving executive-board quotas a form of positive action that could be imposed by EU legislation? There is no straightforward answer.

Any such legislation would certainly be required to pass the conferral and subsidiarity tests prescribed by Art 5 TEU first. As regards the first test, the EU (or more precisely the Commission) would be required to demonstrate that the measure in question falls within one of the regulatory areas within its competence. It has already been argued that executive board membership falls within the scope of the notion of employment. Consequently, it also falls within the scope of the Union's regulatory powers, particularly Art 157(3). As regards the second test, the EU would have to demonstrate that the objectives of the positive action measure such as executive board quotas cannot be sufficiently achieved by the Member States but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level. This completes the full circle and brings us back to the question of legitimate aim.

The fate of EU-mandated executive board quotas is most likely to be determined by the manner in which the EU presents the purpose of this measure. As discussed above, there are two possible goals that can justify this type of measure. The first goal concerns countering hidden stereotypes about women and their capacity successfully to perform work related to the executive level decision-making. It assumes that the low representation of women in executive boards is highly related to such gender bias prejudices. On this view, the purpose of the quota is to circumvent the effects of the existing stereotypes on female candidates, ensure respectable representation of women on the boards that would serve as a safeguard against the stereotypes, and eventually eliminate the glass ceiling altogether. The second goal concerns the social importance of board membership. This view perceives executive boards as bodies of significant social power capable of influencing the manner in which we organize our social relations within a particular society. In that (limited) respect, executive boards are to some extent comparable to political decision-making institutions. Any institution powerful enough to influence the way in which a society organizes its relations that excludes (for whatever reasons) from its process of decision-making members of the group constituting more than 50% of the whole society places that group in the position of second-class citizenship.

The approach based on the first option is more conventional. The current ECJ's positive action doctrine is essentially built around this justification. However, it also

entails certain limitations. The approach trying to justify sex-based preferences through existing stereotypes ties the principle of sex equality to the notion of individual fairness. On this view, equality exists if individuals are treated fairly, that is, according to their individual faculties that make them the best person for a particular position. Even if one ignores the fact that this is *per se* a controversial normative position, one would still face the problem of defining relevant criteria for determining the best candidates for executive board membership. The approach rests on the claim that a person belonging to the underrepresented sex would not get the job because she is less qualified but because she belongs to the particular sex. To make this claim reasonably acceptable one needs to show that the person is at least similarly qualified. To show that she is similarly qualified one needs some criteria of evaluation. How can one determine the appropriate criteria and their relevance (importance) for a job where personal, subjective endowments often play equally as important a role as professional expertise, it is difficult to see. Yet, this approach cannot function without such objective criteria. The second option avoids this difficulty since it is essentially based on the much more group-sensitive notion of representative governance (being a safeguard of responsible use of social power to the benefit of all parts of the society). A clear disadvantage of the second approach is that the Court has so far never approached the issue of sex equality from this standpoint.

In any case, whatever option the Court takes, it is reasonable to expect that the EU would not have too much difficulty satisfying the subsidiarity requirement for EU-mandated executive board quotas. The existing statistics showing embarrassingly persistent low participation of women in executive boards across Europe defeats any argument that the Member States are capable of dealing with this problem individually.⁴⁹ This is particularly so since the option of taking more affirmative steps to solve this problem has been available for decades. At the same time, as the UK expert reported, studies show that it will take more than 70 years to achieve sex-balanced boardrooms in UK at the existing rate of change in the participation of women. This is particularly troubling since women equal, if not surpass, men in their participation rate in higher education. Data such as this certainly justify action at the EU level. This is especially the case due to “reasons of scale”. There are certainly states that essentially agree with the need for greater sex equality at the executive level. However, since they are aware that other states may not care too much, they fear that the cost entailed by this type of action may place their companies at comparative disadvantage. EU action would reduce this version of prisoners’ dilemma.

It is important to note that the preceding arguments do not claim that a possible EU-enacted positive action measure mandating quotas for executive boards of commercial companies operating in the internal market would pass the ECJ’s positive action scrutiny. Since it is not clear what would be the ECJ’s level of scrutiny in such case (if for nothing else than for the simple fact that the relevant Treaty provisions were redrafted in a more favourable manner towards positive action) this would be a very ambitious claim. They merely suggest that the EU is competent to enact positive action measure of this type and that such action would pass the competence and subsidiarity test. Moreover, it is equally important to stress that the preceding arguments are applicable merely to this type of positive action. In that respect, the question whether it would be legal for the EU to enact positive action involving preferential treatment of members of the underrepresented sex in the context of

⁴⁹ See *supra* fn. 47.

standardized jobs would involve a very different set of arguments both in terms of the conferral test and the subsidiarity test.

6. Conclusions

The position of positive action in Europe may be seen as having two aspects. On the one hand, looking only at the national laws, it is fair to say that positive action is well established in Europe. National reports show that almost all 33 States adopted some kind of legal provision regulating positive action. As national reports suggest, the wide spread acceptance of positive action by national legal systems is to a great extent a result of the influence of EU sex equality law. The influence of EU sex equality law on national legal orders has also produced a spillover effect. A significant number of States incorporated a positive action provision similar to Art 157(4) TFEU into their legal order but they also extended its scope beyond employment.

On the other hand, similar to the positive action provision in Art 157(4) TFEU, most of the national positive action provisions are permissive rather than mandatory. As a result, positive action has not been as impressive in practice as it is on paper. Most States used this permission and adopted some form of positive action, especially in relation to public sector employment or political participation. However, national reports show that States are still rather reluctant to use positive action measures involving any kind of sex-related preferences or quotas. Accordingly, measures involving preferences and quotas are still rather sporadic. Measures that are formally equally applicable to men and women (although they are intended to favour women more than men in practice) clearly dominate positive action practice across Europe. At the same time, their effectiveness remains questionable. National reports suggest that (strong and tie-break) preferences and (strict and flexible) quotas are by far the most effective form of positive action. This is particularly where their implementation is subject to monitoring and they are accompanied by appropriate sanctions.

The national reports show that political participation is an area in which States are most likely to use positive action measures involving sex-related preferences and quotas. Positive action measures in this area are most frequently used in relation to appointed political bodies. Most of these measures involve some type of flexible or sex-related preference or soft quotas. A considerable number of States have opted for mandatory positive action involving sex-related quotas for election lists. Numerical targets entailed by these quotas vary from 30% to 50% depending on a state. However, the most frequent target is 40% of members of one sex. The reports show that sex-related quotas are not necessarily effective measures. Their effectiveness depends on two features. First, regardless of the type of quota, the measure is likely to be ineffective in practice if not accompanied by appropriate sanctions on political parties. Second, a quota *per se* will not necessarily increase the number of women in elected political bodies. How women are positioned on the election list is equally important. In that respect, States that have used the so-called zipper rule or the list section rule achieved better results.

The national reports also show that although States may be the least reluctant to use positive action measures (including sex-related preferences and quotas) in relation to political participation, the greatest variety of positive action measures is found in employment. In principle, states are quite reluctant to adopt mandatory positive action measures in the area of employment. This reluctance is particularly noticeable in relation to private sector employment. At the same time, national reports show clearly that private employers are far from being enthusiastic about positive action measures as a tool for promoting equality of women and men. Only a few national experts

reported that employers used positive action entirely of their own accord. Moreover, even these reports accept that these cases are more of an exception than the rule.

States that do opt for mandatory positive action in employment usually prefer sex-neutral positive action measures such as awareness-raising programmes, gender-neutral recruitment tenders, increased recruitment efforts or reporting. In principle, States do not favour measures involving preferences and quotas in relation to standardized employment (positions distributed on grounds of conventional objective professional criteria). Only a small number of States require state-controlled employers to implement some type of mandatory measure involving sex-related preferences and/or quotas in relation to standardized employment. When used in the context of standardized employment, mandatory positive action measures involving sex related preferences are most often focused on increasing women's ability to compete and include measures such as vocational training for the underrepresented sex or mentoring. They are very rarely applicable to recruitment or promotion.

Measures involving sex-related preferences and/or quotas are used primarily in relation to non-standardized employment or, more precisely, in relation to participation in executive boards. In principle, those States that opted for this type of positive action tend to use flexible quotas allowing employers to justify their failure to achieve the target by some good reason. Nevertheless, if accompanied by appropriate sanctions, these measures have been shown to be rather effective. At the same time, only a minority of States imposed this type of positive action measures on their (public and private sector) employers, so far.

States tend to favour particular type of positive action measures. In that respect, a significant number of States adopted Equality Plans. Equality Plans usually require an employer to conduct some type of situation analysis while at the same time they allow the employer considerable discretion in choosing concrete measures to address identified problems. In principle they leave significant discretion to an employer and are rarely accompanied by any sanction. In that respect, their main value seems to be in awareness raising. This seems to be a common characteristic of many sex neutral positive action measures used by the States in relation to employment. Measures such as equality prize programmes, joint commitment programmes or measures encouraging women to apply for positions in which they are underrepresented seem to be respectable awareness raising tools. However, their actual effect on the position of women in labour market is rather questionable. Conventional measures favoured by employers such as flexible working hours, part-time work, tele/home-working also tend to raise the question of effectiveness because it is not clear to what extent they help women rather than perpetuate their disadvantaged position in the labour market.

Although positive action measures involving sex-related preferences tend to be the most effective type of positive action, there are some sex neutral positive action measures that also seem to be useful tool of promoting equality of women in employment. The best example of such sex-neutral measures is the nomination parity rule requiring employers to nominate or short-list two candidates of the opposite sex for every available position. The other example is the measure requiring employers to justify their decision to hire or promote equally qualified (male) candidates belonging to the overrepresented sex. If accompanied by appropriate sanctions measures such as this can be rather effective.

Only a minority of national reports indicated that their States adopted some positive action measures in the area of education. At the same time, those States that have done so have used a diverse set of measures. Moreover, most of the positive action measures in this area are mandatory. These measures usually consist of

motivation campaigns, the obligation of gender mainstreaming in all educational policymaking, designing sex-conscious personnel policies, incorporation of sex equality issues in curriculums, and revision of educational materials with the aim of eliminating sex stereotypes and other discrimination.

Access to goods and services is clearly an area where positive action measures are least used and least developed. Most States allow positive action measures in relation to access to goods and services. However, none of the national experts reported any measure, enacted by a public or private person, that could be straightforwardly considered a positive action measure.

It is not entirely clear why States are less reluctant to use positive action measures involving sex-related preferences and quotas in relation to political participation than other regulatory areas, including employment. Quotas seem to be more acceptable in those areas where the distribution of valuable opportunities is not tightly related to the notion of objective distributive criteria. The fact that the fairness of political decision-making is often judged through the notion of representation of all relevant social groups and their specific interests could explain why quotas do not seem to be particularly controversial in the context of political bodies. Similarly, the fact that many tend to perceive fairness in the distribution of employment opportunities through supposedly objective criteria of professional proficiency tends to explain, at least to some extent, why preferential treatment is still a rarely-used tool for promoting sex equality in employment. It also tends to explain why States are more willing to use sex-related quotas in relation to non-standardized employment such as executive board participation.

The absence of appropriate implementation mechanisms has been one of the most obvious weaknesses of positive action practice in Europe. Just a handful of States have developed a coherent and effective system of implementation mechanisms. Consequently, a considerable number of positive action measures seem to remain ineffective. This ineffectiveness suggests that positive action tends to be a result of *ad hoc* decisions rather than some coherent equality policy. In other words, although strong on paper, positive action does not seem to be high on political agenda of national States in Europe.

The apparent lack of political interest in positive action can also explain the somewhat simple character of existing positive action practices in Europe. The primary focus of positive action practices across Europe has been on (numerical) distribution of political, employment or educational opportunities. In that respect, the lack of coherent equality policy capable of explaining their purpose makes these measures susceptible to the criticism that they confuse quantity with equality. Moreover, most of the existing positive action measures leave conventional criteria of distribution (that tend to place women at systematic disadvantage) intact. They frequently either aim to enable women to compete with men according to the same conventional standards that systematically favour male life-styles, or to accommodate conventional gender roles related to childcare and family responsibilities. Furthermore, to the extent that positive action measures leave significant discretion to employers they often reflect an “employer knows best” attitude. Even sex-related preferences and quotas tend to redistribute existing opportunities without questioning or challenging directly conventional criteria of distribution. Accordingly, not only is there plenty of room for more resourceful and effective positive action measures, there is also a clear need for such measures.

In light of the preceding arguments the idea of EU positive action legislation seems justified. It would certainly be worthwhile considering the extension of positive

action measures involving preferences and quotas that have been shown to be effective in practice across the whole EU legal order. However, any EU positive action policy should also insist on two issues. First, it should insist on measures to change the conventional distribution of childcare responsibilities between the sexes. This could be achieved by measures that would encourage and, if needed, incentivize fathers to assume a greater share of that burden. Second, it should insist on measures that would oblige employers to re-examine and remodel the conventional criteria they use to evaluate their workers (either for the purposes of hiring, promotion or pay). As explained in Section III of the Report, the European Union has the competence to develop a coherent, comprehensive, and effective positive action model that would be applied consistently across the EU legal order.

Part II

National Law: Reports from the Experts of the Member States, EEA Countries, Croatia, FYR of Macedonia and Turkey

AUSTRIA – Neda Bei

1. National legislation on positive action measures/gender quotas

1.1. Positive action measures in the national legal system

The prohibition of discrimination *inter alia* on grounds of sex enshrined in Article 7 of the Federal Constitution since 1920 was amended in 1998 as follows:

‘(2) The federal state, the regions and the municipalities (*Gemeinden*) recognize the principle of de facto equality of men and women. Measures aiming at the promotion of de facto equality between women and men, especially those aiming at the elimination of existing inequalities, are admissible.’ (OJ No. 68/1998)

Content and wording were influenced by Articles 1 - 4 CEDAW, the latter adopted at the level of constitutional law, and by Directive 76/207/EC.¹

1.2. Positive action measures/gender quotas in employment and self-employment

1.2.1. The public sector

The Federal Equal Treatment Act (*‘B-GBG’*) applies to the public sector only and provides for the precept of promoting women (*Frauenförderungsgebot*). Thus all representatives of the employer are obliged to aim at eliminating existing underrepresentation of women according to the targets set in the affirmative action plan (hereinafter: AAP). Women are underrepresented if they form a group of less than 45 % of all employees within a group of the pay scheme or type of function.² Legislation provides for preferential treatment in cases of recruitment and career advancement. Thus female applicants equally qualified compared to the best-qualified male candidate have to be hired or job-promoted according to the targets set in the AAP; since 2001 however the assessment of individual criteria besides the quota is

¹ In a normative sense this provision is a programmatic declaration defining an objective of state activity (*Staatszielbestimmung*; cf. similar provisions on other objectives in the German, the Swiss and the French Constitution). As opposed to a fundamental rights guarantee on the constitutional level it does not establish a subjective right enforceable by appeal to the Constitutional Court, nor is it deemed a basic structural principle of the Constitution. However, it might be taken into account as a subsidiary means of interpreting the Constitution. Thus Article 7(2) Federal Constitution (*Bundes-Verfassungsgesetz, B-VG*) is apt to justify affirmative action within the meaning of Article 4 CEDAW on any level of state activity.

² §§ 11 (2) 11b and 11c Federal Treatment Act (*Bundes-Gleichbehandlungsgesetz - B-GBG*), OJ No. I 65/2004, as amended by Article 5 Federal Act OJ No. I 153/2009. To guarantee occupational mobility of public employees between the Federal State and the *Laender*, legislation applying to the public employees of the *Laender* has to conform with the principles of federal legislation (so-called principle of homogeneity). A more detailed survey of the legislation in the *Laender* is not possible here.

admissible (hereinafter ‘saving clause’).³ The AAP including concrete quotas is binding insofar as arbitrary deviations are deemed discrimination within the meaning of the Federal Equal Treatment Act, the saving clause notwithstanding, and thus are apt to be fought before the Federal Equal Treatment Commission and subject to the damages and sanctions provided for; also a public employee discriminating actively against another, e.g. by sexual harassment, may be subject to disciplinary measures. Furthermore, according to the precept of promoting women they have to get priority treatment when applying for professional training, especially those qualifying for the advancement to higher functions.

1.2.2. The private sector

The Equal Treatment Act (*GlBG*), applying to the private sector only and including in principle managerial staff into its personal scope, provides for the admissibility of positive action in general.⁴ So positive measures with the purpose of promoting the equality (*Gleichstellung*) of women and men, ‘especially by eliminating existing de facto inequalities within the meaning of Article 7 (2) B-VG’, are not to be considered as discrimination within the meaning of the Equal Treatment Act; they can be provided for by legislation, administrative regulations, collective agreements on branch or enterprise level or by a general employer’s direction concerning several employees. The same applies to occupational counselling; to occupational training; to advanced training and occupational re-training; to membership and participation in an employers’ or workers’ or a comparable professional organisation as well as to the access to the services offered by such organisations; and to access to self-employment. The Federal State may grant subventions for special expenditures that employers face when implementing positive measures.⁵

When using resources designated to active labour market policy measures, the employment service has to consider notably disadvantaged groups; ‘in particular’ it has to adopt a policy of counteracting ‘the gender-based segregation of the labour market as well as the discrimination against women by accordingly appointing its services’.⁶

To implement and prepare their decisions, works councils may consign committees inter alia in matters concerning equal treatment, the promotion of women, the interests of employees with family responsibilities, or measures against sexual harassment. Works councils have a right to consult with the employer on general principles of management regularly as well as on positive action in favour of women and on questions of the reconciliation of work and family life. The measures mentioned may be regulated by collective agreement on enterprise or plant level, the latter not being enforceable by complaint.⁷ The agreements mentioned apply to

³ § 43 *B-GB* as amended by OJ No. I 87/2001, incorporating the jurisprudence of the ECJ as applied by the Supreme Court 30.1.2001, 1 Ob 80/00x.

⁴ § 8 *Gleichbehandlungsgesetz, GlBG*, OJ No. I 66/2004 as amended by OJ No. I 98/2008.

⁵ § 8 *GlBG* is more specific than the respective provisions applying to ethnic origin, religion or belief, age or sexual orientation. The discrimination of disabled persons is covered by the Disabled Persons Employment Act 1970, OJ No. 22/1970 by a different systematic and institutional approach.

⁶ § 31(3) Labour Market Service Act (*Arbeitsmarktservicegesetz – AMSG*) OJ No. 313/1994 as specified by a guideline of the Federal Minister for Social Affairs in the late 1990s; accordingly, 50 % of the beneficiaries by employment promotion measures should be women. Considering the regularly lower unemployment rate of women this target value is a positive measure.

⁷ §§ 69 (2), 92 and 97 Labour Constitution Act (*Arbeitsverfassungsgesetz 1974 – ArbVG*), OJ No. 22/1974 as last amended in 2010, OJ No. 101/2010.

employees in leading management positions. Company boards, however, are regulated by the legislation applying to incorporated companies. There are no legal provisions determining quotas for women on company boards, neither for private nor for state-owned companies. Article 42 - R Code of Corporate Governance as amended 2009, a self-regulatory instrument applying to enterprises listed on the Viennese stock exchange, provides for diversity in company boards in a very general way and on the weakest level of compliance (R-Recommendation), inter alia for 'the representation of both genders'.⁸

1.2.3. State-owned companies

In the early 1990s, the increase in privatisations and outsourcings resulted in a situation difficult to assess. Public ownership continuing after privatisation exists on the level of the Federal State as well as on the level of the *Laender*, its extent varying significantly. Every outsourcing from the public domain required a specific act of legislation. Regularly this resulted in the establishment of a new legal entity to which private corporation law applied. Neither was there a standardised legislative procedure in outsourcing as to the equal treatment standards; the standards of the Federal Treatment Act continued to apply only if the act of legislation on the outsourcing explicitly declared so.⁹ Without explicit reference the standards for the private sector apply.¹⁰ If a private company is owned by the State, individual appointments to boards require a Council of Ministers' decision; on 15 March 2011 the Council of Ministers decided upon gradually implementing quotas for boards of companies owned by 50 % or more by the State, starting with a quota of 25 % of the respective public holding until 31 December 2013 and aiming at a representation of women by 35 % until 31 December 2018. In case this target is not achieved, legislative measures will be taken. If possible the quota mentioned should be aimed at women's representation not only proportionately to public ownership but to the board as a whole, progress being monitored by an annual report.¹¹

1.2.4. Differences between the public and the private sector

When equal treatment legislation for the public sector entered into force in 1993, two different standards of equal treatment applied to the public sector on the one hand, and to the private sector on the other hand. The *B-GBG* is part of a general legal framework regulating every aspect of the labour relation including pay, the public employer being bound by the precept of promoting women, the public employee

⁸ <http://www.corporate-governance.at/>, accessed 18 February 2011; S. Hudelist et al. *Corporate Governance Kodex – Evaluierung 2010* Vienna, Chamber of Labour 2010. See also I. König *Frauen in Führungspositionen/Frauenförderung* Vienna, Bundesministerin für Frauen und Öffentlichen Dienst im Bundeskanzleramt 2010, <http://www.bka.gv.at/DocView.axd?CobId=39405>, accessed 1 March 2011.

⁹ To various extents; see inter alia § 54 Paragraph 6 Labour Market Service Act, OJ No. 313/1994; § 7 Paragraph 14 Data Processing Service Centre Ltd Act, OJ No. 757/1996; § 20 Federal Theatre Organisation Act, OJ I No. 108/1998; § 14 Federal Museums Act, OJ I No. 115/1998 as amended by § 20 OJ I No. 14/2002; § 58 Federal Statistics Act, OJ I No. 163/1999. Those companies typically would have AAPs.

¹⁰ No reference to *B-GBG* for instance by the legislation outsourcing Austro-Control (1993), Austria Institute, Diplomatic Academy Vienna, Federal Forestry, Federal Bureau of Pensions, Agricultural Research Centres (all outsourced in 1996); National Printing Press (1997); Stock Exchange Fund, National Agency for Environment (1998) and others.

¹¹ Federal Chancellery/Federal Minister of Women's Affairs and Public Service, 14.03.2011 GZ BKA-140.200/0048-II/1/2011 93/23; http://www.bka.gv.at/site/cob_42745/6595/default.aspx, accessed 15 March 2011.

being in principle protected against dismissal and constantly supported by an extensive institutional equal treatment network and monitoring machinery (see 2.1.). On the other hand, private employers are not obliged to aim at eliminating disadvantages; in particular no binding provisions on job-related decisions (quotas) apply, and there is no comparable machinery in private enterprises. Most notably the different legal structures influence enforcement. In principle the private employee cannot fight infringements of any voluntarily agreed positive measures (if existing at all) as discrimination; moreover, when fighting discrimination in a legal procedure private employees do so at their own initiative and at their own risk (costs, losing the job), the possible support by the Equal Treatment Ombud, a Trade Union or the Chamber of Labour notwithstanding. As furthermore there is more transparency concerning pay and as the recruitment mechanisms are highly formalised in the public sector, the public employee may be in a better position to establish proof.

1.3 Positive action measures/gender quotas in the access to and supply of goods and services

According to § 34 *GIBG* positive action, provided for by legislation, administrative regulations or in any other way, is not to be considered as discrimination.¹² As to the supply of goods or services for primarily one gender the wording of Article 4(5) Directive 2004/113/EEC was incorporated.¹³ There are no legal provisions on quotas.

1.4. Positive action measures/gender quotas in the field of research and education

Positive measures and equal treatment machinery at universities are regulated by principles corresponding to the public sector, modified provisions applying to appointments of personnel or the adoption of curricula. When universities were fully privatised in 2002, the further application of those principles was provided for.¹⁴ A quota of 40 % applies to the university council and other decision-making bodies; however, the most recent legislation on this does not seem to be unequivocally clear. Probably the quota would apply to the constitution procedure but not to the actual composition of the bodies concerned; when missing the quota, the body concerned could neither convene lawfully nor make valid decisions (ex post assessment after veto by the Equal Treatment Ombud).¹⁵

1.5. Positive action measures/gender quotas in legislature, political parties and/or political bodies

There is no legislation providing for quotas of political parties. Some political parties (Social-Democrats, the Greens), however, decided on self-binding quotas for their representatives in national and regional parliaments.

¹² § 34 *GIBG* as amended by OJ I No. 7/2011 (entry into force: 1.3.2011), formerly § 40b *GIBG*, OJ No. I 98/2008 (identical wording, new numbering).

¹³ § 33 *GIBG* as amended by OJ I No. 7/2011 (entry into force: 1.3.2011), formerly § 40d *GIBG*, OJ No. I 98/2008 (identical wording, new numbering).

¹⁴ University Act 2002, OJ No. I 120/2002 as last amended 2009, OJ No. I 81; G. Kucsko-Stadlmayer 'Gleichstellung von Frauen und Männern an vollrechtsfähigen Universitäten', *zJhr 2007*, pp. 8-17; B. Perthold-Stoitzner 'Eckpunkte des Universitätsrechts-Änderungsgesetzes 2009 (Teil II)', *zJhr 2010*, pp. 33-40.

¹⁵ B. Perthold-Stoitzner 'Eckpunkte des Universitätsrechts-Änderungsgesetzes 2009 (Teil II)', *zJhr 2010*, 33; E. Schulev-Steindl 'Frauenquoten im Universitätsrecht – erste Erfahrungen nach der UG-Novelle 2009', *zJhr 2010*, 67.

1.6. Positive action measures/gender quotas in other decision-making bodies or other areas

When social partner organisations delegate or Federal Ministries nominate their representatives to the Equal Treatment Commission for the private sector, they should take a non-binding quota of 50 % into account.¹⁶

1.7. Conformity of gender quotas with equality legislation

See 1.2.1. above.

2. Positive action measures for women and gender quotas in practice

2.1. Implementation of positive action measures for women and/or gender quotas

Article 7(2) *B-VG* is applied in preparatory legislative procedure ('gender impact assessment').¹⁷ According to an amendment to the Federal Constitution from 2008 the Federal State, the *Laender* and the municipalities shall aim at de facto equality in their budgets.¹⁸

2.1.1. Implementation in employment, self-employment and vocational training

In the public sector a Federal Minister or the competent high level unit has to establish an AAP every six years taking into account proposals of the intra-ministerial working group on equal treatment. In the AAP existing under-representation as well as target quotas in the respective units must be indicated exactly so that the AAP may be adjusted to the development of the personnel's structure every second year. In practice AAPs, promulgated as administrative regulations, vary in quality. The *B-GBG* provides for a network of institutions and persons responsible for the enforcement: ombudspersons or equality commissioners on central level (*Gleichbehandlungsbeauftragte*) as well as on the level of smaller units (*Kontaktfrauen*), intra-ministerial working groups on equal treatment, and lastly, an inter-ministerial working group¹⁹ chaired by the Minister for Women's Affairs. The victim of a discrimination may bring a complaint before the Federal Equal Treatment Commission which is an administrative body but may act independently from mandates; the Commission renders legally non-binding decisions which have to be published since 2004. The Government should present a report on the implementation of the *B-GBG* to Parliament every second year.²⁰

The Government reports to Parliament on equal treatment in the private sector as well.²¹ In collective agreements on branch level only two examples explicitly

¹⁶ § 2(9) Equal Treatment Commission and Equal Treatment Ombud Act (*Bundesgesetz über die Gleichbehandlungskommission und die Gleichbehandlungsanwaltschaft – GBK/GAW-G*), OJ No. I 98/2008.

¹⁷ The Federal Chancellery – Constitutional Service Directorate checks all federal laws proposed by Ministries for constitutional law compliance and 'better regulation' aspects. The latter comprise a general check to assess whether the Ministry concerned has examined the possible impact on de facto gender equality, material assessment in detail being reserved to the Minister for Women's Affairs.

¹⁸ Implemented in detail by the Act on Federal Budget; cf. the guidelines for gender budgeting in administration.

¹⁹ The intra-ministerial working groups on equal treatment are formed by the equality commissioners (*Gleichbehandlungsbeauftragte*) and established on the level of a Ministry (*Zentralstelle*) according to § 28 *B-GBG*. The inter-ministerial working group on equal treatment is formed by the chairs of the respective intra-ministerial working groups (§ 32 *B-GBG*).

²⁰ <http://www.bka.gv.at/site/5535/default.aspx>, accessed 7 March 2011.

²¹ <http://www.bka.gv.at/site/5536/default.aspx>, accessed 7 March 2011.

referring to positive measures could be found.²² However, there is no systematic documentation of collective agreements on enterprise level, although some regional governments published brochures on best practice more recently. The Equal Treatment Commission for the private sector may take the existence or lack of such agreements into account when deciding on a case. As to self-employment it might be mentioned that 99.8 % of the Austrian enterprises are small or medium-sized enterprises being promoted substantially by a variety of measures; related gendered statistics are not available however.

2.1.2. Implementation in the access to and supply of goods and services

See under 3.1.2. and 3.3. below.

2.1.3. Implementation in research and education

As an example of a project or programme specifically designed to encourage women researchers the high-potentials programme for university teachers *excellentia* can be mentioned as a positive measure.²³ The *fforte.at* programmes encouraging women in science and technology are established for young women at school level as well.

2.2. Effects of the positive action measures

The assessment of the effects of positive measures requires a systematic approach and constant monitoring and/or evaluation, at least some kind of documentation for minimum transparency. In some areas this is simply not possible; information about positive measures on enterprise level is only erratic for instance. On the other hand, the positive effects of existing mandatory monitoring processes such as the permanent monitoring of equal treatment legislation in the public sector seem to be significant. The 8th Report on the status of equal treatment and the promotion of women in the federal public service (2010) shows increased employment of women and also in managerial positions since 2008.²⁴ Another example is provided by the employment service which is obliged to comply with clearly defined targets and the guidelines of the ESF making evaluation mandatory. For instance, the employment service promoted one-person enterprises in 2009 as part of measures against the economic crisis and loss of jobs; monitoring shows that 55 % of the promoted entrepreneurs

²² Employees of the Austrian Academy of Sciences; employees in non-university (extra-mural) research. The Federal Ministry for Labour, Social Affairs and Consumer Protection (*BMASK*) is documenting collective agreements; furthermore the on-line database of the Austrian Trade Union Congress provides information on collective agreements, http://www.oegbverlag.at/servlet/ContentServer?pagename=V01/Page/Index&n=V01_7, accessed 7 March 2011. Positive measures not named as such may be found in the area of family-related measures, for instance in the frame agreement concluded by the employers' association in health and social professions *BAGS*.

²³ *Excellentia* started in 2005 and ran until 2010, the quota for professors being initially 19 % – according to other sources 16 %. The university gets a basic subvention of EUR 30 000 when recruiting a woman for the post of professor and thereby firstly adding to the number of female professors and secondly to the number of female professors as compared to last year's statistics; in addition to the basic subvention there is an 'target-achieved bonus' of EUR 70 000. The programme included a steering committee and measures such as quality management. Regrettably, an evaluation is not available as part of the internet source describing the programme; http://bmwf.gv.at/uploads/tx_contentbox/prog_excellentia_DT_FINAL_Web_12_5.pdf; http://www.bmwf.gv.at/startseite/mini_menuue/das_ministerium/gender/programme_und_initiativen/excellentia/, accessed 1 March 2011. See furthermore the research projects on <http://www.fwf.ac.at/de/projects/richter.html>, accessed 1 March 2011; measures of the university of Vienna: <http://personalwesen.univie.ac.at/frauenfoerderung/service/studien-zu-universitaerer-frauenfoerderung/>, accessed 1 March 2011.

²⁴ <http://www.bka.gv.at/DocView.axd?CobId=41830>, accessed 1 March 2011.

were women (see above 1.2.2.), whereas other measures show an over-representation of men having to be explained.²⁵

3. Case law

3.1. Case law of national courts

3.1.1. Supreme Court

Two decisions refer to the precept of promoting women in the public sector and, more specifically, to saving clauses. In 2001 the Court, referring *inter alia* to the *Badeck* case, ruled that the *B-GBG* did not conform with Article 2(4) Directive 76/207/EEC by not providing for a saving clause.²⁶ In 2010 the Court ruled that considerations according to the saving clause were a mandatory part of an error-free assignment procedure.²⁷

3.1.2. Constitutional Court

Two cases concern the access to and the supply of goods and services. The Court rejected a claim on grounds of state liability for delayed implementation of Directive 2004/113, not seeing a link of causality between the implementation and the alleged discriminatory damage of different prices for football tickets (EUR 18 for men, EUR 11 for women).²⁸ In the second case the Court found the general terms of transport by tram lines insofar as they provided for reductions available to men from the age of 65 and to women from 60 years to be directly discriminatory against men.²⁹

3.1.3. High Administrative Court

In 2008 the Court stated *obiter* that the original wording of the *B-GBG* provided for the principle of promoting women without instituting the possibility to take the specific personal situation of all applicants into account within the procedures of assignment; however, assuming such a ‘saving clause’ to be in conformity with Directive 76/207/EEC would have reached the limits of possible interpretation.³⁰

3.2. Case law of equality bodies

At least twice the *Federal Treatment Commission (public sector)* referred explicitly to the precept of promoting women. The Commission stated in expert opinions dating from March 2007 and April 2009 that non-consideration of the respective AAP discriminated against the applicants for leading positions on grounds of sex and was to be considered as an infringement of the precept of promoting women. In both cases

²⁵ *BMASK, Dokumentation aktive Arbeitsmarktpolitik in Österreich 1994 bis 2010*, p. 34; http://www.bmask.gv.at/cms/site/attachments/2/7/9/CH0690/CMS1249975678352/dokumentation_aktive_amp_1994-2010_september_2010.pdf, accessed 5 March 2011.

²⁶ OGH 30.1.2001, 1 Ob 80/00x, *DrdA* 2001, p. 42; cf. Case C-380/01 *GustavSchneider v Bundesminister für Justiz* [2004] ECRI-02195, and further more VwGH 12.12.2008, 2004/12/0025, *ZfVB* 2009/1108, p. 614.

²⁷ OGH 23.11.2010, 8 ObA 35/10w, *JusGuide*2011/06/8433 (OGH).

²⁸ VfGH 11.12.2009 A 1/09-18, *ASoK* 2010, p. 92 = M. Holoubek & M. Lang ‘Rechtsprechungsübersicht Verfassungsgerichtshof’, *ecolex* 2010 pp. 711-715 = M. Dorr & W. Liehr ‘Entscheidungen des VfGH – Dezember-Session 2009’, *ÖJZ* 2010/33 pp. 283-287.

²⁹ VfGH 15.12.2010 V 39/10-13, V 40/10-13, M. Dorr & W. Liehr ‘Entscheidungen des VfGH – Dezember-Session 2010’, *ÖJZ* 2011/14 pp. 233-238.

³⁰ Thus referring to OGH 30.1.2001, 1 Ob 80/00x; VwGH 12.12.2008, 2004/12/0025, *ZfVB* 2009/1108, p. 614, concluding Case C-380/01 *GustavSchneider v Bundesminister für Justiz* [2004] ECRI-02195 on national level.

the Commission recommended comparing qualifications in an objective and diligent way.³¹

Seven decisions of *Senate III of the Equal Treatment Commission (private sector)* dealt with sex-based discrimination in the access to and supply of goods and services. Decisions stating that there had been no discrimination concerned a man who was denied an apartment in an architectural complex designed for women (III/42/09) and who was furthermore denied access to the Internet in a public library allocating several booths to the exclusive use of women (III/44/09); a public transportation enterprise did not discriminate against women charging them a fee for the use of toilet cabins whereas men were provided with cost-free access to urinals (A III/59/10). An expert opinion stated inter alia that direct discrimination had occurred in granting reductions in transportation linked to general age limits and in preferential treatment of women and men in recreational facilities for economic reasons, in particular when apt to reinforce gender stereotypes (expert III/37/08; cf. individual cases of direct discrimination against men being charged for admission in a discotheque whereas women got free entrance, III/38/08 and III/48/09). Finally, Senate III stated that sex-based different pricing of identical coiffeurs' services (haircuts, washing, dying) constituted direct discrimination (expert opinion III/62/10).³²

3.3. Case law of other bodies

The Supervisory Commission of Employee Representations stated in an expert opinion that in a planned appointment preferential treatment according to the AAP(*B-GBG*) had to be taken into account. The Commission of Appeals stated that when applying the AAP in establishing the relevant facts and in substantiating a decision high standards were required.³³

4. Proposals

Currently there are no legislative proposals being discussed or pending before Parliament.

BELGIUM – Jean Jacqmain

1. National legislation on positive action measures/gender quotas

1.1. Positive action measures in the national legal system

There is no general legislation on positive action. Indeed, when such wording is used, it is in legislation aimed at implementing EU directives (see below at 1.2 and 1.3).

Exceptionally, the French-speaking Community used 'positive discrimination' in a *décret* of 30 June 1998 which allocates extra subsidies and personnel to certain schools because, for local and sociological reasons, an abnormal number of their pupils belong to 'underprivileged milieux' (a carefully unspecified notion).

Where its existence is recognised, positive action is usually analysed as an exception to the general principle of equality under the law (enshrined in Articles 10 and 11 of the Constitution), although it is accepted as a temporary means to compensate for *de facto* inequalities. Yet, even such a cautious approach may meet

³¹ All decisions on <http://www.frauen.bka.gv.at/site/5538/default.aspx>, accessed 7 March 2011.

³² All decisions on <http://www.frauen.bka.gv.at/site/5540/default.aspx>, accessed 7 March 2011.

³³ *Personalvertretungs-Aufsichtskommission* 27.4.2009, G2-PVA AK/09; *Berufungskommission* 26.02.2008, 187/13-BK/07.

with fierce resistance; for instance, the *Conseil d'État/Raad van State*, in its capacity as a legal adviser to the Federal Government, radically opposed the draft Act on quotas in political elections, although it was eventually adopted (see below at 1.5).

Such quotas remain a major exception, the extension of which is still very tentative (see below at 1.6). Yet, there is a field where the application of quotas must go without saying: the linguistic distribution of staff members in public services. Indeed, the Consolidated Act on Languages in Administration (1966) is a keystone of the ever-precarious structure of Belgian institutions, and the slightest imbalance in the appointment of Dutch-speaking or French-speaking staff members provides a ground for ceaseless litigation. However, using this precedent as an argument to propose the application of quotas to other distinction criteria is invariably regarded as a *non sequitur*.

1.2. Positive action measures/gender quotas in employment and self-employment

The original legislation on equal treatment between men and women in employment (Heading V of the Economic Reorientation Act of 4 August 1978) was aimed at implementing the original Directive 76/207/EEC. Consequently, it allowed for positive action in favour of women in cases which were to be defined by way of Royal Decrees (RDs).

The RDs which had been adopted on this ground (see below at 1.2.1 and 1.2.2) remained in force under the following legislation: the Act of 9 May 1999.

More recently, the whole issue of the elimination of discrimination has been addressed anew through a set of three Acts of 10 May 2007: the 'Gender Act' (implementing all the EU gender directives), the 'Race Act' (implementing Directive 2000/43/EC) and the 'Discrimination in General Act' (implementing Directive 2000/78/EC, but adding a series of homemade criteria – e.g. health, wealth, language – to the four envisaged by this directive). All three Acts include an identical provision (Article 16 in the Gender Act) which allows for positive action, but under very restrictive conditions; no positive action may be conducted until an ancillary RD is adopted. Due to the chaotic evolution of the political situation since 2007, such an RD is still lacking four years later, and the legal status of the 'old' RDs, which rested on a substantially different statutory ground, is very uncertain.

It should also be mentioned that after Belgium was transformed into a federal state, eliminating discrimination in various domains (from education to housing) became the responsibility of the federate components of the state, the Communities and the Regions. Every one of them later adopted anti-discrimination legislation (i.e. at least all 'Article 19 TFEU' criteria), which usually contain provisions on positive action. However, the federal Acts of 10 May 2007 served as a model, and it is unnecessary to comment any further on that aspect except when the issues to be envisaged fall within the exclusive jurisdiction of the federate authorities.

1.2.1. The public sector

Under Article 119 of the Economic Reorientation Act of 4 August 1978, an RD was to specify in what cases positive action *must* be taken. Consequently, the RD of 27 February 1990 provided that any public service had to assign one civil servant to the task of compiling a report on the respective situations of men and women within that public service. Using the findings of the report as a basis, the competent authorities then had to draw up and implement an 'equal opportunities plan'. Given that the RD of 27 February 1990 was applicable to 'any public service', the

‘competent authorities’ were very diverse: every minister for his/her ministry, every local council for its services, etc. Quotas were not mentioned in the RD.

1.2.2. The private sector

The wording of Article 119 (see above) notwithstanding, the RD of 14 July 1987 had a very limited purpose: to provide private employers with a secure legal framework within which positive action *could* be taken. Indeed, when the Act of 7 May 1999 reproduced Article 119 of the previous Act, ‘can’ was substituted for ‘must’.

Thus, the RD of 14 July 1987 only contained methodological advice for those employers which decided to take positive action. The only obligation (later inserted in the RD) which was imposed upon every employer was to draw up a yearly report, even if no positive action had been carried out within the concern in question.

1.2.3. State-owned companies

The notion of ‘state-owned companies’ does not translate easily into Belgian law; giving a state-owned body the form of a commercial company only became possible rather recently. However, if the notion covers public bodies endowed with the autonomy to perform certain tasks, the answer is the same as under 1.2.1. If the notion of state-owned companies covers a private company of which the state is the major shareholder, then the private sector RD (1.2.2) would apply.

1.2.4. Differences between the public and the private sector

A comparison of the two relevant RDs makes it obvious that, as far as the private sector is concerned, the legislation only aimed at making positive action possible (i.e. it did not risk being challenged as reverse discrimination) for employers which decided to take such steps (usually in agreement with trade union representatives). Meanwhile, in public services the tone was definitely sterner as the RD contained the implicit message that ‘something must be done’. However, a lack of measures would not result in any consequences.

1.3. Positive action measures/gender quotas in the access to and supply of goods and services

Directive 2004/113/EC was not transposed in Belgium before the Gender Act of 10 May 2007. As reported above (see at 1.2.), this Act allows for positive action in a provision (Article 16) which applies to the access to and supply of goods and services as well as to employment. However, given that the indispensable ancillary RD is still lacking, no positive action may as yet be lawfully taken in this domain.

1.4. Positive action measures/gender quotas in the field of research and education

Research and education essentially fall within the jurisdiction of the different Communities.³⁴ Both the French-speaking and the Flemish Communities have *décrets/decreten* aimed at the elimination of discrimination (respectively, the *Décret* of 12 December 2008 and the *Decreten* of 8 May 2002 and 10 July 2008).

These instruments cover research and education, in terms of access to as well as employment; but they apply to all ‘Article 19 TFEU’ criteria, plus (in the French-speaking Community) the same homemade extra criteria as in the federal legislation. Consequently, the positive action provisions which each of them contains may be

³⁴ The federal authorities still have some residual jurisdiction concerning scientific research.

used in respect of any of those criteria. Quotas are not mentioned anywhere. The German-speaking Community has no relevant instrument.

1.4.1. Research and academics

Nothing more specific to report.

1.4.2. Primary, secondary and higher education

Idem.

1.5. Positive action measures/gender quotas in legislature, political parties and/or political bodies

Article 11bis of the Constitution provides that within any public executive authority, not all members may be of the same sex.

Electoral legislation (at the federal, federate and local levels) provides that parity between the sexes must be assured in all lists of candidates; moreover, as the whole electoral system is proportional, the first two candidates on every list must be of different sexes. A list which does not comply with those requirements is not admissible.

1.6. Positive action measures/gender quotas in other decision-making bodies or other areas

Concerning boards of directors in public bodies:

- in the Flemish Community and Region, a *decreet* of 13 July 2007 provides that the boards of directors of all Flemish public bodies must comprise at least one third of members of the other sex than the remainder;
- most recently, the French-speaking Community has adopted a similar *décret* (of 15 December 2010);
- within federal jurisdiction, the Economic Public Bodies Act of 21 March 1991 imposes the same rule upon the boards of directors of the three companies which form the S.N.C.B./N.M.B.S. (i.e. the railways).

Concerning boards of directors in private companies, there is so far no legislation (see below under 2.2).

A quota of one third is also to be found in a variety of legislative instruments (both federal and federate) concerning the composition of advisory bodies (councils, commissions, etc.) which provide public authorities with opinions. The same is true for the composition of the Higher Council of the Judiciary, an institution endowed with almost decisive powers in the appointment of judges, under Article 295*bis* of the Judicial Code.

1.7. Conformity of gender quotas with equality legislation

Considering that the rare quota provisions (see above under 1.5 and 1.6) are contained in statutes, i.e. instruments with the same strength as the equality legislation, no serious attention has been given to an eventual contradiction. Moreover, Article 16 of the Gender Act (reproduced in the anti-discrimination *décrets* of the French-speaking Community and of the Walloon Region) provides that a difference in treatment which results from a legislative Act may not be challenged on the ground of the Gender Act.

Statutory quota provisions might be challenged before the Constitutional Court on the ground of the general principle of equality (Articles 10 and 11 of the Constitution) by way of references for preliminary rulings, but so far this has never been attempted.

In the ECJ's case law on positive action the expert cannot find any indication as to the conformity of the current Belgian quota provisions with EU law.

2. Positive action measures for women and gender quotas in practice

2.1. Implementation of positive action measures for women and/or gender quotas

2.1.1. Implementation in employment, self-employment and vocational training

As explained above (see 1.2.2), under the RD of 14 July 1987 positive action in the private sector was entirely left to agreements between the social partners or to the willingness of employers. It seems (as there was never any in-depth investigations into the issue) that what was achieved remained rather low-key: vocational training in traditionally 'male' trades for small groups of unemployed women, coaching in assertiveness aimed at inciting women to be candidates for higher positions, women-friendly wording in job advertisements, the gender desegregation of selection boards, etc.

Notwithstanding the more constraining nature of the RD of 27 February 1990 (see under 1.2.1), the results were hardly more spectacular in the public sector. Indeed, the most visible initiative which is worth mentioning was the creation (in some federal institutions) of day-care schemes available for the children of staff members – although access was never limited to those of female employees.

2.1.2. Implementation in the access to and supply of goods and services

As mentioned above (see under 1.3), positive action in this domain is still illegal because the indispensable ancillary RD has not yet been adopted. However, this does not mean that occasional 'women-friendly' initiatives are unknown, but their real purposes are often unclear (e.g. certain opening hours for 'women and children only' at municipal swimming pools: are they meant to encourage the practice of sport by women, or to meet the cultural needs of certain ethnic or religious communities, or simply to indulge women's privacy wishes?) or are blatantly patronizing and commercial (e.g. Valentine dinners in restaurants, where only the male partner is expected to pay for his meal).

2.1.3. Implementation in research and education

As mentioned above (see under 1.4), positive action is envisaged in the Dutch-speaking and French-speaking Communities in respect of all 'Article 19 TFEU' criteria. No specific initiative in respect of the sole gender criterion is known.

2.1.4. Implementation in the legislature, political parties and/or political bodies

Being compulsory, Article 11*bis* of the Constitution does result in the presence of at least one woman within each of the public executive authorities. A more favourable balance, or even parity, is occasionally achieved, but occurrences of women heading the main executive bodies (the federal and federate governments) remain exceptional.

Electoral legislation is compulsory as well and results in an apparently irresistible evolution. At the General Election of 13 June 2010, women achieved an historic record of 40 % of seats within both Houses of the Federal Parliament.

2.1.5. Implementation in other decision-making bodies or areas

The scattered pieces of legislation concerning boards of directions in public bodies (see above under 1.6) are compulsory, although they do not rely on any sort of sanction; consequently, their enforcement may be rather haphazard.

This is even more true for legislation on quotas within consultation bodies. For instance, under the Federal Act of 20 July 1990, such a body's opinions are invalid if the one-third quota is not achieved, so that when a statute makes it compulsory for the Government to hear that body's opinion before adopting a decision, this decision is invalid as well. However, although the quota is frequently disregarded, such a powerful sanction has never been applied.

2.2. Effects of the positive action measures

The expert regrets to have to conclude that, as far as employment is concerned, positive action schemes have never produced any spectacular effects and they are now fading out with a whimper. The very notion of positive action in favour of gender equality nowadays sounds hopelessly outdated in comparison with the new slogan of 'diversity'. Indeed, women may still be one 'target group' among others whose employment deserves more attention; but when only limited means are available to that effect, making more public buildings accessible to disabled employees in wheelchairs is invariably deemed to have a better public relations value than removing obstacles to women's careers.

Against such a background, the success of the quota system in political elections may seem miraculous. The explanation for this probably lies in the scandalous backwardness which finally made itself felt some 15 years ago when Belgium was compared with other member states, the tireless efforts of some women who had attained positions of power; and the search for fresh blood within political parties.

This trend seems to have prolonged itself in the direction of public bodies. Making the quota principle a general obligation for the boards of directors of all such institutions might be achieved rather quickly, but it must be stressed that appointing directors even in a public-owned company is essentially a political affair in Belgium: as all governments (federal and federate) are coalitions due to the proportional system of elections, all the political parties which take part in a coalition have a say in any appointments. A gender quota is hardly more than an extra complication in this process.

As for boards of directors of private companies, a commission of the House of Representatives (the first House of the Federal Parliament) has recently been discussing no less than five bills, tabled by members in the name of various parties. All of them aim at making a quota (of one-third, 40 % in one case) compulsory for all companies which are quoted on the stock exchange, by way of amendments to the Company Code Act of 7 May 1999. These parties agreed on a compromise text, which was adopted by a majority within the commission on 1 March 2011. However, given that the Federation of Belgian Enterprises is known to be ferociously hostile to such quotas, a position which will probably be echoed by several important political parties, the final result of the debates in Parliament is not yet predictable.

3. Case law

3.1. Case law of national courts

There is no case law whatsoever concerning positive action or quotas. Very marginally, however, one can quote two judgments by the *Conseil d'État/Raad van*

State (as the supreme administrative court). In the first case, the claimant (a woman) had been denied promotion within the Federal Ministry of Finance; in the second one, the claimant (a man) had vainly competed for the position of Commissioner-General of the federal police. Both held that the unfavourable decisions had been taken on the recommendations of advisory bodies, the composition of which did not comply with the Act of 20 July 1990 concerning the gender quota. Both claims were dismissed (respectively, by judgment Nos 120.705 of 18 June 2003 and 202.605 of 3 March 2010) as the *Conseil d'État* found that in neither case did the advisory body fall within the scope of the Act.

3.2. Case law of equality bodies

The gender equality body (the Institute for Equality of Women and Men) has no powers of adjudication under the Act which established it (of 16 December 2002). The same applies to the Centre for Equal Opportunities and the Struggle Against Racism, the autonomous agency in the sense of Directives 2000/43/EC and 2000/78/EC.

3.3. Case law of other bodies

The only case which can be quoted is of the same nature as those mentioned above under 3.1. A man held that he had not been appointed as a member of the Higher Council of the Judiciary (see above under 1.6.) because of the gender quota. He filed a claim with the UN Committee of Human Rights, relying on certain provisions of the International Covenant on Civil and Political Rights. The Committee found that the Belgian quota system was a reasonable means to pursue a respectable aim, and dismissed the claim on 17 Augustus 2004 (*G. Jacobs v. Belgium*, C.C.P.R./C/81/D/943/2000).

4. Proposals

Given the extremely disappointing Belgian experience with positive action and gender quotas, the expert will only venture a couple of suggestions.

Concerning access to positions of promotion, assigning the concerned organization a proportional target might be a more realistic prospect than imposing a quota. For instance: if in a public institution there are X % of men and Y % of women within the recruitment ranks, the same ratio should be found in the first rank of promotion, and so on up to the top rank, unless the institution can demonstrate why this is impossible after the elimination of any gender bias.

More generally, the heart of the matter often lies in the lack of gender mainstreaming rather than in the absence of gender quotas. For instance: currently at all universities, young candidates for academic positions are expected to demonstrate their willingness to 'broaden their horizons' by seeking long-term missions in foreign countries, preferably in foreign continents. Such projects are difficult to reconcile with the duty to care for small children, but the impact of this contradiction on gender equality is hardly ever envisaged, not to say that it is absolute taboo.

Sources

All pieces of legislation are available at <http://www.juridat.be> (in French and Dutch), accessed 28 February 2011

The judgments of the *Conseil d'État*, either in French or in Dutch, are available at <http://www.consetat-raadvst.be>, accessed 28 February 2011.

The UN Human Rights Committee's decision is at <http://www.unhchr.ch>, accessed 28 February 2011.

BULGARIA – Genoveva Tisheva

1. National legislation on positive action measures/gender quotas

1.1. Positive action measures in the national legal system

Positive action measures in Bulgarian legislation are mainly stipulated in the Protection against Discrimination Act (PADA).³⁵

The right to equality, including on the ground of sex, is guaranteed, in the first place, by the Constitution of Bulgaria of 1991.³⁶ In Chapter I 'Basic Principles' of the Constitution, equality of all citizens before the law is declared (Article 6 (2))³⁷ as well as the inadmissibility of any limitation of rights or any privileges. It is regrettable that the principle of *de facto* equality and the possibility for affirmative action have not been explicitly stipulated in this Act. Despite this, the Constitutional Court's Ruling No. 14 of 1992 can be quoted,³⁸ where the Court admits that granting some privileges to certain vulnerable social groups is accepted, when such privileges are socially necessary and justified, provided that the principle of equality of all citizens has priority. This interpretation can be used when justifying the adoption of affirmative action. The problem is that this decision is focused on socially vulnerable groups and the need for affirmative action for women and in the field of gender equality is not necessarily related to the kind of vulnerability envisaged by the decision. The Constitutional Court sees the granting of advantages related with social disadvantages only to some vulnerable groups in specific social situations, socially deprived groups.

Quotes from the Ruling of the Const. Court:

'As a matter of principle, privileges are violations of the principle of equality. From the point of view of etymology, the word comes from *privus legis*, with meaning out of the law. That is why in a state of rule of law the privileges have to be excluded *a priori*. In some cases, though, privileges granted by the Constitution are needed in society and socially justified. They are created to overcome of existing inequality in order to achieve the wished and postulated equality. Such are for example the protection by the state provided in the law for children who remained without the care of their parents, for the elderly who have no relatives and cannot survive with their property, as well as persons with physical and mental impairment. The privileges granted for those people come to compensate for their unfavourable social condition.'

The concept of the positive measures justified by vulnerability of the individuals is a central one also in the provisions of the PADA.

³⁵ In force since 1 January 2004, last amended by S.G. 97/ 2010.

³⁶ Constitution of the Republic of Bulgaria, last amended in February 2007, S.G. 12/ 2007.

³⁷ Article. 6. (1) All persons are born free and equal in dignity and rights.
(2) All citizens shall be equal before the law. There shall be no privileges or restriction of rights on the grounds of race, nationality, ethnic self-identity, sex, origin, religion, education, opinion, political affiliation, personal or social status or property status.

³⁸ <http://www.constcourt.bg/Pages/Practice/PracticeByYear/Default.aspx>, accessed 22 April 2011.

Positive action measures in Chapter 1 'General provisions' of the PADA

Pursuant to Article 2 of the PADA, equal treatment and equal opportunities of individuals are the objectives of the law, along with equality before the law and effective protection against discrimination.

According to Article 7 Paragraph 1 of the PADA, the following positive action measures, among other measures, do not represent discrimination:

- the measures and programs under the Employment Promotion Act (this act promotes the employment of disadvantaged groups at the labour market/;
- different treatment of individuals with disabilities when undergoing training and education, aimed at covering specific educational needs thus contributing to the equal opportunities access;
- educational and training measures ensuring balanced inclusion of women and men, as far as and until such measures are necessary;
- specific measures for the benefit of disadvantaged individuals or groups of people on all the grounds of discrimination under the law, targeted at providing equal opportunities, as far as and until such measures are necessary;
- special protection of orphans, minors, single parents and individuals with disabilities established by law;
- measures to protect the originality and identity of individuals belonging to ethnic, religious or language minorities, and their right to independently or commonly with other group members maintain and develop their culture, profess and practise their religion or use their language;
- educational and training measures ensuring inclusion of the persons belonging to ethnical minorities, as far as and until such measures are necessary.

All these positive action measures are defined as exceptions to discrimination. The majority of them are justified by the vulnerability of the individuals targeted by these measures and are aimed at equal access and equal opportunities. The positive action measures formulated as an exception to discrimination are formulated as opportunities, they are thus not automatically applied, some of them under certain conditions, and not as obligations.

Two types of general positive measures can be applied to equality based on sex: the educational and training measures ensuring balanced inclusion of women and men, as far as and until such measures are necessary; and the specific measures for the benefit of disadvantaged individuals or groups of people on all the grounds of discrimination under the law, targeted at providing equal opportunities, as far as and until such measures are necessary. The two groups of positive action measures are not considered discriminatory as far as and until such measures are necessary. It means that the main elements of the proportionality principle must be fulfilled.

The PADA Article 11 provides for an obligation of the State authorities, public bodies and local self-governments to ensure the implementation exactly of these two types of positive action measures. The measures will be taken, according to the law, if required to achieve the goals of the PADA, and in order to provide equal opportunities for individuals who are victims of multiple discrimination. These provisions of Article 11 are not formulated clearly enough and the notions of positive action measures and multiple discrimination are relatively new for Bulgaria and the Bulgarian institutions. No sanction is provided in case the measures are needed but not applied. Thus the provision has no effect and these positive measures are not implemented in practice.

Therefore, in the national legislation there is no general provision stipulating the possibility to adopt positive action measures in favour of women or men, where

needed. The measures meant for ‘the benefit of disadvantaged individuals’ are based on the notion of vulnerability, which is not sufficient to justify positive action for one of the two sexes.

Furthermore, no specific numeral targets are set in the formulation of the measures. The concept of ‘balanced representation’ is used in one of the cases concerning educational and training measures ensuring balanced inclusion of women and men, but it is not translated into numerical targets

1.2. Positive action measures/gender quotas in employment and self-employment

As a matter of principle, there are no gender quotas provided in the legislation in the field of employment and self-employment. There some positive action measures, though, that will be presented and analysed further on.

1.2.1. The public sector

The provisions governing positive action measures in employment in the public sector are contained in Chapter 2 of the PADA ‘Protection against discrimination’ Section 1 ‘Protection in the exercise of the right to work’, and Section 3 ‘Protection in the exercise of other rights’.

Pursuant to Article 24 of the PADA, where it is necessary for the sake of the PADA’s purpose, the employer, upon hiring an individual, shall encourage the persons of less represented sex or ethnic group to put themselves as candidates to accomplish specific work or to hold a particular post.³⁹ Furthermore, the employer shall be obliged, in otherwise equal conditions, to encourage the professional development and inclusion of workers and employees of a particular sex or ethnic group, where they are less represented compared to workers and employees performing specific work or holding a particular post.⁴⁰ Here the professional development and inclusion can be considered as encompassing the vocational guidance, the vocational training and retraining, within the meaning of Directive 2006/ 54.

Article 27 stipulates the validity of the section on discrimination in employment also to the regular military service with the armed forces. Article 28 declares the applicability of these provisions to civil servants as well.

In both hypotheses (in hiring and in working conditions and professional development) of Article 24, if applied to gender equality, the justification for the positive measures is underrepresentation and the goal is more fair representation and achieving the goals of the law- equal treatment and equal opportunities, including of women and men. The measures are constructed as an obligation of the employers but in practice there are no sanctions. Sanctions provided in the PADA have been applied so far only in cases of discrimination, and not in cases of non- compliance with the obligation for positive actions. The lack of legal practice is maybe the reason why the binding nature of the provision has not been challenged so far. Thus the provision remains without effective implementation.

The analysis of the provision shows that the no specific level of representation is sought in numerical terms. The measures are aimed at some level of proportional representation, which would be relevant for the achievement of equality, as a goal defined in the PADA. In this context, the measures in Article 24 are not construed as an exception to the equal treatment principle but rather as an equally valuable

³⁹ Article 24 Paragraph 2 PADA.

⁴⁰ Article 24 Paragraph 2 PADA.

interpretation of this principle. There is difference between the case of encouraging candidates from the underrepresented sex and encouraging them in the area of working conditions. In the case of the candidates, equal qualifications are not required, while in the second hypothesis the employer shall apply positive measures 'in otherwise equal conditions'. Obviously the value of the candidates will be assessed as a result of the job application procedure. There is no clear reference to the proportionality principle. Only in the case of encouragement of candidates for work, the legislator mentions that this will be done 'for the sake of the PADA's purpose'. So the proportionality principle is implicitly referred to.

Other provisions concerning positive action measures related to employment of women and men in the public sector are contained in the Section on protection against discrimination in the exercise of other rights.

According to Article 39 of the PADA: (1) If applicants for a job in the administration of state and local self-governance authorities are of equal value with regard to job requirements, the applicant of the less represented sex shall be appointed. (2) If there are specific circumstances concerning the equal value of the applicant of the more represented sex, beyond the job requirements, such applicant shall be appointed if this fact will not constitute discrimination against the applicant of the less represented sex.

'Specific circumstances' in this case shall mean circumstances related to social, health and marital status, age and similar circumstances not leading to discrimination based on sex, as stipulated in the Supplementary provisions of the PADA.

The provision, the systematic place of which is in the section on employment, was amended in 2006, following a provision where numerical targets were set. There was provision with numerical targets but it was abolished by the amendment of the PADA, in order to be in compliance with the EU case law. The present one is said to be in compliance with the EU law and practice (the cases *Marschall* and *Kalanke*), although the saving clause added- the specific circumstances, can cause only confusion. There has been no legal practice so far and the saving clause, which has the potential to be discriminatory in itself, has not been tested yet.

The provision seems to be binding for employers in the public sphere, although the non- implementation has not been challenged yet before the courts or the equality body. The justification for the provision is the underrepresentation of one of the sexes, and the preference is given in case of equal value of the candidates. Thus the clause is construed as interpretation of the equal treatment principle within the purpose of the PADA.

1.2.2. The private sector

All the arguments expressed above on the positive action measures of Article 24 of the PADA are valid for the private sector as well. Here special attention will be paid to the measures for participation in company boards. Article 39 of the PADA contains a provision extending the positive measures for the underrepresented sex also in cases beyond the application for a job.⁴¹ As a matter of fact, the provisions of Article 39 mentioned above, including the clause with 'specific circumstances', shall also apply in designating the participants or members of councils, expert working groups, managing, consultative or other bodies, except in cases where such participants shall be elected or appointed following a selection competition. Since it is not specified if the bodies are public or private ones, it might be assumed that this provision can be

⁴¹ Article 39 Paragraph 3 of the PADA.

applied also to the boards of private companies. Despite that a more strict interpretation of Article 39 can be imposed, as Paragraph 1 clearly refers to ‘applicants for a job in the administration of state and local self-governance authorities’. It is logical that Paragraph 3 dealing with gender representation in the boards, councils and other bodies refers also to the public sphere, and more specifically to the administration of state and local self-governance bodies. Nevertheless, if a broader interpretation is adopted, the analysis given below shall apply. We note that there are no specific positive action measures provided for the area of self-employment. For this sphere, the general anti-discrimination provisions shall apply.

1.2.3. State-owned companies

It is not explicitly mentioned that the promotion of the representatives of the less represented sex in advisory and managerial bodies applies also to public companies, and not only to the bodies in the national and local administration.

With the assumption that the clause applies to the state-owned companies, the provision seems to be binding, although the non-implementation has not been challenged yet before the courts or the equality body. The justification for the provision here again is the underrepresentation of one of the sexes, and the preference is given in case of equal value of the candidates. Thus the clause is construed as interpretation of the equal treatment principle within the purpose of the PADA.

Here two conditions have to be fulfilled in order for the preference to play- first, the absence of ‘specific circumstances’ in favour of the other candidate, within the meaning above, and, second, the participants should not be elected or appointed following a selection or a competition.

1.2.4. Differences between the public and the private sector

As mentioned above, there are no gender quotas or quotas for women in the sphere of employment. Concerning the mentioned positive action measures, the difference is related to the preference given in the public sphere to the representatives of the underrepresented sex when they are job applicants, or candidates for members of councils, expert working groups, managing, consultative or other bodies.

1.3. Positive action measures/gender quotas in the access to and supply of goods and services

Article 6 of Directive 2004/ 113 and the positive action measures contained in it were not adopted explicitly in the Bulgarian legislation. Article 4 Paragraph 5 of the Directive was reproduced in the PADA as an allowed exception to discrimination.⁴² The differences in treatment are not considered discriminatory, if the provision of the goods and services exclusively or primarily to members of one sex is justified by a legitimate aim and the means of achieving that aim are appropriate and necessary. As a justification, the proportionality principle is fully valid.

1.4. Positive action measures/gender quotas in the field of research and education

1.4.1. Research and academics

There are no specific positive action measures in the field of research and academics.

⁴² Article 7 Paragraph 1 p. 18 of the PADA.

1.4.2. Primary, secondary and higher education

The PADA allows as non discriminatory, educational and training measures ensuring balanced inclusion of women and men, as far as and until such measures are necessary – Article 7 Paragraph 1 p. 13. This provision was analyzed in Section 1.1. above.

1.5. Positive action measures/gender quotas in legislature, political parties and/or political bodies

There are no clearly formulated positive action measures in this field. There is only a declaratory provision in the PADA, recommending to State authorities, public bodies and local self-governments to implement policy fostering the balanced inclusion of women and men, as well as the representative participation of individuals belonging to ethnic, religious or language minorities in governance and decision-making process.⁴³ As they are not actual positive action measures, they cannot be analyzed as such. We note that here again, like in the case of the measure in the sphere of education and training, the unclear notion of ‘balanced inclusion’ is used. No legal definition of this term is given by the PADA.

1.6. Positive action measures/gender quotas in other decision-making bodies or other areas

No other positive action measures, except the ones mentioned in the sections above, are defined in the national legislation.

1.7. Conformity with equality legislation

The positive action measures mentioned above are in conformity with equality legislation.

2. Positive action measures for women and gender quotas in practice

2.1. Implementation of positive action measures for women and/or gender quotas

As mentioned above, the existing positive action measures have not been implemented in practice, there is no specific policy for their implementation in any of the areas mentioned above.

The following general considerations are valid for the Bulgarian situation: There is no special law on gender equality and no specific institutional mechanism, that would allow for the implementation and development of the positive action measures. There are no assigned equal opportunities officers in the public administration bodies, with specific budget for this task; therefore no specific policy on positive measures is developed. There is no debate and negotiations with the social partners concerning positive measures, corporate self-regulation in this direction is absent either. Isolated decisions of employers may exist but are not known.

2.2. Effects of the positive action measures

As a result of the lack of implementation, no specific effects of the positive action measures can be mentioned.

3. Case law

There is no specific case law of courts and other bodies related to the positive action measures in the field of gender equality in the fields governed by the EU law.

⁴³ Article 38 PADA.

4. Proposals

Currently there are no specific debates on new positive action measures in the field of gender equality.

The general legal framework is positively assessed but not implemented in practice and not developed further through legislation and policy. There is no debate on the need for implementation of these measures.

No concrete positive action measures are envisioned in the 2011 National Plan on Promotion of Gender Equality.

It has been discussed only by NGOs but the very fact the Government does not see any need for a special law and special GE body confirms that the state is happy with this contradictory regulation in the PADA , with no practical implementation.

CROATIA – Goran Selanec

1. National legislation on positive action measures/gender quotas

1.1. Positive action measures in the national legal system

The Croatian Constitution (Art 3) defines equality (in general) and sex equality as the highest values of the national constitutional order and the starting point for the constitutional interpretation. Art 14 of the Constitution further provides that every person in the Republic holds the rights and freedoms regardless of (among other grounds) her or his sex. These provisions *per se* do not say anything about the position of positive action or which conception of equality is favoured by the Croatian legal system. However, the Constitution prescribes a form of positive action in the context of political participation for ethnic/national minorities. Art 15 grants the so called “double franchise” for national minorities. It provides that national minorities can be granted a special right to elect their own representatives to national parliament in addition to their general right to vote. It is this provision - coupled with the Art1 provision defining Croatia as social state - that strongly suggests that Croatia favours substantive rather than formal view of the notion of equality.

This interpretation is strongly supported by the Sex Equality Act (SEA). As stated in Art 1SEA, the purpose of the Act is to secure a basic framework for the protection and promotion of sex equality being one of the basic constitutional values, to define and establish the manner of protection against sex discrimination and to create equal opportunities for men and women. According to Art 5, sex equality means that women and men are equally represented in all areas of public and private life; that they have equal status, equal opportunities to realize all rights and, that they can enjoy equal benefits from their achieved results. In accordance with this strong expression of the substantive understanding of equality, the SEA obliged all state bodies, local government bodies, legal entities with public powers and legal entities controlled by the (national and local) government to continually analyse and evaluate effects of their decisions on the position of women and men in society with the aim of promoting real equality between the sexes.

The SEA also includes a special chapter on positive measure (Chapter III – Arts 9-12). Art 9 defines positive measures as specific benefits granted to members of a specific sex aiming to ensure equal participation in public life, remove existing inequalities or secure rights that were denied to them. They are introduced on a temporary basis and cannot be considered discrimination. Although this is not explicitly stated, Art 9 can easily accommodate positive action measures involving

sex-related preferences and/or quotas (this is even more so in light of Art. 12 discussed below). Art 9 does not explicitly state that positive action measures must satisfy the proportionality principle.

In addition to the SEA, positive action is also regulated by the Act on Elimination of Discrimination (EAD). Art 9(2) EAD provides that unfavourable treatment will not be considered discrimination if taken for the purposes of positive action aiming to improve the position of minority groups. Art 9(2) positive action provision primarily relates to grounds other than sex (race/ethnicity, sexual orientation, religion, etc).

1.2. Positive action measure for women/gender quota's in employment and self-employment

1.2.1. The public sector

The SEA Art 12(1) provides the obligation to promote equal participation of men and women in all institutions of legislative, executive and judicial government, including public services and to progressively include members of the underrepresented sex in these institutions until the percentage reaches the level of their representation in the Croatian general population. In that respect, Art 12 effectively prescribed a numerical target for all public sector employers, except state-controlled companies. This is not merely an aspirational target. Art 12(2) obliges its addressees to introduce concrete positive action measures aiming to increase the representation of the underrepresented sex in the case of noticeable imbalance. However, it is not clear what constitutes noticeable imbalance for the purposes of public sector employment. Art 12(3) provides that noticeable imbalance exists when members of one sex constitute less than 40% of members participating in “bodies involved in political decision-making and decision-making of public interest”. Since not all public sector employers participate in political decision-making and decision-making of public interest it is not clear whether this provision applies to them. The SEA did not specify measures that public sector employer must introduce to achieve balanced representation. Consequently, they are left with a wide discretion in that respect. Positive measures involving sex-related preferences and/or quotas are available to public sector employers as long as they satisfy the Art 9 SEA requirements. However, according to Art 10 SEA, public sector employers cannot use positive action measures that have not been defined by a relevant executive act applicable to them.

The SEA Art 11 requires all state institutions and state-controlled legal entities to devise action plans aiming to promote and realize sex equality. These plans have to be delivered every 4 years. An action plan must include the analysis of the existing situation within the institution. They also must determine reasons for introducing specific positive action measures, goals to be achieved, the manner in which they are to be achieved and the method of supervision.

1.2.2. The private sector

The SEA imposes on private sector employers very few obligations beyond the duty to respect the sex discrimination ban. Few mild measures imposed on the private sector employers can hardly be called positive action measures. They can sooner be described as proactive duties. For example, Art 11(5) requires that private employers employing more than 20 employees incorporate antidiscrimination guarantees and other measures aiming to establish sex equality in their internal regulations (statutes, guidelines, etc). This measure primarily aims to make the existing statutory antidiscrimination guarantees more visible to employees. Art 13 SEA provides that

invitations for job applications must make it clear that both sexes can apply for a particular position. Also, language of employers' internal acts placing employees to some particular position must express the name of a position in both male and female gender (Art 13(6)). Private employers have no other positive obligations. They are certainly not under any duty to use preferences or quotas for executive boards. Moreover, it is to some extent questionable whether private employers could autonomously adopt measures involving sex related preferences and/or quotas. Art 10 SEA provides that positive measures must be defined by statutory law and other bylaws used for regulation of particular areas of social life. Consequently, it is not clear whether (public or private) employers are allowed to adopt positive action measures that have not been explicitly defined by positive law. So far, no such acts can be found in the Croatian legal order.

1.2.3. State-owned companies

State-controlled companies have the obligation to deliver periodical equality action plans required by Art 11 SEA. State-controlled companies are given wide discretion to decide not only which positive action measures they find appropriate but also whether there is a need for such measures. The Croatian legal system did not provide any specific criteria that can be used by employers to determine the need for positive action. Besides the equality action plans there are no other positive action measures, including sex related preferences or executive boards quotas, required from the state-controlled companies.

1.2.4. Differences between the public and the private sector

Differences between the public and the private sector are minor. In contrast to public sector employers, employers from the private sector do not have a duty to adopt equality actions plans.

1.3. Access to and supply of goods and services

The SEA allows positive action measures in this area. According to Art 9(6), such measures must aim to achieve real-life equality between men and women by preventing or compensating for disadvantaged position of members of one sex in relation to access to and supply of goods and services.

1.4. Positive action measures/gender quotas in the field of research and education

1.4.1. Research and academics / 1.4.2. Primary, secondary and higher education

Arts 9-12 of the SEA are also applicable to institutions of public education. Consequently, all institutions of public education must adopt equality action plans. Art 14(2) SEA further provides that materials related to the notion of sex equality must be incorporated into curriculum and teaching programs at all levels of education. Educational institutions are given a duty to prepare students of both sexes for active and equal participation in all areas of life. Art14(4) requires from all educational institutions to pay attention to balanced representation of both sexes in their student body. Moreover, all educational institutions are required to pay special attention to equal representation of both sexes at the executive level. The law did not provide any particular measures for the realization of this goal or any sanctions for the failure to respect this provision. In that respect, the provision is merely a very vague aspirational target.

1.5. Positive action measures/gender quotas in legislature, political parties and/or political bodies

According to SEA Art 15 political parties have the obligation to adopt positive action measures in order to prevent noticeable imbalance of men and women on elections lists for all elections (national, local and elections for the European Parliament in the future). Noticeable balance exists when members of one sex constitute less than 40% of all candidates on the list. Parties that fail to comply with this requirement will be fined. The amount of the fine is not particularly averting (app 3,000 – 7,000 Euros).

1.6. Postitive action measures/gender quotas in other decision making bodies or other areas

SEA Art 16 provides that entities offering media services have the duty to promote public awareness of the notion of equality of men and women through their programs.

1.7. Conformity with equality legislation

In principle, the Croatian legislative provisions regulating positive action are in compliance with the EU requirements. However, in practice, a particular attention will have to be accorded to the principle of proportionality. In relation to sex-related preferences in employment, particular attention will have to be accorded to the requirement of equal qualifications.

2. Positive action measures for women and gender quota's in practice

2.1. Implementation of positive action measures for women and/or gender quotas

2.1.1. Implementation in employment, self-employment and vocational training

Public Sector

Most of the state institutions have respected (at least formally) the SEA Art 11 requirement and have devised equality action plans. The actual action plans show a rather simplistic approach to the ideal of sex equality. The most significant part of the equality plans are gender sensitive statistics, which are a valuable source of information. However, the goals and measures set by these plans are very vague and general. Many plans admit that women are in unfavourable position. This conclusion is primarily based on statistical data showing their underrepresentation within a particular body or institution. In that respect, the action plans do not identify concrete discriminatory barriers. Similarly, they do not set concrete and measurable goals or specific measures that should be introduced to remedy existing inequalities.

For example, the Equality action plan of the Ministry of Economy, Labour and Entrepreneurship points out that statistical data gathered through the analysis of the existing situation within the Ministry shows that there are indications of some form of sex discrimination in relation to promotion criteria, training, appointments to higher administrative positions or appointments to executive and supervisory boards of those entities under control of the Ministry. However, the Plan never identified concrete problems that caused this discrimination. Similarly, the Plan does not provide a single concrete measure. In a language remindful of the past times, it simply states that the existing situation will be addressed by “mobilizing all human and financial resources and by coordinating cooperation within organizational units responsible for implementation of specific programmatic measures.” These programmatic measures are not specified. Similarly, the Equality action plan of the Ministry of Finance

provides that “realization of full sex equality and equality of labour opportunity, promotion and specialization in the Ministry of Finance” is the reasons for introduction of positive action measures. However, the measures set by the plan are very general if not benign. For example, the plan identifies “realization of equality in hiring” as one of the measures and states that the Ministry will “try to establish equality of men and women when hiring new employees which ought to be based on competences and experience, that is, determined criteria.”

Interestingly, one of the rare action plans that defined a concrete goal and a specific measure favours men. The Equality action plan of the Ministry of Science, Education and Sport found noticeable underrepresentation of men within the Ministry. Consequently, it provided that the Ministry will grant hiring preferences to male candidates who fulfil all determined requirements the positive action measure in order to eliminate established underrepresentation.

No positive action measures involving quotas exist in the public sector employment.

Private Sector

There is no information about positive action measures involving sex-related preferences and quotas in the private sector employment. If there are some positive action measures of this type they are sporadic and isolated cases. Some private employers offer childcare services to their (male and female) employees.

2.1.2. Implementation in the access to and supply of goods and services

No information about positive action measures in this area is available.

2.1.3. Implementation in research and education

In principle, institutions of public education do not respect Art 11 SEA duty of adopting equality action plans. Also, it is not known to which extent the educational institutions have incorporated sex equality material into their programmes and curriculums. According to information provided by the Ministry of Science, Education and Sport sex equality is part of a more general program on human rights and democratic citizenship. However, it is not clear how this program is being implemented on a practical basis since it is not offered as a specific class subject in schools. Moreover, the responsible institutions have so far done nothing to implement the goal of increasing the number of women in traditionally male professions (and vice versa). In its Equality action plan the Ministry of Science, Education and Sport explained that low participation of women in traditionally male profession is a well-known European problem. Apparently, the Ministry considered that this was a good reason why no measures ought to be taken. Moreover, the Ministry explained that any measure aiming to achieve this goal must be “implemented on grounds of scientifically established and recognized differences among sexes.”

2.1.4. Implementation in legislature, political parties and/or political bodies

The 2007 election for the national parliament showed that political parties do not respect the statutory obligation of balanced election lists. Women comprised only 29.9% of candidates on all election lists (258 election lists in 12 election districts). Only 5 out of 258 election lists had more than 40% of female candidates.

2.1.5. Implementation in other decision-making bodies or areas

There are no specific measures in practice in this area.

2.2. Effects of the positive action measures

So far, the key positive action measure prescribed by the SEA – equality action plans – was hardly taken seriously by the Croatian administration and public institutions. There are no indications that this measure contributed to equality of women and men in public sector. The Equality action plans have the potential to be an effective measure. However, what is clearly lacking is an institutional mechanism capable of managing and monitoring their implementation. At the moment, the Equality action plans must be approved by the Government's Office for Sex Equality. However, this office of four hardly has an institutional capacity for such demanding task. Moreover, sex equality officers within the state institution who are responsible for monitoring equality plans first hand have showed to be rather ineffective solution. They lack expertise and independence. Moreover, although they are appointed to this position by the head of their institution, no additional pay is provided for their effort. This has been highly demotivating for them.

The 2007 elections showed that the quota system prescribed by Art 15 SEA is highly ineffective. It is clear that political parties consciously disregard their obligation to ensure balanced participation on their election lists. The model clearly requires effectiveness safeguard such as some version of the zipper rule and more deterring sanctions.

3. Case law

3.1 Case law of national courts

There are no known decisions.

3.2. Case law of equality bodies

There are no decisions.

3.3. Case law of other bodies

Not applicable to Croatia.

4. Proposals

At the moment there are no official proposals regarding positive action measures in Croatia. Positive action is simply not on the political agenda of Croatian Government or any political party. However, it has to be noted that the Government is working on the new National Policy for the Promotion of Sex Equality. Hopefully, positive action will be included (at least in some general terms) in the new National Policy.

CYPRUS – Lia Efstratiou-Georgiades

1. National legislation on positive action measures/gender quotas

1.1. Positive action measures in the national legal system

Before 2003 there was no legislation in Cyprus which provided for positive action measures for the underrepresented sex. In 2003 the Republic of Cyprus signed the Accession Treaty and since 1 May 2004 Cyprus is an EU Member State.

The Constitution of Cyprus enacted in 1960 endorses the principle of equality between men and women. In particular Article 28 prohibits any direct or indirect

discrimination, inter alia, on the grounds of sex.⁴⁴ The Supreme Court recognized that the constitutional principle of equality guaranteed substantive equality and it did not allow actual positive action measures.⁴⁵ The term ‘substantive’ in this context means ‘absolute’, so at that time, any positive action taken in favour of the underrepresented or less privileged sex was considered to be contrary to the Constitution.

The Constitution of Cyprus had provisions which were incompatible with the ability of the Republic of Cyprus to fulfil its obligations as a Member State in endorsing the *acquis communautaire* and so it was decided to amend it. Law No. 127(I)/2006 on the Fifth Amendment of the Constitution added a new Article A1 and also amended Articles 104, 106 and 179 of the Constitution. The Constitution allowed the amendment of these Articles because they were not fundamental Articles. The Fifth Amendment of the Constitution introduced the principle that EU Law is superior to the Constitution and the laws of Cyprus. The Constitution has no reference to positive action measures. Such references are made in the Laws mentioned below. As a result of these amendments positive action measures are allowed.

The Equal Treatment of Men and Women in Employment and Vocational Training Law of 2002 (No. 205(I)/2002) was passed for the purpose of harmonizing national law with Directives 76/207/EEC and 98/80/EC. This Law allows positive action measures for the purpose of ensuring full and substantial equality between men and women in professional life, provides for specific advantages for the underrepresented sex in posts or levels of occupational hierarchy or sectors of vocational training, especially for women, and allows measures that prevent or balance the disadvantages in the professional life of such persons. The Law is applicable to all employees and refers to all activities that are related to employment, public and private, except those that are categorically excluded by the Law and where sex comprises a decisive factor in the execution of the activities. Positive action measures must be consistent with the Law and should serve its purpose. They may constitute the content of collective employment agreements or other agreements between employers and employees in a business or a service, in the public or private sector, that are drawn up with the agreement of both the employer and the representatives of the employees. They may also constitute the content of equal opportunity and treatment programmes in a business or service, public and private. It is noted that the Law sets out areas where positive actions can be taken, but does not specify the types of such actions.

The measures for protection of pregnant women, women who have given birth or are breastfeeding or are on maternity leave are not considered as positive measures, because they are aimed at protecting women for the purpose of giving birth to and raising a child.

The above Law was amended by Laws Nos. 191(I)/2004, 40(I)/2006, 176(I)/2007 and 39(I)/2009 (which was passed for the purpose of harmonizing national law with Directive 2006/54/EC Recast).

The Equal Treatment between Men and Women in the Access to and Supply of Goods and Services Law No. 18(I)/2008 allows positive action measures to be taken for the purposes of the Law but does not specify these measures. It also prohibits any discrimination on the ground of sex in fields falling within the provisions of the Law.

The Equal Remuneration of Men and Women for Work of Equal Value or for Work to which Equal Value is Attributed Law No. 177(I)/2002 as amended by Laws

⁴⁴ *Nitsa and Georgia Zoukof v Republic of Cyprus* 25 July 1990, case no. 912/89, *Zoe Nikolaidis v Republic of Cyprus* 19 January 1999, appeal no. 2148.

⁴⁵ *Xinari v Republic of Cyprus* 1962 3 CLR p. 98.

Nos. 193(I)/2004 and 38(I)/2009 prohibits any discrimination on the ground of sex as regards all facts and conditions of remuneration for equal work or for work of equal value.

The Equal Treatment of Men and Women in Occupational Social Insurance Schemes Law No. 133(I)/2002 as amended by Law No. 40(I)/2009 (which was passed for the purpose of harmonizing the Law with Directive 2006/54/EC Recast) and the Provident Fund (Amendment) Law No. 130(1)/2002 prohibit any discrimination between men and women in occupational pension schemes and occupational provident fund schemes.

The Public Service Law of 1990 to 2009 and the Public Service (Wages, Allowances and other financial benefits of Civil Servants) Regulations of 1995, as amended, have no provisions for positive action measures because all civil servants, male and female, have the same benefits and rights. All appointments and promotions in the public service are made in accordance with the Public Service Law and Regulations, which are equally applicable to both sexes. The wage gap is due to the fact that the majority of posts at the lower levels are occupied by women, whereas the majority of post at the higher levels are occupied by men, although the recent trend shows that the number of women in higher posts is increasing.

The only provision included in the Public Service Law which is relevant for this report is the one which refers to the treatment of persons with disability as regards access to the public service. Article No. 44 of the Public Service Law No. 1/1990, as amended, allows the appropriate body for selections and appointments in the public service to give preference in appointment to a public post to a person who has a disability (physical disability), provided that such person has the qualifications and the capabilities to carry out the duties of the post that he or she has applied for.

The Recruitment of Persons with Disabilities in the Wider Public Sector (Special Provisions) Law No. 146(I)/2009 includes a positive measure which helps to counterbalance the limited chances of employment of persons with disabilities, by imposing the obligation on organizations of the wider public sector to fill their vacant posts, up to 10 %, by recruiting persons with disabilities, provided these persons satisfy specially defined objective criteria.

1.2. Positive action measures/gender quotas in employment and self-employment

As mentioned above, Law No. 205(I)/2002 by Law No. 18(I)/2008 allows positive action measures for the underrepresented sex for the purpose of ensuring full and substantial equality between men and women and applies equally to the public and private sector, but no relevant measures have been taken up to now.

1.2.1. The public sector

No positive action measures or quotas have been introduced or applied for women in the public sector.

1.2.2. The private sector

No positive action measures or quotas for women have been introduced or applied in the private sector, nor gender quotas concerning company boards of private companies.

1.2.3. State-owned companies

No positive action measures or quotas have been introduced or applied in company boards of state-owned companies.

1.2.4. Differences between the public and the private sector

There are no differences between the public and the private sector as regards prohibition of direct or indirect discrimination on the ground of sex.

The Equal Remuneration of Men and Women for Work of Equal Value Law No. 177(I)/2002 as amended by Law No. 38(I)/2009 applies to all employees for all activities related to employment. Every employer must provide equal pay for men and women. The maximum rights enjoyed by one sex shall also be enjoyed by the other sex. Any employer who intentionally contravenes the provisions of the Law is guilty of an offence and may be punished with a fine or imprisonment or both.

The Equal Treatment of Men and Women in Employment and Vocational Training Law No. 205(I)/2002 as amended by Law No. 39(I)/2009 allows positive action measures. The Law does not impose an obligation but allows positive measures to be taken and applies equally to the public and the private sector. The Law provides that any person who intentionally contravenes its provisions is guilty of an offence and may be punished with a fine of up to EUR 5 125.80 or with imprisonment of up to three months or both. If the guilty employer is a company the fine may be up to EUR 8 543. The sanctions mentioned in the Law refer to all provisions.

1.3. Positive action measures/gender quotas in the access to and supply of goods and services

No positive action measures/quotas have been applied in the field of access to and supply of goods and services. The Equal Treatment between Men and Women in the Access to and Supply of Goods and Services Law No. 18(I)/2008 provides for access to court proceedings or for out-of-court protection by submitting a complaint to the Ombudsman. Any person who contravenes the Law and is found guilty by the Court may be punished with a fine of up to EUR 7 000 or with imprisonment of up to six months or both.

1.4. Positive action measures/gender quotas in the field of research and education

1.4.1. Research and academics

There are no positive action measures or gender quotas in the field of research.

1.4.2. Primary, secondary and higher education

There are no positive action measures or gender quotas in education.

1.5. Positive action measures/gender quotas in legislature, political parties and/or political bodies

There are no legal provisions for gender balance in political parties and/or political bodies. The majority of the political parties apply a gender quota system in favour of women (20 %-30 %) by including a relevant provision in their constitution. Here the word ‘constitution’ means the rules and laws of the political parties or bodies. This measure allows for better representation of women in the list of candidates in parliamentary and local elections. This measure is not binding and there are no sanctions.

1.6. Positive action measures/gender quotas in other decision-making bodies or other areas

There are no positive action measures or gender quotas in other decision-making bodies or other areas in relation to company boards and there is no debate on using gender quotas.

1.7. Conformity of gender quotas with equality legislation

As mentioned above, no positive measures or gender quotas have been applied in Cyprus and, therefore, no reference can be made to any problems with the exception of the rules of some political parties related to the list of candidates in elections.

2. Positive action measures for women and gender quotas in practice

2.1. Implementation of positive action measures for women and/or gender quotas

2.1.1. Implementation in employment, self-employment and vocational training

There is nothing to report under this heading.

2.1.2. Implementation in the access to and supply of goods and services

There is nothing to report under this heading.

2.1.3. Implementation in research and education

There is nothing to report under this heading.

2.1.4. Implementation in legislature, political parties and/or political bodies

As mentioned above, the majority of the political parties have included provisions in their constitution for quotas in favour of women in the lists of candidates for election. The application of this measure has increased the participation of women in Parliament and in local authorities in recent years. In 2001-2006 the number of women in local authorities was 81 and the number of men 315. In 2006-2011 the respective numbers were 84 women and 330 men. In 2001 the number of women in Parliament was 6 and the number of men 50. In 2006 the respective numbers were 7 women and 49 men. In the coming parliamentary elections in May 2011, the total number of candidates is 278; 115 men and 63 women. The number of seats in Parliament is 56. The number of women in the European Parliament (for Cyprus) is 2 and the number of men 4.

2.1.5. Implementation in other decision-making bodies or areas

There is nothing to report under this heading.

2.2. Effects of the positive action measures

There is nothing to report under this heading.

3. Case law

There is no case law on the subject of positive action measures after the fifth amendment of the Constitution.

3.1. Case law of national courts

There is no case law of national courts on the subject of positive action measures.

3.2. Case law of equality bodies

There is no case law of equality bodies on the subject of positive action measures.

3.3. Case law of other bodies

There is no case law of other bodies on the subject of positive action measures.

4. Proposals

As appears from the above, the relevant laws in Cyprus have general provisions allowing positive action measures to be taken in conformity with EU directives, but they do not specify any measures. The proportionality principle is not applied in the public or the private sector, except for disabled persons and in political parties.

Furthermore, no such measures have been taken by any authority or body, except the quotas adopted by some political parties in favour of women in their lists of candidates for election. Debates on this matter take place in women's organisations and in the National Machinery of Women's Rights.

The principle of equal treatment between men and women set out in the relevant Laws is binding and there are remedies and sanctions in case it is violated.

In my opinion it is necessary for the law to specify some positive measures or quotas in order to promote the participation of women in decision-making bodies in the Government and in other organizations of the public, semi-public and private sectors.

CZECH REPUBLIC – Kristina Koldinská

1. National legislation on positive action measures/gender quotas

1.1. Positive action measures in the national legal system

The only legal source of positive action measures is the Antidiscrimination Act (Act No. 198/2009 Coll.). Section 7 of this Act includes a provision which reads: 'Measures aimed at preventing or compensating for disadvantages resulting from a person's membership of a group of persons defined by any of the grounds specified in Section 2(3) and ensuring equal treatment and equal opportunities for that person shall not be considered to be discrimination.'

This rule was introduced when the Antidiscrimination Act entered into force and this might be the reason why as yet there is very limited attention for positive action measures (see below), not only for women, but also for other groups, e.g. disabled people.

These positive action measures are construed as an exception to the equality principle.⁴⁶

There were no specific reasons or motivations for introducing positive measures into antidiscrimination rules in the Czech Republic. The general reason for introducing positive action measures into Czech legislation was probably the fact that positive action measures were made possible by the respective directives and, since the Czech legislature was implementing those directives, positive action measures were included as a possibility as well.

⁴⁶ P. Boučková et al. *Antidiskriminační zákon – komentář* (Antidiscrimination Act – Commentary), 2010. C.H. Beck. p. 241.

In Czech legislation, there is nothing more than the possibility to introduce positive action measures. There is no part of the Czech legal system where quotas may be found. There are of course some special protective measures, for example for pregnant women, but these do not constitute positive action measures as defined by relevant directives and CJEU case law. Therefore, this report will be rather short.

1.2. Positive action measures/gender quotas in employment and self-employment

There are no quotas or other positive action provisions for women.

As far as it has been possible to obtain information, there are no such measures to be found in the public or private sectors. Quotas are not used even in state-owned companies. There are no rules, not even in the internal regulations of companies, which introduce quotas or similar positive action measures for women. As far as it is possible to get the information, not even collective agreements include positive action measures.

1.3. Positive action measures/gender quotas in the access to and supply of goods and services

In the field of supply of goods and services, there are no positive action measures. There are some services segregated on the basis of sex, for example saunas. However, these cannot be understood as positive action measures.

1.4. Positive action measures/gender quotas in the field of research and education

No positive action measures can be found in this field either. On the contrary, at the level of primary schools, discriminatory behaviour on the part of some school directors has been observed. Some directors paid special premiums to male teachers, arguing that this is the only possibility to convince them to stay in the education sector, as in public education salaries are normally very low. These directors argued that their actions constituted a measure in favour of the underrepresented sex in the field of primary education. No cases have been brought before court yet. If that happens, the respective court would probably rule that such a measure is not a positive action measure, but direct discrimination in pay on the ground of sex.

1.5. Positive action measures/gender quotas in legislature, political parties and/or political bodies

The Czech legislation currently in force still includes no positive action measures in the field of politics. There are, however, some political parties that have quotas in their internal rules. See section 2 for more details.

The former Minister of Human Rights, Michael Kocáb, prior to leaving his post and before the post of Minister of Human Rights was subsequently abolished, proposed introducing obligatory quotas for women in the electoral system. He proposed that women should represent at least 30 % of candidates on candidate lists. This proposal has not been further elaborated. Currently no quotas are foreseen in the Czech electoral act.

1.6. Positive action measures/gender quotas in other decision-making bodies or other areas

There is nothing to report regarding positive action measures in other decision-making bodies.

1.7. Conformity of gender quotas with equality legislation

As there are almost no positive action measures, there are no specific problems in the light of equality legislation.

2. Positive action measures for women and gender quotas in practice

2.1. Implementation of positive action measures for women and/or gender quotas

Positive action measures for women and gender quotas are not actually implemented in practice. There are no equal opportunities officers within public administration bodies. There are no requirements to elaborate positive action plans by public administration bodies and state-established entities. Nor can any effectiveness scrutiny requirements be described.

2.1.4. Implementation in legislature, political parties and/or political bodies

The only example that can be mentioned regarding positive measures in practice is the practice of some political parties that have voluntarily introduced quotas for women into their internal electoral rules.

The Social Democratic Party has as a rule that, in the leading functions of the party, at least one woman should be present at the level of vice-president of the party. Currently, however, this rule is not respected in practice. The last time the Social Democrats voted for the new presidency of the party, just one woman ran for the post of vice-president. She was not elected. The Green Party does not have any such rule, but in reality their candidate lists are almost always filled with 50 % women, as this party underlines the equal representation of women also in its internal policy.

2.2. Effects of the positive action measures

There is no specific analysis of the effects of specific positive action measures.

There are just some studies on the representation of women in politics.⁴⁷ There is an award called 'Political party most open to women,' initiated by an NGO named 'Forum 50 %'.⁴⁸ This award is presented every year to the political party which is the most pro-equality oriented. Usually it is the Green Party who wins this award.

3. Case law

There is no case law in the field of positive action measures or quotas.

4. Proposals

The proposal of the former Minister of Human Rights has not been further elaborated, so there is no further information to be provided. Even the social debate on quotas stopped, just a few days after he presented his proposal. In connection with this, a

⁴⁷ E.g. a study conducted for the Ministry of Labour and Social Affairs: *Analysis of a low representation of women in political and decisive functions*, available at http://www.mpsv.cz/files/clanky/961/02_zprava.pdf, accessed 6 March 2011, or a study conducted by the NGO Gender Studies Women in politics in the Czech Republic, available at <http://www.rovnoprilezitosti.cz/admin/upload/0a348316d1/c882a28172.pdf>, accessed 6 March 2011. Both studies conclude that Czech women are underrepresented in politics and further decisive positions. The best supported suggestion is to introduce quotas for women in political representation.

⁴⁸ <http://padesatprocent.cz/en/english>, accessed 6 March 2011.

quick survey was done, from which it is clear that the Czech society in general does not support introducing quotas.⁴⁹

DENMARK – Ruth Nielsen

1. National legislation on positive action measures/gender quotas

1.1. Positive action measures in the national legal system

In Denmark, there is a mainstreaming provision in Section 4 of the Gender Equality Act and provisions on discriminatory forms of positive action in Section 3 of the Gender Equality Act and Section 13 of the Equal Treatment Act. Generally the Gender Equality Act applies to all areas of society that are not covered by special legislation. The Equal Treatment Act applies to employment and occupation (including vocational training). Section 4 of the Gender Equality Act provides:

‘Public authorities shall within their respective areas of responsibility seek to promote gender equality and incorporate gender equality in all planning and administration.’

The mainstreaming duty in Section 4 of the Gender Equality Act applies to public authorities both when they are exercising their roles as public employers and when they are exercising their competence to take decisions or provide services for the public (judicial services, police services, welfare services of all kinds (social services, healthcare, education, etc.), transport services, religious services, and other services of general interest. The Danish equivalent to the term positive action (in Danish ‘*positive særforanstaltninger*’ or ‘*positiv særbehandling*’) is not precisely defined in any legal text but is most often (and also in the present report) used in a broad meaning as covering temporary special measures to promote gender equality (cf. CEDAW Article 4). Some temporary special measures to promote gender equality may violate the ban on sex discrimination in which case under Danish law they require permission under Section 3 of the Danish Gender Equality Act or Section 13 of the Danish Equal Treatment Act (see below). Other temporary special measures to promote gender equality may fall outside the scope of the ban on discrimination in which case they can be used without permission. The measures covered by the Charter for more women in management described below includes measures to ensure that appointment and recruitment procedures help identify women with leadership potential and thus attract both women and men candidates in internal and external recruitment drives. If for example an employer wishes to recruit a person for a management position and wishes to use a head-hunter company to find 4 suitable candidates to select from, the employer can choose to order the head-hunter to deliver two male and two female names. That would not require special permission as long as the best person (man or woman) is selected for the post.

Under Section 3 of the Danish Gender Equality Act and Section 13 of the Danish Equal Treatment Act the responsible Minister may within his area of responsibility permit discriminatory measures for the promotion of gender equality aiming at

⁴⁹ According to a survey conducted in March 2010, 2/3 of the Czech population believes that quotas would not help to solve the problem of low representation of women in politics; see <http://www.sanep.cz/pruzkumy/zeny-ve-vrcholne-politice-cr/>, accessed 29 March 2011.

promoting equal opportunities for women and men, in particular by removing factual inequalities which affect access to employment, training, etc. Section 3 of the Danish Gender Equality Act and Section 13 of the Danish Equal Treatment Act are exceptions to the prohibition against sex discrimination.

The Minister for Gender Equality is authorised to lay down rules specifying the cases in which discriminatory measures to promote gender equality may be taken without authorisation. By statutory instrument no. 340 of 10 April 2007, the Minister for Gender Equality issued rules on initiatives to promote gender equality pursuant to Section 3 of the Gender Equality Act and Section 13 of the Equal Treatment (in employment) Act. Employers, authorities and organisations can take experimental and development initiatives for a period of up to two years to attract the underrepresented sex. It is a condition that the underrepresented sex makes up less than 25 % in the area in question and it is not lawful to give preference to members of the underrepresented sex at the point of admission to education/training or employment. It is lawful to establish courses or training activities of up to six months' duration if the aim is to promote gender equality in employment, training and management. In advertisements it is lawful to encourage the underrepresented sex to apply for employment or training. Positive action measures have rarely been implemented in practice and almost exclusively in the public sector, mainly in the form of encouraging advertisements or supportive training/courses.

1.2. Positive action measures/gender quotas in employment and self-employment

1.2.1. The public sector

Section 4 of the Gender Equality Act and Section 13 of the Equal Treatment Act, see above under 1.1, apply to employment and self-employment in the public sector. In 2008, the Minister for Gender Equality launched a Charter for more women in management for companies to endorse in collaboration with private and public companies. It reads:⁵⁰

‘We need more women in public and private sector management – both because diversity generates returns for enterprises and also because it makes sense for society to utilise all its resources. This charter has been drawn up jointly with public and private sector companies as part of the Government’s efforts to encourage companies to inspire more women to take up management positions.

The aim of the charter is:

to ensure that women and men have equal opportunities to pursue management careers.

to launch specific, measurable initiatives in companies and organisations to increase the proportion of women at all levels of management .

to make sure that public and private sector enterprises deploy all talents.

In endorsing this charter we undertake to make concrete efforts to bring more women into management positions. Efforts will be adapted to the particular company’s circumstances – sector conditions, for example – and current percentage of women managers.

We undertake:

to prepare a plan or strategy to attract more women into management positions or maintain an equal balance and to launch initiatives to this end.

⁵⁰ See the Charter website on <http://www.kvinderiledelse.dk/charter.asp>, accessed 28 March 2011.

to develop and set goals and/or target figures for the number of women in management, for the proportion of women at selected executive levels to be achieved within a fixed time period or for the proportion of women in talent pools or in the management pipeline.

to support a human resources policy that promotes equal career opportunities for women and men.

to ensure that appointment and recruitment procedures help identify women with leadership potential and thus attract both women and men candidates in internal and external recruitment drives.

to set a minimum number of women candidates if the company uses head hunters for management recruitment.

to create conditions for women to develop their careers through networks, mentoring programmes and other targeted initiatives.

to share experience and results of initiatives launched on the basis of the charter, for example, by submitting contributions to the Minister for Gender Equality's theme page on women and management on the Internet.

We adopt the Minister for Gender Equality's charter for more women in management.

[Enterprise, signature]'

The Charter has been endorsed by a number of private and public companies/authorities. In 2008, when the Charter was launched, it was stated as a target that there should be 100 participating companies in 2010. On 17 February 2011 there was a total of 109 participating companies/authorities.⁵¹ As appears from the above they undertake to share their experiences on how to get more women into management. On the Charter website there are links to the websites of the participating companies and the reports they submit. Most of the material is in Danish but some reports are in English.⁵²

On 3 December 2010, the Minister for Equality submitted the first evaluation report on the Charter for more women in management.⁵³ Companies were evaluated on how well they meet their own goals and how they have implemented their plans to achieve goals. The Minister stated at the presentation of the evaluation report that the basic idea of the Charter is that there is no 'one-size-fits-all-model' based on which all businesses must be assessed on a single scale. The charter takes account of corporate diversity. The evaluation report provides a series of good examples that other companies can draw inspiration from. Århus Municipality, for example, reviewed job advertisements to ensure that they can appeal to both men and women and ensured that both sexes are always represented in recruitment committees. The evaluation report also shows that top management commitment to the efforts for more women in management is essential. The report in this context highlights the IBM Gender Diversity Board and Microsoft Diversity Council as good examples.

⁵¹ See http://www.kvinderiledelse.dk/deltagende_virksomheder.asp, accessed 28 March 2011.

⁵² See for example Dong Energy A/S's report on http://www.dongenergy.com/EN/Careers/Explore_opportunities/Career%20development/Documents/Charter_ENGELSK.pdf, accessed 28 March 2011.

⁵³ Available in Danish on <http://www.lige.dk/files/PDF/Kvinderledelse/Evalueringsrapport.pdf>, accessed 28 March 2011.

1.2.2. The private sector

Section 13 of the Equal Treatment Act, see above under 1.1, applies to employment and self-employment in the private sector. There are no provisions in current Danish legislation on quotas for women on company boards applying to private companies. The Charter for more women in management also applies in the private sector. Only 16 of the total of 109 participating companies/authorities mentioned above were private companies, but they are among Denmark's largest private undertakings.

1.2.3. State-owned companies

Section 13 in the Equal Treatment Act applies to employment and self-employment in state-owned companies. In respect of gender balance in boards of state-owned companies there have been legislative provisions in Denmark since 1990. They are now found in Sections 11-13 of the Gender Equality Act.⁵⁴ According to Section 11 boards in state-owned companies should as far as possible have an equal gender balance.⁵⁵ Section 12 puts an obligation on Ministers, the authorities or organisations who are empowered to suggest a member for the board to suggest both a woman and a man.⁵⁶ The competent Minister has a duty to report on the gender composition of the board every third year.⁵⁷ The Charter is a soft-law measure. The participating

⁵⁴ Consolidation Act no. 1095 of 19 September 2007. Available in Danish on Retsinformation, www.retsinfo.dk.

⁵⁵ Section 11 reads: '11(1) Boards, assemblies of representatives or similar collective management bodies within the public administration should have an equal gender balance.
(2) To the extent possible, boards, assemblies of representatives or similar collective management bodies of independent institutions, partnerships and limited liability companies which are not part of the public administration, should have an equal gender balance. This shall apply where the expenses relating to the independent institution are mainly covered by government funds or where the state holds a majority interest of the company.
(3) The responsible minister may decide that subsection (1) shall apply to the institutions and companies, etc. specified in subsection (2) above.
(4) The responsible minister may decide that subsection (1) or (2) shall apply to specified independent institutions, partnerships or limited liability companies where more than 50 per cent of the expenses incurred by such independent institutions are covered by government funds or where the state holds not less than a 50 per cent stake in the company, etc. The responsible minister may further decide that subsection (1) or (2) shall apply to companies carrying on activities under a concession agreement or similar public licences.'

⁵⁶ Section 12 reads: '12(1) Where one or more members of the board, etc. as set out in section 11 hereof are appointed by a minister, the authorities or organisations suggesting a member for the board, etc. shall suggest both a woman and a man. Where more than one vacancy needs to be filled, authorities or organisations shall suggest an equal number of women and men, and where the number of vacancies is an odd number one more of the one gender than of the other. The same shall apply where the authority or organisation shall appoint members pursuant to Danish law. The minister shall decide on the appointment of members.

(2) The authority or organisation may derogate from the provision of subsection (1) where special reasons exist. In that case, the authority or organisation shall state the reason for the derogation.

(3) Subsection (1) shall not apply if one or more members of the board, etc. are elected in a direct vote.

(4) Where authorities and organisations fail to appoint or suggest members in compliance with subsection (1), the responsible minister may decide that the board, etc. may carry out its functions without the said members. The same shall apply if the minister cannot accept the reason given under subsection (2) for derogating from the provision of subsection (1) hereof.'

⁵⁷ Section 13 reads: '13(1) Prior to 1 November of every third year, the responsible minister shall notify the Minister for Gender Equality of the gender composition of the boards, etc. which are subject to section 11(1) hereof.

(2) Boards, etc. subject to section 11 hereof shall upon request submit information on the gender composition of the board, etc. to the responsible minister. The responsible minister is authorised to

authorities/companies are free in what they do exactly, but there is a duty to report on what they do or do not do.

1.2.4. Differences between the public and the private sector

As appears from the above there are differences between the public and the private sector. In the public sector there is a duty of gender mainstreaming and rules on gender balance in boards. The non-binding Charter for more women in management applies both in the public and in the private sector.

1.3. Positive action measures/gender quotas in the access to and supply of goods and services

Section 3 of the Danish Gender Equality Act, see above under 1.1, applies to access to and supply of goods and services.

1.4. Positive action measures/gender quotas in the field of research and education

1.4.1. Research and academics

Section 3 of the Danish Gender Equality Act and Section 13 of the Danish Equal Treatment Act, see above under 1.1, apply to research and academics.

1.4.2. Primary, secondary and higher education

Section 3 of the Danish Gender Equality Act, see above under 1.1, applies to primary and secondary education. Vocational training including higher education is governed by the Equal Treatment Act and Section 13 thereof, see above under 1.1, on positive action.

1.5. Positive action measures/gender quotas in legislature, political parties and/or political bodies

There are no legislative rules on positive action measures/gender quotas in the legislature, political parties and/or political bodies. Political life is outside the scope of application of the ban on discrimination in the legislation on employment and occupation and the Gender Equality Act, which describes the protected situations in the following way: ‘Women and men shall receive equal treatment by employers, authorities or organisations within the public administration and in connection with business and general activities.’ There is no constitutional provision prohibiting sex discrimination or protecting the principle of equality in Denmark. Political parties are private associations protected by the principle of freedom of association. They can promote gender equality as they wish and if they wish, including by discriminatory means. If a political party has the political will to take positive action to promote gender equality it can simply do so. There is therefore no need to discuss the positive action provision in Section 3 of the Gender Equality Act in relation to political parties.

1.6. Positive action measures/gender quotas in other decision-making bodies or other areas

There is a provision on gender composition of public committees, commissions, etc. in Section 8 of the Gender Equality Act. Public committees, commissions and similar bodies set up by a Minister for the purpose of laying down rules or for planning

lay down rules specifying how and when such information is to be submitted. (3) In the case of doubt as to whether a board, etc. as set out in section 11 hereof is subject to the duty of notification, the matter shall be decided by the responsible minister.

purposes of importance to society should consist of an equal number of women and men. Authorities or organisations which are to suggest a member for a committee, etc. in compliance with Section 8 above shall suggest both a woman and a man. Where more than one vacancy needs to be filled, authorities or organisations shall suggest an equal number of women and men, and where the number of vacancies is an odd number one more of the one gender than of the other. The same shall apply where the authority or organisation shall appoint members pursuant to Danish law. The Minister shall decide on the appointment of members and shall aim at achieving an equal gender balance.

1.7. Conformity of gender quotas with equality legislation

Unless specifically permitted, positive action involving less favourable treatment of either sex on grounds of sex is prohibited.

2. Positive action measures for women and gender quotas in practice

2.1. Implementation of positive action measures for women and/or gender quotas

2.1.1. Implementation in employment, self-employment and vocational training

Positive action is seldom used in employment and self-employment. See below on vocational training in the form of research and higher education.

2.1.2. Implementation in the access to and supply of goods and services

Positive action is seldom used in the access to and supply of goods and services.

2.1.3. Implementation in research and education

The gender composition of Danish university faculties has not changed at a rate that reflects the increasing numbers of female university graduates. Some positive action measures have been adopted by the Universities of Århus and Copenhagen⁵⁸ to encourage recruitment of female professors. Incentive systems for increasing the number of female professors and associate professors include taking recruitment of women into account in the internal allocation of money so that the faculties or departments that are best at recruiting women without discriminating at the time of appointment get more money for their gender-balanced recruitment results than other faculties or departments with a more gender-imbalanced staff.

2.1.4. Implementation in legislature, political parties and/or political bodies

Positive action is not used in these areas.

2.1.5. Implementation in other decision-making bodies or areas

There are no known examples.

2.2. Effects of the positive action measures

There is no precise information available.

⁵⁸ See <http://universitypost.dk/brief/positive-action-and-sex-discrimination-danish-universities-2-december>, accessed 28 March 2011. See also the chapter on Denmark in A. Numhauser Henning (ed.) *Women In Academia & Equality Law. Aiming High - Falling Short?*, Kluwer 2006.

3. Case law

3.1. Case law of national courts

There are no known cases.

3.2. Case law of equality bodies

The Complaints Board for Equality (and before 1 January 2009, the Complaints Board for Gender Equality) has dealt with a few cases of positive action taken by local authorities without asking permission from the relevant Ministry under Section 3 of the Gender Equality Act or Section 13 of the Equal Treatment Act. In such cases it is stated that the ban on discrimination in Section 2 of either the Gender Equality Act or the Equal Treatment Act has been violated. The problem in those cases was not whether or not positive action should be permitted (there have been cases where it is likely that the Ministry would have given permission and thus take the same view on substantive law as the local authority) but whether or not local authorities should be allowed to exercise a competence that under Danish law is centralised and placed at the relevant Ministry.

3.3. Case law of other bodies

There are no known cases.

4. Proposals

The present liberal-conservative Government which has been in office since 2001 is not in favour of legislation on quotas for women on company boards in private companies. There are going to be general elections in Denmark in 2011, at the latest in November. According to the opinion polls it is likely that the present opposition (social democrats and the socialist people's party and their supporters) will win the next elections. The opposition is in favour of legislation on quotas for women on company boards, also in private companies. On 23 March 2010 the opposition parties tabled a proposal for a decision by Parliament requiring the Government to put forward a legislative proposal on quotas for women on company boards.⁵⁹ The proposal was rejected by the Government and its supporters which still have a majority in Parliament. If the opposition wins the next elections it is likely that Denmark will get legislation that requires listed companies (i.e. large private companies) to increase their share of women on company boards to 40 % over a four-year period.

ESTONIA – Anneli Albi

1. National legislation on positive action measures/gender quotas

1.1. Positive action measures in the national legal system

The Estonian Constitution does not include any explicit clause regarding proactive measures to promote gender equality. Article 12(1) of the Estonian Constitution provides the following: 'Everyone is equal before the law. No-one shall be discriminated against on the basis of nationality, race, colour, sex, language, origin,

⁵⁹ Available in Danish on the Parliament website, http://www.ft.dk/dokumenter/tingdok.aspx?samling/20091/beslutningsforslag/B161/som_fremsat.htm, accessed 28 March 2011.

religion, political or other opinion, property or social status, or on other grounds.’ According to established case law, the first sentence of Article 12(1) provides a general right to equality; the second sentence stipulates a right against discrimination on the grounds stipulated in the Constitution and analogous grounds. When applying the general equality clause (the first sentence of Article 12(1)), the Supreme Court has held that it encompasses the idea of substantive equality: those who are equal have to be treated equally and those who are unequal have to be treated differently.⁶⁰ According to the Supreme Court:

‘The first sentence of Article 12(1) of the Constitution does not expressly refer to a subjective right. It only states that everyone is equal before the law. Nevertheless, these words embrace the right of a person not to be treated unequally. The wording of the first sentence expresses, above all, the equality upon application of law and means a requirement to implement valid laws in regard of every person impartially and uniformly. [...] The Chamber shares the opinion that the first sentence of Article 12(1) of the Constitution is to be interpreted as also meaning equality in legislation. Equality in legislation requires, as a rule, that persons who are in similar situations must be treated equally by law. This principle expresses the idea of essential equality: those, who are equal have to be treated equally and those who are unequal must be treated unequally.’

The above statement did not concern positive action (the dispute was about length of service to qualify for state pension). In the absence of case law, it is difficult to say whether the Supreme Court would allow positive action measures under this provision of the Constitution.

The Gender Equality Act (hereinafter GEA, in force since 2004) and the Equal Treatment Act (hereinafter the ETA, in force since 2009) regulate the substance of the principle of equal treatment.

According to the GEA, the purpose of the Act is to ensure equal treatment pursuant to the Constitution and to promote equality between men and women as a fundamental human right and for the public good in all areas of social life (Article 1(1) of the GEA).

Article 5(2)(5) of the GEA stipulates that the application of temporary special measures which promote gender equality and grant advantages for the less-represented gender or reduce gender inequality are not deemed to be direct or indirect discrimination based on sex.⁶¹ This provision was amended in 2009 when the clause was specified by adding that the application of special measures has to be temporary. According to the explanatory memorandum to the respective amendment, this means that after some time it is necessary to assess whether the aims of the measures have been achieved.⁶² In the Estonian legal debate, there is no clear position as to whether

⁶⁰ E.g. judgment No. 3-4-1-8-08 of the Constitutional Review Chamber of the Supreme Court, 30 September 2008, p. 20. – Available in English on: <http://www.nc.ee/?id=991>, paragraph 20, accessed 4 March 2011.

⁶¹ The explanatory memorandum to the Draft of the Gender Equality Act does not explicitly state which measures should be applied under this provision; however, it gives an overview of measures of different natures which have been applied in other countries. Explanatory memorandum of Draft Act No. 227 SE (merged with Draft Act No. 38 SE). Available on (in Estonian): www.riigikogu.ee, accessed 4 March 2011.

⁶² A Draft Act to amend the Gender Equality Act, Labour Contracts Act and Equal Treatment Act, No. 317-UA II (5 May 2009), Article 1(8). Available on (in Estonian): <http://web.riigikogu.ee>, accessed 4 March 2011.

the above provisions mean that positive action is not considered an exception from the equal treatment principle or whether it rather constitutes a substantive expression of the equal treatment principle.

The purpose of the ETA is to ensure the protection of persons against discrimination on the grounds of nationality (ethnic origin), race, colour, religion or other beliefs, age, disability or sexual orientation (Article 1(1) of the ETA). Article 6 of the ETA stipulates that this Act does not prejudice the maintaining or adopting of specific measures to prevent or compensate for disadvantages linked to any of the attributes specified in Article 1(1) of the ETA. Such specific measures have to be proportionate to the objective being sought. According to Article 11(1) of the ETA the provision of preferences to disabled persons, including measures aimed at creating facilities for safeguarding or promoting their integration into the working environment, shall not constitute discrimination.

It appears from the foregoing that the Estonian Constitution does not include a separate provision concerning the promotion of the principle of equality and application of specific measures to this end. The possibility for applying special measures has been envisaged in the GEA and ETA. However, these provisions have been included because they have been stipulated in EU law; they do not originate from national legal practice.⁶³ Therefore these provisions are designed as permissive in nature, i.e. the GEA and ETA do not prohibit applying specific measures, but it is disputable to what extent Article 5(2)(5) of the GEA and Article 6 of the ETA could themselves constitute grounds for applying positive measures. The wording of these provisions is rather vague and it lacks the precision and legal certainty to predict which positive measures could be applied. The wording of these provisions indicates that the GEA and the ETA do not prohibit positive measures, but it is likely that such measures would be enacted by a separate legislative act. This is with the exception of Articles 9, 10 and 11 of the GEA and Articles 12, 13 and 14 of the ETA, which concern the promotion of the principle of equal treatment; as will be discussed below, they set out an objective of greater gender balance but without stipulating a legally binding obligation.

Further, whereas the second sentence of Article 6 of the ETA expressly provides that any positive measures have to be in accordance with the principle of proportionality, Article 5(2)(5) of the GEA does not expressly stipulate the proportionality requirement. However, according to Estonian constitutional theory, any derogation of fundamental rights has to meet the principle of proportionality.⁶⁴

⁶³ In the explanatory memorandum of the Draft of the Gender Equality Act it is indicated that the possibility for applying special measures derives from the CEDAW and respective EU norms. Explanatory memorandum of Draft Act No. 227 SE (combined with Draft Act No. 38 SE). Available on (in Estonian): www.riigikogu.ee, accessed 4 March 2011.

⁶⁴ Article 11 of the Constitution establishes that rights and freedoms may be restricted only in accordance with the Constitution. Such restrictions must be necessary in a democratic society and shall not distort the nature of the rights and freedoms restricted. The Supreme Court has established that 'The principle of proportionality springs from the second sentence of Article 11 of the Constitution, pursuant to which restrictions on rights and freedoms must be necessary in a democratic society. The Chamber reviews compatibility with the principle of proportionality on three levels - firstly, the suitability of a measure, then the necessity and, if necessary, proportionality in the narrower sense.' The decision of the Constitutionality Review Chamber of the Supreme Court, no. 3-4-1-1-02, 6 March 2002, p. 15. Available on (in English): <http://www.nc.ee/?id=434>, accessed 4 March 2011. See also K. Albi Comments on Article 5(2)(5) in: *Soolise võrdõiguslikkuse seadus. Kommenteeritud väljaanne* (Gender Equality Act. Commented version) Tallinn 2010, p. 66, point 9.7.

1.2. Positive action measures/gender quotas in employment and self-employment

Article 11(1) of the GEA provides as follows:

‘Article 11. Employers as persons promoting gender equality

- (1) In the promotion of equal treatment for men and women, an employer shall:
 - 1) act such that persons of both sexes are employed to fill vacant positions;
 - 2) ensure that the number of men and women hired to different positions is as equal as possible and ensure equal treatment for them upon promotion;
 - 3) create working conditions which are suitable for both women and men and support the combination of work and family life, taking into account the needs of employees;
 - (...)
 - 5) inform employees of the rights ensured by this Act;
 - 6) regularly provide relevant information to employees and/or their representatives concerning equal treatment for men and women in the organisation and measures taken in order to promote equality.
- (2) An employer shall collect statistical data concerning employment which are based on gender and which allow, if necessary, the relevant institutions to monitor and assess whether the principle of equal treatment is complied with in employment relationships. The procedure for the collection of data and a list of data shall be established by a regulation of the Government of the Republic.’

The purpose of Article 11(1)(1) is to create equal opportunities for both men and women in applying for employment.⁶⁵ Thus, Article 11(1) establishes the duty for the employer to keep in mind the gender balance of the organisation when recruiting personnel, but also with regard to different levels within the organisation. However, this provision is primarily declaratory in nature, setting out an objective to ‘promote’ the gender balance in personnel policy, rather than stipulating a legally binding obligation. The law does not establish any concrete quotas for gender balance. Neither are there any sanctions provided in this regard in Estonian legislation.

1.2.1. The public sector

The GEA applies to employment in the public sector (Articles 2(1) and 3(2) of the GEA). Article 36¹(1) of the Civil Service Act stipulates that state and local government bodies have to ensure the protection of persons against discrimination and to follow the principle of equal treatment in accordance with the ETA and GEA.

The legislative acts do not provide any additional concrete positive measures concerning employment in the public sector. Article 9(1) of the GEA provides a general principle that state and local government agencies are required to promote gender equality systematically and purposefully. They have a duty to change the conditions and circumstances which hinder the achievement of gender equality.

1.2.2. The private sector

Article 11(1) of the GEA also applies to employment in the private sector. Article 3 of the Employment Contracts Act provides that employers shall ensure the protection of employees against discrimination, follow the principle of equal treatment and promote equality in accordance with the ETA and GEA.

⁶⁵ Ü.-M. Papp Comments on Article 9 in: *Soolise võrdõiguslikkuse seadus. Kommenteeritud väljaanne* (Gender Equality Act. Commented version) Tallinn 2010, p. 105, point 1.

1.2.3. State-owned companies

The legislative acts do not establish any additional provisions concerning state-owned companies.

1.2.4. Differences between the public and the private sector

As pointed out above, the requirements of the GEA (in particular the duties concerning the promotion of the equal treatment of men and women as set forth in Article 11 of the GEA) apply to both the public and the private sector.

1.3. Positive action measures/gender quotas in the access to and supply of goods and services

The legislative acts do not stipulate any specific provisions concerning positive action measures or quotas in the access to and supply of goods and services. However, Article 1(1) of the GEA provides that the scope of the Act includes ‘all areas of social life’, which would appear to indicate that the positive action measures in Article 5 of the GEA can be extended to services.

1.4. Positive action measures/gender quotas in the field of research and education

1.4.1. Research and academics

Legislative acts do not stipulate any specific provisions concerning positive action measures or quotas in the field of research and education. According to statistical data regarding women in science in Estonia, women constitute 55 % of lecturers and researchers, 40 % of senior researchers and senior lecturers, and 18 % of professors and senior researchers.⁶⁶

1.4.2. Primary, secondary and higher education

Legislative acts do not stipulate any specific provisions concerning positive action measures or quotas in the field of primary, secondary and higher education.⁶⁷

However, in practice there are separate tests for boys and girls for the 1st form and/or equal numbers of boys and girls are admitted by some schools. Nevertheless, this issue has not been addressed from the legal perspective.

1.5. Positive action measures/gender quotas in legislature, political parties and/or political bodies

No quotas have been established in legislature, in political parties or other political bodies; however, the Gender Equality Act discussed in 1.1. is applicable in this respect.

The elections for Parliament will be held in March 2011. 77.4 % of candidates are men (in 2007 male candidates constituted 72.9 %). The highest percentage of women are running in the list of the Social Democratic Party (34.4 %); 27.2 % in the Centre

⁶⁶ E. Lõhkivi *Naised teaduses* (Women in science). *Teel tasakaalustatud ühiskonda. Naised ja mehed Eestis, II*, Sotsiaalministeerium 2010, p. 132.

⁶⁷ According to statistics the number of boys and girls is even until the end of primary school (in 2008 at the end of basic education 22 220 boys and 20 479 girls), but in secondary school boys are underrepresented (18 052 girls and 13 213 boys). In vocational schools there are more boys (15 181 boys and 12 058 girls), but around 1700 boys do not continue either in secondary or in vocational schools. Among the graduates of the universities women constituted 69 % in 2008. – quoted in T. Kuurme *Pilguheit soolisele tegelikkusele Eesti haridussüsteemis* (A view on gender reality in the Estonian educational system). *Teel tasakaalustatud ühiskonda. Naised ja mehed Eestis, II*, Sotsiaalministeerium 2010, pp. 128-129.

Party, 26.7 % in Estonian Christian Democrats, 26.2 % in the Green Party, 20 % in the Reform Party and 14.4 % in the Fatherland and Res Publica Union. The two last-mentioned parties formed the coalition for the present Government. Nevertheless, only a few women belong to the top of the party lists.⁶⁸ A political scientist, Tõnis Saarts, commented that it is not surprising that less women than men run for Parliament given that Estonia is a masculine society and polls have demonstrated that almost half of society considers politics to be a male area. The proportion of women in representative bodies can increase if the public opinion changes; however, he did not support the introduction of gender quotas.⁶⁹

A recent study on the participation of women in political representative bodies has shown that the main reason for low participation of women in politics could be related to the structures of the parties. Whereas the proportion of women and men belonging to parties is quite balanced (40-60 %), only around 20 % of women belong to the management bodies of the party. The low participation of women in the management of the parties is the main obstacle for women to run in elections on the party list. The author of the study concluded that the main reason for low representation of women in politics is not the result of discriminatory behaviour of the voters, but rather a result of the decisions of the party.⁷⁰

The Gender Equality and Equal Treatment Commissioner has pointed out in an interview that political parties that so wish could apply soft quotas themselves when forming their lists of candidates. However, she did not recommend introducing such quotas promptly by law. She was of the opinion that some parties have a positive attitude towards gender quotas and would be ready to use quotas voluntarily.⁷¹

The Social Democratic Party has noted the issue of gender equality in their electoral programme and the party has set the goal of including at least 40 % of the representatives of both sexes in all representative bodies.⁷²

1.6. Positive action measures/gender quotas in other decision-making bodies or other areas

No strict quotas have been established in other decision-making bodies. According to Article 9(4) of the GEA, membership of the committees, councils and other collegial bodies formed by state and local government agencies shall, if possible, include both sexes.

It is pointed out in the commentary to the Gender Equality Act that the purpose of Article 9(4) of the GEA is to avoid situations where collegial bodies would include only representatives of one sex. This provision sets forth the minimum requirement to keep in mind the gender aspect when constituting such bodies. The author of the

⁶⁸ B. Lamp *Mehed pürgivad riigikokku naistest enam* (More men run for Parliament than women). *Postimees*, 28 January 2011. Available on (in Estonian): <http://poliitika.postimees.ee/?id=379622&print=1>, accessed 4 March 2011.

⁶⁹ T. Loonet *Politoloog: naiskandidaatide vähesus on täiesti loogiline* (A political scientist: the low number of female candidates is logical). *Postimees*, 29 January 2011. Available on (in Estonian): <http://poliitika.postimees.ee/?id=379931>, accessed 4 March 2011.

⁷⁰ M. Allik *Millal naised poliitikast kaovad?* (When will women disappear from politics?) – *Teel tasakaalustatud ühiskonda. Naised ja mehed Eestis II*, Sotsiaalministeerium 2010, pp. 138-149. Available on (in Estonian): http://www.sm.ee/fileadmin/meedia/Dokumendid/V2ljaanded/Publikatsioonid/2010/Teel_tasak_yhiskonda_II_eesti.pdf, accessed 4 March 2011.

⁷¹ *Sepper: Eesti erakonnad on valmis sookvoote rakendama* (Sepper: Estonian parties are willing to use gender quotas). *Postimees*, 04 October 2010. Available on (in Estonian): <http://www.postimees.ee/?id=321594>, accessed 4 March 2011.

⁷² Available on (in Estonian): <http://sotsdem.ee/programm/inimene-ja-uhiskond/>, accessed 4 March 2011.

comments found that this provision in conjunction with Article 5(2)(5) of the GEA would allow the establishment of quotas for balanced representation in collegial bodies (i.e. at least 40 % for both sexes as set forth in the recommendation REC(2007)17 of the Committee of Ministers).⁷³

Article 9(4) of the GEA applies only to bodies formed by state and local government agencies. This provision is set forth conditionally and the membership of such committees should include both sexes, *if possible*. No concrete proportion of representatives of persons of both sexes has been set.

1.7. Conformity of gender quotas with equality legislation

Thus far no court practice exists in Estonia in relation to the issue of positive action measures for women or gender quotas. Theoretical discussion on the positive action measures and quotas is also very limited and these issues are not part of the political or academic debate in Estonian society.

In terms of relevant legal theory, the leading German legal scholar Prof. Alexy, whose work has been influential in Estonian legal theory, has briefly discussed the paradox of formal and factual equality in his study on the fundamental rights in the Estonian Constitution. He pointed out that the enhancement of factual equality creates legal inequality. He found that a liberal Constitution has to uphold legal equality. Measures to compensate factual inequality are allowed only in particularly compelling circumstances.⁷⁴ In the commented edition of the Constitution, the commentator addressing Article 12 of the Estonian Constitution notes that a legal basis for the adoption of positive measures could in principle be derived from the respective EU directives. However, the commentator takes the view that the constitutional equality clause (Article 12) is not suitable for the justification of positive measures because this clause deals systematically with legal equality. The commentator finds that a legal base for positive action could be derived from other provisions of the Constitution, such as protection of parents and children, care for families with many children and persons with disabilities.⁷⁵

2. Positive action measures for women and gender quotas in practice

2.1. Implementation of positive action measures for women and/or gender quotas

2.1.1. Implementation in employment, self-employment and vocational training

There is no information available on this aspect of implementation.

2.1.2. Implementation in the access to and supply of goods and services

There is no information available on this aspect of implementation.

2.1.3. Implementation in research and education

There is no information available on this aspect of implementation.

⁷³ Ü.-M. Papp, 'Comments on Article 9' in: *Soolise võrdõiguslikkuse seadus. Kommenteeritud väljaanne* (Gender Equality Act. Commented version) Tallinn, 2010, p. 99, point 28.

⁷⁴ R. Alexy. *Põhiõigused Eesti põhiseaduses* (The Constitutional Rights in the Estonian Constitution), *Juridica* 2001 (special edition), pp. 61-62.

⁷⁵ M. Ernits, 'Comments on Article 12' in: *Eesti Vabariigi Põhiseadus. Kommenteeritud väljaanne* (The Constitution of the Republic of Estonia. A Commentary), 2nd ed. 2008, p. 138, c. 1.6.-1.7.

2.1.4. Implementation in legislature, political parties and/or political bodies

There is no information available on this aspect of implementation.

2.1.5. Implementation in other decision-making bodies or areas

There is no information available on this aspect of implementation.

2.2. *Effects of the positive action measures*

As noted above, no positive action measures for women and/or gender quotas have been implemented, and thus the public debate in this field is very limited.

3. Case law

3.1. *Case law of national courts*

There is no case law concerning gender-based positive action measures or quotas.

3.2. *Case law of equality bodies*

In 2005 the Chancellor of Justice carried out proceedings to evaluate whether the Technical Gymnasium of Tallinn had followed the principle of equal treatment. Three groups in the 10th form had been created based on tests and interviews, of which two groups were designated for boys and one group for girls (this was a general policy rather than one aimed at positive action or gender equality). The Chancellor of Justice pointed out that such a practice could lead to the breach of the principle of equal treatment, if there are more eligible candidates of one sex than places in the respective groups.⁷⁶

3.3. *Case law of other bodies*

There is no relevant case law.

4. Proposals

As pointed out above, there is still a lot of uncertainty on the legal boundaries of positive action and/or quotas in Estonia. These are to some extent related to the wording of the European directives, which refer to the possibility of applying positive measures for underrepresented sex. Therefore such clauses would need further clarification, to specify the purpose of positive action measures and the situations these could cover, if applied gender neutrally.

FINLAND – Kevät Nousiainen

1. National legislation on positive action measures/gender quotas

1.1. *Positive action measures in the national legal system*

Section 6, Subsection 4 of the Finnish Constitution reads ‘Equality of the sexes is promoted in societal activity and working life, especially in the determination of pay and the other terms of employment, as provided in more detail by an Act. The formulation refers not only to the Act on Equality between Women and Men, which was already in force at the time the present Constitution was adopted, but even to

⁷⁶ Annual report of the Chancellor of Justice of 2005, p. 360. Available on (in Estonian): <http://www.oiguskantsler.ee/files/130.pdf>, accessed 4 March 2011.

other legislation that is to give substance to gender equality. The provision gives a strong legal ground for proactive gender equality measures. A similar explicit constitutional support for proactive duties concerning other discrimination grounds is lacking. However, the provision on equality before the law in Section 6, although it is taken to refer to formal equality and thus corresponds to the general principle of equality in EU law and Article 20 of the Charter of Fundamental Rights of the European Union, the Section as a whole is taken to refer to substantive as well as formal equality. The interpretation of the Constitution has traditionally allowed for the promotion of equality by action aimed at enhancing the cultural and social equality of minority language or ethnic groups, e.g. Roma. The interpretation of the Constitution takes place mainly in the context of a legislative preview by Parliament's Constitutional Standing Committee. The Constitutional Committee assesses the constitutionality of legislative reforms, and the preview is the main means of constitutional scrutiny in Finland, even though courts have the right not to apply a provision that evidently contradicts the Constitution. Parliament's Constitutional Committee has tended to consider the provision on equality as a principle where the promotion of equality is an aspect of the principle of equality rather than a derogation therefrom.

A provision on general qualifications for public office in the Constitution, Section 125 (2), states that these qualifications shall be skill, ability and proven civic merit. The provision originates from 18th century Swedish law, and there is an established interpretation of its contents. All stages of the nominating procedure are in the hands of the nominating authority, and the authority is allowed only a limited amount of appreciation when considering the merits of applicants to a public office. Thus, the interpretation of the constitutional provision defines the limits of positive action in nominations to public offices. In practice this means that the positive duty to promote equality, as well as other policy or political considerations, may be taken into account by nominating a candidate that is equally merited or who possesses merits that are almost as good as those of the top candidate. There is an established legal practice concerning what is meant by 'skill, ability and proven civic merit'.

The Act on Equality between Women and Men (609/1986) contains several positive action duties. The positive duties were already part of the original Act on Equality, enacted in 1986, but the positive duty provisions have since been amended on several occasions, the latest in 2005. The positive duties consist of Section 4 (Duty of authorities to promote gender equality), Section 4a (Composition of public administration bodies and bodies exercising public authority), Section 5 (Implementation of gender equality in education and training), Section 6 (Employers' duty to promote gender equality), Section 6a which concerns bigger employers (Measures to promote gender equality) and Section 6b (Measures to promote gender equality in educational institutions). The Non-Discrimination Act (21/2004), which was enacted primarily in order to implement two EU directives (Directives 2000/43/EC and 2000/78/EC), prohibits discrimination on grounds other than sex (mentioning age, ethnic or national origin, nationality, language, religion, belief, opinion, health, disability, sexual orientation or other personal characteristics as prohibited grounds), but only contains a proactive duty provision concerning authorities, Section 4 (Authorities' duty to foster equality).

Both the Act on Equality between Women and Men and the Non-Discrimination Act contain a provision which explains that the promotion of equality is not to be considered as discrimination. Section 7, Subsection 2 of the Non-discrimination Act provides that the act does not prevent specific measures aimed at the achievement of

genuine equality in order to prevent or reduce the disadvantages caused by the types of discrimination referred to in section 6 (1) (*positive discrimination*). Positive discrimination must be appropriate to its objective. The Act on Equality, Section 9 states that temporary, special actions based on a plan, which aim at promoting effective (*de facto*) gender equality and are aimed at implementing the objectives of the act shall not be deemed to constitute discrimination based on gender. Both provisions are placed under a section which enumerates the exceptions to the prohibition, entitled 'Action that shall not be deemed to constitute discrimination' or 'Conduct not classified as discrimination'.

In my opinion, Finnish law has taken a stricter view of positive action since the case law of the Court of Justice of the European Union in the 1990s gave more precise guidelines to their use than those in Finland at the time. The Finnish Government (together with Sweden and Norway) stressed in *Marschall C-409/95* that the rule in question in that case 'promotes access by women to posts of responsibility and thus helps to restore balance to labour markets which, in their present state, are still broadly partitioned on the basis of gender in that they concentrate female labour in lower positions in the occupational hierarchy. According to the Finnish Government, past experience shows in particular that action limited to providing occupational training and guidance for women or to influencing the sharing of occupational and family responsibilities is not sufficient to put an end to this partitioning of labour markets' (Para. 16). The Nordic tradition, at least at that time, tended to consider proactive measures as a dimension of the principle of equality, rather than a derogation therefrom.

1.2. Positive action measures/gender quotas in employment and self-employment

1.2.1. The Public Sector

Under Section 6 of the Act on Equality (Employers' duty to promote gender equality), Subsection 1, every employer shall promote equality between men and men in working life in a purposeful and systematic manner. Under Subsection 2, the employer shall, with due regard to the resources available and any other relevant factors, (1) act in such a way that job vacancies attract applications from both women and men; (2) promote the equitable recruitment of women and men in the various jobs and create equal opportunities for them for career advancement; (3) promote equality between women and men in the terms of employment, especially in pay; (4) develop working conditions to ensure that they are suitable for both women and men; (5) facilitate the reconciliation of working life and family life for women and men by paying attention especially to working arrangements; and (6) act to prevent the occurrence of discrimination based on gender. The employer's resources and other relevant factors are taken into account when the extent of this duty is determined.

Under Section 6a (Measures to promote gender equality), Subsection 1, an employer with at least 30 employees shall implement measures that promote gender equality as set out in a gender equality plan to be produced annually that deals in particular with pay and other terms of employment. The gender equality plan may be incorporated into a personnel and training plan or an occupational health and safety action plan. Under Subsection 2, the gender equality plan shall be prepared in cooperation with workers' representatives and must include: (1) an assessment of the gender equality situation in the workplace, including details of the employment of women and men in different jobs and a survey of the grade of jobs performed by women and men, the pay for those jobs and the differences in pay; (2) the necessary

measures planned for introduction or implementation with the purpose of promoting gender equality and achieving equality in pay; and a review of the extent to which measures previously included in the gender equality plan have been implemented and of the results achieved; (3) a review of the extent to which measures previously included in the gender equality plan have been implemented and of the results achieved. Under Subsection 3, a local agreement may be made that, instead of the annual review, may be undertaken every three years.

The Act does not differentiate between public and private sectors, and is thus applicable to all levels of employers. The obligation to develop equality planning does not specify the means to be used by various employers, although binding quotas would, especially in the public sector, be considered problematic, because the constitutional provision on qualifications described under 1.1 would in practice only allow for a soft quota. The gender quota provision concerning public bodies explained below concerns bodies nominated to undertake a certain task, but does not require an employment relationship.

The main aim of the provision on equality planning has been to obligate all employers, including public employers, to consider the gender equality situation in the workplace. The duty to develop equality planning does not obligate public (or private) employers to adopt a definite type of policy, but the duty has been strengthened several times since it was first adopted in 1986. The duty to develop equality planning for the employers of 30 or more employees was extended in 2005 to relatively detailed planning, measures and follow-up actions. Under Section 21, Subsection 4 of the Act on Equality, if an employer fails in its duty to use equality planning as prescribed under Section 6 a, the Equality Board may, at the behest of the Equality Ombudsman, impose a conditional fine on that employer.

1.2.2. The private sector

The provisions in force are similar concerning private sector employment, except that the Constitutional provision and secondary legislation provisions on general qualifications for public office do not apply to the private sector.

1.2.3. State-owned companies

As for state-owned companies, there is a provision on gender quotas. Under Section 4 a (2) of the Act on Equality, 'If a body, agency or institution exercising public authority, or a company in which the Government or a municipality is the majority shareholder has an administrative board, board of directors or some other executive or administrative body consisting of elected representatives, this must comprise an equitable proportion of both women and men, unless there are special reasons to the contrary.' The provision also applies to companies owned or co-owned by municipalities. Municipalities especially own companies which provide certain services, such as energy, area heating and water, and social and health services. Subsection 3 obliges authorities and other requested parties to nominate candidates for the bodies referred to in the section and, 'whenever possible', to propose both a woman and a man for every membership position. Because these administrative nominations take place subject to the requirements of administrative legislation, if they have been made illegally because the provisions in the Act on Equality have not been followed, they may be overturned by the administrative courts.

Section 4 a is entitled 'Composition of public administration bodies and bodies exercising public authority', which shows the origin and aim of the provision: promoting women's participation in decision-making in the public field rather than in

economic decision-making in private companies. Section 4a was amended in 2005 (Act 232/2005), but the provision on companies of which the state and the municipalities are majority shareholders was not amended at that point. The matter of gender quotas in companies was discussed by the Committee which prepared the proposal for the amendment (Committee Report 2002:9, Ministry of Social Affairs and Health), but the discussion at that point was mainly concerned with adding a definite quota rule, instead of a reference to an 'equitable proportion' of both women and men, to the provision on public companies. The Government body that makes use of the state's shareholder power in state-owned companies was at that point consulted, and it gave an assurance that state-owned companies would be committed to increasing the number of women. This promise, given by the relevant authority and committing the state to follow a policy of nominating more women, was given 'under the shadow of the law', or to avoid a legislative provision to this effect. The outcome was that a proposal on a mandatory numerical quota was not presented by the Committee.⁷⁷

1.2.4. Differences between the public and private sector

The differences are mentioned above. There is no positive duty concerning the bodies of private companies.

1.3. Positive action measures/gender quotas in the access to and supply of goods and services.

Under Section 4 (Duty of authorities to promote gender equality) of the Act on Equality, authorities, in all their activities, must promote equality between women and men purposefully and systematically, and must create and consolidate administrative and operating practices that ensure the advancement of equality between women and men in the preparatory work undertaken in different matters and in decision-making, and change circumstances which prevent the attainment of gender equality. Under Subsection 3, the promotion of equality between women and men must be taken into account in the manner referred to in the previous subsections in the availability and supply of services.

1.4. Positive action measures/gender quotas in the field of research and education

1.4.1. Research and academia

Under Section 5 (Implementation of gender equality in education and training), authorities, educational institutions and other bodies providing education and training shall ensure that women and men have equal opportunities for education, training and professional development, and that teaching, research and instructional material support the attainment of the objectives in the Act on Equality.

Under Section 6b (Measures to promote gender equality in educational institutions), Subsection 1, educational institutions must prepare a gender equality plan annually in cooperation with staff and student representatives. The plan must include a survey of the gender equality situation within the institution and of related problems, and the necessary measures that are planned for implementation with the purpose of promoting gender equality. Special attention must be given to the attainment of gender equality in student selections and when organizing teaching and evaluating study performance, and to measures to ensure the prevention and

⁷⁷ The information is based on knowledge received as a member of the said committee.

elimination of sexual harassment and gender-based harassment. Under Subsection 2, the gender equality plan must include an assessment of the extent to which measures previously included therein have been implemented and of the results achieved. Subsection 3 allows the gender equality plan to be incorporated into the curriculum or some other planning instrument of the educational institution. An agreement may be made in the institution that the plan will be prepared once every three years, instead of every year.

Positive measures are thus required of educational institutions, but the positive duties imposed on employers are also binding for universities and research institutions as employers. The provision on the composition of public administration bodies and bodies exercising public authority (Section 4a, Subsection 1) is relevant for public educational institutions (see 1.5). An educational institution may be subject to a conditional fine by the Equality Board if the institution has failed to provide an equality plan.

1.4.2 Primary, secondary and higher education

Section 6b, subsection 4 of the Act on Equality limits the application of the duty to equality planning so that the duty does not apply to education providers referred to in the Basic Education Act (628/1998), i.e. primary education. The equality policy measures concerning primary education have largely consisted of measures to change the composition of the teaching profession. For decades, teachers have been predominantly female. Before the Act on Equality was enacted in the 1980s, quotas for men were used in access to the teaching profession, but these were considered to violate the prohibition of discrimination soon after the Act came into force. Since the 1990s, entrance testing (Finnish universities have a *numerus clausus* system and select students by entrance testing) by various educational institutions often use qualifications known to be more common among (usually) male or (seldom) female applicants. The number of women exceeds that of men in most sectors of higher education.

1.5. Positive action measures/gender quotas in the legislature, political parties and/or political bodies

The Section 4a (Composition of public administration bodies and bodies exercising public authority) quota provision (Subsection 1) requires that the proportion of both women and men in government committees, advisory boards and other corresponding bodies, and in municipal bodies and bodies established for the purpose of inter-municipal cooperation, but excluding municipal councils, must be at least 40 per cent, unless there are special reasons to the contrary. These public body gender quotas do not affect elected bodies, only bodies nominated by elected bodies. Not meeting the target may lead to the nominating decision being overturned by an administrative court.

1.6. Positive action measures/gender quotas in other decision-making bodies or other areas

Section 4a has an impact on all types of public sector decision making, whether political or not. There has been a spillover effect to decision-making bodies that are not bound by the legal provision, so that, for example, many associations pay attention to the gender composition of their decision-making bodies. The economic actors have been more resistant to such spillovers, however.

1.7. Conformity of gender quotas with equality legislation

Equality legislation has been the most important motivation for positive action, but the Act on Equality requires equality planning which, to my knowledge, does not in practice use binding gender quotas in employment policies. The only binding quotas in use are those under Section 4a of the Act on Equality.

2. Positive action measures for women and gender quotas in practice

2.1. Implementation of positive action measures for women and/or gender quotas

2.1.1 Implementation in employment, self-employment and vocational training.

Before the amendment of 2005, the provisions on positive duties were not supervised in practice, and no sanctions existed for infringements. Compliance with the Act on Equality is in the hands of the Ombudsman for Equality and the Equality Board. The equality authorities have the right to receive all information necessary for supervision from the authorities (Section 17 (1)), and the Ombudsman has the right to receive information from a private person (Section 17 (2)). The Ombudsman has the right to carry out inspections at a workplace (Section 18). The Ombudsman may impose a penalty payment as a means of enforcing the obligation (Section 21a).

The Equality Board may, upon a proposal by the Ombudsman, impose an obligation on an employer that has neglected the obligation to prepare a gender equality plan within a defined period, if necessary under the threat of a penalty fine. The Equality Board can make a separate decision that the penalty is to be paid if the employer has neglected to act within the deadline (Section 21).

The implementation of the provisions on equality planning in employment have recently been evaluated, as explained under 2.2.

2.1.2. Implementation in the access to and supply of goods and services

The implementation of the provision relies largely on public awareness and the Equality Ombudsman's activities.

2.1.3. Implementation in research and education

The quality of equality planning by educational institutions has varied. The Academy of Finland, which is an important funding institution, has until 2010 followed an equality plan which required a transparent assessment of applications, and a balanced participation of men and women as experts. The Academy of Finland stood out as an exception in having integrated equality policies and the promotion of women in academic careers into its activities.⁷⁸ The Finnish universities were turned from state institutions into private institutions with certain public duties at the beginning of 2010. The Equality Ombudsman is following the changes resulting from this renovation and it currently requires information on administrative nominations, as some universities have recruited predominantly men to leading positions in the new university administration.

2.1.4. Implementation in the legislature, political parties and/or political bodies

The provision on gender quotas in public bodies is commonly known and, according to various studies, is relatively efficient, although research on the effects of the

⁷⁸ K. Brunila *Sukupuolten tasa-arvo korkeakoulutuksessa ja tutkimuksessa. Sosiaali- ja terveystieteiden tutkimuskeskus* 2009, p. 54.

provision mainly concentrate on municipal bodies, and less is known of their effects in state administration.⁷⁹ The provision seems to have some spill-over effects, so that many organisations roughly follow the quota principle in their decision-making bodies. For example, the Lutheran Church of Finland decided in 2003 to introduce gender quotas to its decision-making bodies, although there is no legal obligation to do so.

2.1.5. Implementation in other decision-making bodies or areas

See under 2.1.4.

2.2. Effects of the positive action measures

Positive measures have been in place since the beginning of 1987, when the Act on Equality was enacted. More detailed requirements have been added by several amendments. The impact of the quota provision (Section 4 a) especially in state and municipal administration has been considerable. Municipalities are responsible for local administration, but also for a large part of all public administration and the provision of public services.

The 2005 amendments to the duty to adopt equality planning were assessed by Parliament's Employment and Equality (Standing) Committee in 2010. Several studies on equality planning had been commissioned by the Ministry of Social Affairs and Health to assess the impact of the 2005 amendments. Compared with a study on equality planning in the public sector in 2005, before the amendments,⁸⁰ a study from 2008 showed a rise in the number of equality plans. In 2010, a comprehensive study on equality planning, pay mapping in particular, based on various materials such as employer and employee interviews was finalised.⁸¹ The Ministry of Social Welfare and Health presented a report on the functioning of the amendments to the Act on Equality to Parliament's Employment and Equality Committee in January 2010, and the Committee gave its report on the Report of the Ministry of Social Affairs and Health in 2010.⁸² For the results, see under 4.

3. Case law

3.1. National courts

The Supreme Administrative Court has for decades decided a number of cases concerning the quota rule for public bodies (Section 4 (2) of the Act on Equality). The cases typically concern situations where it may be justified not to follow the minimum 40 percent women and men rule.⁸³ Such bodies as cooperative bodies nominated by several municipalities have been the focus of certain decisions. For example, a body for regional cooperation nominated by several municipalities had been established so that the chairpersons of the municipal councils had been nominated as members of the

⁷⁹ A. Holli et al., *Sukupuolten valtakunta. Vastapaino* 2007; S. Virkkala *Sukupuolikiintiöt ja kunnallispolitiikan muutokset*, Terra 120(2008)2, S. Pikkala, *Sukupuolikiintiöt kunnallispolitiikassa. Kunnallispoliittinen aikakauskirja* 4/1999.

⁸⁰ *Tasa-arvosuunnittelu julkisella sektorilla, selvitys suunnitteluvälineen toteutumisesta. Tasa-arvo julkaisuja* 2005:3.

⁸¹ K. Uosukainen et al. *Työpaikan tasa-arvosuunnitelma ja palkkakartoitus. Tutkimus suunnitteluvälineen toteutumisesta sekä suunnitelmien ja kartoitusten laadusta I*, Sosiaali- ja terveysministeriö 2010.

⁸² *Ministeriön selvitys naisten ja miesten välisestä tasa-arvosta annetun lain toimeenpäämisestä. Lausunto* TyVL 6/2010 vp - MINS 3/2010 vp.

⁸³ E.g. decision KHO 2001:13.

regional body. The Supreme Administrative Court found that the quota rule applied to the regional body in question, and that a wish expressed by the municipalities in question that the members of the regional body should consist of leading members of municipal bodies was not a relevant ground for not doing so.⁸⁴ The issue has also been whether members nominated on the basis of their office should be taken into account; the Supreme Administrative Court decided that where relevant officials were to be nominated as members to a city committee concerned with city planning, the outcome did not have to be in accordance with the quota rule.⁸⁵ It also had to decide whether a body of the Lutheran Church should follow the quota rule: a congregation council had elected an administrative body for real estate matters consisting of merely men, and a body on educational matters with a great majority of women. The Court decided that the quota provision of the Act on Equality only applied to state and municipal bodies, and to church bodies such as congregations.⁸⁶ As indicated above, the Lutheran Church made a decision in 2003 that the quota rule even binds its bodies, and the Act on the Lutheran Church (1054/19939) was amended accordingly.

3.2. Equality bodies

The Equality Ombudsman has also given several opinions on the quota provision (Section 4 (2)), either when requested to give an opinion by a court, or in a case referred to for an opinion by a private person. The Ombudsman has stated that even the composition of deputy members of a body must follow the quota provision,⁸⁷ that consultative bodies for cooperation with old persons, disabled persons and war veterans do not have to follow the provision,⁸⁸ and that an authority (a ministry) as well as other obligated bodies shall always explain the reason why they are unable to comply with the quota provision, and what has been done in order to guarantee compliance.⁸⁹ There are a few cases on positive action in employment. In one opinion the Ombudsman explained the acceptable limits for university appointments when the equality plan mentions that the under-represented sex may be given precedence provided that the candidates are equally or nearly equally merited. When top candidates for a position have equal or near equal merits, and belong to different sexes, the decision makers should consult the equality plan. The Ombudsman stated that preferential treatment on the basis of sex under these circumstances is in accordance with the case law of the European Court of Justice.⁹⁰

3.4. Other bodies

Parliament's Constitutional (Standing) Committee reports on proposed legislation are an important source of law, because the Committee's view on the constitutionality of the proposed legislation is the main form of constitutional review in Finland. The Committee Reports are considered decisive in Finnish legal literature in the sense that constitutional review consisting of not applying a provision of secondary legislation is not to be applied to a case if the provision in question evidently contradicts the Constitution. According to the Finnish legal doctrine, a legal provision cannot evidently contradict the Constitution if Parliament's Constitutional Committee has

⁸⁴ E.g. decision KHO 2002:38.

⁸⁵ Decision KHO 1997:50.

⁸⁶ Decision KHO 2001: 13.

⁸⁷ Equality Ombudsman's opinion TAS 426/2010.

⁸⁸ Equality Ombudsman's opinion TAS 83/2009.

⁸⁹ Equality Ombudsman's opinion TAS 216/2007.

⁹⁰ Equality Ombudsman's opinion 24/52/02.

uttered its opinion that there is no such contradiction. The reports that may have relevance in this context cannot be considered here. Among recent reports may be mentioned a case where the Government proposed a higher level of parental leave benefit for fathers than for mothers, and argued that the proposal would promote gender equality as it might induce more fathers to take parental leave. The proposal was held unconstitutional, as the measure would have been directly discriminatory against women.⁹¹

4. Proposals

Parliament's Employment and Equality Committee noted at the reporting on the amendments to the duty to equality planning made in 2005 (see under 2.2) that workers should be given an adequate opportunity to cooperate in the equality planning at the workplace. The Act should specify who acts as the representative of the personnel and who represents the employer in equality planning. The Parliamentary Committee also noted that the Equality Ombudsman's office should have adequate resources to monitor equality planning. Pay mapping was considered the most problematic issue, because analysing and comparing pay, as well as access to relevant information on pay by workers' representatives remain difficult under the present legislative provisions. Pay differentials must be analyzed and pay systems made transparent. The analysis should cover all employees across collective agreements, as was intended according to the preparatory works of the 2005 amendment. The principle should be made effective by adding a provision containing a duty to use cross-collective agreement pay mapping, and by giving workers' representatives better access to pay information.

The same issues were repeated when Parliament's Employment and Equality Committee examined the Government's report to Parliament on gender equality policies, which describes the gender equality policies of several Finnish Governments from the end of the 1990s to 2010, and establishes guidelines for gender equality policies up to 2020.⁹² The guidelines also refer to required legislative amendments. The first to be mentioned is equality planning, especially as to pay mapping, and also the monitoring system of the Act on Equality needs to be made more effective, also concerning proactive duties. Parliament's Employment and Equality Committee gave its report on the matter⁹³ in 2011. The Committee stressed that the monitoring bodies have been given new tasks on several occasions without a corresponding increase in resources. Effective monitoring depends on adequate resources. The Committee also referred to its former statement (see above) on the amendments to the Act on Equality, and requested the preparation of the amendments including a more specific duty to use pay mapping. There seems to be a relatively strong consensus in Parliament that the supervision of the provisions should be given more resources, and that the provisions on how equality planning is to be done should be regulated by more precise, mandatory provisions. No Government Bills or other proposals to that effect exist at present, however, and further legal measures will depend on the next Government, after the forthcoming parliamentary elections.

⁹¹ PeVL 38/2006 vp - HE 112/2006 vp.

⁹² *Valtioneuvoston selonteko naisten ja miesten välisestä tasa-arvosta*, Sosiaali- ja terveysministeriö Julkaisuja 3010:8.

⁹³ *Valtioneuvoston selonteko naisten ja miesten välisestä tasa-arvosta*. TyVM 18/2010 vp – VNS 7/2010.

1. National legislation on positive action measures/gender quotas

1.1. Positive action measures in the national legal system

Traditionally positive action measures were not really welcomed in the French system, because they were very often viewed as contrary to the French concept of equality. Very often, positive action measures were also presented as a danger to the Republican idea of equality because they could lead to or favour communitarism. This is why, regarding the issue of quotas, the Constitutional Council in 1982⁹⁴ declared unconstitutional a law whose purpose was to introduce quotas for the election of municipal councillors. A revision of the Constitution was thus needed to allow the legislator to adopt gender quotas. Even with the modifications of the Constitution in 1999 and 2008, the Constitutional Council has not always interpreted in an extensive way the possibility left to the legislator to adopt positive action measures (see below the recent decision of the Constitutional Council).⁹⁵

Although explicit positive action measures are often criticized, the French system includes many specific rights granted to specific groups which are totally accepted perhaps because they are not presented as positive action measures. For example, there are many specific rules for young workers or senior workers, specific measures for disabled groups, etc. For a very long time, specific rights, notably in the pension system, were also granted to women as a consequence of family policies. In order to address a social reality, namely the disadvantages which they incur in their professional career by virtue of the predominant role assigned to them in bringing up children, mothers who have raised children were granted an increase of their insurance coverage and some other advantages. The purpose of these measures was to offset the disadvantages which female workers who have had children encounter in their professional life. These measures were not analysed as positive action measures.

Most of the time, proactive measures for the underrepresented sex are allowed by the Constitution or a Statute but are not obligatory. Since 1999, the Constitution allows positive action measures in the political sphere and since July 2008 in employment relations. The revision of the Constitution, which now states in its Article 1 that ‘Statutes shall promote equal access by women and men to elective offices and posts as well as to professional and social positions’, has allowed the adoption of two statutes imposing some quotas for political elections and in company boards. However, there is no obligation for Parliament to adopt such positive action measures.

Positive measures for other grounds are not so frequent but it depends on the ground. For example, in the employment field, positive measures for young people or old people are very common and they are not discussed and debated as is the case for proactive measures for women that are often criticized as being contrary to the equality principle. There are also some quotas to promote the employment of disabled people. For ethnic minorities, positive action measures are not legal, when they are based on origins, but some measures are possible when they are based on social criteria. Some measures could also be introduced in specific areas: for example, a programme, started in 1982 and still running, provides additional resources to schools in the most disadvantaged areas. These ‘Special educative zones’ are selected according to various criteria: parents’ social and professional backgrounds, parents’

⁹⁴ Decision 82-146 DC of 18 November 1982.

⁹⁵ Decision 2010-618 DC of 9 December 2010.

rate of unemployment, percentage of students who are not native French speakers and percentage of students having repeated a grade.

Positive measures are usually perceived as an exception to the equal treatment principle and sometimes contrary to the French concept of equality. Thus quotas are very often represented as allowing a better representation needed in a democratic society.

1.2. Positive action measures/gender quotas in employment and self-employment

1.2.1. The public sector

If, in the public sector in general, there are more women than men, the proportion of men and women is reversed in the high public office and in the senior level public management. For a long time, women in the public sector were granted specific rights linked to their family responsibilities. As is well known, in the *Griesmar* case (C-306/99), contrary to the argument put forward by the French Government, the European Court of Justice took the view that the credit granted to civil servants who were mothers could not be authorised as being a measure designed to help women in their career since, being granted at the date of their retirement, it did not provide a remedy for the problems which they might encounter in the course of their professional career. The Court concluded that career-related difficulties encountered by mothers could not be resolved by means of the service credit at issue in the present case. After the *Griesmar* case, specific rights for women have progressively disappeared in the public service.

Thus, the principle is that civil servants have equal rights and generally positive action measures are excluded. Some attempts were made by the legislator to create some quotas. For example, the law on equal pay voted in 2006 intended to create mandatory quotas in several places. But on 16 March 2006, the Constitutional Council invalidated many provisions of this law.⁹⁶ The mandatory provisions related to the access of the women to deliberative and jurisdictional boards were cancelled. The Council specified that the Constitution does not permit constraining rules grounded on sex, and, for that reason, refused provisions that imposed predetermined proportions between men and women in boards. In short, all incentive provisions were saved especially those regarding equal representation of men and women in courses of initial and continuous vocational training, but the Constitutional Council censured all constraining provisions. With the amendment of the Constitution in 2008, the position of the Council changed and the legislator is now allowed to adopt compulsory quota rules, but it has not done so yet with the exception of quotas in company boards.

There is now one quota left which is not really mandatory. Since 2002, one third of the members of juries and commissions in recruitment or promotion of civil servants shall be qualified persons of each sex. The aim of this quota is to allow a balanced participation of both sexes in these juries. However, in 2007, the Council of State stated that the decision of a commission which did not respect this quota could not be void, as the law only defines an objective of a balanced representation, and that the criterion of gender cannot prevail against competence and skills.⁹⁷ This strict position of the Council of State towards positive action measures could change with the amendment of the Constitution in 2008 but there has been no decision yet on this issue to confirm this interpretation.

⁹⁶ Decision 2006-533 DC of 16 March 2006.

⁹⁷ *CE 22 juin 2007, n°288206, publié au recueil Lebon.*

Some voluntary action measures are possible and are actually implemented in order to improve the situation of women in the public services. Since 2000, some instruments have been adopted in order to take better account of the situation of women in the public service. For example a steering committee has been installed to promote the access of women to senior management. However, until now the recommendations adopted and the measures taken are not really effective, certainly because they are only recommendations without any sanctions.

1.2.2. The private sector

In the private sector, the Labour Code provides that temporary measures in favour of women to promote equal opportunity for men and women, in particular by removing existing inequalities which affect women's opportunities are possible (Article L. 1142-4). This rule was not constitutionally challenged when it was first adopted, certainly because there were no obligations for employers to adopt such measures. Such provisions can be included either in administrative provisions regarding access to employment, to vocational training, promotion, and as regards working organisation and conditions or in extended collective agreements at branch level or in an 'equality plan'. The Law of 9 May 2001 creates an obligation to negotiate on sex equality. Every year, the employer has the duty to negotiate with trade unions in order to define the objectives concerning equality between men and women in the enterprises and to design the measures to be implemented in order to attain these objectives. In order to facilitate the negotiation, a written report on the comparative situation between men and women in the enterprise shall be drawn up by the employer. The 2001 Law also recognizes a duty to bargain on equality at professional branch level every three years, on the measures to be taken towards attaining occupational equality and on catch-up measures intended to remedy inequalities which have been ascertained. To improve negotiations, the Law adopted on 23 March 2006 specifies that the pay gap must disappear before 31 December 2010.

Also in the private sector, a new Bill has just been adopted on 27 January 2011⁹⁸ in order to improve the representation of women on company boards. The Bill intends to improve the representation of women on company boards and it imposes a quota of women. Firms will have to ensure that women have at least 20 % of board seats within three years and 40 % in 6 years.⁹⁹ However, the law watered down an earlier proposal which would have ordered full gender equality (50-50 % representation) on company boards within six years. The Bill will only apply to large companies, employing at least 500 workers and with revenues of over EUR 50 million. Non-complying companies would see their board elections nullified but not the decisions adopted by the board. New elections shall be held in order to fulfil the obligation of gender representation. The law is presented as permitting a balanced participation of women which is necessary in a democratic society.

1.2.3. State-owned companies

The Bill of 27 January 2011 also applies to state-owned companies.

⁹⁸ *Loi n° 2011-103 du 27 janvier 2011 relative à la représentation équilibrée des femmes et des hommes au sein des conseils d'administration et de surveillance et à l'égalité professionnelle publiée au Journal Officiel du 28 janvier 2011.*

⁹⁹ See *Rapport n° 2205* de Mme Marie-Jo Simmermann, 22 December 2009, and also the parliamentary debates on this issue <http://www.senat.fr/dossier-legislatif/ppl09-223.html>, accessed 17 February 2011.

1.2.4. Differences between the public and the private sector

In the private sector, as in the public sector, there are now instruments in order to analyse the situation of women in private and in public employment. The Bill of 27 January 2011 also applies to state-owned companies. However, until now, the obligations regarding gender equality are stronger for private employers than for public employers certainly because the idea was that civil servants have equal rights and thus positive action measures were excluded. However, a first proposal was made in January 2011 to also adopt some quotas to favour the access of women to top management in the public sector.

1.3. Positive action measures/gender quotas in the access to and supply of goods and services

There are no mandatory positive action measures in the access to and supply of goods and services.

1.4. Positive action measures/gender quotas in the field of research and education

1.4.1. Research and academics

There are no mandatory positive action measures in the field of research and education.

1.4.2. Primary, secondary and higher education

There are no positive action measures in education, but some measures have been taken in order to promote the access by women to technical and scientific studies (which are usually attended by men).

1.5. Positive action measures/gender quotas in legislature, political parties and/or political bodies

Women are underrepresented in politics in France. In the eighties, the Constitutional Council stated that quotas were unlawful under the provisions of the French Constitution. To improve the situation and to allow the adoption of quotas, the Constitution was amended in June 1999, allowing quotas so as to promote the position of women. Different kinds of quotas have been created for different kinds of elections with financial sanctions against parties who do not comply with their obligations. Laws of 2000 and 2007 require for the elections to the National Assembly that the parties present 50 % of candidates from each sex. In legislative elections, which are conducted according to a two-round majoritarian system, the new law required political parties to present an equal number of female and male candidates. If a party failed to do so, the funds it would normally receive from the State would be reduced proportionally. For the election to the Senate, a strict alternation between men and women on the lists is required. The laws of 2003 and 2007 include mandatory parity with strict alternation of candidate lists in elections to the European Parliament, regional councils, and municipal councils in towns with more than 3500 inhabitants. If a party does not abide by the rule of parity at local level and in European Parliament, the list is invalidated. In elections for the National Assembly, there is a financial penalty for non-compliance. The adoption of these quotas was not really presented as the adoption of positive action measures but as a way to improve representation in a democratic system.

1.6. Positive action measures/gender quotas in other decision-making bodies or other areas

On this subject, there is nothing to report.

1.7. Conformity of gender quotas with equality legislation

The French positive action measures for the underrepresented sex seem to conform to European equality legislation.

2. Positive action measures for women and gender quotas in practice

2.1. Implementation of positive action measures for women and/or gender quotas

2.1.1. Implementation in employment, self-employment and vocational training

One of the last annual reports on collective bargaining analyses the number and the content of the agreements concluded.¹⁰⁰ The report confirms a slow increase in the number of collective agreements dedicated or referring to equality, but the subject of equality is still relatively marginal compared to the traditional topics of collective bargaining. At branch level, 19 specific agreements on equality were concluded in 2008 (against 9 in 2007 and 1 in 2006) and 34 agreements refer to equality (on a total of around 1117 agreements concluded in 2008). At enterprise level, 1235 agreements referring to equality were concluded, against 1076 agreements in 2007, on a total of 27 100 agreements. Concerning the content of the agreements, the report distinguishes between 3 categories of agreements. The first category, (representing 1/3 of the specific agreements, and 2/3 of the general agreements) is just formal, it only recalls the principle of non-discrimination and declares its willingness to respect the law without any concrete measures. The second category of agreements (half of the specific agreements and 1/3 of the general agreements) recalls the principle of non-discrimination and proposes at least one concrete measure which is, most of the time, the ‘neutralisation of maternity leave’ in wages (which is in fact a legal obligation). Some agreements specify some objectives in terms of career development and recruitment. The third category (23 specific agreements and no general agreement) tries to take into account the structural causes of gender discrimination and adopts various measures regarding recruitment, promotion, access to training, access to part-time working hours, parental measures, etc.

2.1.2. Implementation in the access to and supply of goods and services

On this subject, there is nothing to report.

2.1.3. Implementation in research and education

On this subject, there is nothing to report.

2.1.4. Implementation in legislature, political parties and/or political bodies

The single-ballot system in which lists must be composed alternately of candidates of each sex tends to allow better representation of women. Thus, at the level of Regions, the regional councillors were elected in proportional representation and with the law on equality, 47.5 % of the councillors are now women. At the lower level of the Departments, there is a uninominal system on a majority basis and only 12 % of the representatives at that level are women. For the MPs, where the system is the same,

¹⁰⁰ M. Rabier, ‘Analyse des accords d’entreprise portant sur l’égalité professionnelle entre les femmes et les hommes signés depuis la loi du 23 mars 2006’, in Ministère du travail, *La négociation collective en 2008*, Bilans et rapport, Juin 2009, pp. 423-459.

the representation of women in the National Assembly is still weak (currently only 18.5 % of MP are women) and sometimes political parties have preferred to receive a financial penalty. An important reform of the governance of the Regions has just been adopted and the election of representatives of the regional communities has also been modified. The new representatives of regional communities will replace both regional and department councillors and they will be elected in a two-round uninominal system on a majority basis. Even if the system of sanctions has been improved (the financial penalty for non-compliance will be higher), one of the consequences of the new system is that the representation of women assuming the functions of representatives of territorial communities will be lower than it is now. The new system of two-round uninominal on a majority basis instead of a proportional representation disfavors women's representation as political parties prefer to present men rather than women. In contrast, with a single and proportional ballot system, political parties present lists of candidates composed alternately of candidates of each sex. Some opponents of the reform have argued on this point that the new Law was unconstitutional as it disfavors women's representation. It is thus contrary to Article 1 of the Constitution according to which statutes shall promote equal access by women and men to elective offices. Unfortunately, in a disappointing decision, the Constitutional Council considers that Article 1 does not limit the legislative competences and without any justification it just states that the new Law is not contrary to Article 1 of the Constitution.¹⁰¹

2.1.5. Implementation in other decision-making bodies or areas

It is obviously too early to see how quota rules for company boards will be implemented and what effects they will have.

2.2. Effects of the positive action measures

On this subject there is nothing to report.

3. Case law

3.1. Case law of national courts

Since 1982, the Constitutional Council has delivered important decisions on quotas and positive action measures. Regarding the issue of quotas, the first decision was the 1982 decision¹⁰² where the Constitutional Council declares unconstitutional a law whose purpose was to introduce quotas for the election of municipal councillors. For the Constitutional Council, 'citizenship confers the right to vote and stand for election on identical terms on all those who are not excluded on grounds of age, incapacity or nationality, or on any ground related to the preservation of the liberty of the voter or the independence of the person elected; these constitutional principles preclude any division of persons entitled to vote or stand for election into separate categories; this applies to all forms of political suffrage, in particular to the election of municipal councillors; It follows that the rule whereby, for the establishment of lists presented to voters, a distinction is made between candidates on grounds of sex, is contrary to the constitutional principles'. A similar position was adopted in 2002 and 2006.¹⁰³ In 2007, a decision of the Council of State followed the principles defined by the Constitutional Council. Thus amendments of the Constitution, which took place in

¹⁰¹ Decision, n° 2010-618 DC, 9 December 2010, *Loi de réforme des collectivités territoriales*.

¹⁰² Decision 82-146 DC of 18 November 1982.

¹⁰³ 16 March 2006, Decision 2006-533.

1999 and 2008, were necessary to impose quota. Concerning other types of positive action measures, the Constitutional Council¹⁰⁴ has recognized the constitutionality of a legal positive action measure in a decision regarding specific rights for women in pensions. Indeed, the French legislator has chosen to implement the exception in Article 7(b) of Directive 79/7/EEC according to which Member States can exclude from the scope of their legislation the advantages in respect of old-age pension schemes granted to persons who have brought up children. Thus the Law of 23 July 2003 on pension reforms chose to retain the 2-year credit per child for women. The Constitutional Council¹⁰⁵ recognized the constitutionality of the measure ‘on grounds of general interest’ given the low level of women’s pensions, noting in particular that ‘they had interrupted their professional employment far more than men in order to ensure the education of their children’. Finally, it stipulates that such a provision is destined to disappear, even if there is no such indication in the Act.

Recently, the Constitutional Council has delivered a very disappointing decision on the interpretation of Article 1 of the Constitution according to which ‘Statutes shall promote equal access by women and men to elective offices and posts as well as to professional and social positions’. As stated above, the Constitutional Council considers that Article 1 defines an objective which does not limit the legislative competences and that the Law (see under 2.1.4.) was not contrary to Article 1. Article 1 only allows the adoption of positive action reforms which will otherwise be considered as contrary to the constitutional principle of equality. The fact that the new Law will have negative consequences on the representation of women is not taken into consideration by the Council and positive action measures are viewed as exceptions to the equality principle.

3.2. Case law of equality bodies

There is no case law to report.

3.3. Case law of other bodies

There is no case law to report.

4. Proposals

At the end of January 2011, Georges Tron, Secretary of State of Public services, announced that he wants the adoption of quotas for management in public services. A report of an MP, not yet published, recommends the definition of numerical targets to favour the development of sex equality. According to the report soft and non-mandatory measures have failed to improve the position of women in public services and it is now necessary to adopt numerical targets and a sanctioning system. An objective of 40 % of women’s participation in top management in public services is proposed, to be reached in 4 or 5 years. This proposal is obviously linked to the new Bill, adopted on 27 January 2011¹⁰⁶ in order to improve the representation of women in company boards (see above) and constitutes a certain extension of this Bill. However, it is just a very recent proposal and it might be politically difficult to transform it into a mandatory statute.

¹⁰⁴ 14 August 2003, Decision 2003-483 DC.

¹⁰⁵ On 14 August 2003, Decision 2003-483 DC.

¹⁰⁶ *Loi n° 2011-103 du 27 janvier 2011 relative à la représentation équilibrée des femmes et des hommes au sein des conseils d'administration et de surveillance et à l'égalité professionnelle publiée au Journal Officiel du 28 janvier 2011.*

1. National legislation on positive action measures/gender quotas

1.1. Positive action measures in the national legal system

The fundamental source of the state's obligation to take proactive measures is Article 3(2)(2) of the Basic Law (the German Constitution), which lays down the duty of the state to work towards full equality between women and men, thus embracing the concept of substantive equality. It does not contain an explicit permission to introduce quota. Positive measures are considered as a means to bring about substantive equality, and hence as part of the concept of equality. However, courts and a large majority of legal scholars consider quota as an exception to the principle of equal treatment requiring strict scrutiny as to their proportionality. Although the Federal Constitutional Court held that the constitution must be interpreted in light of international human rights treaties, no court and only few scholars consider Article 4 CEDAW to imply that quota, too, are an inherent part of the principle of equality.

In normative terms, positive action is thus justified as being inherent in the concept of (substantial) equality, which encompasses the concept of structural discrimination. The compensation for past discrimination is, according to the Federal Constitutional Court, not considered a valid justification. Diversity is increasingly used as a justification in the political or academic debate; so far, it has not been applied by courts as a justification. In the political debate, diversity is often used in the sense of 'the business case', *i.e.* emphasis is laid on the better economic results generated for a company by a diverse workforce. In academic legal debate, diversity is more often understood as a concept flowing from human rights, in particular from Article 1 of the Universal Declaration of Human Rights, enshrining equality in rights and freedoms for everyone and the need for equal respect. Feminist scholars emphasise that CEDAW requires equality for women in all areas of life - public, social, and family, and stress that this means sharing power equally between the sexes.

All legislation providing for positive action must be interpreted in light of the constitution. Hence, they do not reflect a different understanding of equality and equal treatment.

Pursuant to the constitutional obligation to realise women's substantive equality, federal and state legislation was enacted so as to promote women in the public service (*Frauenförderungsgesetze* or *Gleichstellungsgesetze*). On the federal level, these are, for the public service in general, the Federal Law on Equality in the Public Service (*Bundesgleichstellungsgesetz*),¹⁰⁷ and for the armed forces, the Law on the Equality of Female and Male Soldiers (*Soldatinnen und Soldaten-Gleichbehandlungsgesetz*),¹⁰⁸ The laws of the 16 *Länder* (States) resemble more or less the federal Law on Equality in the Public Service. Their main instrument is the adoption of plans to increase women's representations on all levels of employment and to ensure that the recruitment procedure and criteria for promotion do not, in fact, discriminate against women. These laws are couched in sex-neutral terms, speaking of the 'underrepresented sex' and the 'overrepresented sex' only. They aim at an equal

¹⁰⁷ Of 30 November 2001, Official Journal (*Bundesgesetzblatt, BGBl*). part I p. 3234, <http://www.gesetze-im-internet.de/bundesrecht/bgleg/gesamt.pdf>, accessed 6 June 2011.

¹⁰⁸ Of 14 August 2006, Official Journal (*Bundesgesetzblatt BGBl*). part I p. 1897, <http://www.gesetze-im-internet.de/bundesrecht/sgleg/gesamt.pdf>, accessed 6 June 2011.

representation of both sexes; hence numerical equality is understood as a self-standing normative aim because it is proof of whether equality has been realised.

Sect. 5 of the General Equal Treatment Act, which implements the European Anti-Discrimination Directives, explicitly permits positive action if used to prevent or offset disadvantages based on gender or any other ground listed in the European anti-discrimination directives, and if proportionate. This applies to the area of employment as well as to the provision of goods and services by the public and the private sector alike. It does not, however, oblige the private sector to take positive action, let alone to introduce quota.

1.2. Positive action measures/gender quotas in employment and self-employment

1.2.1. The public sector

As described above, the public sector is under a duty to realise substantive equality, understood as an equal representation of women and men on all levels of work. Hence, the public sector must take positive action within the limits of the constitution. The main means is the adoption of plans to promote women (or equality) (*Frauenförderpläne, Gleichstellungspläne*) with the aim of increasing the representations of the underrepresented sex on all levels of employment. These plans have to be developed in light of the ratio of women and men on each layer within the employment hierarchy. They must contain numerical targets and time limits, as well as supporting measures, such as for improving the balance between professional and private life or training. Moreover, there is an obligation to hire or promote a member of the underrepresented sex instead of an equally qualified member of the overrepresented sex, unless there are exceptional reasons to decide in favour of the latter. In addition, recruitment and promotion criteria are defined so as to replace a negative connotation of 'typical female' conduct by a positive one. For example, the laws and internal regulations provide that family work be taken positively into account. Conversely, uninterrupted work experience or mere length of employment are no longer decisive criteria but only if and to the extent that they constitute indispensable qualifications for the position in question. For most of the public service, there are no hard sanctions for the institution if it does not adopt and implement such plans to promote women (or equality). An exception are public universities (which constitute the overwhelming majority of universities in Germany). Their public funding is conditioned, in part, on the promotion of women's equality. For other public bodies, there are indirect sanctions, targeted at persons in decision-making positions: Superiors are evaluated (and, in some cases, paid a premium) on the basis of their having closed the gap between the underrepresented sex and the overrepresented sex.

1.2.2. The private sector

There is no legislation requiring the private employment sector to take positive action. In 2001, the Federal Government and the principal associations of German industry (*Spitzenverbände der deutschen Wirtschaft*) entered into a political agreement for the promotion of gender equality in the private sector entered into in 2001. Pursuant to this agreement, private employers should make voluntary commitments as to the increase of women's representation in their workforce, and to introduce measures for harmonising professional and private life. The agreement did not, expressly, recommend introducing quota.

According to this agreement, the top associations promised to recommend to their members measures for promoting gender equality, including making “family-friendliness” a part of a company’s philosophy and structures, introducing measures for reconciliation of work and family life and for ensuring employees’ employability during a parental leave, more flexible working conditions, and an increase of women in decision-making positions. In return for a successful implementation of this agreement, the Federal Government promised not to introduce any legislation concerning gender equality, unless required by EU law, which constitutes a main pillar of all (private) proposals for a law on gender equality in the private sector.

In addition, the German Corporate Governance Codex was amended (in 2010), and now provides that the Management Board (*Vorstand*) of companies ‘shall take diversity into consideration and, in particular, aim for an appropriate consideration of women’.¹⁰⁹ With respect to the management board, the Code provides that ‘the Supervisory Board shall also respect diversity and, in particular, aim for an appropriate consideration of women’.¹¹⁰ According to the authentic German wording (*soll*), both rules are not binding.

1.2.3. State-owned companies

For state-owned companies regulated by private law, no particular rules apply, except for rules concerning members of supervisory boards directly nominated by the public sector. For these cases, the Statute (*Bundesgremienbesetzungsgesetz, BGremBG*)¹¹¹ provides that the same number of men and women has to be proposed for the positions to be filled and the nominating public official or body has to take a decision with a view of ensuring equal representation of both sexes. No specific rules apply, however, for the decisions taken by the state-owned company with respect to bodies that are determined by bodies of that company (such as the management board, which is determined by the supervisory board), or for hiring and promoting personnel.

For state-owned companies regulated by public law, the Law on Promoting Equality (*Bundesgleichstellungsgesetz, BleiG*) applies. If a company under public law is privatised, there is an obligation to work towards the analogous application of the rules applicable to companies under public law. There is no institutionalised control and no sanction for non-compliance.

1.2.4. Differences between the public and the private sector

Under German law, the decisive difference is that the public sector is directly bound by the constitutional obligation to bring about substantive equality; legal regulation promoting women’s equality is considered as implementing this obligation. The private sector, in contrast, is not directly bound by the constitution. Hence, in the (prevailing) absence of specific legislation to promote equality, they are not under an obligation to adopt positive measures.

1.3. Positive action measures/gender quotas in the access to and supply of goods and services

No specific measures have been taken.

¹⁰⁹ Point 4.1.5, http://www.corporate-governance-code.de/eng/download/kodex_2010/German-Corporate-Governance-Code-2010.pdf, accessed 6 June 2011.

¹¹⁰ *Id.*, point 5.1.2.

¹¹¹ <http://bundesrecht.juris.de/bundesrecht/bgrembg/gesamt.pdf>, accessed 6 June 2011.

1.4. Positive action measures/gender quotas in the field of research and education

1.4.1. Research and academics

For university research and academia that are public bodies, the general obligation of the public sector to introduce plans for promoting women (or equality), and the legal measures for increasing the underrepresented sex in the hiring and promotion process apply. In addition, in 2008, the Federal Ministry for Education and Research (*Bundesministerium für Bildung und Forschung*) and the federal states (*Länder*) launched a programme to promote female professors in German universities. At that time, only 15 % of tenured professorships were held by women (a rise from 8 % since 1995), despite the fact that women constitute more than half of the student body and, on average, obtain better exam results. As a means to increase the number of female professors on tenured professorships, the programme will finance 200 positions during the years 2008-2013. The money will be available for ‘anticipated replacements’, *i.e.* if a male professor is to retire within the next five years and a woman is appointed to the professorship now, the additional money needed will come from the programme. The decision to grant the money to a university depends on an evaluation of its overall programme for promoting women. The budget for the programme is EUR 150 million.

1.4.2. Primary, secondary and higher education

No specific positive action measures or gender quota have been introduced for primary, secondary or other higher education (for universities, see above). The general obligations of the public sector (implementation of plans for promoting women/equality), and for increasing the underrepresented sex in the hiring and promotion process apply.

1.5. Positive action measures/gender quotas in legislature, political parties and/or political bodies

There are no positive action measures, let alone gender quotas, for the legislatures on the federal, state or sub-state level.

With respect to political parties, there are no legal regulations for positive action measures; gender quota have, however, been introduced by most big political parties in Germany. Already in 1979, the Greens (*Die Grünen*), introduced a quota for women in their own statute. It provides for a 50% quota and for assigning women the uneven number on lists for elections (to legislative bodies and within the party), thus including the head of the list. The Social Democratic Party gradually increased a quota in its statute for all such elected positions (from 25% in 1988 and 33 % in 1994) to ‘at least 40%’ (since 1998). The Christian Democratic Party (*Christlich Demokratische Union, CDU*) introduced, in its statute, a soft quota (‘should’) of 30% for all elections (in 1996 time-limited for 5 years, since 2001 unlimited). In 2010, the Christian Social Union (*Christlich Soziale Union, CSU*) decided to introduce, through its statute, a quota of 40 % for women in its local bodies (*Bezirksvorstände*) and its executive committee (*Parteivorstand*). The CSU is the conservative party in Bavaria and the sister party of the Christian Democratic Union (*Christlich Demokratische Union, CDU*), with which it forms a single faction within the Federal Parliament (*Bundestag*). The Left (*Die Linke*) set a quota of ‘at least 50 % women’ in all elections, which is to be ‘pursued’ (*hinzuwirken*). Presently, the Liberal Party (*Freie Demokratische Partei, FDP*) is the only party among the big political parties not to have introduced a quota for women.

1.6. Positive action measures/gender quotas in other decision-making bodies or other areas

Not applicable.

1.7. Conformity of gender quotas with equality legislation

As the equality legislation is mainly determined by the jurisprudence of the ECJ, it does not create legal problems. It is rather the opposite: The impact of CEDAW is not properly taken into account, neither by the German courts nor by the ECJ.

2. Positive action measures for women and gender quotas in practice

2.1. Implementation of positive action measures for women and/or gender quotas

2.1.1. Implementation in employment, self-employment and vocational training

As described above, the obligation to implement plans to promote women (*Frauenförderpläne*) is phrased in gender-neutral language. The obligation is incumbent upon all bodies under public law and within the purview of the federation; equal provisions apply to the public bodies of the *Länder* (states); the latter includes public media. Public bodies must have equal opportunities officers.

The political agreement entered into by the private sector vis-à-vis the Federal Government in 2001 has, for the most part, not been implemented. According to a representative survey of companies, carried out by the Institute for Labour Market and Occupation Research (*Institut für Arbeitsmarkt- und Berufsforschung, IAB*) of the Federal Agency of Employment (*Bundesagentur für Arbeit*) in 2008,¹¹² there is no increase in the number of companies that have taken measures to increase equality of opportunities for men and women: As in 2002 and 2004, 90 % of the companies surveyed had not introduced any such measures. The 10 % that did take such measures are the largest German companies; they employ about 20 % of the female workforce.

2.1.2. Implementation in the access to and supply of goods and services

No measures were taken.

2.1.3. Implementation in research and education

No data is available with respect to the number of universities having made use of the programme introduced in 2008.

2.1.4. Implementation in legislature, political parties and/or political bodies

The quota introduced through the statutes of most political parties as described above are not accompanied by any training measures or sanctions. Political parties do not have equal opportunities officers.

2.1.5. Implementation in other decision-making bodies or areas

Any decision-making body to which the Federation nominates members falls under the *Bundesgremienbesetzungsgesetz (BGremBG)* as explained under 1.2.3. That law not only applies to state-owned companies, but to all decision-making bodies.

¹¹² <http://doku.iab.de/forschungsbericht/2009/fb0409.pdf>, last accessed on 14 December 2009.

2.1. Effects of the positive action measures

With respect to the public sector, a study by the Federal Ministry for Family, Senior Citizens, Women and Youth¹¹³ found that women are more present in higher wage groups in the public sector than in the private sector (for the reference years 2007 and 2008). According to the study, this may be due to better possibilities in the public sector for reconciling work and family life, or a better promotion of women's *de facto* equality there. The study did find a need for further action in the public sector as well, for example in the field of education.

Effects of the Federal Equality Statute (*Bundesgleichstellungsgesetz, BGleiG*) and on the Statute on Bodies within the Purview of the Federation (*Bundesgremienbesetzungsgesetz, BGremB*) are reported by the government regularly.¹¹⁴

With respect to the private sector, the lack of positive action taken by private employers translates into the lack of any effect, and witnesses to the ineffectiveness of the voluntary commitment undertaken in 2001.

3. Case law

3.1. Case law of national courts

For the German legal debate, the cases of the ECJ in Kalanke,¹¹⁵ Marschall,¹¹⁶ and Badeck¹¹⁷ constitute the points of reference for the constitutional debate. The only leading case of the Federal Constitutional Court that is relevant to the question of positive measures is the decision that such measures may be introduced as a compensation for past discrimination. By this holding, the Court considered constitutional legislation that provided for a lower retirement age for women than for men.¹¹⁸

3.2. Case law of equality bodies

The German Anti-Discrimination Body does not have the power to deal with individual cases, so there is no case law.

3.3. Case law of other bodies

None to report.

4. Proposals

Ways to increase the number of women in the board of companies has been debated in Germany in the past year. In early 2010, the legal committee of the Federal Parliament rejected a proposal to introduce a quota of 40 % for boards of companies that are listed on the stock exchange that have not reached an equal representation of

¹¹³ Bundesministerium für Familie, Senioren, Frauen und Jugend (BMFSF) *Der Verdienstunterschied von Frauen und Männern im öffentlichen Bereich und in der Privatwirtschaft*, 2009, <http://bmfsfj.de/RedaktionBMFSFJ/Abteilung4/Pdf-Anlagen/verdienstunterschiede-oeffentlicher-dienst.property=pdf.bereich=bmfsfj.rwb=true.pdf>, last accessed on 27 May 2010.

¹¹⁴ For the last report, see the Second Report on the Federal Equality Statute of the Federal Government, Documents of the Federal Parliament (Bundstags-Drucksache) 17/4307 of 16.12.2010 (for 2004-2009), and Fifth Report on the *Bundesgremienbesetzungsgesetz* of the Federal Government, Documents of the Federal Parliament (Bundstags-Drucksache) 17/4308 (neu).

¹¹⁵ Case 450/93, ECJ 1995, I-3051.

¹¹⁶ Case C-409/95, ECJ 1997, I-6363.

¹¹⁷ Case C-158/97, ECJ 2000, I-1875.

¹¹⁸ Case 1 BvR 455/82, decision of the Federal Constitutional Court (BVerfGE 74, 163), available at <http://www.servat.unibe.ch/dfr/bv074163.html>, accessed 6 June 2011.

women and men before 2017.¹¹⁹ The spokesperson of the Christian Democratic Party (CDU) considered that it was too early to introduce a quota, while a spokesperson for the Liberals (F.D.P.) considered a strict quota to be too rigid and argued that there were not enough qualified female candidates.¹²⁰ In spring 2011, Minister for Family, Senior Citizens, Women and Youth announced that she considered a voluntary commitment by companies to be preferable. In her view, this should be accompanied by a binding obligation if the number of women on company and management boards has not tripled by 2013. The Chancellor expressed herself to be in favour of the latter proposal. Under this proposal,¹²¹ which has not been laid down in legislation so far, enterprises will be legally obliged to set themselves a target women's quota and to publish it, if the aim of tripling the number of women in management and supervisory boards has not been attained in Germany by 2013. This 'flexiquota' serves to take into account that, in the view of the minister, there may not be sufficient qualified women in all areas of economic activities. At a later date, not yet fixed, companies will suffer from sanctions under company law if they have not met their own target. If, however, they have reached a 30% representation of women in their boards, the obligation to have a voluntary commitment ceases to exist. Critics consider this approach too soft and as postponing the solution of the problem.

GREECE – Sophia Koukoulis-Spiliotopoulos

1. National legislation on positive action measures/gender quotas

1.1. Positive action measures in the national legal system

1.1.1. Constitution

In Greece, positive measures are not merely allowed, they are *required* by the Constitution. The Constitution¹²² has always contained a general provision requiring equality for all Greeks before the law (Article 4(1)), which, however, proved insufficient to eradicate gender discrimination and ensure equal rights for men and women. In 1975, a new Constitution came into force, an important feature of which was the strengthening of human rights. On that occasion, a specific gender equality provision was introduced into the Constitution, as a result of a big campaign by women's NGOs. The provision states: 'Greek men and women have equal rights and obligations' (Article 4(2)). This provision was, however, combined with another one, which allowed derogations 'for sufficiently justified reasons, in cases specifically provided for by statute' (Article 116(2)).

¹¹⁹ Documents of the Federal Parliament (*Bundestagsdrucksache*), No. 17/797 of 24 February 2010, proposal by the opposition party The Greens (*Bündnis 90/Die Grünen*), <http://dip21.bundestag.de/dip21/btd/17/007/1700797.pdf>, last accessed 16 April 2010.

¹²⁰ Proposal for a Decision and Report of the Legal Committee (*Beschlussempfehlung und Bericht des Rechtsausschusses*), documents of the Federal Parliament (*Bundestags-Drucksache*) No. 17/1274, <http://dip21.bundestag.de/dip21/btd/17/012/1701274.pdf>, last accessed 27 May 2010.

¹²¹ For a schematic description see: <http://www.bmfsfj.de/RedaktionBMFSFJ/Abteilung4/Pdf-Anlagen/Stufenplan-Schema.property=pdf;bereich=bmfsfj;sprache=de.rwb=true.pdf>, accessed 20 May 2011.

¹²² See the constitutional provisions quoted in this report on the Greek Parliament's website, in English: <http://www.hellenicparliament.gr/en/Vouli-ton-Ellinon/To-Politevma/Syntagma>, accessed 3 March 2011.

In its landmark judgment 1933/1998, the Plenum of the Council of State (the Supreme Administrative Court – CS),¹²³ also invoking Directive 76/207/EEC and the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), held that Article 4(2) of the Constitution (Const.) guarantees not only formal, but also substantive gender equality, and that positive measures in favour of women are necessary in order to remedy their inferior position in society. It must be noted that ratified international conventions enjoy supra-legislative force, according to Article 28(1) Const., and that all Greek courts review the conformity of legislation to the Constitution, to ratified international conventions and to EU law, setting aside those provisions that they consider conflicting therewith.

Following that judgment and a new campaign by women's NGOs, the original provision of Article 116(2) was replaced, in 2001, by a provision proposed by the Greek League for Women's Rights and supported by many women's NGOs,¹²⁴ which reads:

‘Positive measures aiming at promoting equality between men and women do not constitute discrimination on grounds of sex. The State shall take measures to eliminate inequalities which exist in practice, in particular those detrimental to women’.

This provision was inspired by the above landmark CS judgment and by Article 141(4) TEC (now 157(4) TFEU), as authentically interpreted by Declaration No. 28 annexed to the Treaty of Amsterdam,¹²⁵ and Article 3(2) TEC (now 8 TFEU), in conjunction with Article 4(1) CEDAW. Attention must be drawn to the use of the term ‘*inequalities*’ in the CS landmark judgment and then in Article 116(2) Const. This term was also used in Article 3(2) TEC and is repeated in Article 8 TFEU. Under the Greek Constitution, as in EU law, the concept of ‘inequality’ is different in nature from and broader than the concept of ‘discrimination’. Gender inequalities are *de facto* situations affecting mainly women, due to ‘prejudices and stereotypes’¹²⁶ which, by infiltrating socio-economic structures, made these inequalities structural and systemic. Consequently, to eliminate inequalities and promoting gender equality, as required by Article 116(2) Const. and the Treaty, the eradication of gender discrimination does not suffice; *positive measures are necessary*, in particular in favour of women,¹²⁷ as the CS also held in its landmark judgment 1933/1998 and subsequent case law.

¹²³ CS 1933/1998 (Full Court); all judgments quoted in this report are in the NOMOS data base, accessible for those registered only: http://lawdb.intrasoftnet.com/nomos/3_nomologia.php, accessed 6 March 2011.

¹²⁴ On the contribution of women's NGOs to constitutional developments, see S. Koukoulis-Spiliotopoulos ‘Gender equality in Greece and effective judicial protection: issues of general relevance in employment relationships’, *Neue Zeitschrift für Arbeitsrecht* Beilage 2/2008 pp. 74-82.

¹²⁵ Declaration No. 28, on Article 119(4) TEC (now 157(4) TFEU): ‘When adopting measures referred to in Article 119(4) of the [TEC], Member States should, in the first instance, aim at improving the situation of women in working life.’

¹²⁶ ECJ Cases C-158/97 *Badeck and others v Hessischer Ministerpräsident* [2000] ECR I-1875, Paragraph 21; C-409/95 *H. Marschall v Land Nordrhein-Westfalen* [1997] ECR I-6363, Paragraphs 29, 30.

¹²⁷ See A. Yotopoulos-Marangopoulos (who, as President of the Greek League for Women's Rights and the Marangopoulos Foundation for Human Rights, led the campaign for the adoption of the new Article 116(2)) *Affirmative Action: Towards Effective Gender Equality* Athens/Brussels, Marangopoulos Foundation for Human Rights, Ant. N. Sakkoulas/Bruylant 1998 (in English); S. Koukoulis-Spiliotopoulos *From Formal to Substantive Gender Equality. The Proposed*

Thus, the Constitution does not merely prohibit gender discrimination. It proclaims a positive, pro-active principle of substantive gender equality, which requires that the legislature and all other state authorities take those positive measures in favour of women that are necessary, adequate and sufficient (proportionate) to achieve real gender equality *in all areas* where women are in an inferior position. On the basis of this reasoning, the CS confirmed the constitutionality of quotas in local government elections, in view of the under-representation of women in these areas. However, the constitutional requirement does not merely address the underrepresentation of women; this results from the general wording of Article 116(2) and from the CS reference to the ‘*inferior position of women in society*’.¹²⁸

Article 31(2) of the Recast Directive, which requires Member States to submit to the Commission, every four years, a report on the positive measures that they have taken and their implementation, also requires that the Commission assess these measures in the light of Declaration No. 28. This logically means that Member States are expected to take positive measures, which moreover should, in the first instance, aim at improving the situation of women in the areas covered by the Recast Directive. This reading of the Directive also results from the provisions of the Treaties which make gender equality (not merely non-discrimination on grounds of sex) a fundamental value (Article 2 TEU) and horizontal objective (Article 3(3) TEU, Article 8 TFEU (ex 3(2) TEC)), and require its promotion in all EU areas. Consequently, all EU institutions and organs must ‘actively promote’¹²⁹ substantive gender equality, i.e. eliminate the structural roots of gender inequalities,¹³⁰ in all their actions. This ‘positive obligation’ is recalled in Recital 2 of the Preamble to the Recast Directive.

Through the above provisions, ‘the Lisbon Treaty clearly reiterates the obligation of gender mainstreaming for both the Union and the Member States’.¹³¹ We may thus consider that the Member States are also addressees of the above ‘positive obligation’. This, at least, results from their *duty of sincere cooperation* (Article 4(3) TEU (ex 10 TEC)),¹³² which imposes on Member States positive obligations aimed at ensuring the effectiveness of EU law and the promotion of EU values and objectives. The said ‘positive obligation’ also stems from Article 288(3) TFEU

Amendment of Directive 76/207; Comments and Suggestions pp. 24-29 Athens/Brussels, Marangopoulos Foundation for Human Rights, Ant. N. Sakkoulas/Bruylant 2005 (in English).

¹²⁸ CS landmark judgment 1933/1998; CS 2831-2833/2003, 192, 2388/2004, 1667/2009.

¹²⁹ AG Chr. Stix-Hackl, Case 186/01 *A. Dory v. Federal Republic of Germany* [2003] ECJ I-2479, Paragraphs 102-105.

¹³⁰ See Article 5a CEDAW which requires the modification of ‘the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices that are based on the idea of inferiority or superiority of either of the sexes or on stereotyped roles for men and women’. See R. Holtmaat *Towards Different Law and Public Policy*, SZW, 2004, Research on behalf of the Dutch Ministry of Social Affairs and Employment, PO Box 90801, 2509 LV The Hague, 2004; R. Holtmaat & C. Tobler ‘CEDAW and EU Policy in the Field of Combating Gender Discrimination’ 12 *MJ* 4 (2005) (special issue guest-edited by T. Hervey), pp. 399-425; S. Koukoulis-Spiliotopoulos ‘The Limits of Cultural Traditions’, *Annuaire International des Droits de l’Homme* vol. III 2008 A. N. Sakkoulas/Bruylant, pp. 411-443.

¹³¹ S. Burri & S. Prechal *EU Gender Equality Law*, <http://ec.europa.eu/social/BlobServlet?docId=1771&langId=en>, accessed 15 March 2011.

¹³² Article 4(3) TEU (ex 10 TEC): ‘The Member States *shall facilitate the achievement of the Union’s tasks* and refrain from any measure which could jeopardise the attainment of the Union’s objectives’ (emphasis added).

(ex 249(3) TEC),¹³³ since the result required by the gender equality directives is substantive gender equality.¹³⁴ This is what the Recast Directive recalls.¹³⁵ It is obvious that positive action is the logical corollary of this obligation. It is in this sense that the CS read Directive 76/207 in the above landmark judgment 1933/1998, by which it confirmed the substantive character of the gender equality norm, and in its judgments on positive measures taken on the basis of Article 116(2).

We may thus conclude that the requirements of Article 116(2) Const. correspond to those of EU law; however, the former goes further in that it requires positive measures in all areas (even beyond EU jurisdiction). Moreover, by referring to ‘men and women’, Article 116(2) makes it clear that the gender equality principle applies to all persons on Greek soil, not merely to ‘Greek men and women’, to whom Article 4(2) Const. refers only. In this respect, the Greek Constitution is in line with the CEDAW and the EU Charter of Fundamental Rights.

1.1.2. Gender Equality Acts

1.1.2.1. Act 3896/2010 transposing Directive 2006/54/EC (recast)¹³⁶

Article 19 of this Act, entitled ‘Positive measures’, reads: ‘Adoption or maintenance of special measures aimed at eliminating any existing discrimination against the underrepresented sex and achieving substantive equality in the areas included in the scope of this Act, as this scope is more particularly specified in the provisions of the first part, do not constitute discrimination.’

A very welcome feature of this Article is that it explicitly states, like Article 116(2) Const. and Article 4(1) CEDAW, that positive measures do not constitute discrimination, which we can also deduce from ECJ case law.¹³⁷ However, it falls short of EU law, as: i) it only refers to ‘the underrepresented sex’, omitting the prevention or compensation for ‘disadvantages in professional careers’ (Article 157(4) TFEU); ii) it requires the elimination of ‘discrimination’, not of *inequalities* (Article 8 TFEU); iii) it does not require that positive measures favour ‘in the first instance women’ (Declaration No. 28, see above under 1.1.1). For the same reasons, Article 19 of Act 3896/2010 also falls short of Article 116(2) Const., as was pointed out by the

¹³³ Art. 288(3) TFEU: ‘A directive shall be binding as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to national authorities the choice of form and methods’. On the ‘reinforcing of the binding force’ of directives by the ECJ, on the basis of Article 249(3) EC, often in conjunction with Article 10 EC (now 4 TEU), and the directives themselves, see S. Prechal, *Directives in EC Law*, OUP 2005, pp. 305-321.

¹³⁴ See e.g. ECJ Case C-342/01 *M. P. Merino Gómez v. Continental Industrias del Caucho SA* [2004] ECR I-2605, Paragraph 37: ‘The directive [76/207] is intended to bring about equality in substance rather than in form.’ See also Cases C-136/95 *Caisse nationale d'assurance vieillesse des travailleurs salariés v. Thibault* [1998] ECR I-2011, Paragraph 26; C-207/98 *S.-K. Mahlburg v. Land Mecklenburg-Vorpommern* [2000] ECR I-549, καὶ γ) Paragraph 26.

¹³⁵ See S. Koukoulis-Spiliotopoulos ‘The Amended Equal Treatment Directive (2002/73): an expression of constitutional principles/fundamental rights’, 12 *MJ* 4 (2005) pp. 327-368 (335-336).

¹³⁶ Act 3896/2010 O.J. A 207/8.12.2010.

¹³⁷ See Koukoulis-Spiliotopoulos 2005, pp. 337-340.

Greek National Commission for Human Rights (NCHR),¹³⁸ which proposed that this Article repeat the text of Article 116(2), for reasons of legal certainty.¹³⁹

1.1.2.2. Act 3769/2009 transposing Directive 2004/113/EC¹⁴⁰

Article 5 of this Act, entitled ‘Positive action’, reads: ‘By decree issued upon proposal of the competent Minister, special measures aimed at preventing or compensating disadvantages related to sex may be adopted or maintained, with a view to ensuring full equality in practice between men and women.’ This provision falls short of Article 116(2) Const. and the CEDAW in that it omits that these measures do not constitute discrimination, thus not serving legal certainty (see above 1.1.2.1).

1.1.2.3. Act 3304/2005 transposing Directives 2000/43/EC and 2000/78/EC¹⁴¹

Article 6 of this Act, entitled ‘Positive action’, reads: ‘Adoption or maintenance of special measures aimed at preventing or compensating for disadvantages, on grounds of racial or ethnic descent do not constitute discrimination.’ Article 12 of this same Act, entitled ‘Positive action and special measures’, reads: ‘1. Adoption or maintenance of special measures aimed at preventing or compensating for disadvantages, on grounds of religious or other beliefs, handicap, age or sexual orientation do not constitute discrimination. 2. With regard to disabled persons, adoption or maintenance of provisions, on the protection of health and safety in the workplace or of measures aimed at creating or maintaining the conditions for or facilities for safeguarding or encouraging their integration in employment and occupation, do not constitute discrimination.’

A very welcome feature of the above Articles is that they explicitly state, like Article 116(2) Const. and Article 4(1) CEDAW, that positive measures do not constitute discrimination. However, they fall short of Article 5 of Directive 2000/43 and Article 7 of Directive 2000/78 as they omit the first phrase of these Articles, which expresses the aim of positive measures: ‘With a view to ensuring full equality in practice’.

1.1.2.4. Positive measures applying to various groups

Employment

Act 2643/1998¹⁴² fixes mandatory quotas for the employment of ‘protected persons’, such as members of large families, disabled persons, war victims, as well as resistance fighters against the 1940-1944 occupation of Greece and the 1967-1974 military dictatorship and their children. Act 2643/1998 applies to Greek men and women who resisted against the military occupation of Greece; however, it may be considered that EU citizens, who may fulfil the legal conditions, have the same entitlement. Regarding resistance against the dictatorship, the Act refers to ‘persons’, thus not excluding non-Greeks. There is no case law on this issue.

¹³⁸ The NCHR, an independent body established according to the UN ‘Paris Principles’ (UN General Assembly, 85th Plenary Assembly, 20 December 1993, A/RES/48/134), gives formally non-binding opinions to the Government on matters related to human rights: <http://www.nchr.gr>, accessed 2 March 2011.

¹³⁹ See NCHR Opinion of 13 November 2008 on the Bill transposing Directive 2006/54, NCHR, *Annual Report 2008*, p. 80 (in Greek, with a summary in English), and NCHR Letter to the Minister of Labour and Social Security, dated 31 October 2010: <http://www.nchr.gr>, accessed 2 March 2011.

¹⁴⁰ Act 3769/2009 O.J. A 105/01.07.2009.

¹⁴¹ Act 3304/2005 O.J. A 16/27.01.2005.

¹⁴² Act 2643/1998 ‘care for the employment of persons of specific categories’, OJ A 220/28.9.1998.

Greek private undertakings or foreign ones operating in Greece, which employ more than fifty persons, must hire 'protected persons' at a percentage of 8 % of their personnel, unless their balance is negative; this percentage is shared among the various protected categories.

Public corporations and public agencies, legal persons governed by private law, owned by the State or whose budget is regularly funded by at least 50 % from state sources or whose capital is held for at least 51 % by the State, as well as legal persons which are owned by the aforementioned legal persons or by legal persons governed by public law or by local authorities or are regularly funded by at least 50 % by these legal persons or whose capital is held for at least 51 % by the above, must also hire 'protected persons' at a percentage of 10 % of their personnel, unless their balance is negative. The 10 % percentage is shared among the various protected categories. These legal persons must, in addition, also hire trained blind telephone operators to 80 % of their posts of operators. They must also hire disabled persons or children of deceased or disabled resistance fighters or military at one fifth (1/5) of the vacancies of posts of office boys, night watchmen, doorkeepers, gardeners, cleaners and waiters, who are domiciled in the area of the workplace and are able to perform the work required.

If more than one member of the same family is entitled to protection, only one may enjoy it; however, persons disabled for at least 50 % have an autonomous entitlement. The 'protected persons' to be hired are selected by a committee set up in the framework of the local branch of the Agency for Manpower Employment (OAED), the conclusion of an individual contract of employment of indefinite duration with those selected being mandatory for the employer concerned. The decisions of this committee are liable to recourse before a committee of appeal. The latter's decisions are liable to annulment by the administrative courts, whose judgments are subject to final appeal to the CS.

Quotas favouring the access to employment of several protected categories are also fixed by other statutes, such as Act 2190/1994¹⁴³ establishing an independent authority for the selection of the personnel of the public sector.

All the above quotas, even in cases where the selection of personnel is made *via* a competition, within the framework of which the persons belonging to the group concerned are more favourably treated, are justified by the constitutional requirement that the State protect these groups, provided that the quotas are set out by law and respect the principle of proportionality¹⁴⁴ (Article 21 Const.).¹⁴⁵ However, the protected persons must have the necessary qualifications for the particular job.¹⁴⁶

Education

Act 2525/1997¹⁴⁷ allows that a percentage of persons of certain categories, who have completed secondary education, be admitted to Universities and other post-secondary establishments, in addition to the *numerus clausus* of students selected through entrance examinations. Among those favoured are Greeks residing abroad, persons of

¹⁴³ OJ A 28/1994.

¹⁴⁴ CS 1316/2009, 2462/2009.

¹⁴⁵ Article 21 Const. requires that the State protect motherhood, childhood, marriage and the family, large families, the physically or mentally handicapped or disabled, war victims and their widows and children, the young, the elderly and the indigent and citizens' health, and that it plan and implement a demographic policy.

¹⁴⁶ CS 41/1993.

¹⁴⁷ Act 2525/1997 'uniform Lyceum, access to third degree education etc', OJ A 188/1997.

Greek descent, EU citizens irrespective of country of residence, disabled persons and members of the Muslim minority of Northern Greece. These provisions do not seem to have created any problems.

1.2. Positive action measures/gender quotas in employment and self-employment

1.2.1. The public sector

Article 6(1) of Act 2839/2000¹⁴⁸ reads: ‘a) In every *service council*¹⁴⁹ of the civil services, legal persons governed by public law and local authorities, the number of members appointed by the State, a legal person of public law or a local authority shall consist for at least one third of persons of each sex, provided that there is an adequate number of employees in each particular service who possess the necessary legal qualifications for this post and the appointees are more than one’; b) If the State, legal persons governed by public law and local authorities appoint or designate members of *boards* of a legal person governed by public law or of a legal person governed by private law, the number of members thus appointed or designated shall consist for at least one third of persons of each sex, provided that the appointees are more than one.’

The above provisions are *legally binding*. Decisions by which members of service councils or boards are appointed in contravention of the above provisions of Act 2839/2000, are liable to annulment by administrative courts, as they are administrative acts. Decisions of service councils and boards whose members were not appointed in accordance with the above provisions are illegal. Those taken by *service councils*, being also administrative acts, are liable to annulment by the CS, directly,¹⁵⁰ or by administrative courts, depending on their content.¹⁵¹ Those taken by *boards* of legal persons governed by public law (above (b)), are also administrative acts, thus being liable to annulment by the competent administrative court.¹⁵² In all cases, the decision has no legal effect. If the decision was taken by an illegally established board of a legal person governed by private law, the civil court may recognize its nullity. The person who suffered damage from a decision that was annulled or whose nullity was recognised has a claim for compensation.

In light of the *Badeck* judgment,¹⁵³ the above collective bodies must be considered as falling within the ambit of Directive 2006/54.

There are also *non-binding* provisions favouring women’s employment, such as those of Act 3250/2004,¹⁵⁴ which allow that 10 % of all part-timers hired by the State, local authorities and legal persons governed by public law be mothers of minor children, and that 60 % of the unemployed hired as part-timers by the same employers

¹⁴⁸ OJ A 196/12.09.2000.

¹⁴⁹ According to Article 103(4) and (6) Const., civil servants of the State, local authorities and other legal persons governed by public law ‘may not be transferred without an opinion or lowered in rank or dismissed without a decision of a service council consisting by at least two thirds of permanent civil servants. The decisions of these councils are subject to recourse before the Council of the State.’

¹⁵⁰ CS 1933/1998 (see above under 1.1.1) dealt with a decision of a service council established in accordance with a gender quota provided by law. The decision was challenged for annulment on the ground that the law fixing the quota was contrary to the constitutional gender equality norm (Article 4(2)). The CS confirmed the constitutionality of the law and held that it was justified by the substantive character of Article 4(2) Const.

¹⁵¹ See Athens Administrative Court of Appeal 602/2007, 890/2007, 90/2010.

¹⁵² See Athens Administrative Court of Appeal 216/2007.

¹⁵³ ECJ C-158/97 *G. Badeck v Hessischer Ministerpräsident* ECR [2000] I-1875, Paragraphs 64-66.

¹⁵⁴ Act 3250/2004 ‘part-time employment by the State, local authorities and legal persons governed by public law’ OJ A 124/07.07.2004.

be women, provided that there is a corresponding number of candidates. There is no case law on these provisions.

1.2.2. The private sector

There are no legally binding quotas for the boards of legal persons of private law whose board members are not appointed, totally or partially, by the State or another public body, nor any other legally binding positive action requirement for the fully private sector. There are, however, incentives for private employers, aimed at combating female unemployment, which is much higher than male unemployment.¹⁵⁵ An example is provided by Article 2 of Act 3227/2004,¹⁵⁶ which provides an incentive to hire unemployed mothers of at least two children: the State pays the employer's social security contributions for a one-year period for each child. Thus, unemployment benefits are transformed into subsidies to employers and extended in time.¹⁵⁷ Such subsidies (albeit lower) are also granted for hiring young and older workers. Furthermore, women farmers who have at least two children are exempted from social security contributions for one year after the birth of each child. These are positive measures in the sense of Article 157(4) TFEU, in light of Declaration No. 28. They aim 'to prevent or compensate for disadvantages in professional careers' of women, targeting the most important factor of disadvantages: maternity. There is no provision nor case law dealing with entitlement of unemployed single parent fathers. However, such a claim might succeed on the basis of gender equality and family protection (Article 21(1) Const., see above under 1.1.1).

1.2.3. State-owned companies

Companies may only have the form of legal persons governed by private law. Those totally owned by the State or local authorities are also legal persons governed by private law. All board members are appointed by the State or the local authority, so that the quota fixed by Act 2839/2000 (see above under 1.2.1) concerns the whole board. In case they are partly owned by the State or a local authority ('mixed economy companies') some board members are appointed by the State or local authority and some are elected by the shareholders; thus, the quota applies to those appointed by the State or the local authority only. All appointees must possess the legal qualifications. The State or local authority decisions by which board members are appointed are liable to annulment by the administrative court, while the nullity of the decisions of illegally established boards can be recognised by the civil court (see above under 1.2.1).

In light of the *Badeck* judgment, the above collective bodies must also be considered as falling within the ambit of Directive 2006/54 (see above under 1.2.1).

1.2.4. Differences between the public and the private sector

Regarding legally binding quotas, there is a difference regarding the courts which are competent to annul or declare the nullity of decisions violating the quota requirement

¹⁵⁵ In 2010, total unemployment was 11.8 %; male unemployment was 9.4 %; female unemployment was 18.9 %: Labour Institute of the General Confederation of Labour & the Civil Servants Federation (*INE GSEE/ADEDY*), monthly review *Enimerossi* No. 176, October 2010: <http://www.inegsee.gr>, accessed 10 March 2011.

¹⁵⁶ Act 3227/2004 'measures against unemployment etc' OJ A 31/09.02.2004.

¹⁵⁷ See e.g. Joint Decision of the Minister of Economy and Finance and the Deputy Minister of Employment and Social Protection No. 30593/2007, OJ B 1082/2007, issued on the basis of Act 3227/2004.

(see above under 1.2.1 and 1.2.3). However, the main difference is that in the fully private sector there are no legally binding quotas.

1.3. Positive action measures/gender quotas in access to and supply of goods and services

There are none.

1.4. Positive action measures/gender quotas in the field of research and education

1.4.1. Research and academics

Article 57 of Act 3653/2008¹⁵⁸ requires that the number of scientists participating in any research council or committee dealing with research, including those assessing candidacies for research projects, be fixed ‘on the basis of scientific excellence and according to a quota of at least one third from each sex, in accordance with Article 116 of the Constitution (see above under 1.1.1), provided that they possess the necessary qualifications for the particular post’. The appointments are made by ministerial decision, which is liable to annulment by the administrative courts, if it does not apply the above provision. Similarly, the decisions of such councils and committees which are not established in accordance with the above provision are also liable to annulment. As this Act is quite recent, there does not seem to be any case law regarding the above provision.

1.4.2. Primary, secondary and higher education

There are none. It must be noted that post-secondary female students outnumber male students (60.32 % of post-secondary, 50.16 % of post-graduate students, 2008) and that their number is increasing fast; girls are almost equal to boys in secondary education, while female teachers in secondary education are about 60 % (2008).¹⁵⁹

1.5. Positive action measures/quotas in legislature, political parties and/or political bodies

1.5.1. Local government elections

The first positive measure in the field of politics was a quota requirement for local government elections. Article 75 of Act 2910/2001¹⁶⁰ reads: ‘The number of candidate members of local government councils of each sex shall correspond to at least one third of the total number of candidates appearing on each ballot.’ Thus, at least one third of the candidates appearing on each ballot should belong to one sex. The candidates in local government elections appear on a ballot paper on which the voter chooses his/her preferred candidate by placing a cross beside his/her name. Thus, the number of women elected finally depends on the voters’ choice and party support. This positive measure was applied in two local government elections (in 2002 and 2006). The CS case law which interpreted Article 116(2) Const. concerned cases relating to these quotas (see above under 1.1.1.).

¹⁵⁸ Act 3653/2008 ‘institutional framework for research and technology and other provisions’ OJ A 49/21.3.2008.

¹⁵⁹ http://www.isotita.gr/var/uploads/HOME%20PAGE/7H_PERIODIKH_EKTHESH_CEDAW_articles.pdf (7th periodic report of Greece to the CEDAW, 2005-2008), accessed 7 March 2011.

¹⁶⁰ Act 2910/2001 OJ A 91/2001.

Act 3852/2010¹⁶¹ introduced an important and quite complicated reform of the local government system, by which the municipalities and regions were reduced and their competences extended. Articles 18(3) and 120(3) of this Act contain a modified version of the quota. Instead of corresponding to the number of *candidates* on each ballot, the quota must correspond to the number of *members* of the municipal or regional authorities to be elected. Greek NGOs, on the initiative of the Greek League for Women's Rights, strongly protested against this regression, which is such as to decrease the number of women elected.¹⁶² This provision was applied in the 2010 local government elections. There is no case law on it yet.

1.5.2. Parliamentary elections

Article 3 of Act 3636/2008¹⁶³ on the election of MPs requires that every party present a number of candidates of each sex which corresponds to one third of the total number of its candidates in the country. The candidates appear on a ballot paper on which the voter chooses his/her preferred candidate by placing a cross beside his/her name. However, the Constitution (Article 54(3)) allows that part of Parliament, comprising not more than the one twentieth of the total number of its members (which are currently three hundred (300)), be elected throughout the country in proportion to the total electoral strength of each party. Thus, each party also presents a 'state ballot' containing a list of names of candidates for the office of 'State MP'; the order of the candidates on this list determines their chances of being elected. There is no case law as yet concerning this positive measure.

1.6. Positive action measures/gender quotas in other decision-making bodies or areas

There are none.

1.7. Conformity of gender quotas with equality legislation

The above quotas are gender neutral. However, in practice, they favour women, thus complying with the requirement of Article 116(2) Const. (see above under 1.1.1).

2. Positive action measures for women and gender quotas in practice

2.1. Implementation of positive action measures for women and/or gender quotas

2.1.1. Implementation in employment, self-employment and vocational training

We have not been able to find any reliable data on implementation or impact assessment.

2.1.2. Implementation in the access to and supply of goods and services

This is irrelevant, as there are no positive measures in this area.

2.1.3. Implementation in research and education

We have not been able to find any reliable data on implementation or impact assessment.

¹⁶¹ Act 3852/2010 'new architecture of local government and decentralised government – Kallikrates programme', OJ A 37/7.6.2010.

¹⁶² See Greece, EGELR 2-2010.

¹⁶³ OJ A 11, 1.2.2008.

2.1.4. Implementation in legislature, political parties, political bodies

See above under 1.5.1 and 1.5.2.

2.1.5. Implementation in other decision-making bodies or areas

There are no other provisions, except those mentioned under 1.2, and no information on implementation is available.

2.2. Effects of the positive action measures

2.2.1. Effects in legislature and local government

In the previous legislature there were forty eight (48) women MPs out of a total of three hundred (300), i.e. 16 %. Following the 2009 elections, there was a slight increase in the number of women MPs: they are now 52 out of 300, i.e. 17.3 %.¹⁶⁴ The results of the 2010 local government elections cannot yet be evaluated, in comparison with those of 2006 (see above under 1.5.1). The only available data are that the percentage of women mayors remained 3 %; no women were elected as head of region, while 20 % of the deputy heads of regions and 21 % of region counsels are women.¹⁶⁵

3. Case law

3.1. Case law of national courts

See above under 1.1.1., 1.1.2.4 (under ‘employment’), and 1.2.1.

3.2. Case law of equality bodies

There is no case law regarding equality bodies.

3.3. Case law of other bodies

There is no case law regarding other bodies.

4. Proposals

While Article 116(2) Const. requires positive measures, in particular in favour of women, and Greek courts uphold the constitutionality and necessity of such measures, *there is no systematic impact assessment* of the (indeed numerous) positive measures. Thus, the Greek Government is not complying with Article 31(2) of the Recast Directive.

EU law: We consider (see above under 1.1.1) that the Member States are required to take positive measures, by virtue of the principle of sincere cooperation and other provisions of the Treaties, in conjunction with the Recast Directive, in light also of the CEDAW, whose impact, since it is ratified by all Member States, results from Article 53 of the Charter. We also deduce from ECJ case law that positive measures do not constitute discrimination (as explicitly stated in Article 4(1) CEDAW). We would thus suggest that both the above requirement and the non-discriminatory character of

¹⁶⁴ Website of the General Secretariat for Gender Equality: <http://www.isotita.gr/index.php/docs/c180>, accessed 7 March 2011.

¹⁶⁵ Minister of the Interior, Decentralisation and Electronic Governance, answer dated 24 February 2011 to a question of MP Ms E. Tsoumani, No. 5493 of 02.02.2011, which invoked the protest of the League for Women’s Rights: MP E. Tsoumani website: <http://www.tsoumani.gr>, accessed 20 March 2011.

positive measures be either clearly laid down in future Directives or clarified in a Recommendation.

We also believe that there is a right to positive measures, as a corollary to the right to gender equality. Up to now, Greek courts have dealt with petitions seeking the annulment of positive measures because they are said to be incompatible with gender equality or with petitions seeking the annulment of measures that have not applied or not correctly applied Article 116(2) Const. or the legislation on positive measures. This concerns all judgments mentioned in this report, whether dealing with electoral, board or employment quotas. We believe that persons belonging to groups in favour of which positive measures were taken, or who consider that their group should also enjoy a positive measure, are also entitled to challenge a positive measure because it is inadequate for bringing about the result sought (substantive gender equality) or because it should also cover them. This also concerns measures replacing previous measures in a way that is likely to limit their scope or positive impact (see e.g. above under 1.5.1). Such regression is contrary to Article 27(2) of the Recast Directive. The aforementioned right to seek judicial protection could also be mentioned in a Recommendation which would deal with positive measures, as suggested in the previous paragraph.

HUNGARY – Csilla Kollonay Lehoczky

1. National legislation on positive action measures/gender quotas

1.1. Positive action measures in the national legal system

Constitution – equality and positive action

Article XV of the new Constitution of Hungary (not anymore the Republic of Hungarian) that will be in force from January 1, 2012 has a similar prohibition of discrimination – including on the ground of sex – as it is in the current Constitution, in addition in paragraph (3) it separately provides for that women and men have equal rights. It declares in paragraph (4) that Hungary promotes the realization of equal opportunity by special measures and (5) that Hungary protects children, women, the elderly and the disabled through special measures.

The provision on promoting equality of opportunity has somewhat broader wording than the current, outgoing Constitution¹⁶⁶ therefore it is still to see whether the cautious interpretation of the Constitutional Court will rule in the future as well. The Constitutional Court has developed a quite strict test of the constitutionality of positive discrimination, with special regard to departure from sex-equality, however, it has not given a clear guideline, rather a vague framework for the legislature: while ‘positive discrimination’ might be permitted if it promotes greater equality of persons, it may not violate the dignity of other persons and may not contravene the fundamental rights of others explicitly declared in the Constitution.

Paragraph (5) of Article XV of the new Constitution – on the protection of children, women, elderly and the disabled – is worded in a rather outdated protective spirit, it is too early to see how it will be applied, and how the Constitutional Court

¹⁶⁶ Old Constitution: ‘promotes the realization of equality before the law also by measures aiming to eliminate inequalities of opportunity’, new Constitution: promotes the realization of equal opportunity by special measures’.

will decide on its meaning. (The pension privilege granted to women after forty years of employment – with the possibility to include some years on child-care leave as employment has been already adopted in that spirit. The sex-based legislative differentiation has not been exposed yet to the examination by the Constitutional Court.)

The Equality Act

The Equality Act (in Section 11) permits positive action (the law calls it ‘preferential treatment’) and, drawing on the gender equality *acquis* of the EU, provides for the criteria of lawful differentiation. The measure aimed at the elimination of inequality of opportunities has to be based on an objective assessment of an expressly identified social group it has to be based on an Act of Parliament, or on a governmental decree or collective agreement issued/concluded on the basis of an Act of Parliament, it is for a limited period of time that expires either at a fixed date or at the completion of a pre-determined condition.

In order to comply with the CC’s requirements as well as the case law of the ECJ, it is also a precondition that such a positive action shall not violate any basic rights, shall not provide unconditional advantage, and shall not exclude the consideration of individual circumstances.

No legislation or administrative regulation on gender quota is in force in Hungary.

A number of new measures – ‘local (regional) equal opportunity programs’, employing ‘equal opportunity experts’ – are provided for by a number of (partly new) legal provisions, however, all these are soft measures, they do not involve individual, enforceable rights, they establish some duties for the local governments and other local actors.

Thus, an amendment of the Equality Act – to be applied from 1 May 2011 – makes possible the adoption of a ‘local equal opportunity program’ for the local government. Such a program is based on the analysis of the situation of the disadvantaged groups living in the settlement and determines the goals that promote the equal opportunity of these groups. The application for central financial resources by the local government is conditional on having such a program in place. Although the programs will be aimed at the promotion of the opportunities of ethnic minority groups (the Roma), female inhabitants might also gain (e.g. the lack of childcare institutions frequently prevents women from working outside the home). Equal opportunity experts – trained and included in a list by the government – might be employed.

1.2. Positive action measures/gender quotas in employment and self-employment

1.2.1. The public sector

Public employers have the obligation under the Equality Act to adopt a so-called ‘Equal opportunity plan’. The purpose of the plan is to eliminate disadvantages of certain groups, such as ethnic minorities, the disabled, single parents, parents with multiple children and employees over fifty years of age. The adoption of the plan is sanctioned (the employer might be fined by the Equal Treatment Authority for having failed to adopt one); however, its content is not inspected. The Equal Opportunity Plans, as a rule, contain soft provisions that do not grant rights to the protected groups.

1.2.2. The private sector

No obligations are established for private sector employers. They may adopt equal opportunity plans, but it is not mandatory. Several of the large employers – with more corporate responsibility for the employer – have adopted such a plan. In such cases the voluntarily adopted provisions are less declaratory and empty; however, they hardly ever establish individual rights or duties. In a few of such plans there are also quotas mentioned as a goal, as an obligation for the management to target such goals, without concrete enforceable rights granted to the employees.

Incentives are granted to employers who take the use of legal measures promoting the reconciliation of family and workplace life. Employers who hire half-time (20 hours per week) employees returning from maternity or parental leave and hire for the other half (20h/week) either the former substitute for the absent worker or they hire someone part time, have to pay only 20 instead of 27 per cent of the salary of the workers as total social security contribution. The upper limit of the benefit is the double amount of the minimal wage. Above this amount the regular 27% has to be contributed.

One good example for voluntary affirmative action and, eventually, quota is Hungarian Telecom that – under the German Telecom plan – has elaborated (by the end of March 2011) a plan whereby they intend to increase the number of women in board and in key managerial position to 30 % by 2015. No subjective rights or obligations are conferred on employees or management.

Examples of best practices are few, they include cases when the positive measures are negotiated between the employer and trade unions and included in a collective agreement. This not only establishes enforceable (and calculable) individual rights but also contributes to a change in the hegemony of classic core male interests in trade union representation. Such examples are very rare.

The best examples are the few cases when the employers and company trade unions negotiate the equality plan and they include the results in the collective agreement that not only grant enforceable rights but may contribute to the change of the male approach to trade union work.

1.2.3. State-owned companies

Employers with a state share above fifty per cent have the same obligation as public employer to adopt a so-called ‘Equal opportunity plan’. These show the same attributes as those under 1.2.1 and 1.2.2.

1.2.4. Differences between the public and the private sector

No regulatory or institutional differences between the public and private sector are initiated by either the legislation or administrative law-makers. Private employers have greater autonomy in setting employment conditions and major employers (employing hundreds or perhaps thousands of employees) are more inclining to adopt positive measures. Obviously, the business goals – gains deriving from good public image – might play a role in the more attention paid by (major) private employers to equality and equal opportunity measures than by public employers.

1.3. Positive action measures/gender quotas in the access to and supply of goods and services

No such measures are known. Private actors in the area of telecommunication are required to avoid biased or stereotyped featuring and presentation, to avoid addressing persons in an improper, intimate or demeaning way. Similar duties affect advertising companies. These are rather non-discrimination duties, but – by the use of less gender-stereotyped public- and telecommunication – might also promote social equality.

1.4. Positive action measures/gender quotas in the field of research and education

1.4.1. Research and academics

While the disadvantages of women in academia – first of all due to their childcare duties – is broadly acknowledged and evidenced by surveys and research studies – no mandatory legal measures are adopted. A lot is spoken about what should be done (with lots of references to European examples) but little is done.

The Hungarian Academy of Sciences has introduced an extension of the age limit by two years per child in case of female (!) applicants taking care of small children and applying for junior researcher's positions. Permitting flexible working hours, granting home internet access are also told to aim the improvement of the situation of 'female researchers'.

While the measures are benevolently aiming the improvement of the disadvantaged situation that is affecting evidently women, however, the sex-based definition of the measures contributes to the confirming of stereotypes. Thus, while they might improve somewhat the situation of some women, they can perpetuate the disadvantage of women (academic women) as a group.

Voluntary positive actions by some universities to extend the paid scholarship period of Ph.D. students by the years spent at home at maternity or parental leave.

1.4.2. Primary, secondary and higher education

There is no affirmative action for female students in the primary and secondary education (there are some programs for the promotion of equal opportunities of the Roma.)

In higher education there used to be, in the past, statutory affirmative action measures applied in favour of persons on parental leave – enhancing their gains by the sex-neutral definition – reimbursing the costs of education to persons who were participating in a higher education training program (either under- or postgraduate). This was abolished (for obvious budget saving reasons) and now persons on maternity leave or parental leave in the period of application to a university and the decision on admission (February to July) have 40 additional score (similarly to the disabled and the multiple disadvantaged applicant)¹⁶⁷ in the application competition. These measures – while obviously cheaper than the former ones – might be criticized for providing (somewhat arbitrary), accidental and temporary advantage.

¹⁶⁷ Equivalent to the additional scores available for foreign language certificate or good results at a national student competition.

1.5. Positive action measures/gender quotas in legislature, political parties and/or political bodies

In departure from Article 11 of the Equal Treatment Act the pre-requirements for the election of party officials and representatives, the last two requirements are replaced by compliance with the by-laws of the political party.

There were two failed trials in the Parliament (in 2007 and late 2009) to initiate quotas at the candidacy process before elections. The trials failed, one party (the Socialist Party) followed some quotas in their candidacy procedures, but there has been no legislation on the issue.

1.6. Positive action measures/gender quotas in other decision-making bodies or other areas

While the serious imbalance in the gender composition of decision making bodies of different governmental and non-governmental bodies and institutions is a permanent topic of discussions at conferences, trainings and research studies, no concrete measure was yet proposed either by governmental or non-governmental (business or civil) organizations.

1.7. Conformity of gender quotas with equality legislation

In lack of gender quotas, the question is not relevant in Hungary.

2. Positive action measures for women and gender quotas in practice

2.1. Implementation of positive action measures for women and/or gender quotas

The implementation of the – either mandatory but prevailingly soft or purely voluntary – positive measures corresponds to their legal character. The mandatory measures frequently end in empty declarations and/or in various meetings, conferences, studies, discovering the reasons (widely known anyway) talks about what should be done, what is done in the European Union, and little is done for increasing the genuine opportunities of women in employment, politics, culture or services.

2.1. Effects of the positive action measures

Corresponding to the controversial character of the measures they may improve the situation of individual women in certain situations and at the same time the same measures due to their design and sex-discriminatory wording or nature they may contribute to the perpetuation of inequality of opportunities of men and women.

3. Case law

In lack of establishing subjective rights and duties by the legislation positive action measures cannot be taken to judicial organs by the affected individuals.

4. Proposals

In the new constitutional and legislative framework in Hungary it is difficult to see the tendencies and to make proposals. There seems to be a prevailing view that goes rather back to a strong communication between national and European authorities.

The EU legislation approach to positive action – by constituting it as derogation, an exception from equal treatment – is not helpful in eliminating the post-communist approach that positive measures, especially in favour of women, are against equality, they are a form of discrimination. The wording of Article 157(4), and even more the

simplified version in Article 23(2) of the Charter of Fundamental Rights of the European Union, on the ‘underrepresented sex’. Underrepresentation in certain positions and situations might be a result of socially advantaged position that does not justify specific advantages, whereas the overrepresented sex might need compensation for the disadvantages that result in the overrepresentation in certain positions. This provision of Charter and not much differently TFEU 157(4) are based on a mistaken symmetric approach to the issue of sex-discrimination. (That was criticized by Dagmar Schiek already in 2002.¹⁶⁸) The wording of Article 6 of the Service equality directive is more differentiated and better expressing that positive actions are not an exception from, instead, the application of the principle of equal treatment.

ICELAND – *Herdís Thorgeirsdóttir*

1. National legislation on positive action measures/gender quotas

1.1. Positive action measures in the national legal system

In 1994, a human rights section was included in the Icelandic Constitution, including a provision guaranteeing in Article 65 Paragraph 1 the enjoyment of human rights without prejudice to sex, religion, opinion, national origin, race, colour, property, birth or other status.

During the constitutional amendment process, a later paragraph was added to the said Article 65 specifically stating that: Men and women shall enjoy equal rights in all respects.

As a prohibition against discrimination was already mentioned in the first paragraph, the latter paragraph is a clear indicator of the strong emphasis on the need for affirmative action to achieve gender equality without explicitly mentioning the need for temporary measures in favour of the underrepresented sex.

The right not to be discriminated against was entrenched into the human rights chapter to confirm the Icelandic legislator’s dedication to the existing international treaty obligations. Iceland ratified the International Covenant on Civil and Political Rights (ICCPR) in 1979. Article 26 of the ICCPR is an unequivocal statement of the right of all persons to be equal before the law and to be entitled without any discrimination to the equal protection of the law. The principle of non-discrimination in the Icelandic Constitution was meant to have a wider application than the non-discrimination clause of the European Convention on Human Rights, which was incorporated into Icelandic law in 1994, as it was to apply to the whole spectrum of legislation so that everyone is equal before the law. It was furthermore mentioned in the explanatory report to the amended provisions of the Constitution that certain specific international treaties provided scope for positive action where there was a real need to improve the situation of groups in danger of being discriminated against. Iceland ratified the Convention on the Elimination of All Forms Discrimination Against Women (CEDAW) in 1985. CEDAW contains a provision (Article 4) enabling states parties to adopt temporary special measures aimed at accelerating de facto equality between men and women. The drafters of the amended human rights chapter of the Constitution stated that it might well be justifiable to resort to measures in legislation to accelerate de facto equality. The principle of non-discrimination is

¹⁶⁸ See: D. Schiek ‘A New Framework on Equal Treatment of Persons in EC Law?’, *European Law Journal* Vol 8 No. 2 June 2002, especially on p. 309.

mainly perceived of as a negative freedom, e.g. a hands-off policy prohibiting authorities to discriminate rather than a substantive right where subjects can make claims; or that authorities must sense the initiative to resort to positive measures to ensure equality. It is, however, evident from the explanatory report that special measures are not excluded to enhance equality.

The first equal rights act was adopted in 1976 placing the obligation on authorities to work towards de facto gender equality. Since then the law has been amended four times by laws no. 65/1985; no. 28/1991, no. 96/2000 and the present gender equality act, the Act on Equal Status and Equal Rights of Women and Men (Act No. 10/2008). Act No. 10/2008 on gender equality is to firmly and fully establish the principles of the EC directives that have been incorporated through the EEA treaty into Icelandic law: Directive 75/117/EC on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women; Directive 76/207/EC 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; Directive 92/85/EC on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding; Directive 96/34/EC on the framework agreement on parental leave; Directive 97/80/EC on the burden of proof in cases of discrimination and Directive 2002/73/EC amending Council Directive 76/207/EC 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.

There is no provision equivalent to Article 157 (4) TFEU in Act No. 10/2008 explicitly stipulating that positive measures can be resorted to in order to correct the imbalance of the sexes in society or in line with Article 3 of the Recast Directive 2006/54/EC on matters in employment and occupation on positive action. Affirmative Action is merely defined in Article 2 of Act No. 10/2008 as a term: Special temporary measures that are intended to improve the position or increase the opportunities of women or men aimed at establishing gender equality in a specific field where either sex is at a disadvantage. In such cases it may prove necessary to give either sex temporary priority in order to achieve balance.

Aims and definitions of the present Act No. 10/2008 are set forth in Article 1 of the Act and entail goals such as specifically improving the position of women and increasing their opportunities in society along with other aims such as changing traditional gender images, awareness raising on gender equality and working to secure equal influence of women and men in society.

The last aim mentioned above is elaborated on in Section III of Act No. 10/2008 on rights and obligations on the labour market, stating in Article 18: Particular emphasis shall be placed on achieving equal representation of women and men in managerial positions.

The reasons provided for amending the gender equality law with Act No. 10/2008 was the recognition that there had been too little progress in matters of equality. It had been somehow naively expected that awareness would increase and subsequently have an impact to remove the gender pay gap. Without making any statements about the actual awareness or general understanding of equality, the pay gap has remained more or less the same during the last 15 years (between 15-16 %).

In an attempt to compensate for past and current discrimination the present wage equality clause, Article 19 of Act No. 10/2008 now grants workers the right at all times, *upon their choice*, to disclose their wages, as a lack of transparency enables employers to discriminate. The framing of this clause is, however, not likely to render

any real results as those that have grounds to believe that they are discriminated against cannot enforce disclosure within their workplace. A remedy that depends on the willingness of a co-worker to disclose his (better) terms in a competitive environment is not helpful and does not constitute actual transparency.

1.2. Positive action measures/gender quotas in employment and self-employment

1.2.1. The public sector

The only clause in the present Gender Equality Act No. 10/2008 requiring gender quotas in government and municipal communities, councils and boards is Article 15, which reads:

When appointments to national and local government committees, councils and boards are made, care shall be taken to ensure as equal representation of men and women as possible and not lower than 40 % when there are more than three representatives in a body. This shall also apply to the boards of publicly-owned limited companies and enterprises in which the State or a municipality is the majority owner. When nominations are made to national and local government committees, councils and boards, a man and a woman shall be nominated. The nominating party may deviate from the condition of the first sentence when, in consequences of objective circumstances, it is not possible to nominate both a man and a woman. In such cases, the nominating party shall explain the reasons for this. The appointing party may deviate from the condition of 40 % if the exemption provided for above applies.¹⁶⁹

Despite the explicit instructions in the above Article 15 of Act No. 10/2008 and Article 17 requiring that gender mainstreaming shall be observed in all policy making and planning on the part of the Ministries and the public institutions operating under their realm, recent examples of appointments in committees at the highest level of the public administration show that this is simply not complied with. To give an example: *The National Election Board* referred to in Article 31 of the Constitution, appointed by the *Althing* (the National Parliament) on 28 February 2011, has one female member out of five members elected by Parliament. The Chairman of the Board is a man.

After each parliamentary election, the Minister of Welfare¹⁷⁰ shall appoint a Gender Equality Council of eleven representatives according to Article 8 of Act No. 10/2008. The role of this Council is to advise the Minister and the Director of the Centre for Gender Equality with particular emphasis on promoting gender equality on the labour market. In February 2010 the Gender Equality Council issued a recommendation on the share of women on the boards of companies urging the Association of Women Employers, the Iceland Chamber of Commerce and the SA-Confederation of Icelandic Employers to use their influence to achieve the goal of 40 % female share on the boards of directors.¹⁷¹ State-owned companies, or ‘Official Public Limited Companies’ as they are now called, do not fall within the sphere of the Chamber of Commerce or the SA Confederation of Employers – their directors are publicly appointed

¹⁶⁹ Act No. 10/2008 further entails clauses on gender equality representatives within the Ministries (Article 13) and gender equality counsellors that the Minister of Welfare may engage to work temporarily on gender equality issues in a specific field and/or in a particular region of the country.

¹⁷⁰ Prior to 2011 the Minister of Social Affairs and Social Security.

¹⁷¹ <http://jafnrettisrad.jafnretti.is/jafnrettisrad/NoMaster.aspx?D10cID=PrintNews&ID=28>, accessed 20 May 2011.

Despite these endeavours, surveys of 2010 (May) show that there is a decrease in women on the boards of companies. Furthermore there are fewer companies with gender-mixed boards now (14 %) than before (16 %).¹⁷²

1.2.2. The private sector

Article 18 of Act No. 10/2008 on rights and obligations on the labour market stipulates that particular emphasis shall be placed on achieving equal representation of women and men in managerial and influential positions.

The Act respecting Public Limited Companies No. 2/1995 was amended by Law no. 13/2010 adopted by the Althing on 4 March 2010 but will not take effect until 1 September 2013. The Act also applies to Official Public Limited Companies, which although state owned fall under the scope of the Act on Public Limited Companies. State companies were by Law No. 90/2006 changed into Official Public Limited Companies so that various rules of company law would apply to them, such as the demand for transparency and efficiency.

The following is an unofficial translation of the amended text: Paragraph 1, Article 63 of the Act now reads: A Public Limited Company's Board of Directors shall consist of a minimum of three persons.

On Boards of Directors of Official Public Limited Companies and Public Limited Companies with more than 25 employees generally on an annual basis each sex shall be represented on the Board when the Board consists of three persons, and when members of the Board of Directors are more than three in such Companies it shall be ensured that the sex ratio be not lower than 40 %. The same applies to sex ratios among Reserve Directors in such Companies, but ratios on the Board and the Reserve Board shall in total be as equal as possible. In case a satisfactory result is not reached a necessary amendment can be approved with a new decision of the shareholders' meeting, but a provision regarding this matter shall be entered into the Articles of Association of the Company. In notifications regarding Boards to the Register of Companies information regarding sex ratios on the Board shall be detailed. For Public Limited Companies with more than twenty-five employees generally on an annual basis information regarding sex ratios among employees and the management of the Company shall also be detailed.¹⁷³

To Paragraph 1, Article 65 of the Act a new sentence has been added phrased as follows: Attention shall be paid to sex ratios upon the hiring of Manager(s) and information shall be given in notifications to the Register of Companies regarding sex ratios among Managers.

Act No. 138/1994 on Private Limited Companies was also amended by Law No. 13/2010. Paragraph 1, Article 39 of the Act now reads: The Board of Directors of a Private Limited Company shall consist of at least three persons, unless there are four or fewer shareholders, then it is sufficient that the Board consist of one or two persons. In case the Board of Directors of a Company consists of one person at least one Reserve Director shall be selected. When members of the Board are two or three in a Company with more than 50 employees generally on an annual basis each sex shall be represented on the Board and when members of the Board of Directors are more than three in such Companies it shall be ensured that the sex ratio be not lower

¹⁷² <http://eyjan.is/2010/05/19/konum-faekkar-i-stjornum-fyrirtaekja-thratt-fyrir-miklar-umraedur-og-adgerdir/http://www.visir.is/article/20100201/SKODANIR03/41041271>, accessed 24 March 2011.

¹⁷³ The above is an unofficial (unpublished) translation from the Ministry of Economic Affairs of Law No. 13/2010, adopted on 4 March 2010, amending Company Act No. 2/1995; http://eng.efnahagsraduneyti.is/laws-and-regulations/Company_Law/, accessed 24 March 2011.

than 40 %. The same applies to sex ratios among Reserve Directors in such Companies, but the ratios on the Board and the Reserve Board shall in total be as equal as possible. In case a satisfactory result is not reached a necessary amendment can be approved with a new decision of the shareholders' meeting, but a provision regarding this matter shall be entered into the Articles of Association of the Company. In notifications regarding Boards to the Register of Companies information regarding sex ratios on the Board shall be detailed. For Private Limited Companies with more than twenty-five employees generally on an annual basis information regarding sex ratios among employees and the management of the Company shall also be detailed.

To Paragraph 1, Article 41 of the Act a new sentence has been added phrased as follows: Attention shall be paid to sex ratios upon the hiring of Manager(s) and information shall be given in notifications to the Register of Companies regarding sex ratios among Managers.

The aim of Law No. 13/2010 with the amendments regarding the sex ratio is, as stated in the explanatory report,¹⁷⁴ in accordance with the Act on the Equal Status and Equal Rights of Women and Men No. 10/2008 stipulating in Section III on Rights and Obligations (Article 18 Labour Market) that employers shall make deliberate efforts to bring women and men on an equal footing within their enterprise or institution and on the labour market in general.

Amending company law is in conformity with Act No. 10/2008 to promote gender equality in influential positions in public limited companies and private limited companies¹⁷⁵ with increased transparency and greater access to information. The obligation to report regarding sex ratios on the Boards to the Register of Companies applies to companies with more than 25 employees. The scope of providing such basic information ought to be easy and pave the way for guaranteed surveillance that the notification is actually received by the Register of Companies. The access to information of the Register of Companies is based on rules set by the Minister of Finance according to Paragraph 2 of Article 147 of Act No. 2/1995 and Paragraph 2 of Article 121 of Act No. 138/1994 on Private Limited Companies.

There are no sanctions making companies liable to pay fines or be subject to other penalties if they deliberately or through negligence violate the clauses on the gender quota or the reports on the status of the boards of directors.

1.2.3. State-owned companies

Act No. 138/1994 on Private Limited Companies was also amended by Law No. 13/2010 which applies to state-owned companies as well (see 1.2.2 above).

1.2.4. Differences between the public and the private sector

The main difference is in the application of Article 15 of Act No. 10/2008, stipulating that when appointments to national and local government committees, councils and boards are made, care shall be taken to ensure an as equal representation of men and women as possible and not lower than 40 % when there are more than three representatives in a body. This shall also apply to the boards of publicly owned-limited companies and enterprises in which the State or a municipality is the majority owner. When nominations are made to national and local government committees, councils and boards, a man and a woman shall be nominated. The nominating party may deviate from the condition of the first sentence when, in consequences of

¹⁷⁴ Parliamentary document 71 <http://www.althingi.is/altext/138/s/0071.html>, accessed 13 April 2011.

¹⁷⁵ Act No. 138/1994; http://eng.efnahagsraduneyti.is/laws-and-regulations/Company_Law/, accessed 24 March 2011.

objective circumstances, it is not possible to nominate both a man and a woman. In such cases, the nominating party shall explain the reasons for this. The appointing party may deviate from the condition of 40 % if the exemption provided for above applies.

1.3. Positive action measures/gender quotas in the access to and supply of goods and services

There is nothing to report under this heading.

1.4. Positive action measures/gender quotas in the field of research and education

Article 23 of Act No. 10/2008 applies to education and schooling and states that gender mainstreaming shall be observed in all policy making, including sports and leisure activities. At all levels of the educational system, pupils shall receive instruction on gender equality issues in which emphasis shall be placed amongst other things on preparing both sexes to play an equal role in society, including work and family life. Educational materials and books shall be designed in such a way as not to discriminate against either sex.

1.4.1. Research and academics

Universities as all other institutions and enterprises with more than 25 employees on average over the year shall according to Article 18 of Act No. 10/2008 set themselves a gender equality programme or mainstream gender equality perspectives into their personnel policy.

There are no quota rules specifically designed for academia.

1.4.2. Primary, secondary and higher education

See 1.4.1.

1.5. Positive action measures/gender quotas in legislature, political parties and/or political bodies

The Social Democratic Alliance, the leading party in the coalition Government, has in its statutes (2.10) a clause on at least 40 % representation of each sex in all the parties' institutions for which elections take place, with regard to both members and substitutes. The same goes for instructions in pre-elections where the lists of candidates must be in accordance with the above policy. This is done by having both sexes in two of the top seats and subsequently following that principle down the list. At present 9 out of 11 Members of Parliament are female and 2 out of 5 Cabinet Ministers.

The other coalition party in Government, the Left-Green Movement, has a general policy of equality, justice and women's liberalisation and the same rule regarding lists of candidates for local and parliamentary elections. At present 2 out of 5 Cabinet Ministers are female.

The Progressive Party, a centre party, also has a defined policy of equal participation in committees and institutions as well as balanced lists of candidates for elections. A special equal rights counsel oversees equality matters for the party. The party's general assembly has set the goal for a 40 % balance in every organ of the party in 2011.

The Independence Party, a conservative/right party, and the largest political party for years, avoids speaking of gender as a determining factor but places emphasis on 'competent individuals.' Female members of the Althing represent around 30 %.

1.6. Positive action measures/gender quotas in other decision-making bodies or other areas

There is nothing to report here.

1.7. Conformity of gender quotas with equality legislation

Gender quotas are in conformity with the Constitutional principle of non-discrimination, not least with the second paragraph of that principle placing special emphasis on equality between men and women in all respects. It is furthermore in conformity with the newly adopted Gender Equality Act No. 10/2008 as explained under 1.1. above.

2. Positive action measures for women and gender quotas in practice

Only 15 % of all companies in Iceland had mixed boards, i.e. with both sexes represented, in 2009. After the financial crash in the Autumn of 2008 there has been a decrease in the number of women despite intentions to enhance their share in influential positions in companies.¹⁷⁶

2.1. Implementation of positive action measures for women and/or gender quotas

The Act regarding Public Limited Companies No. 2/1995 was amended by Law no. 13/2010, adopted by the Althing on 4 March 2010, but it will not take effect until 1 September 2013. The same goes for Act No. 138/1994 on Private Limited Companies, which was also amended by Law No. 13/2010.

2.2. Effects of the positive action measures

No effects have become visible, except in politics where prior to elections parties must show that they ‘mean business’. Even the largest party, the Independence Party, although avoiding having quotas on its agenda, appears to avoid having male-dominated lists of candidates.

3. Case law

There is no case law to report.

4. Proposals

- To ensure a gender-balanced composition of boards of directors binding legislative measures are necessary in companies with more than 25 employers. Strict time limits for companies to adapt should be introduced.
- Key criteria for appointment onto a board should always be merit. Companies should recruit from the widest possible talent pool – even outside the corporate mainstream and not least taking into consideration experience and independent thinking.
- Self-regulation will not meet externally set standards, as male-dominated boards have a tendency to be self sustainable – chairmen from the ‘old boys’ club’ will not become creative in looking for talented women (there is a prevailing tendency to seek young, inexperienced women to stay within the comfort zone – the media is a good example).
- What might be suggested is that a Professional Board Forum Advisory Service is established where women entrepreneurs, academics or women with a professional

¹⁷⁶ <http://eyjan.is/2010/05/19/konum-faekkar-i-stjornum-fyrirtaekja-thratt-fyrir-miklar-umraedur-og-adgerdir/>, accessed 13 April 2011.

- service background can register and form a pool (no excuse for companies to say that there is lack of qualified women.)
- Raise awareness of ageism in order to change corporate culture. One of the most effective ways of battling corruption, which is one of the underlying factors of the present crisis, is to recruit efficient, independent, qualified, mature and experienced women. (Insight is based on experience.)
 - Increase corporate transparency: Quoted companies must be required to make public the proportion of women they have on their boards.
 - Set up mechanisms of external evaluation to check if boards are in fact in accordance with the law.
 - A form of reward to companies that operate in accordance with the principle of real gender equality: ‘human-rights’ friendly companies (like eco-friendly companies).
 - Special tools for complaints procedures if companies are merely showing off. Effective protection of whistleblowers.

IRELAND – Frances Meenan

1. National legislation on positive action measures/gender quotas

1.1. Positive action measures in the national legal system

The primary source of Irish law is the Constitution. Article 40.1 provides that all Irish citizens shall be held equal before the law. Article 45.2. i provides that all citizens have the right to an adequate means of livelihood. Section 24(1) of the Employment Equality Act 1998¹⁷⁷ and s. 14(b)(i) of the Equal Status Act 2000 allow for positive action. These provisions are enacted as an exception to the equal treatment principle and are non-binding. The wording in the Employment Equality Act 1998 is virtually word for word the same as in Article 157 of the Treaty on the Functioning of the EU. The rationale for positive action as stated in the legislation is the promotion of equal opportunities in areas where existing disadvantage affects the opportunities of one group of persons to avail of services or employment opportunities. As the provisions allow only for an exception to the equal treatment principle there is no numerical level of representation of either gender required generally under Irish statutes. It is unclear as to what, if any, role the proportionality principle would play in the interpretation of these sections. While the Employment Equality Acts 1998 – 2008 appear silent on this question, s. 14 of the Equal Status Act 2000 requires only that the measure be *bona fide* for the promotion of equality of opportunity. This would appear to suggest a broader exception to the equal treatment principle than measures which are proportionate only. This legislation covers both the public and private sectors.

1.2. Positive action measures/gender quotas in employment and self-employment

1.2.1 The public sector

On 6 March 2011, the new *Fine Gael* / Labour Coalition Government in their programme for government state that all State boards (i.e. the public sector) will have 40 % of each gender.¹⁷⁸ This is a programme for government and does not have legal

¹⁷⁷ As amended by s. 15 of the Equality Act 2004.

¹⁷⁸ <http://www.irishtimes.com/focus/2011/coalition-pact/agreement.pdf>, accessed 7 March 2011.

standing. The Civil Service is committed to the principle of positive action in its Equal Opportunities Policy.¹⁷⁹ In addition the National Women's Strategy¹⁸⁰ set a target of 27 % female representation at the Principal Officer level within 5 years and 33.3 % of female representation at the Assistant Principal Officer grade. This Strategy is aspirational only. The Strategy further sets a target of 40 % female participation on all state boards and committees. To this end the various pieces of legislation setting up state boards and committees in recent years have contained provisions requiring appointments to have either a set minimum number of male and female members or to have, as far as reasonably practicable, an equitable balance between women and men.¹⁸¹

¹⁷⁹ <http://www.finance.gov.ie/viewdoc.asp?fn=/documents/equality/circ2402.htm&UserLang=GA&StartDate=1+January+2011>, accessed 5 March 2011.

¹⁸⁰ <http://www.inis.gov.ie/en/JELR/National%20Womens%20Strategy%20PDF.pdf/Files/National%20Womens%20Strategy%20PDF.pdf>, accessed 10 February 2011.

¹⁸¹ Such legislation includes s. 12 of the Inland Fisheries Act 2010; s. 98 of the Adoption Act 2010; Schedule 1 art. 4 of the Charities Act 2009; s. 8 of the Broadcasting Act 2009; s. 19 of the National Asset Management Agency Act 2009; ss. 14 and 17 of the Dublin Transport Authority Act 2008; s. 530 of the Foyle Fisheries Act 1952, as amended by the Foyle and Carlingford Fisheries Act 2007; ss. 10 and 13 of the Consumer Protection Act 2007; s. 17 of the Medical Practitioners Act 2007; art. 5 of the Health Research Board (Establishment) Order 1986 as substituted by art. 2(c) of the Health Research Board (Establishment) (No. 3) Order 2007 (S.I. No. 305 of 2007); s. 48 of the Sea Fisheries and Maritime Jurisdiction Act 2006; s. 17 of the Registration of Deeds and Title Act 2006; s. 9 of the National Sports Campus Development Authority Act 2006; s. 18 of the National Economic and Social Development Office Act 2006; art. 7 of the National Cancer Service Screening Board (Establishment) Order 2006 (S.I. No. 632 of 2006); s. 17 of the Grangegorman Development Agency Act 2005; s. 82 of the Railway Safety Act 2005; Schedule 1 art. 1 of the Private Security Services Act 2004; s. 153 of the Residential Tenancies Act 2004; s. 22 of the Education for People with Special Needs Act 2004; s. 11 of the Health Act 2004; art. 5 of the National Treatment Purchase Fund Board (Establishment) Order 2004 (S.I. No. 179 of 2004); art. 9 of the National Breast Screening Board (Establishment) Order 2004 (S.I. No. 891 of 2004); reg. 14 of the Composition of Vocational Educational Committees Regulations 2004 (S.I. No. 924 of 2004); s. 14 of the National Tourism Development Authority Act 2003; s. 15 of the Digital Hub Development Agency Act 2003; s. 11 of the Arts Act 2003; s. 54 of the Taxi Regulation Act 2003; s. 9 of the Industrial Development (Science Foundation Ireland) Act 2003; s. 56 of the Personal Injuries Assessment Board Act 2003; s. 10 of the Sustainable Energy Act 2002; s. 22 of the Public Health (Tobacco) Act 2002; s. 6 of the Residential Institutions Redress Board Act 2002; s. 11 of the Civil Defence Act 2002; s. 6 of the Solicitors Act 1960 as amended by s. 8 of the Solicitors (Amendment) Act 2002; s. 12 of the National Development Finance Agency Act 2002; para. 7 of the Schedule to the Irish Horseracing Industry Act as amended by para. 16 of the Schedule to the Greyhound Racing Act 2001; s. 8 of the Vocational Education Act 1930 as substituted by s. 7 of the Vocational Education (Amendment) Act 2001; s. 35 of the Mental Health Act 2001; art. 8 of the Schedule to Adventure Activities Standards Authority Act 2001; s. 10 of the Family Support Agency Act 2001; s. 20 of the Transport (Railway Infrastructure) Agency Act 2001; s. 9 of the Comhairle Act 2000; s. 5 of the Human Rights Commission Act 2000; s. 7 of the National Pensions Reserve Fund Act 2000; s. 12 of the Irish Sports Council Act 1999; s. 20 of the National Disability Authority Act 1999; s. 7A of the Refugee Act 1996 as inserted by s. 11 of the Immigration Act 1999; s. 10 and para. 3 of the Fisheries Act 1980 as amended by ss. 7 and 23 of the Fisheries (Amendment) Act 1999; s. 11 of the Courts Service Act 1998; ss. 14, 34 and 35 of the Food Safety Authority of Ireland Act 1998; s. 9 of the Industrial Development (Enterprise Ireland) Act 1998; s. 19 of the Cultural Institutions Act 1997; s. 45 of the Universities Act 1997; para. 2 to the Schedule to the Heritage Act 1995; s. 4 of the Civil Legal Aid Act 1995; s. 4 of the Regional Technical Colleges (Amendment) Act 1994; and s. 4 of the Dublin Institute of Technology (Amendment) Act 1994.

1.2.2. The private sector

There are no binding measures for positive action or gender quotas under Irish law. Section 24 (1) of the Employment Equality Act 1998 allows for positive action. The provision is however discretionary in terms of what, if any, positive action is to be taken.

1.2.3. State-owned companies

There are no explicit measures for positive action or gender quotas on state-owned companies (however see 1.2.1 above). As stated above there is a 40 % target of female participation on state boards. This does not, however, appear to extend to state-owned commercial companies and there is little legislative provision addressing gender balance on such boards. Section 81 of the Broadcasting Act 2009 does, however, require public service broadcasting corporations to have a 12-person board comprising at least 5 males and 5 females.

1.2.4. Differences between the public sector and the private sector

Within the public sector there is generally legislative provision for gender quotas contained within the legislation setting up a state board. The impetus for such legislation is based on the National Women's Strategy as well as the desire to have more women in public life. Positive action within the private or semi-state sector is discretionary and efforts to promote the advancement of women have generally occurred only through social partnership agreements or collaborative schemes such as the National Women's Strategy and the Equality for Women Measure.

1.3. Positive action measures/gender quotas in the access to and supply of goods and services

Section 14(b)(i) of the Equal Status Act 2000 allows positive measures which *bona fide* are intended to promote equality of opportunity for persons who are disadvantaged or who have been or are likely to be unable to avail themselves of the same opportunities as those other persons. This measure is discretionary, however. Section 71 of the Pensions Act 1990, as substituted by s. 22 of the Social Welfare (Miscellaneous Provisions) Act 2004, allows for exceptions to the principle of equal pension treatment where differential treatment is aimed at removing or limiting differences, as between men and women in the amount or value of benefits provided under a scheme.

1.4. Positive action measures/gender quotas in the field of research and education

1.4.1. Research and academics

There are no specific provisions regarding female participation in research and academics other than s. 24 of the Employment Equality Act.

1.4.2. Primary, secondary and higher education

Access to primary, secondary or third level institutions is regulated by s. 7 of the Equal Status Acts 2000. This makes no provision for preferential treatment on the gender ground in relation to admission to any establishment or course other than an allowance for single-sex primary and secondary establishments.

1.5. Positive action measures/gender quotas in legislature, political parties and/or political bodies

There are currently no positive action measures or quotas for women in the legislature. Paragraph 19 of Schedule 10 of the Local Government Act 2001 requires local authorities to seek to promote the objective of an appropriate gender balance in the making of appointments by it to all committees of a local authority or joint committees or bodies of one or more local authorities. These measures are however non-binding in terms of any requirement for a particular proportion of female representation and they encompass no sanctions for failure to implement them.

1.6. Positive action measures/gender quotas in other decision-making bodies or other areas

The main impetus for positive action is by means of the National Women's Strategy and generally in society there is seen a need to have a balance. The Strategy states that while legislation and mainstreaming are the mainstays of policy, in order to achieve true gender equality these mechanisms must still be complemented with well targeted positive action measures to address deficits which still exist despite the presence of a corpus of legislation.

1.7. Conformity of gender quotas with equality legislation

Section 24 (1) of the Employment Equality Act 1998 and s. 14 of the Equal Status Act 2000 allow for positive action. These exceptions allow broad discretion to employers or service providers as to what, if any, positive action measures to implement and accordingly positive action measures would not appear to encounter any problems regarding conformity with equality legislation.

2. Positive action measures for women and gender quotas in practice

2.1. Implementation of positive action measures for women and/or gender quotas

2.1.1. Implementation in employment, self-employment and vocational training

The implementation of positive action measures for women with regard to employment, self-employment and vocational training is generally organised through collaborative schemes, such as the National Women's Strategy and the Equality for Women Measure,¹⁸² as well as through social partnership agreements. The 'Towards 2016',¹⁸³ social partnership agreement contains a number of agreed priority actions for the promotion of gender equality, including 'Focusing on actions by the social partners to encourage greater numbers of women to advance to the higher levels within their chosen careers through training and cost effective reviews of equality policies within organizations' and 'Reviewing as necessary existing equality legislation with a view to establishing best practice in relation to positive action'.

The National Women's Strategy and the Equality for Women Measure¹⁸⁴ also address the issue of female advancement in their employment. The National Women's Strategy aims to increase the percentage of women on company boards by

¹⁸² <http://www.inis.gov.ie/en/JELR/Guidelines%20for%20EWM.pdf/Files/Guidelines%20for%20EWM.pdf>, accessed 5 March 2011.

¹⁸³ http://www.taoiseach.gov.ie/attached_files/Pdf%20files/Towards2016PartnershipAgreement.pdf, accessed 5 March 2011.

¹⁸⁴ <http://www.inis.gov.ie/en/JELR/Guidelines%20for%20EWM.pdf/Files/Guidelines%20for%20EWM.pdf>, accessed 10 February 2011.

maintaining a database of women who might be considered for appointment to company boards and providing development training to prepare suitably qualified women to participate in the work of such boards. Responsibility for monitoring the implementation of these measures lies with a broad range of bodies including the relevant government departments and agencies, social partners and relevant professional bodies and training providers.

The Equality for Women Measure aims to provide long-term funding for projects aimed at promoting equality of opportunity in relation to one of four strands, namely access to employment, developing female entrepreneurship, career development for women in employment and fostering women as decision makers at all levels of the economy and society.

2.1.2. Implementation in the access to and supply of goods and services

The National Women's Strategy identifies pension coverage as a key objective of reducing the numbers of women experiencing poverty.¹⁸⁵ Consequently the Strategy focuses on increasing the percentage of female coverage for social insurance pensions and supplementary pension. Responsibility for implementing these measures will lie with the relevant government departments as well as the Revenue Commissioners and the Pensions Board. The Strategy further commits to ensuring that childcare services are optimised in order to equalise socio-economic opportunities.¹⁸⁶ Responsibility for implementing these measures will lie with the relevant government departments, the Health Service Executive, city and county childcare committees, various agencies such as the Centre for Early Childhood Development and Education, the National Council for Curriculum and Assessment and FÁS (national training authority) as well as other key stakeholders.

2.1.3. Implementation in research and education

As previously stated there is no legislative requirement for positive action in the area of research and education. There are measures within the National Women's Strategy and the Equality for Women Measure aimed at this area. The National Women's Strategy gives responsibility to the Department of Education, the Science, Engineering and Technology Committee and other stakeholders to ensure that women achieve their full potential in the education system. The Strategy further commits to the introduction of "Women into Educational Management" which are courses to address female under-representation in educational management. These measures do not, however, address female representation in higher academic positions in universities and do not encompass any quotas regarding female participation in any courses. In practice, universities and other educational establishments generally have Equal Opportunity Policies which make a commitment to positive action.¹⁸⁷

2.1.4. Implementation in legislature, political parties and/or political bodies

The National Women's Strategy identifies increasing the number of women in decision-making positions in Ireland as a key objective.¹⁸⁸ This objective sets out an

¹⁸⁵ Page 60.

¹⁸⁶ Page 51.

¹⁸⁷ http://www.nuigalway.ie/administration_services/equality/documents/equal_opportunities_policy.pdf, accessed 5 March 2011; http://www.ucd.ie/equality/policieslegislation/equal_opportunities_policy.pdf, accessed 5 March 2011; http://www.tcd.ie/Staff_Office/assets/pdf/equalop.pdf, accessed 5 March 2011;

¹⁸⁸ Page 96.

action plan for increasing the number of female representatives in the legislature. The plan is, however, non-binding and is contingent on political parties to take such steps of their own initiative.

There is a recent report from the *Oireachtas* (Parliament),¹⁸⁹ which focuses on the experiences of European national parliaments in implementing special measures, especially gender quotas, which aim to improve the gender composition of those legislatures. It considers that quota systems can improve the gender balance amongst candidates, but if they are to succeed in getting more women elected, quotas need to be applied in a way that attends to the intricacies of the electoral system. Political parties also play a key role in balancing gender representation in Parliament since they nominate candidates for elections.

2.1.5. Implementation in other decision-making bodies or areas

Other decision-making bodies have no separate measures for implementing positive action to those general schemes such as the National Women's Strategy, the Equality for Women Measure and 'Towards 2016'.

2.2. Effects of the positive action measures

There is no available statistical data on female representation on private sector boards. As of 2007, however, only 4 % of the chief executives of the 'top 500' companies in Ireland were women.¹⁹⁰ In terms of political representation there was 13 % female representation in the outgoing 30th *Dáil* (lower house). Female representation in the 31st *Dáil* has increased to 15 % from the recent election on 25 February 2011. As of 2005 only 11 % of senior civil servants were women.¹⁹¹ As of 2007 there was 23.4 % female representation across all regional and local representative bodies.¹⁹² As of the 31st of December 2007 the participation for women on state boards was 34 %. In a recent paper the level of female participation in higher academic positions was under 20 %¹⁹³ as compared with women representing 55 % of all university students.

3. Case law

3.1 Case law of national courts

There is no case law from the national courts addressing the question of positive action with regard to gender. In *Re The Employment Equality Bill 1996*¹⁹⁴ the court addressed provisions for positive discrimination on the ground of religion. Under the Act discrimination was allowed by an institution in order to protect the 'religious ethos' of an institution. The Supreme Court found that this provision was compatible with the Constitution of Ireland. The Court further addressed requirements for employers to make reasonable accommodation for persons with a disability. While ultimately finding the provision unconstitutional due to the possible cost implications for employers, the Court nonetheless found that such positive discrimination could be in conformity with the provisions of the Constitution.

¹⁸⁹ http://www.oireachtas.ie/parliament/media/housesoftheoireachtas/libraryresearch/spotlights/GenderBalanceInEUParliamentsSpotlight_181110.pdf, accessed 17 May 2011.

¹⁹⁰ The National Women's Strategy, p. 92.

¹⁹¹ *Ibid.*

¹⁹² The National Women's Strategy, p. 94.

¹⁹³ www.bmwassembly.ie/news/events/GenderEqualityinResearch_Feb2011.ppt, accessed 5 March 2011.

¹⁹⁴ [1997] 2 IR 321.

3.2 Case law of equality bodies

The Equality Tribunal (and on appeal the Labour Court) has a wide discretion in terms of orders it can make against a company. For instance, in *McCarthy v Dublin Corporation*¹⁹⁵ it was ordered that the respondent must update immediately its 'Equal Opportunity Policy and Positive Action Programme' to take account of the provisions of the Employment Equality Act 1998. Further they were required, if necessary, to liaise with the Equality Authority in relation to the matter. They were further ordered to take various steps to ensure members of staff were informed of the updated policy.¹⁹⁶ In *Black v. Tesco Ireland*¹⁹⁷ the respondents were again required to review their equal opportunities policy after being found to have indirectly discriminated against the claimant by not giving reasonable consideration for her application to switch to part-time employment. In *Cunnigham v. BMS Sales Ltd.*¹⁹⁸ the Equality Officer commented on the inadequacy of the respondent's Equal Opportunities Policy which made reference only to UK legislation. Accordingly, the respondent was required to draft a policy suitable for Irish employees.

3.3. Case law of other bodies

There is no relevant case law of any other bodies on the issue of positive action.

4. Proposals

There are no proposals in terms of any new positive action measures. Section 56 of the Employment Equality Act 1998 provides the Equality Authority with the power to draft codes of conduct for the purposes of the elimination of discrimination in employment or the promotion of equal opportunities. These draft codes can subsequently be declared approved codes for the purposes of the Act by the Minister for Community, Equality and *Gaeltacht* (Irish-speaking areas) Affairs. While such an approved code would not be legally binding, the code would, nonetheless, be admissible in any proceedings where any provision of the code appears relevant to the proceedings and the provisions of the code can be taken into account in determining the matter. Thus far this section has only been utilised once and has not addressed equality of opportunity. The section would, however, empower the Equality Authority to lay down guidelines on the question of equality of opportunity if they so wished. Recently, there has been some discussion concerning gender quotas in relation to candidates for Parliament; however, there are varying views in relation to quotas.¹⁹⁹ In practical terms the key issues have been the late sittings of parliamentary sessions late into the night as sittings are for three days a week so that members may be in their constituency the rest of the time. However, in practical terms undoubtedly the difficulties for women is more acute for those Members of Parliament whose constituencies are further from the capital. The main opposition party last year (which

¹⁹⁵ EE 2000/45; [2001] ELR 255. This case concerned a successful claim for victimisation by the complainant and the respondent was held to be vicariously liable for the conduct of its employees.

¹⁹⁶ Similar orders were made against the respondent in *Equality Authority v. Ryanair* (age discrimination). Decision No. DEC-E2000-14 <http://www.equalitytribunal.ie/Database-of-Decisions/2000/DEC-E2000-14.PDF>, accessed 7 March 2011.

¹⁹⁷ Decision No. DEC-E2002-003. <http://www.equalitytribunal.ie/Database-of-Decisions/2002/Employment-Equality-Decisions/DEC-E2002-003.pdf>, accessed 7 March 2011.

¹⁹⁸ Decision No. DEC-E2007-006. <http://www.equalitytribunal.ie/Database-of-Decisions/2007/Employment-Equality-Decisions/DEC-E2007-006-Full-Case-Report.html>, accessed 7 March 2011.

¹⁹⁹ <http://www.irishtimes.com/newspaper/frontpage/2010/0804/1224276150481.html>, accessed 25 March 2011.

is now the main government party) put a proposal about candidate gender quotas to its parliamentary members but it was defeated.²⁰⁰ In terms of female participation in the political process quotas on female candidates did receive some discussion during the recent general election, held on 25 February 2011.

ITALY – Simonetta Renga

1. National legislation on positive action measures/gender quotas

1.1. Positive action measures in the national legal system

As regards gender, the rules governing positive action measures were reorganized in 2006 by the Code for Equal Opportunities (*the Code*),²⁰¹ which covers both the public and the private sector, and combines all provisions on the ban of discrimination and on the promotion of equal opportunities in all other fields.

The definition of positive action, provided by the Code, includes an open typology of activities, which means that all kinds of measures can be adopted so as to pursue the objectives provided by the discriminatory legislation, including the introduction of, in some instances, quotas (although these are a matter of discussion in our country). This involves that positive action measures are neutral measures as well as preferential measures and that numerical targets are relevant or not as the case may be.

According to Italian scholars, positive action measures, as far as they include preferential measures, i.e. measures specifically directed to favour women, could consist in giving priority to women in access to work or in promotion or in the right to be elected, whenever women are underrepresented in any position, grade or level. However, such preferential measures must be strictly justified by the aim of removing factual obstacles to equal opportunities between men and women, where factual obstacles are meant to be the stereotyped roles of women in family, social, economic and political life. Under-representation exists wherever there is an evident disproportion between the two sexes in the position, grade or level concerned (some provisions, for instance, refer to *a ratio* of two thirds).

Positive action measures are normally adopted on a voluntary base, but some provisions also introduce binding measures.

The rules governing positive action measures are based on the constitutional principle of substantive equality stated in the second Paragraph of Article 3 of the Constitution.²⁰² This general and fundamental principle of the Italian legal system has a programmatic value enforceable in all fields and provides the basis of the definition of substantial equality which justifies positive action measures.

As regards the right to be elected the way to the justification of positive action such as preferential measures has also been paved by an amendment of Article 51 of the Constitution on the right to vote and the right to be elected, which at present states

²⁰⁰ <http://www.irishtimes.com/newspaper/frontpage/2010/0312/1224266109422.html>, accessed 25 March 2011.

²⁰¹ Decree No. 198 of 11 April 2006, in OJ no. 125 of 31 May 2006, o.s. No. 133, published on <http://www.normattiva.it/dispatcher>, accessed 1 March 2011.

²⁰² Article 3 Paragraph 2 of the Constitution states that ‘It shall be the responsibility of the Republic to remove all obstacles of an economic and social nature which, by limiting the freedom and equality of citizens, impede the full development of the human person and the effective participation of all workers in the country’s political, economic and social organization’.

that ‘the Republic shall promote equal opportunities for men and women’. Similarly, the new text of Article 117 of the Constitution²⁰³ on the legislative power of the State and the Regions provides that Regional Acts shall eliminate all obstacles to the achievement of equality between men and women in social, cultural and economic life and promote equality between men and women as regards the right to be elected. A similar provision is also included in Constitutional Act No. 2/2001 on the direct election to Chairmanship of the Regions and the Provinces with special autonomy.²⁰⁴ Nevertheless, all implementing provisions of Regional Acts only introduced neutral measures, such as quota systems in list of candidates for administrative elections, so as to achieve equal opportunities in this field; in particular, quotas in lists of candidates can be considered as a neutral measure in these cases as the respective provisions normally state that *neither of the two sexes* can be represented in these lists in a *ratio* higher than a certain percentage, meaning that they are obviously measures aimed at the promotion of a higher participation of women in politics, but they are addressed to both sexes.

Leaving aside gender, positive action measures are provided by Article 7 c) of Decree no. 215/2003²⁰⁵ which implemented Directive 2000/43/EC on the principle of equal treatment between persons irrespective of racial or ethnic origin as a task of the *UNAR* (the Office specially set at the Prime Minister Department) to prevent or rebalance situations of disadvantage based on race or ethnic origin. The Decree does not provide a definition of positive action, which is simply described as a specific measure to be adopted by public or private subjects, and especially by associations which operate to counteract ethnic discrimination, with the aim mentioned above.

1.2. Positive action measures/gender quotas in employment and self-employment

1.2.1. The public sector

The provision of positive action measures, both in the complaints-led model and in the voluntary model, is described below for the private sector, with the exception of some differences that are described in 1.2.4.

1.2.2. The private sector

The Code provides for two kinds of positive action measures as regards employment.

The first kind of positive action measure includes compulsory measures regarding cases of collective discrimination, i.e. cases of unlawful differential treatment in working conditions, access to jobs and so on, where a whole group of female workers is discriminated against. They can start with an attempt of conciliation (Article 37 Paragraph 1), where the agreement on the enforcement of a plan to remove the discrimination becomes a writ of execution through a decree of the court, or with ordinary proceedings (Article 37 Paragraph 3), where the court in the decision ascertaining a collective discrimination, after having heard trade unions representatives as well as the National or Regional Equality Adviser, orders the

²⁰³ The amendment was provided by Constitutional Act No. 3/2001, published in OJ no. 248 of 24 October 2001.

²⁰⁴ This Act, which states that the respective regional and provincial statutes shall promote equality in the right to be elected with the aim of balancing the presence/representation of the two sexes, was published in OJ no. 26 of 1 February 2001.

²⁰⁵ Decree no. 215/2003, on the principle of equal treatment between persons irrespective of racial or ethnic origin, implementing EU Directives 43/2000; published in OJ No. 186 of 12 August 2003, <http://www.normattiva.it/dispatcher>, accessed 1 March 2011.

employer to set up a plan to end it, fixing a time limit for drawing up the plan. In both cases the ‘victim’ is a group of women and the attempt of conciliation or the complaint is initiated by the National or Regional Equality Adviser.

A penal sanction is provided in case of non-compliance with the court order.

The second kind includes voluntary measures designed to encourage female employment and to achieve substantial equality between men and women at work, by removing obstacles which in practice prevent the achievement of equal opportunities. Under Article 42 of the Code they can be promoted by different subjects, both public and private ones (including Equality Advisers), and can give access to public funds. Each year the National Equal Opportunities Committee (*EONC*) residing under the Minister of Labour approves a plan which states criteria for the partial or total reimbursement of costs related to the projects, which is decided by the Minister of Labour following the positive opinion of the EONC itself. Parties entitled to the funds are all employers, not only enterprises, both private and public ones, in addition to trade unions and professional training centres.

Other voluntary measures are also provided by Article 50 of the Code which refers to Article 9 of Act No. 53/2000,²⁰⁶ to improve the reconciliation of private life and working activity by allocating part of the Fund for Family Policies to public and private businesses who enforce collective agreements on positive action measures aimed at allowing parents or those engaged in the care of a disabled family member to adopt a flexible working hours schedule, through part-time work, teleworking, working from home, flexitime and other measures. These measures are normally neutral ones but clearly have an indirect effect on women, as these measures are mainly used by women in order to conciliate private and working life. These measures may actually end up perpetuating the stereotype that women carry a primary responsibility for childcare and thus weaken their position on the labour market. Nevertheless, they could also be very useful to increase the percentage of participation of women in labour market, which is still quite low in Italy. So it is crucial that they are clearly explained as neutral measures, even promoted for men, and that they are not the main and/or only kind of intervention.

Also in the field of entrepreneurial activity, positive action measures are provided by Article 52 of the Code as preferential measures meant to sustain female self-employment by favouring the access to bank credit and public funds. The subjects entitled to these benefits are partnerships or cooperatives made up by 60 % of women at least, limited and unlimited companies owned for at least two-thirds by women and whose board of management is made up for at least two-thirds by women, individual female undertakings and finally undertakings, their pools (*consorzi*) and associations, bodies, undertakings for the promotion of entrepreneurial activity which promote professional training on self-employment or services for professional advice and assistance on management techniques reserved to a quota of at least 70 % women.

1.2.3. State-owned companies

As regards state-owned-companies, where ordinary rules are fully enforceable, a specific provision is dedicated to positive action measures in the Radio and Television sector. Article 49 of the Code states that public and private broadcasting companies shall promote positive action measures so as to eliminate unequal opportunities conditions between the two sexes in the working organization, recruitment and

²⁰⁶ Act No. 53 of 8 March, 2000, on Sustenance of Motherhood and Fatherhood, Time for Care and for Vocational Training, and Coordinating Hours of the Public Services of the Town, published in OJ No. 60 of 8 March 2000, <http://www.normattiva.it/dispatcher>, accessed 1 March 2011.

appointment to high and responsible positions. No sanctions are provided in case no plans have been achieved, so the adoption of these positive action measures is not binding and unfortunately we do not have any data on its real implementation.

1.2.4. Differences between the public and the private sector

According to the letter of the law, the Public Administration holds quite a primary role in promoting equal opportunities. Article 48 of the Code provides that public employers must draw up three-year positive action plans, which can be sustained within budget limits. Recruitment stoppage and the exclusion from access to public funds are provided in case of infringement. In these three-year plans the Public Administration can also adopt positive action measures aimed at ensuring a better balance between sexes in jobs and levels where women are underrepresented (that is, according to the express provision of the law, if they represent less than one third of the total). Moreover, with this aim, in hiring procedures and in promotion, when there are male and female applicants with the same level and qualification and the male one is chosen, the Public Administration has to give an express and suitable reason. The same Article already stated that at least one third of the members of the commission for public competitions (hiring) must be women, except in case of justified impossibility. As regards the concept of justified impossibility, it has to be underlined that, following general rules, the interpretation of the open wording of this provision should be strict, as it is an exception and should mean objective impossibility (i.e. lack of qualified female employees to be appointed as member of the commission).

Finally, the Public Administration shall ensure the professional training of personnel in proportion to the percentage of representation of each sex in the specific sector and facilitate this participation through the reconciliation of work and private life. It also adopts internal administrative regulations to ensure equal opportunities between men and women at work following the Prime Minister Directives.

1.3. Positive action measures/gender quotas in the access to and supply of goods and services

Article 55-*octies* Paragraph c) of the Code provides for an Office for Equal Opportunities to be accommodated as part of the Prime Minister's Department. This Office is also charged with promoting the achievement of positive action measures by both public and private subjects. At present we do not have any published cases on the implementation of Directive 2004/113/EC and currently the Equal Opportunities Department's website does not include any further information on this point.

1.4. Positive action measures/gender quotas in the field of research and education

No specific provisions on positive action measures are to be recorded in this field, neither voluntary nor binding.

1.5. Positive action measures/gender quotas in legislature, political parties and/or political bodies

Article 56 of the Code,²⁰⁷ governing political elections for the European Parliament, states that in all lists of different districts which have the same party symbol neither of the two sexes may be represented in a *ratio* greater than two thirds. In case of violation of this rule the funds are cut to half in a *ratio* proportional to the number of

²⁰⁷ The provision was issued at first by 3 of Act No. 90/2004, published in OJ No. 84 of 9 April 2004, <http://www.parlamento.it/parlam/leggi/040090l.htm>., accessed 1 March 2011.

candidates which exceed the quota. An incentive is also provided as the cut in expenses coming from the enforcement of this sanction is given to parties where the elected persons are represented by more than one third for each sex. The stricter sanction of inadmissibility is only provided for lists of more than one candidate which do not have candidates of both sexes. As regards political elections for the national Parliament Act No. 165/2004,²⁰⁸ which states general principles on the ground of Article 122 Paragraph 1 of the Constitution, does not take into consideration the issue of equal opportunities at all. This is quite disappointing as currently few political parties' statutes include self-regulation on gender representation in lists of candidates.

The difference between the elections for the European Parliament and for the National Parliament may be rooted in the different impact of the rules as regards the different function of the National Parliament and of the European Parliament, and as regards the number of the elected members of the National Parliament (945) and the number of elected members of the European Parliament (72); no debate, however, can be recorded on this issue.

Many Regional Acts include provisions aimed at rebalancing gender representation in lists of candidates or in the establishment of governmental local bodies.²⁰⁹ Some of them are just a kind of declaration of principles and state that equal opportunities shall be taken into consideration in the fields mentioned above. Other provisions are more incisive and state that lists of candidates in which one of the two sexes is not represented at all are inadmissible, or that lists of candidates shall never represent one of the two sexes in a proportion higher than two thirds, and include reductions in the reimbursement of electoral expenses or even the inadmissibility of the list for parties which violate this rule. In any case the result in terms of women's representation also depends on the preferential votes and the rules mentioned above could be easily circumvented by parties simply placing women in the lower positions of the list. In fact, where no preferential vote is cast the vote goes to the candidates starting from the first of the list.

1.6. Positive action measures/gender quotas in other decision-making bodies or other areas

Article 6 Paragraph 3 of Decree No. 267/2000²¹⁰ provides that the Statutes of Local Bodies shall include provisions aimed at achieving equal opportunities between men and women and at promoting their balanced representation in governmental bodies of Municipalities and Provinces and in other bodies or undertakings depending on them. This rule has generally been enforced by provisions stating a similar declaration of principles or at the most by neutral measures such as provisions aimed at ensuring that none of the two sexes can be represented in a *ratio* higher than two thirds in decision-making positions.

Similar self-regulation also regards workers' unions and political parties, where most Statutes include at least equal opportunities as a fundamental objective to pursue, up to the more incisive but actually uncommon rules provided, for instance, by the Statute of *CGIL* (one of the main workers' unions) which expressly state that

²⁰⁸ Act No. 165 of 2 July 2004, implementing Article 122 Paragraph 1 of the Constitution, published in OJ No. 155 of 5 July 2004.

²⁰⁹ P.L. Petrillo, in *Democrazia paritaria*, 'quote rosa' e nuovistatutiregionali, http://www.retepariopportunita.it/Rete_Pari_Opportunita/UserFiles/Pubblicazioni/saggio_petrillo.pdf, accessed 1 March 2011, offers a clear overview of the regulations in force.

²¹⁰ Published in OJ No. 227 of 28 September 2000, o.s. N. 162, <http://www.normattiva.it/dispatcher>, accessed 1 March 2011.

also on boards of management one sex cannot be represented in a ratio higher than 60 % or lower than 40 %, ²¹¹ and the very innovative rules of the Statute of *PD* (the main centre-left party), ²¹² which has recently been issued and provides that equal gender representation shall be ensured in all managing or executive bodies of the party, subject to their dissolution, and shall also be promoted and financially sustained in lists of candidates as well as in all monocratic posts, internal and institutional. The latter involves a commitment of the party to support in equal percentage male and female candidates for both the appointment of posts of responsibility in the party itself, and in institutional bodies (such as for instance chairmanship of Chambers of Parliament).

1.7. Conformity of gender quotas with equality legislation

Positive action measures for women/gender quotas do not create specific problems in the light of EU or national equality legislation, as they are normally quite soft interventions (see further on case law on positive action measures in politics). From a theoretical point of view, in relation to positive action, it is still under discussion whether the concept of equal opportunities should be limited to equality of initial opportunities or be extended to equality in the end results: equality in end results would lead to the legitimacy of reserved quotas for women in the access to employment or in any other sector where they are underrepresented.

2. Positive action measures for women and gender quotas in practice

2.1. Implementation of positive action measures for women and/or gender quotas

2.1.1. Implementation in employment, self-employment and vocational training

An organized network of Equality Advisers at central and local level, the EONC, and its Technical Board, together with the Commission for Equal Opportunities between men and women, part of the Ministry for Equal Opportunities, and the Commission for Equal Opportunities in entrepreneurship, are provided and financed by the Code also to sustain the achievement of positive action measures.

In practice, only financed plans have been adopted until now. In this sense, positive action measures can mainly be considered the result of legislation. But they are often a result of negotiation as well. In fact, Article 42 of the Code provides a priority in the admission for reimbursement of costs for positive action plans adopted on the basis of collective agreements bargained between employers and trade unions.

Unfortunately we have no information whatsoever on the concrete achievement or on the approval of positive action plans in the last five years. In fact, leaving aside a general report on the current state of implementation of the principle of equality, ²¹³ the Code does not provide for any duty for these institutional bodies to monitor and to specifically report on the activity of promotion of positive action plans and on its effects. Nevertheless, starting from the EONC Programme on positive action

²¹¹ <http://www.cgil.it/ChiSiamo/materiali/2010/Statuto.pdf>, accessed 1 March 2011.

²¹² <http://beta.partitodemocratico.it/doc/100454/statuto-del-partito-democratico.htm>, accessed 1 March 2011.

²¹³ Article 20 of the Code provides that the Minister of Labour together with the Minister for Equal Opportunities shall report to Parliament at least every two years. Under Article 15 and Article 19 of the Code, the National Equality Adviser and the Regional and Provincial Equality Advisers shall only report, to Parliament and to local governmental bodies respectively, on their own activity.

measures,²¹⁴ which includes annual criteria to recognize the total or partial reimbursement of costs, we can remark that the last programmes have gradually left out more traditional interventions such as those on professional training and paid more attention on women's employment seclusion ('segregation'), also through projects which should intervene on job organization and job evaluation. In particular, the last Programme for 2010 also provided a scheme for the evaluation of the projects where votes must be cast on the concrete objectives to be achieved, measures and time and on the possibility to measure the level of achievement of the plan. Some of the measures sustained by this Programme also include numerical targets to be achieved, such as measures addressed to young qualified or graduated women, where 50 % of the recipients are expected to be hired on an employment contract (not a fixed-term one); and measures addressed to unemployed women or women on redundancy over 45 years old, where 50 % of the recipients shall enter or re-enter the labour market.

2.1.2. Implementation in the access to and supply of goods and services

For this aspect no information is available.

2.1.3. Implementation in research and education

For this aspect no information is available.

2.1.4. Implementation in legislature, political parties and/or political bodies

For this aspect no information is available.

2.1.5. Implementation in other decision-making bodies or areas

For this aspect no information is available.

2.2. Effects of the positive action measures

This is definitely one of the weak points of our legislation as no impact assessment is provided and to this day the State's control only regarded the effectiveness of operating costs and the respect of accounting rules. Nevertheless Decree no. 5/2010 which recently amended the Code to implement the Recast Directive 2006/54/EC provides that the EONC shall evaluate the correct achievement of the plan through a method which ensures a scientific and technical system of evaluation. This could pave the way for a real impact assessment, but we will still have to wait at least for the first implementation of the rule, i.e. for the achievement of positive action measures financed by the Programme for 2010.

As regards politics no institutional body is specifically charged with monitoring the effects of positive action measures. So we can only refer to the results of elections, which are quite disappointing. The percentage of women elected in Parliament in 2008 was 20.20 % and 22.2 % in the elections for the European Parliament of 2009. Administrative elections of 2010 showed a similar percentage, from the higher results of Piemonte and Campania ranging about 23.3 % to the minimum of Basilicata and Calabria where no women were elected. The situation is very critical if we consider that female voters are about 52 %.²¹⁵

²¹⁴ The programme was issued by Decree of the Minister of Labour on 9 June 2010, published in OJ N. 159 of 10 July 2010, <http://www.lavoro.gov.it/NR/rdonlyres/35C73783-654E-4D83-AE35-48A50CDF1347/0/Programmaobiettivo2010.pdf>.

²¹⁵ More information and a short comment on the projects of electoral reform from this point of view, <http://www.ingenere.it/articoli/strumenti-di-democrazia-contro-il-vero-porcellum>, accessed 1 March 2011.

3. Case law

3.1. Case law of national courts

As regards self-employment, the Constitutional Court, already in 1993, in judgment No. 109 of 24-26 March confirmed the fully constitutional legitimacy of positive action measures as measures intended to secure equal opportunities to disadvantaged groups. The Court stated that they imply the adoption of special differentiated legal principles, even if this involves a deviation from the principle of formal equality.

As regards the right to vote and the right to be elected, the Constitutional Court, at first, expressed a strict view in judgment no. 422/1995. The judges in fact declared the constitutional illegitimacy of a whole series of legal provisions in which it was laid down that neither of the two sexes may be represented on lists of candidates for Town Council, Provincial Council and Regional Council elections in a *ratio* greater than two thirds. Positive action measures – the Court also stated – may not have a direct effect on the content of the right to be elected, as Article 51 of the Constitution is to be interpreted as stating a principle of an absolute but formal equality to grant the right to be elected in equal measure to all citizens as such.

After the amendment of Article 51 the way was paved to the ascertainment of the legitimacy of the introduction of limits to the right to vote aimed at the realization of equal opportunities. Judgment No. 49/2003 of the Constitutional Court confirmed the constitutional legitimacy of the provision of the Statute of Regione Valle d'Aosta which states that lists of candidates for administrative elections where one of the sexes is not represented at all cannot be admitted. The Court stated that new constitutional provisions expressly set the objective of gender rebalancing in the rules of political and administrative elections. Following the Court, such rules do not affect the content of the rights to vote and to be elected, as they do not ensure any result but are merely aimed at avoiding gender discrimination in the choice of candidates through the total exclusion of one of the two sexes. A similar reasoning led the Court to confirm the constitutional legitimacy of Article 48 of the Code which includes a preferential measure in the composition of the commission for public competitions (hiring) in the public sector where women shall be at least one third of the members, except in cases of justified impossibility.²¹⁶

Also the most recent judgment of the Constitutional Court, No. 4 of 14 January 2010,²¹⁷ confirmed this interpretation confirming the constitutional legitimacy of the rules of elections of Regione Campania, which provide that two preferences can be given but to candidates of different sexes. In particular, under the regulations of administrative elections in Campania, the voter is allowed to express his/her preference for two candidates within the list (rather than only one). If the voter uses this option he/she cannot vote for two male candidates or two female candidates but must choose one of each sex. If not, the vote is null and void.

3.2. Case law of equality bodies

Only a case which dates back to 1996 can be recorded here. It concerns the introduction by collective agreement of a quota reserved for women in the hiring of the North-West Department staff of the National Railway Company (FS), where the percentage of female employees is very low.

²¹⁶ Judgment of the Constitutional Court no. 39/2005, <http://www.giurcost.org/decisioni/index.html>, accessed 1 March 2011.

²¹⁷ <http://www.giurcost.org/decisioni/index.html>, accessed 1 March 2011.

Male applicants, who scored better in the selection process compared to female applicants but were not hired because of the quota system, initiated court cases against this positive action. In particular, the notice announcing the recruitment provided that at least 30 % of women should be admitted and also that at least the same percentage should get the job. Law reviews reported that the latter preferential measure was to apply to female candidates who were admitted to the selection procedure, regardless of the results. After some contrasting judgments,²¹⁸ and after the advice of the Board of Inquiry of the Equal Opportunities National Committee (EOCN) which confirmed the legitimacy of the quota system (as a temporary and flexible measure introduced by collective bargaining), the workers' and employers' representatives agreed to conform with the opinion of three experts (Labour Law academics). The experts considered this kind of positive action as a legitimate temporary measure characterised by rationality, i.e. a measure which does not represent an unjustified discrimination against male workers. The favourable advice was mainly based on the characteristics of the contractual instrument used to carry out the positive action: flexibility, temporariness and a limited scope which allows better control on the rationality of the quota system.

3.3. Case law of other bodies

There is no information available.

4. Proposals

On 2 December 2010 the Finance Commission of Parliament approved a Bill on the introduction of a quota system for the appointment of managing directors of listed companies presented by Lella Golfo (who is a centre-right Member of Parliament) together with Alessia Mosca (who is a centre-left Member of Parliament). Bill No. 2482²¹⁹ is aimed at ensuring a balance in gender representation in boards of directors and in boards of auditors, by providing that the statute of companies and state-subsidiary companies shall state that directors and auditors of one sex cannot be elected in a proportion higher than one third compared to the directors and auditors of the opposite sex. This rule shall be enforced for three mandates and also includes severe remedies in case of infringement: dissolution of the Company Boards that do not respect these provisions.

The quota system would be provided by an article of the Code governing merchant banking. This Bill, which would represent a great change, as at present in Italy women cover a very low percentage of posts in company boards,²²⁰ about 6.9 %, ²²¹ has sparked opposite comments. Actually, notwithstanding the enthusiasm of its supporters of both parties, who also organized a database of curricula vitae to

²¹⁸ Judgment of Pretura di Genova of 8 July 1996 and Tribunal of Genova of 18 July 1996, in D&L 1997, p. 105.

²¹⁹ Published on the High Chamber website, on <http://www.senato.it/leg/16/BGT/Schede/Ddliter/36199.htm>, accessed 1 March 2011.

²²⁰ A study of September 2010 by the Observatory on the Diversity Management of the Catholic University of Milan (http://www.sdabocconi.it/it/ricerca/osservatori/osservatorio_sul_diversity_management/, accessed 16 February 2011), also mentioned in the file for the discussion of the Bill presented to the Senate, (<http://www.senato.it/leg/16/BGT/Schede/Ddliter/dossier/36199/dossier.htm>, accessed 16 February 2011), covering 274 listed companies, shows that the total number of members of company boards of directors, boards of auditors and other management boards is 4.346, and that 332 are women, with a percentage of 7.6 % (which was 6.9 % in 2009). Moreover, 50 % of the companies have no women on their boards.

²²¹ <http://www.lellagolfo.com/?p=1268#more-1268>, accessed 1 March 2011.

facilitate companies in choosing from a list of qualified female managers, it was sharply criticised and opposed by the employers' industry and bank associations and the Government has presented some amendments, which are under discussion at present and would imply a gradual implementation (to be achieved in 2018) and a change in sanctions which would be only pecuniary.²²² The present serious Government crisis may, however, prevent its final approval, but in any case the lively debate on equality issues caused by this Bill is important, as in recent years these have been quite unacknowledged in social and political debates and in newspapers.

In fact, at the moment, only quota in company boards are under discussion. The debate on the introduction of quotas in political elections (similar to those already provided in many Regions) which dates back to 2006 was not continued in the following legislature. Also, an interesting proposal by the national Association of Women in Italy (*UDI*), founded in the 1940s for the promotion of women's condition and participation in all fields of political and social life, has remained a dead letter. The Bill, presented by popular initiative (ex Article 71 of the Constitution), as part of a wider campaign called '50AND50 wherever a decision must be taken', provided that a *ratio* of one to one for each sex has to be ensured on each list of candidates, or on the whole of the candidates of a party in case the election system is made of single-member constituencies. According to the Bill, lists and parties that do not comply with the requirements mentioned above are not admitted to the election. This would probably be the only way to quickly ensure balanced representation of women in politics, but it had little chance of success as even more 'moderate' bills had already failed.

LATVIA – Kristine Dupate

Positive action measures hardly exist in Latvia. They are irregular rather than systemic. There are no developments in Latvian legal doctrine with regard to the place and character of positive measures.

1. National legislation on positive action measures/gender quotas

1.1. Positive action measures in the national legal system

In Latvia legal measures on positive action are non-systemic. Article 91 of the Constitution of Latvia (*Satversme*) provides for the principle of equality of rights before the law and the courts and for protection of these rights without any kind of discrimination. From the perspective of Latvian legal doctrine Article 91 of *Satversme* is a blanket norm. This means that the norm itself does not provide for any rights unless competent authorities such as the legislator or courts have filled it with specific rights.²²³ There have been no debates or studies on the legal nature of positive action measures under the Latvian legal doctrine. So, the Latvian legal doctrine remains silent on the nature of positive measures.

The legislator has so far adopted only a few norms allowing positive measures to be taken by public institutions in certain fields and under certain circumstances. There are no legal norms on positive measures allowing positive measures in general or

²²² <http://www.italiannetwork.it/news.aspx?ln=it&id=24853>, accessed 1 March 2011.

²²³ Egils Levits, '*Par tiesiskās vienlīdzības principu*' (On Equality Principle), *Latvijas Vēstnesis*, 8 May 2003, No.68.

legal norms allowing any positive measures to be taken by private persons (legal or natural) in the private sector.²²⁴

Currently there are some legal norms providing for positive measures in the public sphere by state authorities. Those legal norms are contained in laws and the Regulation of the Cabinet of Ministers. One set of positive measures provided by Latvian law derives from the obligations provided by EU law, such as special rights during pregnancy and maternity or reasonable accommodation requirements for the disabled,²²⁵ and another set contains purely national norms on positive measures. The latter contains, in the author's view, only two norms on positive measures (on soft quotas),²²⁶ but several more norms could be added on more favourable treatment on the grounds of pregnancy depending on the definition of positive measures under national legal doctrine.²²⁷

The current situation with regard to the field of employment is such that, for example, the Labour Law²²⁸ only provides norms prohibiting discrimination with regard to the access to employment,²²⁹ while the Law on Support of the Unemployed and Job-seekers²³⁰ provides that active employment measures shall be aimed at the provision of equal opportunities for persons willing to join the labour market.²³¹ On the basis of the latter provision, the Law on the Management of the EU Structural and Cohesion Funds and relevant EU Regulations, the Cabinet of Ministers adopted the Regulations on active employment measures envisaging special rights (usually on educational measures or subsidised working places) for certain groups of persons (mothers after long childcare leave, disabled, young unemployed). It follows that two laws formally provide for contradictory norms: the Labour Law prohibits any less favourable treatment on the basis of discrimination grounds, while the Law on Support of the Unemployed and Job-seekers in substance allows for more favourable (and thus less favourable) treatment on the basis of discrimination grounds. According to the traditional solution in the event of conflict of norms, the Law on Support of the Unemployed and Job-seekers as a special law would prevail over the Labour Law as a more general law. However, the relationship between the said norms from the doctrinal point of view is still unclear, since the legal doctrine on substantial equality under Latvian law is as yet undeveloped.

There are two norms on soft quotas.²³²

1.2. Positive action measures/gender quotas in employment and self-employment

1.2.1. The public sector

There are no generally applicable norms regarding positive measures in the public sector. Persons employed in the public sector on the basis of an employment

²²⁴ It may be debatable with regard to the provisions on the access to and supply of goods and services. See for more details Point 1.3.

²²⁵ Some officials of the Ministry of Welfare claim that norms on special protection during pregnancy and maternity and the obligation of reasonable accommodation for disabled people as positive action measures.

²²⁶ See for more details Section 1.2.

²²⁷ See, for example, Article 134(2) of the Labour Law.

²²⁸ OG No. 105, 6 July 2001.

²²⁹ Article 29.

²³⁰ OG No. 80, 29 May 2002.

²³¹ Article 3(2)(4).

²³² Articles 44(2) and 50(2) of the Law on Judicial Power, OG No.1, 14 January 1993, respective amendments OG No. 160, 7 October 2005. See for more details Point 1.2.1.

agreement are subject to the Labour Law which does not provide for any positive measures. The same situation applies to civil servants and officials. None of the special laws regulating their service allow positive measures/quotas.

However, there is one exception. It concerns self-governing bodies of judges of the Supreme Court. Article 44(2) of the Law on Judicial Power²³³ provides that chairpersons of the departments of the Senate of the Supreme Court and the chairpersons of the Panels of the Supreme Court shall be elected by the Plenary Session of the Supreme Court, taking into account the principle of equal representation of gender, and Article 50(4) of the same law provides that two Deputy Chief Justices of the Supreme Court shall be elected by the Plenary Session for seven years from among the chairpersons of the Senate Departments and the chairpersons of the court panels, taking into account the principle of equal representation of gender.

These provisions have the characteristics of soft quotas, because there is no guarantee that Plenary Session members will follow the gender balance principle and because there is no sanction for non-observation of such principle.

The interesting fact with regard to this exceptional positive measure is that it works in favour of male judges. During the Soviet Era, when independence of judges was doubtful, it became a female-dominated profession. During the last 20 years of independence, the proportion of male judges has increased. However, horizontal segregation occurs here: higher-level courts have a higher proportion of male judges culminating in almost 50/50 in the Supreme Court. Currently there are 25 senators in the Supreme Court – 11 male and 14 female judges. Out of three departments of the Senate, two are headed by male judges and only one by a female judge. It follows that the purpose of the provisions in question is to provide positive measures in favour of men.

In addition to this, there are positive measures on account of different activities financed by the European Social Fund deriving from EU law. Such activities include different kinds of training for special groups, such as women after long-term childcare leave, disabled people etc. Such activities are regulated by the Regulations of the Cabinet of Ministers but the legal bases are relevant EU Regulations²³⁴ and the Law on the Management of the EU Structural and Cohesion Funds (see also under 1.1.).

It is noteworthy to mention that sometimes the lack of legal provisions allowing positive measures may lead to certain difficulties when enforcing other EU law provisions. The Public Procurement Law²³⁵ implements Directive 2004/18.²³⁶ This Directive, among other provisions, envisages priority in the award of public procurement contracts for companies predominantly employing disabled people. Although Public Procurement Law²³⁷ also contains such provision, it is impossible to enforce it, due to the fact that there are no enterprises predominantly employing disabled persons. There are no such companies because there are no positive measures allowing the employment of disabled people. So without positive measures allowing the employment of disabled people even if other candidates have better qualifications, the enforcement of this particular provision of the Public Procurement Law is impossible.

²³³ OG No. 1, 14 January 1993, respective amendments OG No. 160, 7 October 2005.

²³⁴ Regulations 1828/2006; 832/2010; 846/2009.

²³⁵ Public Procurement Law, OG No.65, 25 April 2006.

²³⁶ Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, Official Journal L 134, 30/04/2004 P. 0114 – 0240.

²³⁷ Article 14.

1.2.2. The private sector

Latvian law does not provide for any positive measures in the private sector. Even more, in substance it prohibits any positive action measures taken by a private employer, due to the prohibition of less favourable treatment provided by the Labour Law.

1.2.3. State-owned companies

The law does not provide for any positive measures to be taken in state-owned companies.

1.2.4. Differences between the public and the private sector

In general there are no differences between the private and the public sector, because both are bound by the Labour Law which in substance does not allow positive measures.

1.3. Positive action measures/gender quotas in the access to and supply of goods and services

There is no special legal regulation providing for positive measures. However, in the author's view, the wording of the exception to the equal treatment principle provided by Article 4(5) of the Directive 2004/113 and implemented by the Law on the Protection of the Consumer Rights, is such that it allows some space for positive measures. Article 3¹(2) of the said law provides that different treatment of consumers on the grounds of sex could be justified if the different treatment has a legitimate aim and if the means chosen are proportionate. The author of this report considers that it is possible to justify positive measures under this provision, because factual inequality with regard to access to or supply of goods and services according to sex and the necessity to ensure de facto equality may serve as a legitimate aim under this provision. It follows that Article 3¹(2) of the Law on the Protection of Consumer Rights could be considered as a norm which in general allows positive measures with respect to private persons.

1.4. Positive action measures/gender quotas in the field of research and education

Latvian law includes no positive action measures in the field of research and education.

1.5. Positive action measures/gender quotas in legislature, political parties and/or political bodies

There are no positive action measures with regard to legislature, political parties and political bodies, although statistics show that they would be desirable. Current statistics show a 19 % female representation in Parliament. This number has been stable for at least 10 years now.²³⁸ The representation of women in Government is changing. However, there have never been more than 30 % of female Ministers in the Government. Currently there are only 3 female Ministers out of 19. Besides, female Ministers more frequently occupy 'non-influential' ministerial posts such as Minister of culture, welfare, or education. Latvia has never had a female head of Government. Only one of the parties represented in Parliament (New Era) is headed by a woman, who is also the current speaker of Parliament. In previous parliamentary elections

²³⁸ Central Statistical Bureau of Latvia, <http://data.csb.gov.lv/DATABASE/visp/lkgad%C4%93jie%20statistikas%20dati/Politisk%C4%81%20dz%C4%ABve%20un%20reli%C4%A3ija/Politisk%C4%81%20dz%C4%ABve%20un%20reli%C4%A3ija.asp>, accessed 29 March 2011.

New Era was the only party that followed the principle of parity of sexes for the lists of candidates for Parliament. However, in the recent Parliament elections in 2010, no such action was taken.

1.6. Positive action measures/gender quotas in other decision-making bodies or other areas

There are no legal norms on quotas in decision-making bodies. Statistics shows that in 2010 only 23 % of the members were women in the highest decision-making bodies of the largest publicly quoted companies.²³⁹ In 2009 around 35 % of business leaders were women. The latter data places Latvia among the leading Member States with regard to women's involvement in business.²⁴⁰

1.7. Conformity of gender quotas with equality legislation

Please see under 1.1.

2. Positive action measures for women and gender quotas in practice

2.1. Implementation of positive action measures for women and/or gender quotas

2.1.1. Implementation in employment, self-employment and vocational training

Please see under 1.2.

2.1.2. Implementation in the access to and supply of goods and services

Please see under 1.3.

2.1.3. Implementation in research and education

Please see under 1.4.

2.1.4. Implementation in legislature, political parties and/or political bodies

Please see under 1.5.

2.1.5. Implementation in other decision-making bodies or areas

Please see under 1.6.

2.2. Effects of the positive action measures

There is no data available on the effects of the positive action measures. However, the result of soft quotas in the Supreme Court is obvious. Of three departments of the Senate of the Supreme Court, two are headed by a male and one by a female senator, in contrast to the fact that there are more female persons among senators than male. It demonstrates the paradox of Latvian positive measures: they are taken in an important decision-making field employing more women than men to give priority to men, while at the same time neglecting the fact that female employees have less opportunities in general in the labour market and that a quota system would be more appropriate in the male-dominated employment fields.

²³⁹ Report on Progress on Equality between Women and Men in 2010. The gender balance in business leadership, European Commission, 2001, page 47.

²⁴⁰ Report on Progress on Equality between Women and Men in 2010. The gender balance in business leadership, European Commission, 2001, page 52.

3. Case law

There is no case law on positive measures.

4. Proposals

Taking into account the situation in Latvia where positive measures are almost completely lacking, it would be appropriate to provide for particular positive measures in EU law. Otherwise it is most likely that positive measures will not ‘appear’ in Latvian law in the near future due to the total reluctance of the present state authorities to recognise the existence of gender inequality. Taking this into account there has been very little political debate on any kind of positive measures. The only initiative was taken by the political party New Era for the parliamentary elections of 2006, after a campaign on the equality principle organised by the women’s NGO Centre of Resources for Women ‘Marta’. New Era formed their election lists equally – 50/50 male and female candidates. However, such action did not increase the number of female MPs.

LIECHTENSTEIN – *Nicole Mathé*

1. National legislation on positive action measures/gender quotas

1.1. Positive action measures in the national legal system

In Liechtenstein the Gender Equality Act (*Gleichstellungsgesetz, GLG*)²⁴¹ regulates in its Article 3 Section 3 concerning the prohibition of discrimination that adequate measures for realising *de facto* equality are not to be considered as discriminatory. According to information of the Equality Office in Liechtenstein in February 2011 there are no positive action provisions/quotas which generally apply to various groups.

1.2. Positive action measures/gender quotas in employment and self-employment

1.2.1. The public sector

The only positive action measure to be mentioned in the Liechtenstein Administration are the so-called guidelines for the improvement of the representation and the professional position of women in the Administration (*Richtlinien der Regierung des Fürstentums Liechtenstein zur Verbesserung der Vertretung und der beruflichen Stellung der Frauen in den der Regierung nachgeordneten Organen*) edited by the Liechtenstein Government on 12 May 1998.²⁴² These guidelines were created before the *GLG* entered into force, namely one year later on 5 May 1999, but were also motivated by the preparation work to the *GLG* as well as by the national strategies and plans to implement the action platform of Beijing and the constitution of the Gender Equality Office. All these measures are construed as supporting measures to bring forward the *de facto* gender equality based on Article 31 Section 2 Liechtenstein Constitution according to which men and women having equal rights.

The main aim of the guidelines is to eliminate any direct and indirect discrimination on the ground of sex and to realise equality in all offices including public prosecutors and courts. A gender parity in all fields and hierarchical levels is

²⁴¹ LGBL 1999 No. 96.

²⁴² RA 96/257.

aimed at. There is a special focus on adequate measures to reduce the under-representation of women in middle and higher functions and salary classes.

Regarding the publication of vacancies the feminine and masculine linguistic forms are to be used and the text itself has to be formulated in a way that both sexes are directly attracted by it. Skills important for the position like life experience, team player and negotiation competence are to be emphasized equally with management skills, the ability to assert oneself and many years of professional experience, because based on traditional role behaviour especially men are attracted by the latter group of skills. Additionally a specific indication is to be included in the publication if women are underrepresented, in a rather big section: 'Applications of women are especially welcome, since the administration is aiming at the increase of women in all sections where women are still underrepresented.'

In respect of appointments and promotions a quota is introduced. It aims at a 50-50% representation but no time limit for realising equal representation nor consequences for non-compliance are foreseen. If female applicants are equally qualified for the post they have to be preferred as long as gender parity is not reached, in a rather big section as far as reasons with regard to the competitor do not prevail.

This clause is formulated in a rather vague manner and allows a wide interpretation. Further on, the criteria for the evaluation of posts have to be regularly examined with regard to their gender-discriminatory effects. Groups installed by the Government have to aim at balanced proportionality between women and men of their members. Superiors inform their staff systematically about professional training and encourage personally and systematically especially women, regardless of whether they are full-time or part-time workers, to attend professional training courses. In addition to that, the opportunity to promote women is an integral part during the formation of apprentice and in professional training courses of the administration. More professional training courses shall be directed by women. Part-time work and job sharing shall be accepted and examined with filling of posts.

Finally the Office of personnel and organisation shall regularly present gender-specific data of this promotion programme which has a period of four years based on the guidelines. In the end the departments concerned have to deliver a report concerning the effectiveness and the obstacles in realising the programme to the Office of personnel and organisation which transfers the results to the working group promoting equality of women and men of the Liechtenstein Administration which is due to evaluate the reports.

Concerning the guidelines mentioned above a report regarding the compliance with the programme, the obstacles in the realisation as well as additional measures shall be established every four years at the end of the programme period (point 8 of the guidelines). Since the first programme started in 1998 there should be at least one report from 2002, but at the specific request of the Equality Office in Liechtenstein from February 2011 such a report or any data based on the evaluation of the report has not yet been produced. As a result, it has to be concluded that these guidelines have never been fully applied or integrated. Unfortunately any follow-up measures are lacking.

1.2.2. The private sector

For the private sector the guidelines mentioned above are an example of how the public sector's approach is construed. In the introduction to these guidelines applicable in the public sector the Government explicitly expresses the wish that Liechtenstein employers take them as a model to improve the professional position of

women in private enterprises. Furthermore there is no legislation or self-regulatory instrument on quotas for women on company boards. There is not even a public discussion about quotas in Liechtenstein, according to the information of the Equality Office from February 2011.

Since the year 2000 the Equality Office in Liechtenstein has been organising the annual 'Equal Opportunity Prize' as a recognition prize for the promotion of gender equality. The cash prize of EUR 14 300 (20 000 Swiss Francs) for the first rank, and EUR 3 500 (5 000 Swiss Francs) for the second and third ranks alternates with a challenge trophy for the most women and family-friendly company in Liechtenstein and written certificates for the second and third ranks. Whereas the cash prize is given to organisations and private persons, the challenge trophy is awarded to companies. The Equal Opportunity Prize is to encourage all organisations and private initiatives improving the situation of women and leading to more gender equality as well as making the public aware of gender questions and family work. The main evaluation criteria for the projects awarded the cash prize are the following: definition of the objective, timeframe for the realisation, financing, large efficiency, public awareness campaign, long-term and sustained change potential, new innovative character and creativity. Every other year, the challenge trophy goes to the most innovative company in Liechtenstein for measures developing and implementing women and family-friendly working conditions.

After a specific request for more detailed data on how private enterprises approach positive actions in practice at the Equality Office in Liechtenstein in February 2011, it indicated that no specific measures are undertaken by private enterprises. No further public discussion has started yet in Liechtenstein concerning the topic.

1.2.3. State-owned companies

There is no additional information available at this time.

1.2.4. Differences between the public and the private sector

There is no additional information available at this time. It has to be confirmed that in the public sector the above-mentioned soft quota are not pursued by any active policy. No quota rule applies in the private sector.

1.3. Positive action measures/gender quotas in the access to and supply of goods and services

To my knowledge no specific measures exist in Liechtenstein at this time.

1.4. Positive action measures/gender quotas in the field of research and education

To my knowledge no specific measures exist in Liechtenstein at this time.

1.5. Positive action measures/gender quotas in legislature, political parties and/or political bodies

The only example available is the government decision of 16 July 1997 for the nomination to state committees. This decision envisages gender parity. In 2003 this decision was evaluated regarding its impact in practice. Unfortunately it was not satisfying at all because there is neither short-term nor sustained effectiveness to be observed. The main reason for this is the passivity of all stakeholders involved. This situation has not changed up to now, which was confirmed by the Equality Office in Liechtenstein in February 2011.

1.6. Positive action measures/gender quotas in other decision-making bodies or other areas

See above under 1.5.

1.7. Conformity of gender quotas with equality legislation

For the two existing measures I cannot see any discrepancy with equality legislation. The Government even intended these measures to be in line and complementary to equality legislation. Furthermore they are not binding and not really applied or seriously implemented in practice.

2. Positive action measures for women and gender quotas in practice

As already mentioned above under 1.2, the two positive action measures existing in Liechtenstein are not seriously taken into account in decisions in practice. Therefore no serious implementation can be reported.

2.2. Effects of the positive action measures

No information available at this time.

3. Case law

There is no case law available at this time.

4. Proposals

According to information confirmed by the Equality Office in Liechtenstein in February 2011 no proposals are available at this time. There has not even been any public discussion on this topic up to now.

LITHUANIA – Tomas Davulis

1. National legislation on positive action measures/gender quotas

1.1. Positive action measures in the national legal system

The Law on Equal Opportunities of 18 November 2003²⁴³ dealing with the prohibition of direct and indirect discrimination based on the grounds of gender,²⁴⁴ race, nationality, language, origin, social status, belief, convictions, or views gives the definition of direct discrimination for the purposes of this law. Direct discrimination is described as a situation where one person is treated less favourably than another is, has been or would be treated in a comparable situation on the grounds of gender, race, nationality, language, origin, social status, belief, convictions or views, age, sexual orientation, disability, ethnic origin or religion, except for the following cases:

²⁴³ State Gazette, 2008, no. 76-2998.

²⁴⁴ The ground of gender is mentioned in the Equal Opportunities Act since 2008 despite the fact that the Equal Opportunities Act for Women and Men specifically deals with discrimination based on sex. As a result of this double coverage of gender discrimination, there are differences in the level of protection under both Acts. In some areas women and men have more protection under the Equal Opportunities Act, and in other areas under the Equal Opportunities Act for Women and Men.

‘(...):

6) special measures applied in the fields of healthcare, work, safety, employment and labour market when striving to create and apply conditions and opportunities guaranteeing and promoting the integration of the disabled into the labour environment;

7) special temporary measures applied when striving to ensure equality and prevent violation of equal treatment on the basis of gender, race, nationality, language, origin, social status, belief or convictions, sexual orientation, disability, ethnic origin or religion.’

Both exceptions are allowed only if established by law (Section 2(7) pp. 6-7 of the Act). There are some legal provisions in the Labour Code²⁴⁵ and the Law on Support for Employment²⁴⁶ which give certain priorities or additional guarantees for elderly people, disabled people and other vulnerable groups of employees. Other groups include pregnant women and persons with more extensive family responsibilities (Section 4(1) p. 4 of the Law on Support for Employment). They can be supported in the framework of so-called ‘subsidised employment’ where the employer receives the subsidy for the period of 12 months to cover the costs related to salary and social insurance contributions of these employees.

As far as actual positive action legislation is concerned, this type of legislation has never been adopted by the Lithuanian legislator, which means that there is a ban on the introduction of such measures unilaterally by the employer or by way of collective bargaining agreements or administrative enactments of state institutions. In practice, no such measures are known to have been introduced either. But if preferential treatment or quotas were introduced at a practical level, they would be considered unlawful.

The Equal Opportunities for Women and Men Act (EOAWM)²⁴⁷ takes an even more narrow approach. It only consolidates the first possible exception to the principle of direct discrimination.²⁴⁸ Section 2(3) EOAWM stipulates that direct discrimination on grounds of sex means passive or active conduct expressing humiliation and contempt, also restriction of rights or granting of privileges by reason of the person’s sex, except when relating to (...) *special temporary measures* foreseen in the laws, which are applied to accelerate the implementation of *de facto* equality between women and men and are to be cancelled when equal opportunities for women and men are realised (point 5). This Act covers *expressis verbis* such areas as education and labour law²⁴⁹ whereas the Equal Opportunities Act also covers public service and self-employment.

This means that the EOAWM itself does not allow positive discrimination, but refers to other laws, which *may* provide measures to promote equal opportunities for men and women. Hence, the possibility to deviate from the principle of non-

²⁴⁵ State Gazette, 2002, no. 64-2569.

²⁴⁶ State Gazette, 2006, no. 73-2762.

²⁴⁷ State Gazette, 1998, no. 112-3100.

²⁴⁸ The provision of Point 6 Section 2(7) of the Equal Opportunities Act which allows special measures to be applied in healthcare, work, safety, employment and the labour market when striving to create and apply conditions and opportunities guaranteeing and promoting the integration of the disabled into the labour environment is not included in the EOAWM.

²⁴⁹ The public service will fall under the principles of the EOAWM only by way of analogy of law. This will cause some problems with regard to the possibility to impose administrative sanctions for the breach of law on employers in public service – they are not mentioned as addressees of the EOAWM.

discrimination by introducing special measures shall be specified in laws (Acts of Parliament) and must not be regulated by the Regulations of Government, collective bargaining agreements or internal regulations of enterprises.

1.2. Positive action measures/gender quotas in employment and self-employment

Positive action measures or gender quotas are not expressly permitted and therefore not allowed in the field of employment and self-employment.

1.3. Positive action measures/gender quotas in the access to and supply of goods and services

Positive action measures or gender quotas are not expressly permitted and therefore not allowed in the access to and supply of goods and services.

1.4. Positive action measures/gender quotas in the field of research and education

Positive action measures or gender quotas are not expressly permitted and therefore not allowed in the field of research and education.

1.5. Positive action measures/gender quotas in legislature, political parties and/or political bodies

In 2004, MP Birute Vesaite came up with the initiative to amend the Law on Political Parties requiring the introduction of gender quotas in the pre-election lists of political parties. Due to doubts about its constitutional conformity this single initiative remained ineffectual.

Currently only the social democrats have formally declared that they will observe quotas for women (40 %) when composing lists of candidates for political elections. This issue is outside the scope of application of the Equal Opportunities Act and EOAWM.

1.6. Positive action measures/gender quotas in other decision-making bodies or other areas

Positive action measures or gender quotas are not expressly permitted and therefore not allowed for other decision-making bodies or other areas.

1.7. Conformity of gender quotas with equality legislation

Gender quotas are not expressly permitted and therefore no assessment is needed.

2. Positive action measures for women and gender quotas in practice

There is no practice to be described.

3. Case law

There is no relevant case law.

4. Proposals

The prevailing public opinion is against any quotas, mainly because they would 'create artificial priorities'²⁵⁰ and not produce a long-term effect'. It seems that the position of the legislator is a similar one. In the Annual Report for 2009 the Ombudsperson for Equal Opportunities focused the Parliament's attention on positive

²⁵⁰ *Ar kvota į vadovo postą padės „prasimušti“ moterims?* (<http://www.ekonomika.lt/naujiena/ar-kvota-i-vadovo-posta-pades-prasimusti-moterims-4723.html?page=2>), accessed 31 March 2011.

action measures and recommended that a law on positive action should be passed, but there was no reaction.

The more comprehensive approach combined with a clear mechanism or guidelines for achieving substantial equality at European Union level (e.g. in a directive) would help the post-Soviet societies to address the inequalities more quickly and to react more efficiently.

LUXEMBOURG – *Anik Raskin*

1. National legislation on positive action measures/gender quotas

1.1. Positive action measures in the national legal system

Article 11(2) of the Constitution reads ‘Women and men are equal in rights and duties. The State has to actively promote the elimination of any existing obstacles to equality between women and men’.

This Article could be the legal basis for binding positive action measures such as quotas, but no such measures have been implemented until now.

The Equal Treatment Acts, as well as the Equal Opportunities Acts and the Gender Equality Acts mainly result from the implementation of EU directives. They allow the adoption of positive action measures according to the directives.

1.2. Positive action measures/gender quotas in employment and self-employment

1.2.1. The public sector

There are no provisions concerning positive action measures and no quotas regulations. However, some municipalities have adopted ‘Action plans’ on gender equality. Most of them contain sensible measures aiming to promote gender-balanced participation in decision making, such as training courses for civil servants. Furthermore, even without binding provisions, one can observe that individual political stakeholders opt for promoting the underrepresented sex, this on national as well as on municipal level. As an example, a former Minister increased the number of women in decision making in the cultural scene by appointing several women as directors of public cultural institutions.

1.2.2. The private sector

The legal framework for positive action measures consists of Article L.243-1 to Article L. 243-5 of the national Labour Code. Positive action measures are defined as concrete measures conceding specific advantages in order to enable the underrepresented sex to exercise a professional activity or to prevent or compensate for disadvantages in the professional career path. Positive action projects can relate to either one or more companies, or to a sector or an economic branch. The State subsidizes the agreed projects.

The Labour Code also contains provisions which allow employers to obtain financial support when they employ people of the underrepresented sex. According to Article L.242-1 the underrepresented sex in a profession is considered to be the sex whose representation is equal to or less than forty percent of the total workforce in this occupation on a national level. Moreover, according to Article L.242-3 employers may implement specific advantages in order to facilitate the activity of the workers of the underrepresented sex or to prevent or compensate for disadvantages in their

professional career path. There are no provisions on quotas. The Administration of Employment has a specific service for women's employment.

1.2.3. State-owned companies

There are no provisions regarding state-owned companies or for private companies.

1.3. Positive action measures/gender quotas in the access to and supply of goods and services

There are neither positive action measures nor gender quotas in these fields.

1.4. Positive action measures/gender quotas in the field of research and education

1.4.1. Research and academics

There are no provisions on positive action measures or gender quotas in these fields.

1.4.2. Primary, secondary and higher education

There are no provisions on positive action measures or gender quotas in these fields.

1.5. Positive action measures/gender quotas in legislature, political parties and/or political bodies

Two political parties have decided on binding quotas regarding the candidates and the internal structures. One party has a quota of 30 %, the second one has committed itself to parity.

No binding provisions exist by law.

1.6. Positive action measures/gender quotas in other decision-making bodies or other areas

There are no provisions on action measures/gender quotas at all.

1.7. Conformity of gender quotas with equality legislation

As mentioned under 1.1., the legislator could decide on gender quotas based on Article 11(2) of the Constitution. To date, no positive action measures have been implemented into law.

2. Positive action measures for women and gender quotas in practice

2.1. Implementation of positive action measures for women and/or gender quotas

2.1.1. Implementation in employment, self-employment and vocational training

Some employers are running positive action plans according to labour law (see 1.2.2.). To date, none of these plans have ever contained gender quotas. The measures mainly focus on conciliation of private and professional life.

2.1.2. Implementation in the access to and supply of goods and services

Neither positive action measures nor gender quotas exist in this field.

2.1.3. Implementation in research and education

Neither positive action measures nor gender quotas exist in this field.

2.1.4. Implementation in legislature, political parties and/or political bodies

No binding measures exist in this field. However, as mentioned above, some political parties have chosen to introduce internal rules about quotas or parity. Where rules like these exist, they are actually applied and the participation of women in decision making corresponds with the aims fixed by the respective political party.

2.1.5. Implementation in other decision-making bodies or areas

There are neither positive action measures nor gender quota in any decision-making bodies or area other than the ones already mentioned.

2.1. Effects of the positive action measures

There are no effects to be reported on.

3. Case law

As no measures exist, there is no case law to report.

4. Proposals

On 22 January 2011, the Minister of Equal Opportunities announced that she does not exclude legal quotas in the private sector. First, she wants employers to put efforts into establishing gender-mixed teams until 2014.

In Luxembourg, the quota issue is not a popular subject. To date, no Government has ever declared to be in favour of quotas in the public, private or political fields. Although the announcement by the present Minister of Equal Opportunities is fairly vague, this statement represents a change in the Government's position. This could be a result of the way the European Commission vice-president, Viviane Reding, has recently addressed the subject.

NGOs, such as the National Council of Women, are calling for gender quotas in the political area and in public decision-making bodies such as advisory committees and the council of State. Until now, these calls have always been without any result.

In a more general way, civil society does not agree to limiting the gender quota issue to the boards of important groups in the private sector. It is perceived as an 'elite' way of making policy. Indeed, the whole labour market has sexual segregation, both horizontal and vertical.

If Luxembourg implemented legislative quotas for boards of private companies, there would be no effect on the horizontal segregation in the private sector and no effect at all in the public sector.

FYR of MACEDONIA – Mirjana Najcevska

1. National legislation on positive action measures/gender quotas

1.1. Positive action measures in the national legal system

The *Constitution* of the Republic of Macedonia deals with equality (Article 9) regardless of sex, race, colour of skin, national and social origin, political and religious beliefs, property and social status. Also, citizens are equal before the Constitution and the law. As a result of the amendments to the Constitution of the Republic of Macedonia (2001), numerous laws related to equality on ethnic grounds have been changed as well. Most of these changes relate to the use of language and

provide for 'equitable' representation of ethnic communities in public administration and public institutions, with the objective of 'achieving equality'.

These amendments to the provisions of the Constitution²⁵¹ start in Article 8 where the basic values are enlarged by introducing the concept of 'adequate and equitable representation of citizens belonging to all communities in the Government and other public institutions at all levels'.²⁵² The supervision of the implementation of this change is delegated (Article 77/2) to the Ombudsman.

Although strictly speaking, no quotas are envisaged in the Constitution on any issues related to equality, including for the members of the communities (further on: ethnic minorities), the new provisions of the Constitution on equitable representation are widely interpreted as percentages corresponding to the percentage of presence in the overall population. This would mean that the quotas on ethnic minorities (apart from the ethnic Macedonian majority which is approximately 64 %) are as follows: ethnic Albanians 25 %, ethnic Turks 4 %, ethnic Roma 2.5 %, etc. Hence, one possible method of achieving equality or 'adequate and equitable representation of citizens belonging to all communities in the Government and other public institutions at all levels' is to implement these percentages or quotas.

There are no specific provisions (other than the general clause in Article 9) regarding gender equality in the Macedonian Constitution. It does not envisage any equitable representation or mention any quotas with respect to gender. The only protected aspects are 'motherhood' and 'mother' (Article 42).

The basic Act in the area of gender equality is the Law on Equal Opportunities of Women and Men adopted in 2006²⁵³ (hereafter: Equality Law). Its aim is not defined as to achieve equality but as to ensure equal opportunities for both sexes in the political, economic, social, educational and any other social sphere (Article 2). However, the basic measures are defined (Article 5) as 'normative measures (...) forbidding discrimination based on sex and equal treatment', and are in the area of complaints-led procedures, meaning that 'sanctions are provided for the disrespect of requests and disrespect of prohibitions'. Furthermore, in Article 6), the special measures are defined as measures 'directed toward the removal of objective obstacles to achieve the implementation of the principle of equal participation of women and men'. The positive measures, defined as openly giving preferential treatment to women at all levels of political authorities, are justified until equal representation is achieved. This definition also applies to unequal representation, which is established as 'less than 40 %' 'in the governing institutions at all levels, including the judicial, legislative and executive branches of Government, the local governments, as well as all other public institutions and services, the political functions, commissions and boards, including participation in the bodies that represent the State at the international level'. The main method of implementing these policies is considered to be to adopt and implement a National Action Plan for Gender Equality (further on: NAPGE).

Such an NAPGE was adopted in May 2007 for the period 2007-2012. Although this is a duty in accordance with the Equality Law (Article 21) which is a legally binding provision, the NAPGE itself is not. It includes no sanctions and the only

²⁵¹ Amendments, IV, V, VI, VII, VIII, IX, X, XI, XII, XIII, XIV, XV, XVI, XVII and XVIII of the Constitution of the Republic of Macedonia, 'Official 'Gazette' of the Republic of Macedonia, No.91/01.

²⁵² Amendment VI, <http://www.sobranie.mk/en/default.asp?ItemID=9F7452BF44EE814B8DB897C1858B71FE>, accessed 27 April 2011.

²⁵³ Law on Equal Opportunities of Women and Men, 'Official Gazette 66/2006& 117/2008'.

mechanism to ensure compliance is that it is an Act adopted by Parliament following a proposal by the Cabinet. It repeats the standing of the Equality Law, but introduces a positive definition: ‘An important condition for equality between men and women is the distribution of positions of power and decision²⁵⁴ (40 to 60 % for each gender) among men and women in every public aspect of social and political life’ (meaning the public sector). The general objective is phrased as: ‘advancement of equality between the genders and incorporating the gender perspective in policies, programmes and projects in different areas of social activity at national and local levels’. The only place where quotas are mentioned in the NAPGE is the so-called Strategic Goal II of ‘Women in the Decision-Making Process’ in the context of: ‘Prepared, adopted and implemented policies/measures/quotas’. This rather comprehensive document ends with a comprehensive bibliography, and under the title ‘International Obligations’, following ‘UN’, are the various EU directives related to this matter.

The affirmative measures are defined in the Law on Prevention and Protection from Discrimination.²⁵⁵ They are related to all grounds of discrimination (e.g. gender) and different fields (employment, education, social care, housing, etc.). The definition is related to discrimination, and to the measures that will not be perceived as discrimination (Chapter describing possible exceptions to discrimination).

1.2. Positive action measures/gender quotas in employment and self-employment

There are no positive action measures or gender quotas in the legislation on employment and self-employment. On the contrary, the Labour Law²⁵⁶ includes a clear ban on any different treatment on the ground of gender: ‘The employer should not announce the vacancy as only for men or for women, except if gender is a necessary condition to perform the work. The announcement of the vacancy must not suggest that the employer is giving any preferences to a certain sex.²⁵⁷’ The Labour Law is a *lex generalis* while the Law on State Administration, the Law on Public Administration etc. are *legi speciali*. Therefore, the Labour Law is applied in the area of the public sector only if a question is not covered by the *legi speciali*, meaning that it is predominantly applied in the private sector.

Another problem is that the anti-discrimination legislation (Equality and Anti-discrimination Law) has not been synchronised with other laws in the respective area in order to create viable options for non-discrimination and equality solutions.

1.3. Positive action measures/gender quotas in the access to and supply of goods and services

There are no quotas (including soft quotas) or numerical targets, only a general equality clause.

1.4. Positive action measures/gender quotas in the field of research and education

There are no quotas or numerical targets, only a general equality clause.

²⁵⁴ In the sense of division or balanced allocation.

²⁵⁵ Article 13, Official Gazette 50/2010.

²⁵⁶ Labour law (revised version), Official Gazette 16/2010.

²⁵⁷ Article 24, Labour law (revised version), Official Gazette 16/2010.

1.5. Positive action measures/gender quotas in legislature, political parties and/or political bodies

The Law on Political Parties²⁵⁸ in its Article 4 stipulates that political parties should ensure the implementation of the principle of gender equality (without defining whether through positive measures or by prohibition of discrimination) but only in the area of accessibility of the positions in their own political party. Although it is a legally binding provision, there is no mechanism to ensure compliance nor are there any sanctions. The vague wording and absence of protection in fact transform this provision into a legal declaration.

That is not the case with the Law on Elections²⁵⁹ which has two imperative and plausible clauses on quotas. In Article 4/3 it is stipulated that each sex will be represented by at least 30 % in the electoral bodies. The same quota is envisaged in the list of candidates for Members of Parliament and for municipal councils, in a different wording: Article 64/5 states that ‘(...) every three positions have to have at least one position for the less represented sex.’

This quota does not encompass the mayors’ lists. This differentiation is immediately reflected in practice. While the number of female Members of Parliament and members of municipal councils has reached approximately 30 %, there is not a single female mayor (for more information, see under 2 of this Report).

1.6. Positive action measures/gender quotas in other decision-making bodies or other areas

The Equality Law orders the decision-making and executive bodies to deal with positive measures in the public sector only. Parliament, besides adopting the NAPGE, is ordered to establish a Committee on equal opportunities for women and men (which was installed in September 2006), in order to monitor the legal regulation which is proposed by the Government of the Republic of Macedonia from the perspective of gender equality (Article 11).

The Cabinet has the task to ensure the implementation of this Law as such and to reflect *equal* participation of men and women in its working bodies and delegations, as well as task forces and coordinative bodies, appointees etc. (Article 12).

All other administrative bodies (Ministries and agencies) are supposed to implement the principle of gender equality and to have an employee to coordinate these issues (Article 13).

The Ministry of Labour and Social Policy is the key organ in the implementation of the Equality Law (Article 14) while the Ombudsman, again, is the supervising body (Article 15).

At the level of local self-government, the municipalities have the task to form committees for equal opportunities of women and men. The basic task of the committees is to advance the position of women and to provide equal opportunities for men and women at a local level, by creating and designing policies, putting them into effect, and by monitoring and evaluating the results achieved. Also, they have to appoint *coordinators* for equal opportunities of women and men in the municipalities that should have the status of civil servants (Articles 16 & 17).

²⁵⁸ Law on Political Parties, Official Gazette 76/2004.

²⁵⁹ Law on Elections (Изборен законик), Official Gazette 40/2006.

1.7. Conformity of gender quotas with equality legislation

Generally speaking, it could be concluded that there is conformity with EU legislation, but it depends on the course taken. Namely, in practice, Macedonian legislation only deals with gender equality in politics. And even there, two problems are quite apparent. First, there are still no solutions for more complex situations like the lack of female mayors. Secondly, the binding quotas are not interpreted as a minimum standard but more as an ultimate goal. Outside politics, legislation in practice only includes the legal declaration of the principle itself, especially in employment and in goods and services.

At the level of conformity with national legislation, a rather problematic provision is the one in Article 18 of the Equality Law. It envisages not only that the political parties within their own, internal programmes should adopt a biannual plan on equal opportunities including promoting *equal gender participation* in the bodies of that political party (which contradicts with Article 4 of the Law on Political Parties; see under 1.5 of this Report), but that they are also supposed to present the final draft of that plan to the Ministry of Labour and Social Policy (Article 18/2), and also to present it again to the same Ministry once they have adopted it (Article 18/3). This procedure, if implemented,²⁶⁰ enables the political parties in power to interfere, via the Ministry, in the internal affairs of political parties in the opposition.

A possibly more important issue is that of the comparison between the minorities' representation and gender equality. The first one lacks binding quotas, but combines two important aspects: adequate and equitable representation. In the interpretations of the term 'adequate', it is widely accepted in practice that it means quality, expertise and competence, usually connected with adequate working experience. By contrast, the gender equality principle has certain binding quotas, is phrased in apparently neutral wording, but at the same time means employing openly preferential treatment of the underrepresented sex. Therefore, although for the time being the minorities' representation in practice emphasizes achieving numerical targets, there are legal conditions for the implementation of the merit system in future. The gender equality principle lacks this legal condition of combining quantity and quality. The same legal wording as is used in the area of ethnic equality could be effective.

2. Positive action measures for women and gender quotas in practice

It is very difficult to track the implementation of positive action measures for women and gender quotas in practice. In general, there are very few clear examples of positive measures for women and gender quotas in practice and they are mainly related to political parties and state administration.

In numerous action plans and strategies which have been developed in the last few years, positive action is mentioned. However, it is not defined and usually just placed in the context of the implementation of EU regulations. There are no concrete mechanisms and activities which will enable such actions²⁶¹ and there is no system to evaluate the results (statistical or other data).

The body responsible for gender equality and for monitoring the implementation of the Equality Law was established in 2007, by the Act on Systematization and Organization of the Ministry of Labour and Social Policy, and is called the Sector for

²⁶⁰ There are no records that any political party has implemented this procedure and there are no records that the Ministry in question has initiated any sanctioning procedures against any political party for not complying with this provision.

²⁶¹ The institutions covered by the Equality Law are obliged to adopt positive measures in the periodical plans for gender equality. But no criteria or more detailed directions are set in this regard.

Equal Opportunities. It is the successor of the Unit for the Promotion of Gender Equality set up as part of the same Ministry in 1997.

The coordinators in the Ministries are obliged to issue annual reports (according to the Equality Law), however, this is still not systematic or transparent. On the other hand, the most comprehensive monitoring reports on the implementation of the Equality Law and (among other things) positive measures are produced by NGOs (e.g. *AkcijaZdruzenska*, reporting on an annual basis).²⁶²

2.1. Implementation of positive action measures for women and/or gender quotas

2.1.1. Implementation in employment, self-employment and vocational training

There are no written policies on positive action measures for women related to employment, neither in the public nor in the private sector. In all action plans and programmes related to employment, the gender equality principle is mentioned as a desired value, without further explanation of the practical tools to achieve it.

One of the most worrying elements concerning the strategic documents, plans of action and programmes, is the repetition of the same aims without evaluation of the previous activities. For example: in the National Action Plan for employment for 2009-2010,²⁶³ the objectives include the ambition to increase the employment rate of women from 30.1 % in 2005 to 38 % in 2010. According to the last data from the statistical office, the employment rate for women in the Republic of Macedonia in 2009 was 29.4, which is even lower than the employment rate in 2005.²⁶⁴ At the same time, the very same aim is defined in the National Strategy for the reduction of poverty 2010-2020,²⁶⁵ again without practical tools for accomplishment.

There are no positive action measures resulting from negotiations between social partners, corporate governance or employers' decisions. The only existing positive action measures are those in the Equality Law and in the plans of action derived from this law.

The NAPGE includes a special chapter entitled 'Women and employment'. The positive action consists of proclaimed support of women's entrepreneurship by financial and non-financial measures. However, there is no practical explanation of the measures that should/will be taken or the financial implications of such measures. Also, there is no obligation for public or private employers to develop policies based on this proclamation.

One of the projects designed as a positive action project is the Gender Budget Analysis. The aim of the project is to implement the gender perspective in budget policies and processes. This analysis mentions that there is a need to 'encourage' measures in employment to help implement the strategic aims.²⁶⁶ However, even in this analysis, positive action is not identified as an instrument to achieve gender equality.

²⁶² Report monitoring the policies for gender equality in the Republic of Macedonia, Skopje, December 2010, *AkcijaZdruzenska*, <http://www.zdruzenska.org.mk/article.asp?id=552>, accessed 27 April 2011.

²⁶³ <http://www.mtsp.gov.mk/?ItemID=BD66FCC3A7FBCB47AB9150CBFECD2C96>, accessed 27 April 2011.

²⁶⁴ Women and Men in Macedonia, 2010, State Statistical Office, page 74.

²⁶⁵ <http://www.undp.org.mk/content/publications/SocialExclusion%20Strategy%20MK%20final%20word.pdf>, accessed 27 April 2011.

²⁶⁶ Gender Budget Analysis: <http://www.mtsp.gov.mk/WBStorage/Files/Rodova%20Analiza%20ANGLISKI%2001%20MART%202010.pdf>, accessed 27 April 2011.

In the Operational Plan for active programmes for employment for 2011²⁶⁷ positive action measures are only mentioned in relation to victims of domestic violence (a target group of 70 women) and women from ethnic communities who have been unemployed for more than 3 months. These are the same target groups as in the 2009, 2010 and 2011 Operational Plans.

The national strategy for the development of small and medium-sized enterprises from 2002 includes one sentence where special training programmes for women are mentioned. The revised strategy (2002-2013) does not even mention these training programmes.²⁶⁸

2.1.2. Implementation in the access to and supply of goods and services

In the field of access to and supply of goods and services, the gender-neutral approach is dominant. Even in NAPGE, whenever possible the programmes and activities are related to men and women (for example: 'Improvement of Preventive Programmes for Advancement of Health of Men and Women for the Most Common Situations Regarding Morbidity and Mortality').

In October 2010 the Government adopted the National Strategy for the reduction of poverty and social exclusion 2010-2020. Positive action is not completely absent from the strategy,²⁶⁹ however, women are not mentioned as a specific category in the proposed measures in some fields (e.g. health, education, housing, transport, communication). The Strategy proclaims a new universal approach instead of targeting specific vulnerable groups.

2.1.3. Implementation in research and education

The national programme for the development of education²⁷⁰ provides for changes in the curriculum. However, none of these changes mention the gender dimension. There are no official written documents in schools to promote gender equality.

The NAPGE concludes that there are male and female professions and related education affiliations. Also, the existing data indicate insufficient inclusion of girls from rural areas, as well as of girls from minority communities in the educational process. Proposed activities are: Redesigning of textbooks and teaching aids at all levels of the educational system regarding stereotypes from the perspective of gender equality, and awareness-raising campaigns.

The NAPGE chapter entitled 'Gender Balancing in the Choice of Educational Occupations and Profiles in Secondary and Higher Educational Institutions' proposes numerous changes without explaining how to achieve them, and there are no visible results of any implementation.

Positive action measures and quotas are mentioned in some of the strategic plan documents related to the education of Roma. However, these are gender neutral.

2.1.4. Implementation in legislature, political parties and/or political bodies

Within the Parliament of the Republic of Macedonia, a *Committee* on equal opportunities for women and men was created in September 2006, with the task to monitor the legal regulations proposed by the Government of the Republic of

²⁶⁷ <http://www.mtsp.gov.mk/?ItemID=BD66FCC3A7FBCB47AB9150CBFECD2C96>, accessed 27 April 2011.

²⁶⁸ Ministry of Economy 2002, Ministry of Economy 2007.

²⁶⁹ <http://www.undp.org.mk/content/publications/SocialExclusion%20Strategy%20MK%20final%20word.pdf>, accessed 27 April 2011.

²⁷⁰ <http://www.npro.edu.mk/>, accessed 27 April 2011.

Macedonia from the perspective of gender equality.²⁷¹ The Committee had two meetings in 2009 and two in 2010 with one item on the agenda for each meeting.²⁷²

Apart from the Sector for Equal Opportunities, *coordinators* for equal opportunities of women and men are appointed at the Ministries. They are civil servants who are mainly employed in the units responsible for human resources, and in addition to their other tasks they have the obligation to monitor the Ministry's activities from the perspective of equal opportunities of women and men and to inform the Sector for Equal Opportunities to make certain suggestions and decisions in the field of gender equality.

The *coordinators* for equal opportunities of women and men have been appointed in 80 out of 84 municipalities. They have the status of civil servants and work to advance the equality between women and men and establish equal opportunities at local level. Their mandate is not clear and it does not include positive action as part of their work.

There is a requirement for public administration bodies and state-established entities (Ministries, and local government bodies) to elaborate positive action plans. However, according to the last monitoring reports only a limited number of them submit reports; these reports are not public.

2.1.5. Implementation in other decision-making bodies or areas

In 2009 the Ministry of Defence adopted the only document of its kind in Macedonia: the Programme for equal opportunities of men and women in the Ministry for Defence and the Army of the Republic of Macedonia. This document proclaims positive action measures. There are no records of any practice in this regard.

2.2. Effects of the positive action measures

As there are no policies or written documents on positive measures, any positive changes (e.g. the present situation in the central administration) could be explained as a result of *ad hoc* influence of women in Parliament and in the higher political party positions.²⁷³

On the other hand, although the municipalities are encouraged to foster and improve the gender balance of the municipal administration, no positive measures have been taken. Neither quotas, nor preferential treatment when employing new civil servants have been found.²⁷⁴

The Cabinet has shown a lack of sustainability of the whole process and has even seen a retrograde effect. After periods with three and even four female Ministers, now there are only two out of 24 ministerial positions. Of the same number of deputy

²⁷¹ <http://www.sobranie.mk/?ItemID=988772D659F5CF448B41939158D69EC9>, accessed 27 April 2011.

²⁷² <http://www.sobranie.mk/ext/workingbodiesessions.aspx?Id=d65dce36-7183-4be2-89fb-e6604c6fbdc5>, accessed 27 April 2011.

²⁷³ At first sight, the public administration seems gender balanced, with 51 % of the civil servants being women. Furthermore, the total number of women and men analysed from the perspective of seniority level is more or less balanced. In one of the highest positions in the public administration, General Secretary, there are even twice as many women as men. 'Achieving gender equality in Macedonia', Center for research and policy making, Skopje 2010; <http://www.crpm.org.mk/Papers/Gender%20web%20verzii/Achieving%20gender%20equality%20in%20Macedonia.pdf>, accessed 27 April 2011.

²⁷⁴ 'Achieving gender equality in Macedonia', Center for research and policy making, Skopje 2010; <http://www.crpm.org.mk/Papers/Gender%20web%20verzii/Achieving%20gender%20equality%20in%20Macedonia.pdf>, accessed 27 April 2011.

ministerial positions, there are only three female deputy ministers at the moment. In the local elections, no female mayors were elected.

The only real effects are visible in the areas where the Law on Elections stipulates legally binding quotas: both in Parliament and in the municipality councils there are more than 30 % women. At a certain moment both the NGOs and the Women's Lobby (in which Members of Parliament participate) managed to focus the public debate on the issue of women's representation in these two forms of political representation. This success was not repeated in other areas.

3. Case law

There is no case law to be reported.

4. Proposals

- Positive measures for women must be placed on the agenda as a specific issue.
- To further implement the concept, there is a need for more desegregated data on the basis of gender to illustrate the real situation of women in different fields and to support the claim for special measures.
- The highly general statements in the strategic documents should be replaced with more concrete measures and the financial implications of positive action measures should be identified.
- The obligation to develop policies should be introduced at the very concrete level of enterprises, schools, state bodies etc.
- Positive action on ethnic grounds should be crossed with positive action measures on the ground of gender.
- There must be support for public debates on gender equality and on the need for positive action measures in the private sector (e.g. initiatives such as the one started by a national representative of the International Finance Corporation, who presented the study 'Women on the Boards of Directors' as part of the project 'Corporative Management').²⁷⁵

MALTA – Peter G. Xuereb

1. National legislation on positive action measures/gender quotas

1.1. Positive action measures in the national legal system

The Constitution

The Constitution of Malta²⁷⁶ provides in Article 14 that '[t]he state shall promote the equal right of men and women to enjoy all economic, social, cultural, civil and political rights and for this purpose shall take appropriate measures to eliminate all forms of discrimination between the sexes by any person, organisation or enterprise: the state shall in particular aim at ensuring that women workers enjoy equal rights and the same wages for the same work as men.'

The Constitution further provides in Article 45(11) that nothing in the provisions of Article 45 (on non-discrimination) 'shall apply to any law or anything done under

²⁷⁵ http://iod.org.mk/mk/documents/Zenite_Vo_Odborite_Na_Direktori_Komparativen_Pregled.pdf, accessed 27 April 2011.

²⁷⁶ Available at <http://www.mjha.gov.mt/DownloadDocument.aspx?app=lom&itemid=8566>, accessed 27 May 2011.

the authority of a law, or to any procedure or arrangement, in so far as such law, thing done, procedure or arrangement provides for the taking of special measures aimed at accelerating *de facto* equality between men and women and in so far only as such measures, taking into account the social fabric of Malta, are shown to be reasonably justifiable in a democratic society’.

Readers will note the phrase: ‘taking into account the social fabric of Malta’ as additional to the phrase ‘reasonably justifiable in a democratic society’. At the time when this provision was drafted, the social fabric of Malta was certainly more patriarchal than it is today, so that any decision made then would not necessarily be taken in today’s social environment, although it has to be said that the sense of family and traditional family values and of gender stereotypes is by no means radically altered. Nevertheless, economic considerations themselves require that there be more women in employment or self-employment, and this has been felt and acknowledged in Maltese society for many years now, but has come to the fore of recent government pronouncements on the economy. This constitutional provision therefore sets out the legal criteria for the adoption of legitimate positive action, while invoking the social fabric. The provisions do not give rise to justiciable rights.

Equality for Men and Women Act

Article 2(4) of the Equality For Men and Women Act (Chapter 456 of the Laws of Malta, hereinafter ‘EMWA’) provides that nothing shall be deemed to constitute discriminatory treatment for the purposes of the Act ‘in so far as such treatment (a) is given to grant special protection to women during childbirth or pregnancy; (b) constitutes measures of positive action for the purpose of achieving substantive equality for men and women’. This provision certainly points in the direction of substantive equality in practice for men and women. However, again, of itself it confers no new rights.

Employment and Industrial Relations Act 2002

For the purposes of the Employment and Industrial Relations Act of 2002 (Chapter 452, Laws of Malta, hereinafter ‘EIRA’), ‘discriminatory treatment’ means any distinction, exclusion or restriction *which is not justifiable in a democratic society*. Article 26 provides that the prohibition against discriminatory treatment in Paragraphs (1) and (2) shall be without prejudice to the rights and obligations prescribed by the Equal Opportunities (Persons with Disability) Act, and shall not apply to *any preference or exclusion which is reasonably justified* taking into account the nature of the vacancy to be filled or the employment offered, or where a required characteristic constitutes a genuine and determining occupational requirement or where the requirements are established by any applicable laws or regulations. Furthermore, Article 31 provides that the Minister may ‘(...) prescribe regulations to give better effect to the provisions of Articles 26, 27, 28 and 29 and in particular (...) *for providing equal opportunities of employment for classes of persons who are at a disadvantage.*’ This power has not to date been used in order to enact measures of positive discrimination.

Access to Goods and Services and Their Supply (Equal Treatment) Regulations

Regulation 6 of the Access to Goods and Services and Their Supply (Equal Treatment) Regulations²⁷⁷ is typical; it provides that ‘With a view to ensuring full

²⁷⁷ Legal Notice 181 of 2008.

equality in practice between men and women, the principle of equal treatment shall not prevent *any person* from maintaining or adopting specific measures to prevent or compensate for disadvantages linked to sex.’

In relation to gender discrimination, while proactive measures are specifically excluded by statute²⁷⁸ from falling under the general prohibition against discriminatory measures and treatment, there is no real proactive approach taken. It can be argued that there are wider notions of equality and equality of opportunity (and sometimes of result) at play, side by side with legislation that is more narrowly focused on the absence of direct or indirect discrimination as defined by EU law, and that this is reflected in the narrower or broader legislative approaches and provisions addressing disability on the one hand and sex and other ‘grounds’ on the other. It is possible to argue that the approach is more substantive in the former case while more formal in the other cases. In the provisions addressing discrimination on grounds of disability, one finds a number of obligations imposed upon an employer (or prospective employer) which constitute such proactive steps while this is lacking (as an obligation, not as a voluntary option) in the gender field. Quotas may well be in force in political parties and in some commercial entities. However, no study has been carried out regarding such, and in so far as they exist they are not imposed by law, nor are they encouraged by any special government incentives, so that they remain purely voluntary.

Given that there is no clear enforceable obligation under national law (*on the State*) to take or to impose such proactive steps, responsibility for taking such steps is not clear. Regulation 6 of the Access to Goods and Services and Their Supply (Equal Treatment) Regulations²⁷⁹ is indicative, as stated above; it was seen that it provides that: ‘With a view to ensuring full equality in practice between men and women, the principle of equal treatment *shall not prevent any person* from maintaining or adopting specific measures to prevent or compensate for disadvantages linked to sex’. Such a provision does not identify any responsible party, or impose any obligation.

As part of its statutory remit, the National Commission for the Promotion of Equality (NCPE), Malta’s main equality body, is responsible for: identifying, establishing and updating all policies directly or indirectly related to equality for men and women, as well as keeping under review the working of the legislation, and, where deemed required, is to submit proposals for amendment or substitution of the relevant legislation.²⁸⁰ One should note that despite the lack of substantive legislative movement in this direction, there has been a shift towards pro-active policy making in some areas, aimed at bolstering female participation in the workforce, by both the central Government and various local councils; such as the allocation of resources to provide childcare and training facilities, adjusting the National Insurance contribution to favour women in employment and a number of other fiscal incentives, aimed at attracting women into or *back* into the work force. In general, it is left to the discretion of employers or the social partners as to what proactive steps they might wish to take, and there are no real examples of this beyond what has been indicated above.

²⁷⁸ Equality for Men and Women Act; Chapter 456 of the Laws of Malta; Article 2(4)(b). The laws of Malta are available at <http://www.justiceservices.gov.mt/LOM.aspx>.

²⁷⁹ Legal Notice 181 of 2008.

²⁸⁰ Equality for Men and Women Act; Chapter 456 of the Laws of Malta; Article 12.

1.2. Positive action measures/gender quotas in employment and self-employment

There are no recorded examples of positive action measures applicable generally in the public or the private sectors.

1.3. Positive action measures/gender quotas in the access to and supply of goods and services

No adoption of such specific measures is reported.

1.4 Positive action measures/gender quotas in the field of research and education

1.4.1. Research and academics

None reported. While there is full awareness of the proportionate dearth of women in the higher grades in academia, and even more specifically in scientific research, and while it is encouraging that some women have recently risen to top university posts (one Pro-Rector, ten Professors, two Faculty Deans), this has not been the result of any legislative or other positive measure or indeed of any positive action within the University or indeed of Government, which in general has a powerful say in University policy-making. It should be noted that the number of women graduates now exceeds that of men graduates.

1.4.2. Primary, secondary and higher education

None reported.

1.5. Positive action measures/gender quotas in legislature, political parties and/or political bodies

Apart from the adoption of a women's quota for their party candidate lists in the last general elections of 2008 by the opposition Labour Party (*Partit Laburista*), there have been no real moves in this direction. However, a shift appears to be occurring, with the most significant – if not widespread – change coming in the thinking of leading women politicians who have hitherto taken a negative or at best neutral stand to positive action in politics. This appears to be borne out by recent public pronouncements. It was reported in March of last year that at a seminar to mark International Women's Day there was a clearly detectable consensus in favour of 'some sort of positive discrimination in favour of women', with representatives of the two main political parties and other organisations starting to lean in favour of 'this idea' as a necessary means to increase the involvement of women in politics.²⁸¹ One Maltese MEP, Professor Edward Scicluna (MEP) has called it 'shameful' that not one of Malta's MEPs is a woman.²⁸²

²⁸¹ Claudia Calleja 'International Women's Day, Quotas a 'necessary evil', Women must shake off the culture of sacrifice', *Times of Malta* 9 March 2010, at <http://www.timesofmalta.com/articles/view/20100309/local/quotas-a-necessary-evil>, accessed 26 February 2011. See also Claudia Calleja 'Female MPs Quota will limit Electorate's Choice – PM', *Times of Malta* 10 March 2010, at <http://www.timesofmalta.com/articles/view/20100310/local/female-mps-quota-will-limit-electorates-choice-pm>, accessed 27 February 2011. See also Frances Camilleri-Cassar, *Gender Equality in Maltese Social Policy?* Agenda, 2005, pp.237-241.

²⁸² http://www.europarlmt.eu/view/en/Focus/Women_Public_Life.html?jsessionid=BC6397756050210EAD291364F2AD939A, accessed 28 February 2011.

1.6. Positive action measures/gender quotas in other decision-making bodies or other areas

While there has been an increase in the number of women in the judiciary, this tends to be at the level of magistrate, rather than judge.

There is no legislation or national provision on quotas for women on company boards applying to private companies and state-owned companies. Nor have there been any legislative proposals in this regard. Equally, there are no general codes of conduct, corporate governance codes etc. on quotas for women on company boards.

Nor is there at this time any sustained debate about quotas for women on company boards, although recent European Commission moves in this direction have given rise to some public discussion in Malta. Some contrasting positions have emerged. The matter was raised and discussed at a public dialogue event organised by the National Council of Women Malta held on 17 May 2010 with the title '*Women in Public Life – A Changing Scenario: More Women in Senior Positions – key to economic stability and growth*'. Both quotas and positive action were discussed from various perspectives, and it can be reported that there appeared to be an emerging consensus at that event that there was a need to speed up the inclusion of women in the highest decision-making level, namely in corporate board rooms. It was pointed out and noted that some European governments had already adopted a legislative approach by introducing gender quotas. Such were the findings of a Commission Report published in 2010,²⁸³ and the various reports of the Malta event, including on women's organisation websites, follow practically the same sense and wording of that Commission report. Two months earlier, Issue 10 of 'Chamberlink', which is the weekly newsletter of the Malta Chamber of Commerce, Enterprise and Industry, carried a message from the President, Ms Helga Ellul, wherein the President declared that the 'Malta Chamber does not believe in 'quick-fix' solutions for female participation whether for business or politics'. She added that 'We believe that artificial impositions are more limiting than helpful'. It is interesting to note that the above-mentioned Commission study of 2010, entitled '*More Women in Senior Positions – Key to Economic Stability and Growth*', had asked the question 'Gender quotas for boardrooms – a quick fix?' While noting that there had been a 3 % increase on average in Europe of women on company boards between 2003 and 2009 and that therefore progress was slow and unsatisfactory and there was a need to speed up female inclusion, as some governments were attempting to do through legislation, the European Commission report had noted that despite their capacity to bring about rapid change, legislative quotas remain controversial. This statement can be said to reflect the general overall position in Malta. There has been very little discussion of possible 'softer' options, including insertion of appropriate provision in corporate governance codes or similar. Indeed, the National Council of Women of Malta has observed that according to research carried out by employers only a small percentage of Maltese companies have a gender equality policy in place 'as required by EU law', while noting that ad hoc family-friendly arrangements were not uncommon.²⁸⁴

The Government would probably argue that it is possible, as the Commission Report had noted, for change to occur without specific pressure being brought on

²⁸³ *More women in Senior Positions – Key to Economic Stability and Growth*, European Commission, Directorate-General for Employment, Social Affairs and Equal Opportunities, Unit GI, available at <http://ec.europa.eu/social/search.jsp?pager.offset=40&langId=en&searchType=null&mode=quick&order=null&quickSearchKey=More%20women%20in%20Senior%20Positions>, accessed 3 March 2011.

²⁸⁴ See <http://www.ncwmalta.com/councilviews?id=57>, accessed 15 February 2011.

companies, and this could be done through the creation across government policy of the underlying conditions to ensure equal access to, and distribution of, resources of and power between men and women.

While it is broadly assumed that government example can change private corporate practice, and this approach has been used in other areas, such as with the introduction of family-friendly measures such as reduced hours, and it has been the case that the Government has sometimes taken the lead, directing the public sector to follow, in the hope that the private sector would also follow suit, yet this approach does not appear to have commended itself when it comes to women in decision-making and company boards. As for Government, guidelines have been issued for the constitution of government boards with due attention to gender balance, but these are worded in very general and loose terms, and it appears that the numbers of women appointed have rarely moved beyond 18 % of such boards or committees.²⁸⁵

1.7. Conformity of gender quotas with equality legislation

The matter does not arise due to the lack of resort to such quotas.

2. Positive action measures for women and gender quotas in practice

2.1. Implementation of positive action measures for women and/or gender quotas

2.1.1. Implementation in employment, self-employment and vocational training

As quotas do not exist, the question of their implementation does not arise. As far as positive action is concerned, the Government has taken the lead in areas such as child-care, flexible working time, tax incentives aimed at encouraging women to return to work, leave and reduced hours. However, it is fair to say that the private sector has not followed this lead in the way that Government had hoped that it would.

The Government defines positive action as including the type of measures described above. Government and public bodies do have a gender policy,²⁸⁶ but the focus is on these types of measures, and true positive action measures are not in evidence. The position can be contrasted with that relating to disability. The law requires that enterprises and institutions employing not less than 20 persons should employ a quota (2 %) of disabled persons.²⁸⁷

2.1.2. Implementation in the access to and supply of goods and services

None reported, by contrast with the law relating to disabled persons.²⁸⁸

2.1.3. Implementation in research and education

None reported, by contrast with the law relating to disabled persons.

²⁸⁵ See Frances Camilleri-Cassar, cit., at p. 241.

²⁸⁶ See, for example, the University of Malta's Gender Issues Committee Policy, at http://www.um.edu.mt/_data/assets/pdf_file/0008/46466/policy.pdf, accessed 2 March 2011.

²⁸⁷ See Persons with Disability (Employment) Act, Chapter 210 of the Laws of Malta, as amended, among other legislation. The laws of Malta can be accessed at <http://www.justiceservices.gov.mt/LOM.aspx?pageid=24>, accessed 20 May 2011.

²⁸⁸ See Equal Opportunities (Persons with Disability) Act of 2000, Chapter 413 of the Laws of Malta, as amended. Besides employment, the Act covers education, access to goods and services, accessibility, insurance and accommodation. It obliges employers to make reasonable accommodation (Section 7(2)), and in Section 15 treats as an 'exemption' any 'action' taken by any person that falls under the head of 'positive discrimination'. The language is therefore that of exception to the equal treatment principle.

2.1.4. Implementation in legislature, political parties and/or political bodies

The Labour Party has employed quotas for its candidate lists, with no dramatic success as to result.

2.1.5. Implementation in other decision-making bodies or areas

The Government has issued guidelines on equal treatment applicable to government boards and committees, with no measured real impact in practice as yet. There is no requirement to elaborate positive action plans by public administration bodies or state-established entities. Gender equality does not as a rule figure in collective bargaining.

2.2. Effects of the positive action measures

Positive action measures have been very limited, indeed confined in the political electoral sphere to internal party policy in the opposition *Partit Laburista* (Labour Party), in the form of a women's quota (of 20 %) for party candidate lists for the last general elections in 2008. I am informed that such a policy operates within the Nationalist Party structures. This did not appear to have had any impact on the number of women candidates elected (even from among the Labour Party candidates). Nor have the range of so-called positive action measures taken by the Government made any significant impact, albeit there has been some increase in female employment. In particular they have failed to inspire the private sector to make any significant effort in this regard.

3. Case law

3.1. Case law of national courts

None reported.

3.2. Case law of equality bodies

Not applicable.

3.3. Case law of other bodies

None reported.

4. Proposals

No official proposals have been made. Despite statements going back at least ten years in favour of positive action, while excluding recourse to mandatory quotas as a policy tool,²⁸⁹ the position in terms of women's participation has, predictably, not altered in substance since then, although it is possible to discern slow progress by reference to participation in local councils for example. This applies in all spheres of public and commercial life. The difficulty is certainly structural and embedded, and only partly explained by the extremely low participation rate of women in employment, a phenomenon that itself can only be explained by reference to Malta's socio-cultural milieu.

For its part, the National Commission for the Promotion of Equality for Men and Women (NCPE), the equality body set up by the Act, has wide functions including policy- formulation and monitoring functions. The first annual report (2004) of the Commission, published (ISBN 99909-89-13-3) in 2005 and covering the first year of

²⁸⁹ See for example the statements of the then Minister for Social Policy, currently Prime Minister, Dr. Lawrence Gonzi, in April 2001, at http://www.msp.gov.mt/documents/wis/01WIS_LG02.pdf, last accessed 28 February 2011.

the NCPE's operation, referred to positive action measures (page 11) and spoke of the initiation of 'discussions with various local institutions in order to promote practices based on the principle of equality'. The NCPE then drafted a 'gender equality clause' which it hoped would thenceforth be included in all public tender contracts under the then new Public Contracts Regulations of 2006; this provided inter alia that '(...) the Contractor shall be bound to ensure an equal distribution of the sexes in the different occupational levels. If this for some reason is not possible, and therefore, the distribution is unbalanced in favour of one of the sexes, the Contractor is required to submit a proper explanation to justify such imbalances'²⁹⁰ (Source: NCPE Annual Report 2004, p.45). The NCPE's priorities for action for 2004-2006 included that of undertaking a feasibility study on the implications of introducing targets/quotas with respect to gender in Malta.

The voluntary approach has not resulted in any recorded use of positive action measures. Whether this or any other Government in Malta will be willing to engage in any legislative exercise without Union prompting is very dubitable. That raises the question of the desirability of and the need for European Union level action of a mandatory nature. Of course, this would also mean amendment of current EU legislation, and would open a full debate at European level. In this Report, it is not possible to explore the wider implications or to go into any detail, but it is clear that while soft law measures may have an impact on the situation in Malta in the medium to long term, the short term is a different matter altogether. Those who wish to see significant immediate change would no doubt argue for some form of binding Union legislation aimed at seeing gender balance achieved in practice. As reported above, there has been some public discussion, but this has not led to any concrete suggestions or proposals.

THE NETHERLANDS – Rikki Holtmaat

1. National legislation on positive action measures/gender quotas

1.1. Positive action measures in the national legal system

This section describes the *general legal provisions* concerning positive action which are applicable with respect to various non-discrimination grounds and in many different areas (employment, education, housing, et cetera). The following paragraphs describe the legislation that is applicable in certain specified areas.

Legislation

There is no provision in the Dutch Constitution *prescribing* positive action measures or allowing for such measures to be taken. The Dutch equal treatment legislation²⁹¹ contains various clauses *allowing* for positive action measures to be taken. The terminology for this is 'preferential treatment'. There are no clauses in these laws in which positive action measures or quotas are prescribed or are made mandatory. The instrument of soft or hard quotas is not mentioned as a particular kind of positive action measure. Therefore, there are also no legal norms in which a particular percentage of men and women is mentioned.²⁹²

²⁹⁰ NCPE Annual Report 2004, p. 45 available at www.equality@gov.mt, accessed 3 March 2011.

²⁹¹ The Netherlands has a series of equal treatment laws which are applicable to different grounds and in different areas. Only those laws that contain positive action clauses will be discussed here.

²⁹² Quotas are proposed for company boards. See section 1.2. of this Report.

The General Equal Treatment Act (GETA), which applies to a broad range of non-discrimination grounds, contains an exception to the prohibition of unequal treatment, but only in the case of *sex* and *ethnic or cultural minorities*. See Article 2(3) of the GETA which reads as follows:

‘The prohibition on discrimination as contained in this Act does not apply if the aim of the discriminatory measure is to place women or persons belonging to a particular ethnic or cultural minority group in a privileged position in order to eliminate or reduce existing inequalities connected with race or sex and the discrimination is in reasonable proportion to that aim.’

The scope of the exception

As regards *sex*, one should note that the Dutch legislation only allows positive action for *women*, not for men or for the underrepresented sex.²⁹³

Apart from race/ethnicity and sex, mentioned in the GETA, positive action measures are also allowed under Article 3(1) sub. (c) of the Disability Discrimination Act (DDA).

The GETA has a broad material scope, including goods and services, primary and secondary education and housing. For the ground OF race/ethnicity it also covers social security and social services. The scope of the DDA includes primary and secondary education and housing. Positive action measures are mostly applied in the area of employment and education.

The construction of the exception and its legitimisation

Positive action measures are legally construed as an *exception* to the equal treatment principle; i.e. they are not perceived as a competing but equally valuable interpretation of the equal treatment principle. From this, one may conclude that this principle is primarily constructed as formal legal equality. The fact that the clauses in the GETA and DDA allow for positive action and do not prescribe it also means that a failure to develop such policies may not be brought before the courts, as was explicitly stated during the process of drafting the law.²⁹⁴

The main reason given by the legislator to include this provision in the equal treatment law is that this legislation aims at the *elimination* or the *reduction* of factual existing inequalities. The positive action provision is clearly not more generally aimed at *preventing future discrimination*.²⁹⁵ In 2004-2005, it was again discussed in Parliament why this exception is not applicable in the case of other non-discrimination grounds. The Government stated that this was not necessary, since only women, ethnic and cultural minorities and disabled persons did and still do actually suffer from discrimination in a *structural* and *systemic* way.²⁹⁶ It is apparent that the objective of the Government is primarily to overcome the effects of past and present structural and systemic discrimination against these groups. The legitimization of this exception clause is not linked to certain biological or physical characteristics of these

²⁹³ Originally, the equality legislation did allow positive action measures for the underrepresented sex. The reason for the amendment of the law in 1989 was that, on the whole, women are discriminated against in society whereas men are not. (*Staatsblad* 1989, 169.)

²⁹⁴ See *Kamerstukken II* 1987-1988, 19 906, no. 6, p. 11 and 13.

²⁹⁵ See the Explanatory Memorandum to the EC Implementation Act, *Kamerstukken II* 2002-2003, 28 770, no. 3, p. 9.

²⁹⁶ Memorandum on Preferential Treatment (*‘Nota Voorkeursbehandeling’*), *Kamerstukken II* 2004-2005, 28 770, no. 11.

groups.²⁹⁷ Arguments like the welfare state (*Sozialstaat*) or the value of diversity, the proportional distribution of social goods, opportunities and power are also not mentioned explicitly by the legislator.

1.2. Positive action measures/gender quotas in employment and self-employment²⁹⁸

Employment and self-employment

Article 7:646 par. 4 of the Civil Code (*Burgerlijk Wetboek*) (applicable to employment) reads:

‘Derogation from par. 1 is permitted in case of stipulations which aim at placing female employees in a privileged position in order to eliminate or reduce de facto inequalities and provided that the different treatment is reasonably proportionate to the intended aim.’²⁹⁹

Art. 5 (1) of the *Wet gelijke behandeling van mannen en vrouwen bij de arbeid* (Act on Equal treatment for men and women in employment (WGBm/v)) (applicable in employment and self employment) reads:

‘A derogation from (the equal treatment norms laid down in) Articles 1, 1a, 2, 3 and 4 of this Act is allowed, when the difference made aims to put women in a privileged position in order to eliminate or reduce de facto inequalities and provided that the different treatment is reasonably proportionate to the intended aim.’

The GETA and the DDA also apply to the areas of employment and self-employment. Therefore, positive action plans in this area in relation to *ethnic and cultural minorities* and *disabled persons* are also allowed.³⁰⁰

In practice, this exception applies to the process of recruitment and selecting/hiring personnel and to the conditions of the labour contract and/or working conditions, including pay. Positive action measures in fact are mostly related to recruitment/hiring. Sometimes they are related to other working conditions, like e.g. the right to use childcare facilities of the organization or company, or special training programmes which are only available for women (or ethnic minorities/disabled persons) within the organization or company. Also, the equal treatment laws are applicable to access to vocational training and all conditions under which this training may be followed.

²⁹⁷ In as far as women, ethnic minorities or disabled people do need such special protection, other exception clauses in the equal treatment legislation provide possibilities to develop such measures.

²⁹⁸ The equal treatment legislation in the Netherlands is equally applicable in both the private and the public sector; there is also no difference between private and state-owned companies. Therefore this subdivision is not made in this section. The last part of the section discusses positive action in the area of membership of company boards.

²⁹⁹ Although this clause only refers to ‘stipulations’ in a labour contract, also stipulations in collective labour agreements are meant to fall under this exception clause.

³⁰⁰ The Age Discrimination Act (ADA) does not contain a positive action exception clause, but since unequal treatment on the ground of age may be objectively justified in any case, the defence that the unequal treatment is in fact a positive action measure may be raised and will be tested in the same way as described above.

Although the law does speak in general terms of ‘putting women’³⁰¹ in a privileged position’, in practice three different kinds of such preferential treatment policies are distinguished, when it concerns the area of recruiting new personnel. These are:

- the recruitment is only directed at women (absolute preference);
- the recruitment is directed at both men and women, but when the m/f applicants are equally qualified for the job, preference will be given to a woman (weak preference);
- the recruitment is directed at both men and women, but when there is a suitable female candidate, preference will be given to her, even if there is a more or better qualified male candidate (strong preference).³⁰²

The first method is generally rejected in the Netherlands as being contrary to the guidelines given by the ECJ (e.g. in the *Kalanke* case), especially the requirement that an individual assessment needs to take place. It appears that the third method is also not acceptable, at least according to the interpretation that the ETC has given to this ECJ case law.³⁰³ The acceptability of the second type of measure depends inter alia on the conditions, mentioned below, and on the general condition that it needs to be specified in great detail what are exactly the requirements or qualifications that are needed for the particular job at hand and when a candidate can be deemed to be ‘equally suitable’.

With respect to other positive action policies, e.g. a policy to give preferential treatment to women as regards the right to participate in training programmes or as regards the right to childcare facilities, there are no such subdivisions. Such programmes are either open to both men and women, or only open to women (or men). In the latter case, there needs to be a ‘very weighty reason’ for doing so. Their acceptability depends on the outcome of a test in which:

- it is ascertained that there is indeed a pressing need for the company to have such a preferential treatment policy;
- that the policy is appropriate and necessary to achieve the aim of eliminating the underrepresentation of women in the company/organization, or in certain function groups of the company/organization. (See for more criteria, below.)

On 31 January 2011, the ETC issued a *News Letter*, in which it summarizes the legal guidelines that it uses in any case of positive action that it investigates.³⁰⁴ The general point of view is that – at least when the positions that are at stake are to be considered as employment relationships – EU legislation and case law prohibit a system of fixed quotas and require an individual assessment of each job applicant’s capabilities and suitability for the job.

From the case law of especially the ETC as regards the provisions in the Civil Code and the Act on Equal Treatment for Men and Women in Employment (WGBm/v), and from the parliamentary debates on the GETA, it may be derived that the following conditions need to be fulfilled for any such preferential treatment or

³⁰¹ Where we state ‘women’ here, the same applies to ethnic and cultural minorities and disabled persons.

³⁰² See Asscher-Vonk & Monster, *op cit*, p. 81.

³⁰³ See e.g. ETC Opinion 2010-27, dd 24 Febr. 2010, to be found at: <http://www.cgb.nl/node/15057/volledig>, last accessed 8 March 2011. (Reported in Newsflash 02-2010.)

³⁰⁴ See http://www.cgb.nl/nieuws/bericht/1000000537/31_01_2011_over_voorkeursbeleid_voor_ondermeer_vrouwen, last accessed 16 February 2011). In 2010, the ETC also published a brochure on this topic: see <http://www.cgb.nl/node/15095>, last accessed 7 March, 2011.

positive action measure in the area of employment and self-employment to be valid.³⁰⁵

- any positive action plan needs to be in writing and must clearly specify the aims and methods of the plan;
- the disadvantaged position of a certain group in relation to a certain function or class of functions must be clearly provable with the help of e.g. statistical evidence; the proportion of the disadvantaged or underrepresented group in the organisation/company needs to be compared to their presence or availability more generally on the labour market;
- for each function or class of functions it needs to be established which kind of preferential treatment measures would be the most appropriate to achieve the goal of putting an end to the underrepresentation; any measure must be proportionate and possibly effective in relation to that aim;
- if there is public advertising for certain functions for which a positive action plan applies, this should be made clear in the advertisement.

Representation of women on company boards

In the Netherlands there is as yet no legislation on quotas for women on company boards. However, at the initiative of a member of the Labour Party, the Second Chamber of Parliament adopted an amendment to the Civil Code in which quotas for women were introduced in company law.³⁰⁶ The amendment obliges private and state-owned public limited companies (in Art. 2:266 Civil Code) and private limited companies (Art. 2:276 Civil Code) to establish a share of at least 30% of both sexes on the company's board of executive directors and on the supervisory board when they have met certain criteria.³⁰⁷ (See Articles 2:166 par. 1 and 2:276, par. 1 Civil Code.) If a company does not reach this target of 30%, this failure must be explained in the annual report to the shareholders, accompanied by the introduction of new measures which will be applied by the company in order to reach the target. (See Article 2:391, par. 7 Civil Code). There are no sanctions for not meeting the quotas. The measure has a temporary character, because the Government expects that it will soon no longer be necessary, and will be abolished on 1 January 2016. (See Article IV of the Bill amending the Civil Code.) The amendment was accepted in the Second Chamber of Parliament on 8 December 2009 and still needs to be discussed in the Senate (First Chamber).

1.3. Positive action measures/gender quotas in the access to and supply of goods and services

Article 2(3) of the GETA, quoted above in section 1.1. of this report, is applicable in the area of access to and the supply of goods and services (see Art. 7 GETA). The general criteria as regards proportionality need to be applied in this case as well. *Mutatis mutandis*, it is to be expected that the courts and the ETC will apply the other

³⁰⁵ See Asscher-Vonk & Monster, *op cit*, p. 80. The authors here write about sex discrimination, but it must be concluded that the same conditions apply in relation to the other grounds for which this exception is allowed. See *Idem*, p. 88.

³⁰⁶ *Kamerstukken II* 2009-2010, 31 763, no. 14.

³⁰⁷ The need to have assets worth > EUR 17 500 000, an annual turnover of > EUR 35 000 000 and > 250 employees. A Company which does not meet at least two of these three requirements needs to take into account, *as far as possible*, a balanced representation of both sexes in its procedures to select new members of the board of executive directors or the board of supervisors, and in the drafting of the characterization of any vacancy. (See Articles 2:166, and 2:276 par. 2 Civil Code.)

criteria, mentioned in sections 1.1. and 1.2., in the case of positive action plans in this area.

1.4. Positive action measures/gender quotas in the field of research and education

1.4.1. Research and academia

There are no *legal* measures to increase the number of women in the area of research or academia. (For academic teaching, see the next section of this report.)

1.4.2. Primary, secondary and higher education

In order to increase the number of women in *management positions* in primary and secondary schools and higher education, a specific law was adopted in 1997.³⁰⁸ This Law obliges primary and secondary schools, schools for special education, higher professional education and university boards to regularly compile policy reports on how they intend to improve the number of female managers on their management boards. The aim of the Act is to strive for a ‘proportionate representation’ of women. No concrete targets or quotas are prescribed and no sanctions for not reporting are imposed. It was foreseen in the Act that it would expire in 2002.³⁰⁹ However, the latest versions of the relevant education laws still contain this obligation.³¹⁰

No legislation exists with respect to increasing the numbers of women working as *teachers* or as *academic teaching staff* or with respect to attaining a better representation of both sexes. The number of female teachers heavily outweighs the number of male teachers, especially in primary education. It is exactly the other way around as far as university professors are concerned.³¹¹

1.5. Positive action measures/gender quotas in legislature, political parties and/or political bodies

There is no legislation on gender quotas in political parties/representative bodies. Neither is there any legislation on (wider) positive action measures in this area.

1.6. Positive action measures/gender quotas in other decision-making bodies or other areas

No legislation exists at this point.

³⁰⁸ *Kamerstukken II 1995-1996, 24-149. Wet van 14 februari 1997, houdende wijziging van enkele onderwijswetten in verband met het opnemen van een document inzake evenredige vertegenwoordiging van vrouwen in leidinggevende functies in het onderwijs* (Staatsblad 1997, 105)

³⁰⁹ See the Letter of the Minister of Education, Culture and Science of 16 August 2006, AP/A&A/2006/32302. To be downloaded from: <http://www.rijksoverheid.nl/documenten-en-publicaties/kamerstukken/2006/08/17/eindrapport-vervolgevaluatie-wet-evenredige-vertegenwoordiging-wev.html>, accessed 6 March 2011.

³¹⁰ See e.g., Article 30 of the Act on Primary Education (*Wet op het Primair Onderwijs*), Article 32 of the Act on Secondary Education (*Wet op het Voortgezet Onderwijs*) and Article 2.2 of the Act on Higher Education (*Wet op het Hoger Onderwijs*).

³¹¹ Only 18 % of students training to become primary schoolteachers are male (2010), only 15 % of teachers at primary schools are male. See e.g. <http://www.leraar24.nl/dossier/1723>, accessed 6 March 2011. With regard to university professors: only 12 % of them are females. See e.g. <http://www.stichtingdebeauvoir.nl/index.php/montop>, accessed 6 March 2011). See more generally the overview compiled by the Ministry of Education ‘*Werken in het onderwijs 2010*’ (Available in Pdf on the Internet; search with the title of the report.)

1.7. Conformity of gender quotas with equality legislation

Quotas may be in conformity with equal treatment legislation, provided that they remain within the limits set therein. (See sections 1.1. and 1.2. of this report.) In the area of recruitment for personnel the instrument of setting quotas, and on that basis giving *automatic preferential treatment* to women (who are qualified for the job), is not acceptable. In other areas, quotas may be acceptable, provided they are part of a positive action plan that is well defined and has clear aims, and that they are appropriate and necessary to reach these aims.

2. Positive action measures for women and gender quotas in practice

2.1. Implementation of positive action measures for women and/or gender quotas

General remark as regards all sub-areas

In as far as such measures are being taken at all in the Netherlands, they take place on a voluntary basis. The only exception to this is the area of education, where there is a certain obligation to enhance a 'proportionate representation of women' in school and university management, and to report on the progress made thereon. There is also no institutional infrastructure accompanying positive action policies or efforts. There are equal opportunities officers within some public administration bodies (e.g. ministries or local governments), but this depends on the internal policies of these bodies. Most notably, the Ministry of the Interior and Kingdom Relations, responsible for the employment of all civil servants, and the Ministry of Education, Culture and Science, responsible for women's emancipation policies, have departments that are engaged in the development of policy plans.

In its latest official emancipation policy report, the Government announced that it strives for certain target percentages ('*streefcijfers*') to be met in 2010.³¹² These targets are set for various sectors, even where the Government has no direct influence in appointing personnel or members of boards. The following percentages are mentioned as regards increasing the number of women in the following positions in 2010:

- the most senior civil servant functions to 25 %,
- the top management in (private) companies to 20 %,
- the most senior functions in the non-profit sector to 35 %,
- political organs to 45 %,
- professorships to 15 %.

The policy plan does not prescribe specific methods (e.g. quotas or preferential treatment policies) to attain these targets. It describes several activities by the Government that could support the policies of various organisations to increase the participation of women. According to the latest Emancipation Monitor, apart from higher management in the civil servant sector (2010 = 26 %), the targets mentioned above had not been met in 2010.³¹³

³¹² See the Emancipation Policy Plan (*Meerjarenbeleidsplan Emancipatie*) for 2006-2010; to be downloaded from: http://www.iiav.nl/publications/2005/meerjarenbeleidsplanemancipatie2006_2010.pdf, accessed 9 march 2011.

³¹³ See *SCP Emancipatiemonitor 2010*, to be downloaded from: http://www.scp.nl/Publicaties/Alle_publicaties/Publicaties_2011/Emancipatiemonitor_2010, accessed 9 March 2011.

2.1.1. Implementation in employment, self-employment and vocational training

As regards employment etc.

As far as *private employers* are concerned, very few positive action measures actually exist in the country. Some positive action measures were taken in the 1980s and early 1990s, but the instrument became less and less popular from then onwards.³¹⁴ This trend has even increased in the last couple of years. Positive action measures have become less regulated in Collective Agreements as well.³¹⁵

The Government has taken a few measures to stimulate the increase of women at the management level of companies and organisations. Opportunity in Business was supported by the Government between 1999 and 2002.³¹⁶ The Government also established the 'Part-time Plus Task Force' (*Taskforce Deeltijd Plus*), in order to promote that Dutch women start working more than (only) in minor part-time jobs. In a reaction by the Cabinet to its final report in 2010, however, no specific positive action measures were announced.³¹⁷

In *public employment*, positive action plans are more common. In 1999, all Ministries accepted special tasks for themselves in this respect. The Ministry of the Interior and Kingdom Relations, for example, accepted the obligation to raise the number of female firefighters, women in higher civil servant positions, women in the police force etc. The Ministry of Defence accepted the task to raise the number of women in the military forces to 8 %. These policies did not contain strict quotas, but specific quantitative objectives (*'strefcijfers'*).³¹⁸ After the implementation period for this plan had expired, no new plan was established and an official 'central record' of these plans no longer exists. In 2009-2010, the Ministry of the Interior and Kingdom Relations still had a positive action policy as regards its own personnel policies (the appointment of civil servants) as far as women and ethnic minorities were concerned. This policy included personnel of the police and the fire service. The Coalition Agreement of the current Liberal (VVD) and Christian Democrat (CDA) minority government explicitly provides that the Government will terminate all activities and programmes concerning positive action and diversity policies on the grounds of race/ethnicity and gender. The selection of personnel will have to take place on the basis of the quality of the candidates in question.³¹⁹

³¹⁴ Ina Sjerps, The Netherlands, in the *Report on Positive Action Measures*; Report issued by the Commission's Network of legal experts on the application of Community law on equal treatment between women and men; European Commission April 2005.

³¹⁵ The latest report on the existence of positive action plans in Collective Agreements dates from 1997. See the Report by Ina Sjerps (2005) *op cit*.

³¹⁶ See www.opportunity.nl, accessed 9 March 2011. The organization is now a professional expert institute in the area of diversity management.

³¹⁷ See the Cabinet's reaction to the final report of this Task Force at: <http://www.rijksoverheid.nl/documenten-en-publicaties/kamerstukken/2010/09/03/kabinetsstandpunt-eindrapport-taskforce-deeltijdplus.html>, accessed 6 March 2011.

³¹⁸ An overview of the policies of the different ministries can be found in *Actieplan taakstellingen departementen 1999-2002*. See the Letter of 8 April 1999 of the Vice Minister of Social Affairs to the Second Chamber with the Action Plan's objectives in emancipation targets at the Ministries (*Aktieplan Emancipatietaakstellingen Departementen*); *Kamerstukken II* 1998-1999, 26 206, no. 11

³¹⁹ The clause in the agreement is (in Dutch): '*Het kabinet beëindigt het diversiteits/voorkeursbeleid op basis van geslacht en etnische herkomst. Selectie moet plaatsvinden op basis van kwaliteit*'. See *regeerakkoord*, p. 26, under the heading '*integratie*' (integration). The text may be found at: <http://www.rijksoverheid.nl/regering/het-kabinet/regeerakkoord/immigratie>, accessed 18 October 2010).

As regards company boards³²⁰

There are some initiatives in this area.³²¹ The main instrument is the so-called Corporate Governance Code, issued by the Government on the basis of Article 2:391, par. 5 of the Civil Code. In 2009, two *diversity* clauses were included in this Code. The first concerns the characterization or profile of the Supervisory Board in terms of the number of board members, their expertise, their capacities, etc.; the second concerns the actual composition of the Board. In both fields, the Code stresses that diversity in terms of age, nationality, gender, expertise and social background is necessary. It is requested that the Company makes public what its targets in this respect are and that in the annual report to the shareholders the policies in this respect are described. The Code does not contain ‘hard’ quotas, nor is there any sanction foreseen when companies do not live up to these diversity standards. Most companies do not report on this issue, or report that they do not meet their own targets in this respect.

The second initiative concerns the ‘*Talent naar de Top*’ (‘Talent to the Top’) Foundation, subsidised by the Government to organise special events and to monitor the implementation of a so-called ‘Charter’.³²² In the Charter, a company or organisation formulates its own target percentages as regards the representation of women in top management and/or on the board. The Charter also describes the policies that a company or organisation will follow to attain these targets, as well as a timeframe for implementation. By now (March 2011) 168 different companies and public and private organisations (e.g. in the area of health care or education) in the Netherlands have already signed such a Charter.³²³ Companies and organisations that have signed a Charter are obliged to report to the Monitoring Committee, which publishes an annual overview of the progress that has been made.³²⁴

2.1.2. Implementation in the access to and supply of goods and services

The present author is not familiar with any initiative to design positive action measures in this area. One could argue that some ‘women-only facilities’ (e.g. a fitness centre that is only for women, or swimming lessons for only (minority) women) could be seen as a form of ‘positive action’. However, such policies are hardly ever presented as such.

2.1.3. Implementation in research and education

There is no information as to in what way and in how far the existing legislation³²⁵ as regards the proportional representation of women in *education management* is implemented/monitored by the national government. It appears that some school boards do indeed draft a plan according to the legislative requirements and publish

³²⁰ In the Netherlands, company board members are seen as employees when certain civil law conditions are met.

³²¹ More details are given in the report that was submitted on the ground of the Ad Hoc Request on Quotas in Company Boards, February 2011.

³²² See for the English text of the Principles on which the Charter rests: <http://www.talentnaardetop.nl/charter-en/Principles.htm>, last accessed 16 February 2011.

³²³ A list of signatories may be found at <http://www.talentnaardetop.nl/charter-en/Signatories.htm>, last accessed 16 February 2011.

³²⁴ See for the report on 2009 (issued in 2010): <http://www.talentnaardetop.nl/Charter/Rapportage-Commissie-Monitoring-2010.htm>, accessed 16 February 2011. The report on 2010 will be published on 26 May 2011. An English summary of the 2009 report is available with the author of the ad hoc request report.

³²⁵ See section 1.4. of this report.

them. From the latest Emancipation Monitor, it appears that the percentage of women in the management of higher education institutions has increased considerably in the last couple of years (from 24 % in 2008 to 28 % in 2010). However, the general target of 35 % of women in top management in the non-profit sector has still not been met.³²⁶

As regards *research*, especially at the level of academic (university) institutions, the Netherlands Organization for Scientific Research (NWO) has a programme to stimulate and support women's academic careers (the *Aspasia Programme*.) It subsidises universities to promote their female staff members who have the rank of lecturer to the rank of assistant professor or full professor. Grants are linked to competing for one of the major research funding programmes of the NWO by female candidates. One of the conditions is that the university board spends part of the grant on more general positive action policies that will help to increase the number of women in higher academic ranks.³²⁷ There are no reports about the effectiveness of this policy. However, the number of female professors still stagnates at a mere 12 %.³²⁸ Several university boards have signed up to the so-called 'Charter' of 'Talent to the Top' (see section 1.2.1. above.)

2.1.4. Implementation in the legislature, political parties and/or political bodies

There are no legal quotas prescribed for this sector. Most political parties voluntarily try to ascertain that every list of candidates for representative bodies contains at least a minimum number of women. For example, the PvdA (Labour Party) has an official policy aimed at all lists of candidates which states that they must contain 50 % women and 50 % men. Another example is the Green Party, which has the policy of listing female and male candidates alternately.

2.1.5. Implementation in other decision-making bodies or areas

In November 2007 the Government agreed to start setting target figures for the number of women on government advisory boards: 50 % of all board member should be women, and 10 % should be members of a minority group.³²⁹ The appointment of a member or the chair of these boards is the authority of the relevant Minister, who is responsible for meeting these targets. From the latest Emancipation Monitor, it appears that in the last few years the percentage of women on Advisory Boards has slightly increased to just below 30 %.³³⁰

2.1. Effects of the positive action measures

There are no studies of the effects of the existing positive action measures in the country. There is a steady increase in the percentage of women who are active on the labour market, albeit mostly on a part-time basis. Monitoring the developments takes place on a bi-annual basis by the Social & Cultural Planning Office (*Sociaal Cultureel*

³²⁶ See *SCP Emancipatiemonitor 2010*, *op cit.* at p. 240.

³²⁷ See for more details: <http://www.nwo.nl/aspasia>, accessed 9 March 2011.

³²⁸ See <http://www.kennislink.nl/publicaties/aantal-vrouwelijke-hoogleraren-neemt-langzaam-toe>, accessed 8 April 2011.

³²⁹ See 'The 5th Report from the Netherlands about the implementation of the UN Women's Convention. To be downloaded from: <http://www.rijksoverheid.nl/documenten-en-publicaties/kamerstukken/2008/11/04/aanbieding-5e-rapportage-implementatie-van-het-vn-vrouwenverdrag.html> (at p. 67), accessed 9 March 2011.

³³⁰ See *Emancipatiemonitor 2010*, at p. 241, to be downloaded from: http://www.scp.nl/Publicaties/Alle_publicaties/Publicaties_2011/Emancipatiemonitor_2010, accessed 9 March 2011.

Planbureau).³³¹ From this report it is obvious that the position of women in higher management, politics and higher ranks in academia is still far less than 50 %.

3. Case law

3.1. Case law of national courts

There are very few cases from national courts on the topic of positive action measures or preferential treatment (which is the relevant legal term in the Netherlands). A search of the main portal for the publication of judicial decisions (www.rechtspraak.nl) shows that only two such cases that have come before the courts in the past decade were published there.³³²

3.2. Case law of equality bodies

From a quick search of the website of the current ETC, it appears that since 1994 some 19 positive action measures on the ground of sex were examined, as against 10 measures on the ground of ethnicity/race.³³³ The criteria that are applied by the ETC are described above in this Report.

3.3. Case law of other bodies

The CEDAW Committee, in reaction to the fifth periodical Dutch Report on the period 2005-2008, has posed questions to the Government about its ‘temporary special measures’ under Article 4 of the Convention, both in respect of the labour market and political participation.³³⁴ In its Concluding Comments, the Committee made several recommendations about applying more actively a policy of temporary special measures in these areas.³³⁵ To date, the Government has not announced any concrete measures in reaction to the comments made by the CEDAW Committee.³³⁶

4. Proposals

Any proposal by the European Commission in this area of positive action will most probably be met with a great deal of political resistance in the Netherlands.³³⁷ This already became apparent from the negative reaction given by a Liberal MP to the suggestion, made by European Commissioner Viviane Reding in a Dutch national

³³¹ See *Emancipatiemonitor 2010*, *op cit*.

³³² The first in fact concerns a case where also ethnic minorities were targeted by the preferential treatment policy of a local council. See Hof Leeuwarden, 4 August 1999, LJN: AA1048. The second case is a judgment by the Central Appeals Tribunal (the highest administrative court in the country) of 25 July 2002, LJN: AF1900. In both cases, the courts did not extensively test the contested positive action plan, but concluded on other grounds that the claim should be dismissed.

³³³ See the website of the ETC, www.cgb.nl (accessed 6 March 2011) and use the search terms ‘voorkeursbeleid: vrouwen’ and ‘voorkeursbeleid: allochtonen’, or generally ‘voorkeursbeleid’.

³³⁴ See CEDAW Pre-session Working Group 45th Session Jan.-Feb. 2010, UN Doc. CEDAW/C/Nld/Q5, par. 15 and 25.

³³⁵ Concluding Observations the Netherlands, UN Doc. CEDAW/C/NLD/CO5. See esp. the recommendations in paragraphs 22, 23, 32, 33, 36 and 37. The document may be downloaded from: <http://www.steo.nl/documenten/vnl/Genevefeb2010/COBS2010.pdf>, accessed 9 March 2011.

³³⁶ See for the so-called governmental response Letter of 4 March 2010 of the Vice Minister to the Second Chamber of Parliament, to be downloaded from: <http://www.rijksoverheid.nl/documenten-en-publicaties/notas/2010/07/05/kabinetsreactie-op-de-aanbevelingen-van-het-committee-on-the-elimination-of-discrimination-against-women-cedaw-comite.html>, accessed 9 March 2011.

³³⁷ See supra footnote 319.

daily newspaper, about possible European Union positive action measures in the area of corporate governance.³³⁸

NORWAY – *Helga Aune*

1. National legislation on positive action measures/gender quotas

1.1. Positive action measures in the national legal system

Directive 76/207/EEC and its Article 2(4), or Recast Directive 2006/54/EC Article 3, is included in the European Economic Area Agreement (EEA) through its Article 70.³³⁹ The Directive and the provision allowing positive action measures in the employment field were implemented in the Gender Equality Act of 1978, 9 June, No. 45 (GEA).³⁴⁰ The GEA applies to all areas of society, with the small exception of internal matters of religious societies. In that respect, the GEA has a broader scope than (the current) Article 157(4) of the Treaty on the Functioning of the EU and Directive 76/207/EEC. Article 157(4) is not directly part of the EEA. It is, however, a clearly stated aim to ensure the same development of the equal treatment principle in the EU and the EEA. The EFTA Court will naturally look closely at the ECJ's interpretation of the Article.

Section 3, first paragraph of the GEA states the general rule that direct or indirect differential treatment of women and men is not permitted. Section 1, first paragraph states that: *'The Act shall promote gender equality and aims in particular at improving the position of women'*. Section 3a regulates affirmative action in favour of one of the sexes and is viewed as an exception from the general rule in Section 3. Section 3a, first paragraph, first sentence, states that: *'Different treatment that promotes gender equality in conformity with the purpose of this Act is not a contravention of section 3'*. The second sentence pronounces that the same applies to special rights and rules regarding measures that are intended to protect women in connection with pregnancy, childbirth and breastfeeding.

Section 3a is interpreted in accordance to the EEA. Section 3a is interpreted as only allowing for affirmative action where two employees or applicants are equally qualified or near-equally qualified for a position. It is a requirement that the means chosen are proportionate to the aim of the action. Also, it is a requirement that the action is intended to last only for a limited time period, only until the aim is achieved. Section 3a, second paragraph states that: *'The King (i.e. the Government) may prescribe further provisions as to which types of different treatment are permitted in pursuance of this Act, including provisions regarding affirmative action in favour of men in connection with the education and care of children.'* One central regulation has been introduced as a result of Section 3a. The central regulation of 1998-07-17-622 – *Forskriftomsærbehandlingavmenn* – affirmative action in favour of men – allows differential treatment in favour of men when it regards recruitment for a position

³³⁸ See <http://archieff.nrc.nl/?modus=1&text=Opinie&hit=4&set=1&check=Y>, accessed 6 March 2011.

³³⁹ See the EEA agreement: http://www.lovdata.no/cgi-wift/wiftldles?doc=/app/gratis/www/docroot/all/nl-19921127-109.html&emne=eos-lov*&&, accessed 7 March 2011.

³⁴⁰ See the Gender Equality Act: http://www.lovdata.no/cgi-wift/wiftldles?doc=/app/gratis/www/docroot/all/nl-19780609-045.html&emne=likestilling*&&, accessed 7 March 2011.

within education and care of children.³⁴¹ Also affirmative action may be applied where it is about attracting male applicants to such schools. The condition in either case is that the male applicant has to be just as qualified or near-equally qualified as the female applicant, see Section 2 of the regulation. In addition, men must be underrepresented for the type of position in the actual enterprise involved, see Section 4 of the regulation. The reason for introducing this regulation was that male role models were viewed as a way of influencing future generations to become a less gender-segregated society.

1.2. Positive action measures/gender quotas in employment and self-employment

1.2.1. The public sector

Four different measures apply: 1) The Gender Equality Act Section 21, 2) The Local Government Act (*Kommuneloven*) Section 80, 3) company legislation and 4) voluntary self-imposed quotas in most political parties and their electoral lists based upon the model in the GEA Section 21. The latter no. 4) is the only one not bound by legislation.

In December 2003, the Norwegian Parliament adopted legislation on gender representation to be imposed on all publicly owned enterprises (state-owned limited liability and public limited companies, state-owned enterprises, companies initiated by special legislation and inter-municipal companies) and all public limited companies in the private sector. The rules regarding gender representation also apply to limited liability companies which are wholly-owned subsidiaries of state-owned limited liability companies, state-owned public limited companies or state-owned enterprises. Public limited companies normally have a broader spread of shares and less personal involvement in the management.

The Public Limited Liability Companies Act of 13 June 1997 No. 45 Section 6-11a³⁴² states:

- ‘§ 6-11a. Requirement of representation of both men and women on the company board (*Krav om representasjon av begge kjønn i styret*)
- (1) On the board of Public Limited Liability Companies both genders/sex shall be represented in the following manner: (*I styret i allmennaksjeselskap skal begge kjønn være representert på følgende måte*):
1. On boards consisting of two or three members, both men and women shall be represented. (*Har styret to eller tre medlemmer, skal begge kjønn være representert*).
 2. On boards consisting of four or five members, both genders shall be represented by at least two. (*Har styret fire eller fem medlemmer, skal hvert kjønn være representert med minst to*).
 3. On boards consisting of six to eight members, both genders shall be represented by at least three. (*Har styret seks til åtte medlemmer, skal hvert kjønn være representert med minst tre*).
 4. On boards consisting of nine members, both genders shall be represented by at least four, and if the board consists of more than nine members each gender shall be represented by at least 40 %. (*Har styret ni medlemmer, skal hvert*

³⁴¹ See Regulation 1998-07-17 no. 622, http://www.lovdata.no/cgi-wift/wiftldles?doc=/app/gratis/www/docroot/for/sf/bl/bl-19980717-0622.html&emne=forskrift*%20om*%20særbehandling*%20av*%20menn*&&, accessed 7 March 2011.

³⁴² Translation by H. Aune.

kjønn være representert med minst fire, og har styret flere medlemmer, skal hvert kjønn være representert med minst 40 prosent).

5. The rules as stated in no. 1 – no. 4 equally apply to the election of deputy members. (*Reglene i nr. 1 til 4 gjelder tilsvarende ved valg av varamedlemmer*).

- (2) The rules as stated in the first paragraph do not apply to board members elected by and amongst the employee representatives as stated in Section 6-4 or 6-37 first paragraph. When two or three members of the board are to be elected as prescribed in this first sentence, both men and women shall be represented. The same applies to the election of deputy members. The rules as prescribed in this Section (1) nos. 1 and 2 do not apply in cases where one gender accounts for less than 20 % of the total number of employees in the enterprise at the time of the election. (*Første ledd omfatter ikke styremedlemmer som skal velges blant de ansatte etter § 6-4 eller § 6-37 første ledd. Når det skal velges to eller flere styremedlemmer som nevnt i første punktum, skal begge kjønn være representert. Det samme gjelder for varamedlemmer. Annet og tredje punktum gjelder ikke dersom et av kjønnene utgjør mindre enn 20 prosent av samlet antall ansatte i selskapet på det tidspunkt valget skjer*)

List of most relevant Acts:

- The Public Limited Liability Companies Act of 13 June 1997 No. 45 Section 6-11a.³⁴³ These provisions are the model for all equivalent quotas in other Acts.
- The Limited Liability Companies Act of 13 June 1997 No. 44 *Lovomaksjeselskaper [aksjeloven]*, Section 20-6.³⁴⁴
- The Local Government Act (*Kommuneloven*) Section 80 a.³⁴⁵
- The Act on Mutual Societies of 29 June 2007 No. 81 (*Lovomsamvirkeforetak (samvirkelova)*). Section 69 of this Act provides requirements of gender balance on the board in line with the provisions in the Limited Liability Companies Act Section 20-6, provided that the society holds more than 1000 members.³⁴⁶
- The Act on Foundations of 15 June 2001 no. 59 (*Lovomstiftelser (stiftelsesloven)*) provides in Section 27a a requirement of gender balance on the board in cases where the State or the municipality or county appoints its members to the board. In that case the Gender Equality Act Section 21 applies.³⁴⁷
- The Local Government Act (*Kommuneloven*) Section 80a refers to the Limited Liability Companies Act Section 20-6 and states that the rule equally applies to the requirements of gender balance in boards of companies where the county/municipality owns (alone or jointly) at least two thirds of the stocks in the

³⁴³ See (in Norwegian) the following website: http://www.lovdata.no/cgi-wift/wiftdles?doc=/app/gratis/www/docroot/all/nl-19970613-045.html&emne=allmennaksjelov*&&, accessed 7 March 2011.

³⁴⁴ See (in Norwegian) the following website: http://www.lovdata.no/cgi-wift/wiftdles?doc=/app/gratis/www/docroot/all/nl-19970613-044.html&emne=aksjelov*&&, accessed 7 March 2011.

³⁴⁵ See (in Norwegian) the following website: <http://www.lovdata.no/all/tl-19920925-107-015.html#80a>, accessed 7 March 2011.

³⁴⁶ See (in Norwegian) the following website: http://www.lovdata.no/cgi-wift/wiftdles?doc=/app/gratis/www/docroot/all/nl-20070629-081.html&emne=samvirkeforetak*&&, accessed 7 March 2011.

³⁴⁷ See (in Norwegian) the following website: http://www.lovdata.no/cgi-wift/wiftdles?doc=/app/gratis/www/docroot/all/nl-20010615-059.html&emne=stiftels*&&, accessed 7 March 2011.

company.³⁴⁸ The Ministry is also granted the right to issue Regulations stating that the same rules as described in the Local Government Act (*Kommuneloven*) Section 80 a equally apply to companies owned by the county/municipality for less than two thirds of the stocks, in cases where the rest of the company is owned by the State or companies which are directly or indirectly completely owned by the State. The Local Government Act (*Kommuneloven*) Section 80a was amended by addition to the Act on 19 June 2009 no. 91 and entered into force on 1 January 2010, allowing already existing boards a time limit of two years to meet the requirements.

Company legislation provides general provisions for the enforcement of the rules regarding the composition of the board. The rules regarding gender representation have a natural place in these general provisions regarding companies – on equal footing with other requirements such as for book-keeping, accounting etc.. Thus, no special rules have been adopted for enforcement of gender representation and this requirement will be enforced through the normal control routines followed by the Register of Business Enterprises. Under these rules, the Register of Business Enterprises will refuse to register a company board, if its composition does not meet the statutory requirements, just as it refuses registration if the chief executive officer or auditor does not fulfil the legal conditions. A company which does not have a board that fulfils the statutory requirements may be dissolved by order of the Court of Probate and Bankruptcy.

1.2.2. The private sector

The GEA equally applies to the public and private sector. No rules have been adopted for privately owned limited liability companies because most of these companies in Norway are small family enterprises and the owners themselves are members of the board. An employer, who wishes to use positive action as a way to enhance equality, may do so within the requirements of the GEA without seeking approval in advance. For example, companies will often specifically encourage members of the underrepresented sex to apply when announcing vacancies for specific positions. Another example is a company that arranged a workshop on leadership skills only for its female employees; see the Ombud's case 10/2004. The Ombud found this action to be in accordance with the GEA.

1.2.3. State-owned companies

See my answer to 1.2.1 above.

1.2.4. Differences between the public and the private sector

The private sector as regards privately owned limited liability companies does not have any quota requirements.

1.3. Positive action measures/gender quotas in the access to and supply of goods and services

I am not familiar with any such measures in legislation apart from the general rule in Section 2 of the GEA, prohibiting gender discrimination in all areas of society (a minor exception for religious communities).

³⁴⁸ See (in Norwegian) the following website: <http://www.lovdata.no/all/tl-19920925-107-015.html#80a>, accessed 7 March 2011.

1.4. Positive action measures/gender quotas in the field of research and education

1.4.1. Research and academics

There are no requirements in legislation regarding quotas and affirmative action apart from the general provision in GEA Section 3a and thus there are no sections regarding quotas in the University Act. This is typical for the Norwegian legislation technique. The aim and goal is defined in the Act (here the GEA) and then it is up to the companies, often in collaboration with the employee representatives, to make specific action plans as to how to reach these goals at the specific workplace.

1.4.2. Primary, secondary and higher education³⁴⁹

There are no requirements in legislation regarding quotas and affirmative action apart from the general provision in GEA Section 3a. Raising the number of male employees in kindergartens³⁵⁰ has been a centre of attention for a long time. This target is also reflected in GEA Section 3a, last paragraph, which states the possibility for affirmative action in favour of men in connection with the education and care of children and has led to the adaptation of such regulation (FOR-1998-07-17-622 *forskriftomsærbehandlingavmenn*).³⁵¹

1.5. Positive action measures/gender quotas in legislature, political parties and/or political bodies

There are no provisions in the Constitution on positive measures/gender quotas.

GEA Section 21 states the rule regarding representation of both men and women in all public boards and committees. Examples are public appointed boards of any kind, being the Board of the National Museum, official delegations representing Norway, e.g. to the UN, and committees preparing legal reforms. If a board has two or three members, members of both sex shall be represented. If a board has four or five members, each sex shall be represented by a minimum of two. If a board has between six and eight members, each sex shall be represented by a minimum of three. If a board has nine members, each sex shall be represented by a minimum of four members. If a board has more than nine members, each sex shall be represented by a minimum of 40 %. The rules apply accordingly to the appointment or election of substitutes. Exceptions to the rules may only be made in so far as special circumstances make it obviously unreasonable to fulfil the requirements. There is a Guide on the application of Section 21.³⁵² The use of Section 21 was evaluated in 2008 and resulted in a consultative paper in 2009 (green paper - invitation to submit

³⁴⁹ Various legislation regarding the education sector states the principle of gender equality as a fundamental value to be part of all education, see the Act on Education of 17 July 1998 no. 61 (*Opplæringsloven*) Section 1-1, fourth paragraph, the Act on Kindergartens of 17 June 2005 no. 64 (*Barnehageloven*) Section 2, third paragraph. In the action plans, the Ministry of Education points to the reality where Norway has a strong gender division in the various fields of education and subsequently in the jobs that girls and boys choose. Kindergartens shall raise children to be participants in a society of gender equality.

³⁵⁰ <http://www.regjeringen.no/en/dep/kd/Documents/Reports-and-actionplans/Actionplans/2008/action-plan-for-gender-equality.html?id=508110>, accessed 7 March 2011.
See also http://www.regjeringen.no/nb/dep/kd/dok/lover_regler/reglement/2006/rammeplan-for-barnehagens-innhold-og-opp/2.html?id=278628, accessed 7 March 2011.

³⁵¹ See regulation FOR-1998-07-17-622 *forskrift om særbehandling av menn*:
http://www.lovdata.no/cgi-wift/wiftldles?doc=/usr/www/lovdata/for/sf/bl/bl-19980717-0622.html&emne=s%20c6rbehandling*%20%2b%20av*%20menn*&&, accessed 7 March 2011.

³⁵² See <http://www.regjeringen.no/nb/dep/bld/dok/rundskriv/2005/rundskriv-om-representasjon-av-begge-kjo.html?id=109525>, accessed 7 March 2011.

comments) regarding the evaluation of GEA Section 21.³⁵³ One of the suggestions was to strengthen the control of the appointments to committees as well as to include some sanctions in relation to instances where the requirement is not fulfilled. The form of sanctions may need to vary depending on what areas are at stake and this is one of the issues regarding which consultative remarks are wanted.

1.6. Positive action measures/gender quotas in other decision-making bodies or other areas

In some collective agreements there are clauses stating that members of the underrepresented sex should specifically be encouraged to apply for vacant positions. The Collective Agreement for public employees and the State as employer (Hovedavtale i Staten, 2002–2005), lists positive action as one of many measures in Agreement § 21. §21, No. 1, last paragraph, states that positive action may be applied with the following rules: ‘If there are several applicants who are equally or near-equally qualified for a vacant position in the state/public sector, applicants from the underrepresented gender, i.e. less than 40 % of the employees in the relevant category of employees in question, shall have the right to the position before members of the gender having the majority. Normally, positive action measures in favour of men should not be agreed or arranged for.’ § 21, No. 4, states that announcements of vacancies shall be phrased with the intent to recruit both male and female applicants.

1.7. Conformity of gender quotas with equality legislation

The EFTA Court’s case *E-1/02*,³⁵⁴ regarding the reservation of academic positions for women at the University of Oslo, caused the University of Oslo to look even more closely at the factors and structures slowing down women and to directly deal with them. Action plans on gender equality have been adopted. No sanctions have been applied if the targets stressed in the plans have not been met. Case *E-1/02* concerned the fact that the Norwegian Government had funded positions for professors for which only women could apply as a way to increase the number of female professors in academia.

2. Positive action measures for women and gender quotas in practice

2.1. Implementation of positive action measures for women and/or gender quotas

2.1.1. Implementation in employment, self-employment and vocational training

All companies comply with the requirement of gender-balanced boards due to the fact that these rules are sanctioned with the same efficiency as those that apply to other company requirements. If the requirement is not fulfilled, the sanction is that the company will be dissolved. Facing this reality all companies comply with the requirement.

The Tribunal cases referred to under 3 below indicate that some positive action measures are applied during the hiring process where especially members of the underrepresented sex are asked to apply and if candidates are of equal or close to equal qualifications, the member of the underrepresented sex will be favoured.

To my knowledge, gender quotas are not openly applied in the hiring process, this being direct discrimination based on gender.

³⁵³ See <http://www.regjeringen.no/nb/dep/bld/dok/hoyringar/hoeringsdok/2009/horing---evaluering-av-likestillingslove/horingsnotat.html?id=584251>, accessed 7 March 2011.

³⁵⁴ http://www.eftacourt.int/index.php/cases/case_e_1_02/, accessed 5 April 2011.

2.1.2. Implementation in the access to and supply of goods and services

The Tribunal cases referred to under 3 indicate that advantages such as places for a child at a kindergarten have been applied, being viewed as a service to enhance the possibility for women to pursue their career. This was found to be in violation of the Gender Equality Act and thus is no longer a possible measure. The other case regarding a place at a kindergarten was from the perspective of the children attending the kindergarten, and not from the perspective of the parents needing carers for their children. Even though the reason to reserve three of the available spots for members of the underrepresented sex was to improve the gender balance in the teaching environment for children, it still regards children's access to a service.

2.1.3. Implementation in research and education

Many universities and colleges have action plans for gender equality and defined targets to improve the gender balance at the various levels of researchers and professors. See for instance the University of Oslo, which had a plan to ensure that 40 % of professors were women by 2011, but at the beginning of 2011 the percentage is still only 25 %. The targets are sought to be reached by especially requesting women/members of the underrepresented sex to apply for positions and if applicants are found near-equally qualified, the member of the underrepresented sex will be favoured. At university level, a lot of attention has been given to gender representation, both at the level of employment, counting the number of female professors as well as integrating the gender perspective in curriculum and teaching.³⁵⁵ These action plans may be defined as soft quotas.

The Norwegian State's Reports to the CEDAW Committee (eight reports in the period of 1981-2010) provide a detailed insight into a wide range of measures that have been tried in order to achieve greater equality between men and women both in the education system and in working life. These measures have varied from campaigns to influence stereotypical gender patterns in education to granting extra admission points to the underrepresented sex in certain fields of education. Some of these campaigns were successful and others were not.

2.1.4. Implementation in legislature, political parties and/or political bodies

Section 21 of the Gender Equality Act was introduced into the GEA in 1981 and has acted as a model for the majority of political parties, who have on a self-regulatory basis copied this quota system for their internal work. In 2009 39.6 % of the Members of Parliament were women.³⁵⁶

2.1.5. Implementation in other decision-making bodies or areas

It is a Government aim to increase the number of female judges at the national level as well as at each local court level - see the preparatory works Ot.prp.nr. 44 (2000-2001) and St.prp.No.1 (2007-2008) page 47, as well as *Instillingsrådetspolicynotat* of

³⁵⁵ See for instance Decision no. 4 regarding the integration of a women's and gender perspective in the compulsory subjects of the Law Study Programme of the Board of the Law Faculty, University of Oslo, 21 January 2002. In addition, there are reports on women in research, see *KIF-Komiteen* 30 April 2008 and an evaluation of gender equality in plans and budgets at the University of Oslo 2007. See also: Report on 'Kvinne- og kjønnsperspektivet i Master i rettsvitenskap', <http://www.duo.uio.no/sok/work.html?WORKID=69591>, last accessed 23 November 2009. See also the EFTA Court's case *E-1/02* University of Oslo.

³⁵⁶ See: <http://stortinget.no/no/>, accessed 5 April 2011.

February 2007. The Government has appointed several female judges where they regarded applicants to be near-equally qualified. Some of the male judges who have felt to be the victim of sex discrimination have filed complaints to the Ombud and one even to court. Some cases were lost, some were won.

2.2. Effects of the positive action measures

Detailed statistics regarding various matters divided by gender are provided by 'Statistic Norway' as well as by annual reports from the Equality and Anti-discrimination Ombud. To my knowledge, statistics to determine the effect of quotas may only be found in the annual reports following companies' report duty according to Section 1a. However, the quality of the reports varies, as revealed in the Ombud's evaluation of the 50 municipalities fulfilling their obligations according to Section 1a.

The one big success story regarding quotas are the very strict quotas in company law. The secret is that the quota requirement is on equal footing with all other general requirements applying to companies and that the same sanctions apply. After a series of warnings, the final sanction is dissolution of the company. This threat is so powerful that no companies have been dissolved due to the gender requirement on company boards. See the last paragraph under 1.2.1.

3. Case law

3.1. Case law of national courts

There is only one case to report: Oslo Municipal Court of 8 July 2010 (TOSLO-2010-7432) regarding the appointment of a judge's position as head of a Municipal Court (court of first instance). Three applicants were nominated for the job and listed one through three. The Government appointed applicant no. three, a woman. Applicant no. one claimed to have been the victim of direct discrimination because of gender. The question at stake was whether the conditions for applying Section 3a of the Gender Equality Act had been fulfilled. Applicant no. one claimed that his qualifications as a leader were better. After an overall assessment of the applicants' qualifications, the Court found that the two applicants were of equal qualification and that therefore the Government had not discriminated against the applicant when it appointed the member of the underrepresented sex. The Court's decision was in line with the Tribunal's decision in the same case, see LDN-2009-23.

3.2. Case law of equality bodies

The cases for the Tribunal may be sorted under the following categories: a) appointments to positions, b) advantages for one gender only, c) access to various services.

a) Appointments to positions

These cases all involve detailed scrutiny of the factors involved in the evaluation of the applicants' qualifications.

LDN-2009-33 – Forsvarssjefen nominated applicant A (male) for the position as Head of the Norwegian Defence University College (NDUC)- *ForsvaretsSkolesenter* (FSS), and applicant C (female) was not on the list of nominees. The Minister of Defence nominated applicant C for the position as head of the school based on an overall assessment of A and C's qualifications. The Ministry stated that even though C lacked the operational experience that A had, C received very good recommendations as the current leader of the school in question. In addition, the

Ministry openly argued that appointing a woman would be very important in light of the clear political aim of increasing the number of women in leading positions in the military. C was nominated number one for the position by the Ministry and the Government appointed C to the position as *kontreadmiral* and head of the Military School by royal decree of 1 February 2008. Applicant A filed a complaint to the Gender Equality and Discrimination Ombud in August 2008. In August 2009 the Ombud found that the conditions of Section 3a in the Gender Equality Act had been fulfilled and that thus no discrimination had taken place. Applicant A appealed to the Tribunal and the case came before the Tribunal in November 2009. The Tribunal was divided 3-2. The majority found that Applicant A had been the victim of discrimination, as they found that A was better qualified than C. The minority found that the Ministry of Defence had rightly argued that the applicants were near-equally qualified. The minority also pointed to the Ministry's duty of activity to promote gender equality according to Gender Equality Act Section 1a and that the appointment of a woman in this high-ranking position was of great importance for the work of equality.

This case was about an appointment performed by the Government and the Tribunal has no competence to issue binding decisions in these kinds of cases, according to the *discriminationombudsloven* Section 9. However, the Tribunal has the obligation to provide an opinion about whether or not the issue contradicts the Gender Equality Act or not.

LKN-2005-4 – The question was whether or not a university had violated the Gender Equality Act when it employed B and not A as a junior professor. A tribunal unanimously found that of the two applicants A seemed to be more qualified than B and thus the burden of proof fell on the university. However, as the university proved that their evaluation had been based on the trial lectures and amongst many other factors they especially seemed to conclude that B seemed to have stronger pedagogical skills than A, it was found that no discrimination had occurred.

LKN-2002-12 – The question at stake was whether or not a municipality had violated the Gender Equality Act when it specifically encouraged men to apply for positions in the health and care sector. The Tribunal unanimously found that the municipality had good cause to specifically encourage men to apply for positions, as only 4 % of the employees were men, in addition to the specific desire for male careworkers for some of the male patients.

b) Advantages for one gender only

These cases vary from awards for the underrepresented sex to attracting them to schools or institutions and stimulating women to work as board member.

LDN-2006-20- The costs of a training course for work on company boards were partly covered for female participants, and in addition to that 2/3 of the places at the course were reserved for women only. Not in violation of the GEA.

LDN-2006-1- A municipality provided financial support to companies that recruited female board leaders. Not in violation of the GEA.

LKN-2005-23- A college awarded female students that started at their school of engineering a travel and education scholarship of approximately EUR 3 000 (NOK 25 000). Not in violation of the GEA.

c) Access to services

LKN-2005-12- A kindergarten disregarded the waiting list and offered the three places available to boys, as this was the underrepresented sex among the children. Not in violation of the GEA.

LKN-2004-10 – Children of female PhD students were given priority at a university kindergarten, while children of male PhD students were not. This was in violation of the GEA.

The Ombud has received a few complaints regarding separate courses for men's and women's fitness clubs. The conclusions in these cases have been that this was not in violation of the GEA.³⁵⁷

3.3. Case law of other bodies

There is no case law of other bodies to report.

I would like to recall the EFTA Court's case *E-1/02* regarding the reservation of academic positions for women.³⁵⁸

4. Proposals

There are no proposals for new legislation on positive action measures. However, Section 21 regarding gender-balance requirements for a minimum of 40 % for each sex in all committees etc. is under evaluation. One of the issues discussed is the need for more efficient control to ensure that the requirements are fulfilled and sanctions in case of violations.

The overall challenge is the practical implementation of existing measures and achieving the targets set.

POLAND – Eleonora Zielińska

1. National legislation on positive action measures/gender quotas

1.1. Positive action measures in the national legal system

In the Polish Constitution of 1997³⁵⁹ there is no direct general reference to the promotion of gender equality and positive action. The Constitution only contains a general equality and anti-discriminatory clause (Article 32) and declares that both women and men have equal rights (Article 33).

Poland has no specific gender equality law or equal opportunities (treatment) Act. The legal basis for the implementation of positive action measures is provided for in some particular laws (mainly in: the Labour Code,³⁶⁰ the Law on implementation of several EU provisions in the matter of equal treatment,³⁶¹ the Laws on the electoral

³⁵⁷ See <http://www.ldo.no/no/Klagesaker/Arkiv/2011/Treningssenter-kun-gir-tilbud-til-kvinner/> and;

³⁵⁸ EFTA Surveillance Authority v The Kingdom of Norway
http://www.eftacourt.int/images/uploads/E-1-02_Judgment.pdf, accessed February 2011.

³⁵⁹ *Dziennik Ustaw* (Journal of Laws of the Republic of Poland; hereinafter referred to as the 'JoL') 1997 No. 78 item 483 with amendments. All legislation is available online: <http://orka.sejm.gov.pl>, accessed 1 March 2011.

³⁶⁰ Labour Code (hereinafter referred to as the 'LC') of 26 June 1974 as amended, 1974, No. 11, item 38; consolidated text JoL 1998, No. 21, item 92, with amendments.

³⁶¹ Act of 3 December 2010 JoL 2010 No. 254, item 1700 (hereinafter referred as the '2010 Law'. This Law implements the following Directives: Council Directive 86/613/EEC of 11 December 1986 on the application of the principle of equal treatment between men and women engaged in an activity, including agriculture, in a self-employed capacity, and on the protection of self-employed women

system,³⁶² and the Law on higher education).³⁶³ Since the amendment of the Labour Code in 2003,³⁶⁴ its provisions cover positive action aimed against other grounds of discrimination than gender, such as race, ethnic origin, religion or belief, disability, age, sexual orientation, political opinion, membership of trade unions, and terms of employment (fixed-term or permanent employment and full or part-time employment). The 2010 Law on implementation of several EU provisions in the matter of equal treatment provides for the legal basis for positive action measures in the field of the following: professional training, conditions of employment and the performance of work under other legal forms than employment contract, access to and the functioning of trade unions, organization of employers and professional corporations, access to and conditions for the enjoyment of publicly available instruments of the labour market, the social security system, the system of health protection, education and access to goods and services, including housing, and the provision of electricity. The 2010 Law, however, guarantees different degrees of protection, depending on the ground of discrimination.

Both in the Labour Code (LC) and in the 2010 Law, the legal basis for applying positive action measures is legally construed to constitute exceptions to the principle of equal treatment as well as to be justified by the need of compensation for past discrimination or prevention of possible discrimination. Known in practice are cases of positive action measures applied in relation to national minorities, e.g. the preference granted to national minorities at the political level. Pursuant to Article 134 of the Law on the electoral system,³⁶⁵ in running for seats in the *Sejm* (lower chamber of Parliament), for example, minority parties are exempted from the requirement to obtain the threshold of 5 % of votes cast. Some positive action measures are provided for in relation to racial and ethnic minorities (especially the Roma), mostly in the field of education and culture, as well as in relation to age, disability (e.g. in access to public transportation and employment) or religion (e.g. tax reductions for churches). So far, however, these measures were not based on any particular provision on positive action, but rather derived from a general interpretation of the constitutional principle of equal treatment and special protection granted by the Constitution to selected groups of the population, with regard to recognition of the value of diversity and the need for social inclusion.

during pregnancy and motherhood, Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, 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, and 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). The Law refers to Directive 86/613/EEC, while Directive 2010/41/EU now repeals Directive 86/613/EEC.

³⁶² That is: the Law of 16 July 1998 on the elections to local councils (*Ordynacja wyborcza do rad gmin, powiatów i sejmików wojewódzkich*), unified text JoL 2010, No. 176, item 119, Law of 12 April 2001 on elections to *Sejm* and Senate, unified text JOL 2007, No. 190, item 1360 and Law on the election to the European Parliament of 13 January 2004, JoL 2004, No. 25, item 210 with amendments.

³⁶³ JoL 2005, No. 164 item 1365, with further amendments.

³⁶⁴ This amendment took effect on 1 January 2004.

³⁶⁵ The Electoral Statute to *Sejm* and Senate (Lower and upper Chambers of Parliament) (*Ordynacja wyborcza do Sejmu RP i Senatu RP*), Law of 12 April 2001, unified text JoL 2007 No. 190, item 1360 as amended.

1.2. Positive action measures/gender quotas in employment and self-employment

The Labour Code, after the amendments introduced in 2001,³⁶⁶ contains an explicit general stipulation allowing for positive action in relation to gender (Section 18^{3b}(3)).

Positive action measures in the Labour Code are legally construed as an exception to the equal treatment principle and are aimed at equalization of opportunities for all, or for a significant number of employees, who are distinguished by at least one of the discrimination grounds named above. They are restricted to limited periods of time only. Their goal is to diminish the factual inequalities experienced by a specific group of employees, distinguished on the basis of criteria such as sex, race, age, etc. The measures of positive action may be construed towards: conclusion or resolution of the employment contract, access to vocational training (understood as promoting the raising of professional qualifications), and improvement of working conditions. Provisions of the Labour Code on positive action do not apply to self-employment and self-regulatory (free) professions. Therefore the possibility of applying positive action measures in such cases was introduced by the 2010 Law on implementation of several EU provisions in the matter of equal treatment. Pursuant to Article 11 of the 2010 Law, the undertaking of activities aimed at preventing unequal treatment or equalizing disadvantages connected with unequal treatment based on one or several grounds, such as race, ethnic origin, religion or belief, disability, age or sexual orientation, does not constitute any violation of the principle of equal treatment. With regard to gender equality in employment this rule applies to: 1) access to vocational training (including professional additional training, raising of professional qualifications, professional requalification (reorientation) and professional practices); 2) conditions of business undertakings or involvement in professional or economic activities, pursued in particular in the framework of the labour contract, or the employment resulting from a civil-law contract; 3) membership or involvement in trade unions, organizations of employers or professional self-regulatory bodies, including benefits provided for by such organizations; 4) access and application of the instruments and services of the labour market, provided for by the Law of 20 April 2004 on the promotion of employment and institutions of the labour market.³⁶⁷

The positive action provisions of the Labour Code and the 2010 Law on implementation of several EU provisions in the matter of equal treatment apply to all employment contracts in the public and the private sector.

1.2.1. The public sector

In addition to the information above on positive action measures, it can be noted here that there is no legislation on gender quota in the public sector.

1.2.2. The private sector

In addition to the information above on positive action measures, it can be noted here that there is no legislation on quotas for women in private enterprises, including company boards.

1.2.3. State-owned companies

There is no legislation on quotas in state-owned companies. However, there are some self-regulatory instruments on quotas for women on company boards. On 19 May 2010, the Warsaw Stock Exchange Management Board issued resolution

³⁶⁶ The Law of 24 August 2001, JoL 2001 No. 128, item 1405.

³⁶⁷ JoL2004, No. 99, item 1001.

No. 17/1249/2010³⁶⁸ amending the ‘Good Practices of Companies listed on New Connect’ of 31 October 2008.³⁶⁹ In Part I of the resolution (‘Recommendations’) a new provision number 9 was introduced, which reads as follows: ‘Warsaw Stock Exchange recommends public companies³⁷⁰ and their shareholders to ensure balanced participation of women and men in performing the functions of management and supervision over enterprises, strengthening in this manner the creativeness and innovativeness of the companies’ economic activities’. In contrast to many rule-based regulations contained in the ‘Good Practices’ this provision has the character of a general guidance, to which the principle ‘comply or explain’ does not apply.³⁷¹

1.2.4. Differences between the public and the private sector

There is no difference in the legislative approach towards positive action measures in the public and the private sector.

1.3. Positive action measures/gender quotas in the access to and supply of goods and services

Article 11 of the Law of 3 December 2010 mentioned above on implementation of selected EU provisions in the matter of equal treatment³⁷² constitutes the legal basis for the introduction of positive measures in the field of access to and supply of goods and services. However, in respect to gender equality, its application is limited to access to social security benefits and to publicly accessible services, including housing, goods, entitlements or energy (Article 6).

1.4. Positive action measures/gender quotas in the field of research and education

1.4.1. Research and academics

In 2011 the Foundation for Polish Science (a non-profit, non-governmental organization, with the mission to support science in Poland) has started a new programme, partially financed from the EU Structural Funds. The so-called Parent-Bridge Programme provides special grants to women, with the objective to enable them to return to research work, after an interruption to raise a child of up to 4 years old. This opportunity is open also to men who have taken at least 6 months’ leave to take care of a child. The research projects may be realized in a part-time system, which should help parents to reconcile work with family life. The programme also supports pregnant women conducting research that might be hazardous to the unborn child, by providing them with money to employ assistants who will continue the research project during their pregnancy. In the framework of the programme there is an additional possibility for parents holding a scientific degree to apply for research grants as well as additional funds for employment of a research team.³⁷³

³⁶⁸ The unified text of these rules is contained in an Annex to Resolution No. 17/1249/2010, published on <http://www.corp-gov.gpw.pl/assets/library/polish/publikacje/dpsn2010.pdf>, accessed 15 February 2011.

³⁶⁹ Annex No. 1 to the Resolution No. 795/2008 of the Warsaw Stock Exchange Management Board, http://www.newconnect.pl/?page=1061&ph_main_content_start=show&cmn_id=2280, accessed 15 February 2011.

³⁷⁰ A public company, generally speaking, is a company (private or state-owned) which offers securities (stocks, bonds etc.) to the general public.

³⁷¹ It is explicitly provided for in the Preamble of the described document.

³⁷² JoL 2010 No. 254 item 1700.

³⁷³ http://www.fnp.org.pl/programmes/overview_of_programmes/programmes_financed_from_the_european_funds, accessed 28 March 2011.

1.4.2. Primary, secondary and higher education

The area of education is excluded from the application of positive action measures on the basis of Article 11 of the 2010 Law on implementation of selected EU provisions in the matter of equal treatment (Article 5 (1) and (4)). Nevertheless, some proactive measures have been applied in this field as well. For example the campaign ‘*Dziewczyny na politechniki!*’ (‘Girls As Engineers!’) was initiated by the *Perspektywy* Educational Foundation and the Conference of Rectors of Polish Technical Universities. The main goal of the campaign is to introduce technical studies to female high-school students and to promote this educational path as an interesting and beneficial option for the long term.³⁷⁴

1.5. Positive action measures/gender quotas in legislature, political parties and/or political bodies

Legislation on quotas

On 5 January 2011, the Polish Parliament passed a law,³⁷⁵ amending several electoral laws,³⁷⁶ providing that there should not be less than 35 % of candidates of each sex on all electoral lists (for the European Parliament, national Parliament, as well as for local councils based on general elections). The sanction for not complying with this requirement is refusal to register a list.

A debate on the introduction of a mechanism which would accelerate the process of achieving equality between men and women in Poland has been conducted since the early 1990s. The attempts to introduce quota into legislation have centred around the two following strategies: 1) introduction of a quota system as a part of the law on the equal status of women and men;³⁷⁷ 2) introduction of a quota system as a part of the electoral laws. A first legislative proposal representing the latter strategy was submitted during debates on the election law in 2001. However, the Bill was rejected almost without debate.³⁷⁸

³⁷⁴ http://www.dziewczynynapolitechniki.pl/index.php?option=com_content&task=view&id=128&Itemid=82, accessed 28 March 2011.

³⁷⁵ JoL 2011, No. 34, item 172, <http://orka.sejm.gov.pl/proc6.nsf/>, accessed 1 March 2011, hereafter: Law on quotas.

³⁷⁶ That is: the Law of 16 July 1998 on the elections to local councils (*Ordynacja wyborcza do rad gmin, powiatów i sejmików wojewódzkich*), unified text JoL 2010, No. 176, item 119, the Law of 12 April 2001 on elections to *Sejm* and Senate, unified text JOL 2007, No. 190, item 1360 and the Law on the election to the European Parliament of 13 January 2004, JoL 2004, No. 25, item 210 with amendments.

³⁷⁷ A 40 % quota for each sex on electoral lists and all appointed or nominated multimember’s public organs (e.g. National Broadcasting Council) was proposed. The Bill was also supposed to fully regulate the issue of equality of women and men, create mechanisms to prevent discrimination, and set up institutions to which a person who suffered discrimination could file a complaint in a discrimination case. M. Fuszara and E. Zielińska, ‘Women and the Law in Poland: Towards Active Citizenship’, in J. Lukic, J. Regulska and D. Zavirsek (eds), *Women and Citizenship in Central and Eastern Europe* (Aldershot: Ashgate, 2006) pp. 39-60.

³⁷⁸ During these debates in 2001 the political party Freedom Union (*UW*) proposed a regulation that would require parties and election committees to have a minimum quota – at least 30 % of their candidates – of each gender among candidates standing in general elections. More: M. Fuszara, One step forward, one step back: Polish dance around quota system, (in:) D. Dahlerup, L. Freidenvall and others, WIP, Women in Politics Research Centre, Department of Political Science, Stockholm University, in cooperation with International IDEA *Electoral Gender Quota Systems and Their Implementation in Europe*, 2008: Policy Department C Citizens’ Rights and Constitutional Affairs. Women’s Rights and Gender Equality. September 2008. PE 408.309, Report available on:

The successful draft that passed in 2010 followed the second strategy as well. This draft was prepared by the first Congress of Women³⁷⁹ held in 2009 and provided that there should not be less than 50 % of women on all electoral lists. This initiative was presented as a so-called citizens' (social) draft, which had to be signed by at least 100 000 adult citizens in order to be successfully submitted to Parliament.³⁸⁰ In February 2010 the draft was presented to Parliament. In the course of further works on the Bill, the ruling party (*Platforma Obywatelska* – the Civic Platform) suggested an amendment to replace the gender parity rule (50:50) with a gender quota (no less than 35 % of either sex) for electoral candidate lists. In subsequent voting rounds (held in the *Sejm* on 3 December 2010, later on in December in the Senate, and finally on 5 January 2011 in the *Sejm* again) the sex quotas were adopted.³⁸¹ The law was signed by the President on 31 January 2011.

Quotas at party level

During the elections held in 2001, three parties (the Alliance of the Democratic Left (*SLD*),³⁸² the Labour Union (*UP*)³⁸³ and the Freedom Union (*UW*)³⁸⁴ guaranteed women a minimum of 30 % of the positions on their candidate lists.

However, only the *SLD* formalized this rule by introducing a provision (Article 16) into its bylaws (the Party Statute) which stipulates as follows: '1. Women and men are equally represented among the candidates for party leadership at every level, as well as the candidates for delegates. No gender can constitute less than 30 % of the candidates. 2. Section 1 shall apply accordingly to candidates for public offices. There is no sanction for violating this rule'.³⁸⁵

The party currently in power, Civic Platform (the *PO*), has not introduced a quota system. However, before the elections held in 2007 a resolution was adopted, stipulating that at least one of the three first positions on each candidate list must be held by a woman. There was no sanction for violating this rule. The resolution rather

<http://www.europarl.europa.eu/document/activities/cont/200903/20090310ATT51390/20090310ATT51390EN.pdf>, accessed 6 March 2011.

³⁷⁹ The Congress was organized by a network of women from a wide range of professions and political opinions. Some of them were members of women's NGOs, but the great majority has never been active in such organizations. After the first Congress, which was a kind of social movement, the association 'Congress of Women' has been established, with the mission to promote equality of women and men in public life, <http://www.stowarzyszeniekongreskobiet.pl/kongres-kobiet-stowarzyszenie.html>, accessed 28 March 2011.

³⁸⁰ Given the fact that more than 150 000 signatures were collected, the signature collecting drive should be considered to be a huge success. The action provided an excellent opportunity for a public debate on the subject: it was carried out in public spaces such as squares, shopping malls, theatres, museums, etc. During the signature collection drive, participants of the Congress lobbied for a gender parity regulation among politicians; FEMCIT research cited at the Polish Parliament, www.femcit.org/researchupdates.xpl?theID=47, accessed 2 March 2011.

³⁸¹ In the final voting round, 241 deputies voted in favour of the law, 154 were against and 9 abstained from voting. http://wyborcza.pl/1,76842,9049825,35_proc_Poczatek_rewolucji.html#ixzz1DgLuCpxQ, accessed 28 February 2011. The ruling party demanded voting discipline from its members during the vote on the Bill. Nonetheless, ten MPs from this party, all male, breached the party discipline and voted against the Bill. They were all fined for this breach (the fines amounted to about EUR 120 each (PLZ 500)). <http://www.rp.pl/temat/437947.html>, accessed 2 March 2011.

³⁸² Left-wing political party, represented in Parliament. Currently in opposition. In the past, several prime ministers were members of this party.

³⁸³ Left-wing political party, now in alliance with the *SLD*.

³⁸⁴ *Unia Wolności* (Freedom Union), liberal-democratic party, rooted in the *Solidarność* movement. Among the members of the party was the only female prime minister in Poland: Hanna Suchocka. The party lost the elections in 2001 and split up.

³⁸⁵ http://www.sld.org.pl/partia/statut_sld.htm, accessed 2 March 2011.

introduces a moral obligation on the party leadership to ensure that it is enforced. The remaining parties that are currently represented in Parliament have not introduced any quota regulations or other mechanisms aimed at ensuring equality between men and women in the party.

Of the parties currently not represented in Parliament, the Greens have a more developed equality provision in their bylaws (Statute).³⁸⁶

Paragraph 14(1) of this party's Statute stipulates that members of the Green Party are elected in a secret, majority voting, taking into consideration the principles of sex parity.

All party organs shall consist of an even number of members and 50 % shall be held by representatives of each sex (Paragraph 14(2)). Electoral lists for public elections to multimember's of public organs shall be constructed by using the 'zipper system', according to which a woman follows every man until the exhaustion of all candidates of one sex. However, every sex on the list shall be represented by at least 40 %, both in upper and lower places (Article 14(7)). On electoral lists to for the Senate (upper chamber of Parliament) women are guaranteed at least 50 % of the places (Article 14 (7a)). The same goes for electoral districts with even numbers of mandates. In electoral districts with uneven number of mandates the National Council (highest party organ) shall distribute the mandates in mind the requirement of equal representation. Men may receive a place designated for a woman only if there are no female candidates for this place. This rule applies accordingly in general elections, where different electoral committees are represented on one electoral list (Article 14(7b)).

It is worth mentioning that since 2007 there is a Women's Party, which, however, has failed to enter Parliament. According to its Statute, all adults may become a member of this party (male as well as female).³⁸⁷ The Statute of this party does not mention any quota. However, since the new Law on quotas will be in force for the upcoming parliamentary elections in October 2011, this party should also fulfil the legal requirement of at least 35 % representation of each sex on the electoral list.

1.6. Positive action measures/gender quotas in other decision-making bodies or other areas

Positive action measures for women have been introduced for decision-making bodies acting in the field of higher education. With respect to two central bodies established by the Minister of Science and Higher Education, the Law of 4 February 2011,³⁸⁸ amending the Law of 25 July 2005 on Higher Education,³⁸⁹ includes special provisions aimed at raising women's participation in the consultative (advisory) or audit bodies of the Minister.

In relation to the Main Council of Higher Education (*Rada Główna Szkolnictwa Wyższego*), the relevant provision of Article 46(3) of the 2011 amendments, has the form of a guideline and reads as follows: 'In the election of Council candidates, the

³⁸⁶ <http://www.zieloni2004.pl/art-38.htm>, accessed 2 March 2011.

³⁸⁷ http://www.polskajestkobieta.org/index.php/?page_id=24, accessed 2 March 2011.

³⁸⁸ The Law has been passed by the *Sejm* (Lower Chamber of the Polish Parliament) and sent to the Senate (Higher Chamber). The legislative procedure is thus not fully accomplished. It is predicted that the Law will enter into force in the beginning of the new academic year, i.e. by 1 October 2011. The drafts have been provided in *Sejm* Prints No.: 2215, 2484 and 3391. All prints have been combined on [http://orka.sejm.gov.pl/opinie6.nsf/nazwa/2215_u/\\$file/2215_u.pdf](http://orka.sejm.gov.pl/opinie6.nsf/nazwa/2215_u/$file/2215_u.pdf), accessed 1 March 2011.

³⁸⁹ JoL 2005, No. 164 item 1365, with further amendments.

competent organ should strive for equalisation in the participation of women and men (...)'.

In relation to the audit body, the Polish Accreditation Commission (*Polska Komisja Akredytacyjna*), a similar requirement is formulated in a more categorical way, binding the Minister: 'the members of the Commission the Minister should (...) ensure that at least 30 % of the Commission's members of the Commission are women' (Article 48(4)). The Law, however, does not provide for any sanctions for failure to fulfil this requirement. In the justification of the amendments no particular reason for introducing quotas for women in the Commission is given, although the EU recommendation concerning gender balance in decision-making bodies may have been a stimulation for this legal change of law. The document only stresses that the new provision will initiate the process of gradual introduction of sex parity into the composition of these bodies.³⁹⁰ These provisions have not been challenged before the Constitutional Court and as long as women in these bodies they do not seem to be questionable from a constitutional point of view.

1.7. Conformity of gender quotas with equality legislation

So far, the quotas do not seem to create any specific problems. However, during the debate on the draft law on quotas for electoral lists, issues of conformity of the draft law with the constitutional equality clause were raised.³⁹¹ Therefore it cannot be ruled out that the 2010 Law, introducing quotas into electoral laws, will be constitutionally challenged.³⁹² It is difficult to predict what would be the position of the Constitutional Court in such case. Until now in several decisions the Tribunal has expressed the opinion that the Constitution provides for a possibility of so-called positive action in favour of women, which does not constitute unlawful discrimination of men, the justification not only being for biological, but also for social reasons. 'In some situations,' the Tribunal explained, 'when biological and social differences between women and men are especially apparent (...) the establishment of such privileges even becomes the constitutional duty of the legislator'.³⁹³

2. Positive action measures for women and gender quotas in practice

The proactive measures applied in Poland to tackle gender discrimination, tend to have the character of broader social policy measures (e.g. governmental programmes,

³⁹⁰ http://www.bip.nauka.gov.pl/_gALLERY/10/85/10859/20100910_UZASADNIENIE_na_RM.pdf, accessed 1 March 2011.

³⁹¹ See e.g. the opinion of L. Skoczyński who questioned the constitutionality of the draft law (published on the website of the Plenipotentiary of Equal Treatment <http://www.rownetraktowanie.gov.pl/files/dokumenty/ekspertyza%20skotnicki.pdf>), and the opinion of W. Osiatyński who argued that the introduction of quotas would serve a better implementation (realization) in practice of the constitutional equality norms (published on www.kozłowska-rajewicz.pl/.../konstytucyjnoscparytetow_prof_wiktor_osiatynski.doc), both documents accessed 1 March 2011.

³⁹² This assumption also derives from the unsuccessful appeal of the Social Movement against Parity to the President to refuse to sign the 2010 Law on quotas and to submit it instead to the scrutiny of the Constitutional Tribunal; <http://www.rp.pl/arttykul/585127.html>, accessed 1 March 2011.

³⁹³ The affirmative action means – in the wording of Constitutional Tribunal – the introduction of preferential treatment in order to diminish factual inequalities between women and men existing in social life. Kw 5/91, K 27/99, K 35/99, cited after: M. Zubik (ed.), *Konstytucja III RP w tezach Trybunału Konstytucyjnego i wybranych sądów* (Constitution of III Republic of Poland in the theses of the Constitutional Tribunal and other selected courts), C.H. Beck, Warszawa 2008 pp. 182-205. See also the ruling of 15 July 2010, No K 63/07. All decisions of the Constitutional Tribunal are published on of the Tribunal's website: <http://www.trybunal.gov.pl/.htm>. The most significant ones are translated into English; accessed 1 March 2011.

projects, campaigns), rather than being concrete legal tools of preferential treatment, such as e.g. quotas, target figures, etc. The most important programmes and policies in this respect were described in the 2007 Report on proactive measures. Since then not much has changed. Some new measures are expected to be introduced, in particular in connection with the so-called Nursery Bill.³⁹⁴ Some programmes have stopped and others have been postponed in connection with the search for possible cutbacks, to reduce the public debt.³⁹⁵ In addition, in the Ministry of Employment and Social Policy the unit responsible for programmes to counteract discrimination has been dissolved³⁹⁶ and in 2009 all competences connected with counteracting discrimination were transferred to the Plenipotentiary for Equal Treatment, despite the obvious fact that gender equality was not on the list of priorities of the person currently holding this post. This decision has resulted in loss of impact of the implementation of proactive measures in this area.

2.1. Implementation of positive action measures for women and/or gender quotas

2.1.1. Implementation in employment, self-employment and vocational training

No information on implementation is available. The explanatory memorandum to the Labour Code mentions as a possible example of proactive measures in employment the accelerated pay promotion for women, in cases of gender pay gaps.³⁹⁷ However, no such measure has been found to be applied in practice. The author of the memorandum only mentions this measure as hypothetically possible, and fails to elaborate it in detail.

2.1.2. Implementation in the access to and supply of goods and services

No information on implementation is available. The provisions of Article 11 of the Law on implementation of several EU provisions in the matter of equal treatment have not been tested in these fields yet.

2.1.3. Implementation in research and education

The law providing quotas for women in the advisory body of the Minister of Science and Higher Education is not in force yet. No other information on the implementation of positive measures is available.

2.1.4. Implementation in legislature, political parties and/or political bodies

There is some information as to the implementation of quotas by several parties in the past. For example, as regards the *SLD* it has been pointed out that thanks to the 30 % rule women, who accounted for only 15 % of candidates on the *SLD*'s lists for the 1997 parliamentary elections, in the 2001 elections already accounted for 36 % on the lists of the *SLD-UP* coalition. The share of women on the Freedom Union's (*UW*)

³⁹⁴ The Law of 4 February 2011 on the care of the child under 3 years of age, not published yet, <http://www.thenews.pl/national/?id=126116>, accessed 7 February 2011, http://orka.sejm.gov.pl/proc6.nsf/ustawy/3377_u.htm, accessed 2 March 2011.

³⁹⁵ This happened with Programme 50+ aimed at professional activation of older people and various programmes aimed at reducing unemployment. <http://www.plus50.pl/index.php/my-plus-50/solidarnosc-pokolen/425-program-q50q-czy-przetwra-kryzys.html?id=425%3Aprogram-q50q-czy-przetwra-kryzys>, accessed 1 March 2011.

³⁹⁶ In 2005-2009 the Department of Family Matters, part of the Ministry of Labour and Social Policy, was responsible for counteracting gender discrimination.

³⁹⁷ M. Gersdorf, K. Rączka, J. Skoczyński, *Kodeks pracy. Komentarz* (Labour Code. Explanatory memorandum), ed. Z. Salwa. Lexis Nexis, Warsaw 2004 p. 70.

lists increased from 18.5 % in 1997 to 31 % in 2001. Unfortunately, in the following elections the *SLD* and its coalition partners no longer observed this rule, and thus the percentage of women on its candidate lists was much lower (in 2005 women constituted 27.6 % on the *SLD*'s candidate lists, while in 2007 they accounted for only 22.2 % of those on the lists of the Left and Democrats coalition (of which the *SLD* was a member).

As regards the party currently in power, the Civic Platform (*PO*), in the 2007 parliamentary elections the rule that at least one of the three first positions on each candidate lists must be held by a woman was observed in 34 out of 41 electoral districts. In other districts, women held positions lower down the list, which illustrates how difficult it is for women to get high positions on candidate lists even when there is a party rule that theoretically guarantees them a good position. This shows the fundamental weakness of a regulation which is not enforced by any sanctions.³⁹⁸

The political parties quotas policy has also produced some effects for the number of women on the lists of candidates for the organs of territorial self-government. From an analysis made by the Institute of Public Affairs on the basis of data collected by the State Electoral Commission, the representation of women on electoral lists for territorial self-government bodies increased by 4 % in the 2010 elections, compared to the elections held in 2006. In the 2006 local elections women constituted 29 % of all candidates on the lists, while in 2010 the number had increased to 31 %.³⁹⁹

2.1.5. Implementation in other decision-making bodies or areas

There is nothing to report under this heading.

2.2. Effects of the positive action measures

As a result of the increase of the number of women on electoral lists, due to the fact that in the 2001 elections three political parties applied quotas to their lists of candidates, the representation of women in the *Sejm* increased from 13 % to 20 % and remained on the same level after the parliamentary elections held in 2005 and 2007.⁴⁰⁰ The increased number of women on electoral lists for local councils has also translated into good election results. For example, the number of female deputies to the local councils rose from 21 % in 2005 to 25 % in 2010.

There is no information as to whether the Warsaw Stock Exchange Management Board's resolution, recommending balanced representation of women and men on company boards, has actually enhanced women's participation. Due to the system of

³⁹⁸ M. Fuszara, One step forward, one step back: Polish dance around quota system, in: D. Dahlerup, L. Freidenvall et al., *WIP, Women in Politics Research Centre*, Department of Political Science, Stockholm University, in cooperation with International IDEA *Electoral Gender Quota Systems and Their Implementation in Europe*, 2008: Policy Department C Citizens' Rights and Constitutional Affairs. Women's Rights and Gender Equality. September 2008. PE 408.309, Report available on: <http://www.europarl.europa.eu/document/activities/cont/200903/20090310ATT51390/20090310ATT51390EN.pdf>, accessed 6 March 2011.

³⁹⁹ Self-government in men's hands. <http://www.isp.org.pl/aktualnosci,1,637.html>, accessed 2 March 2011.

⁴⁰⁰ For more detailed information see: M. Fuszara 'One step forward, one step back: Polish dance around quota system' in: D. Dahlerup et al. *WIP, Women in Politics Research Centre*, Department of Political Science, Stockholm University, in cooperation with International IDEA *Electoral Gender Quota Systems and Their Implementation in Europe*, 2008: Policy Department C Citizens' Rights and Constitutional Affairs. Women's Rights and Gender Equality. September 2008. PE 408.309, Report available on: <http://www.europarl.europa.eu/document/activities/cont/200903/20090310ATT51390/20090310ATT51390EN.pdf>, accessed 6 March 2011.

appointment of board members, the practical effects of the resolution, which was only issued in May 2010, can only be evaluated in a while.

3. Case law

3.1. Case law of national courts

In 1987 the Constitutional Tribunal decided about the unconstitutionality of a regulation providing that 50 % of students admitted to Medical University should be men.

This regulation was adopted in order to prevent feminization of the medical profession, however, in the opinion of the Tribunal, the arguments in favour of such regulation provided by the Minister of Health were not proportionate and not strong enough to justify such exception from the equality principle.⁴⁰¹ In the justification of this decision the Tribunal expressed the opinion that: ‘every limitation of the equality principle not resulting from the drive to strengthen actual social equality is inadmissible’. Through *a contrario* inference of the Tribunal’s thesis, the conclusion can be drawn that exceptions to the principle of formal equality are admissible insofar as they serve to ‘strengthen actual social equality’. As a matter of fact this decision seems to allow the introduction of quotas (in general).⁴⁰²

3.2. Case law of equality bodies

The Plenipotentiary for Equal Treatment has no power to decide individual cases.

3.3. Case law of other bodies

The special competence in case of violation of the principle of equal treatment was transferred to the Human Rights Defender by the Law on implementation of several EU provisions in the matter of equal treatment only in December 2010. Therefore this body has no case law yet.

4. Proposals

The Polish women's lobby, the *Kongres Kobiet* (Women’s Congress), has launched a strong campaign to force legislation that would establish a 35 % gender quota in

⁴⁰¹ Decision of 3 March 1987, in case P 2/87, *OTK* (Decisions of Constitutional Tribunal) 1987, No. 1, item 2. <http://www.trybunal.gov.pl/.htm>, accessed 1 March 2011. The Minister of Health, while justifying the need of raising the number of male students in medical schools, used the following arguments: several medical specializations, e.g. surgery, require special psychophysical capacities, which are more frequent among men; the work in certain specializations like radiology or nuclear medicine is not recommended for women; the execution of the physician’s profession in hospitals requires round-the-clock patient care and the ability of female physicians for night shifts is limited due to their familial obligations; there is a need to educate a certain number of male physicians in case of military mobilization. The Tribunal decided that most of those arguments were ill-founded, arguing as follows: there are different branches of surgery, such as microsurgery, or bone surgery, where not the sex but the strength of a person should be the decisive criterion. In addition to this, the Tribunal noted that the choice of specialization is made by the physician after their studies not at the beginning. As concerns risks of certain work for pregnant women, the Tribunal stressed that in all professions pregnant women have special privileges. As to night shifts, it did not see any reason for distinguishing female doctors, since nurses and cleaning personnel (mostly women) also work nights. As concerns the need to educate male physicians in case of war, the Tribunal pointed out that there are special military medical schools which educate future doctors, mainly admitting men, and that all medical students (women and men) have to undergo a special military training.

⁴⁰² W. Osiatyński. *Opinion on the draft law on quotas*. www.kozłowska-rajewicz.pl/.../konstytucyjnosci_parytetow_prof._wiktora_osiatynski.doc, accessed 6 March 2011.

Polish companies' supervisory boards. According to information received from the Polish Confederation of Private Employers *Lewiatan*,⁴⁰³ an amendment to the governmental Draft law on principles of execution of some competences by the State Treasury⁴⁰⁴ will be presented, which will refer to balanced representation of women and men in recruitment to the boards of state state-owned companies, conceived as a rule-based regulation to which the principle 'comply or explain' shall apply.⁴⁰⁵ The ruling party *PO* declared to be willing to talk about the idea.⁴⁰⁶

PORTUGAL – Maria do Rosário Palma Ramalho

1. National legislation on positive action measures/gender quotas

1.1. Positive action measures in the national legal system

I. In Portugal, positive action measures started to be considered only in the area of employment, but over time they have gained a general scope.

These measures were contemplated for the first time in the Gender Equality Act for Employment, of 1979⁴⁰⁷ (Article 3, No. 2), which established the possibility of taking temporary measures to eradicate factual inequalities due to sex, as well as measures to protect maternity, and stated that these kinds of measures were not to be considered as discrimination. Thus, by this time, positive measures were allowed in the area of gender equality but only in the area of employment.

In the reform of the Portuguese Constitution of 1997, positive measures gained a constitutional ground, with the introduction of Article 9, Paragraph h) of the Constitution, which considers the *promotion* of equality between men and women as a 'fundamental task' of the Portuguese State (introduced in 1997). The positive and proactive way in which this provision is written therefore gives strong support to the taking of positive action measures in the area of gender equality.

The rule of Article 9 Paragraph h) is immediately binding, but since it is addressed to the State, it needs further legislative development to be implemented at more concrete levels. So far, and despite the fact that positive measures are formally allowed at legislative levels in several areas, practical implementation measures have been adopted only in the area of employment and in the area of political representation. We will consider these developments below.

II. In Portugal, positive measures are considered as a necessary tool to achieve gender equality in practice, rather than as an exception to equal treatment.

The reasons usually indicated in the law to justify these measures are the *de facto* inequalities between men and women in a particular situation, proved by disproportional representation or by other objective or statistical data. These measures may involve preferential treatment of women, rather than 'sex-neutral' measures, but

⁴⁰³ Polish Confederation of Private Employers *Lewiatan*, www.pkpplewiatan.pl, accessed 15 February 2011.

⁴⁰⁴ *Sejm* (Lower Chamber of the Polish Parliament) print No. 3580, <http://orka.sejm.gov.pl/proc6.nsf/opisy/3580.htm>, accessed 15 February 2011.

⁴⁰⁵ <http://www.warsawvoice.pl/WVpage/pages/article.php/15951/news>, accessed 8 March 2011.

⁴⁰⁶ As writes the daily *Gazeta Wyborcza* citing the ruling party *PO*'s caucus head, <http://www.warsawvoice.pl/WVpage/pages/article.php/15951/news>.

⁴⁰⁷ Decree-Law No. 392/79, of 29 September 1979. A similar rule was approved for the public sector, by Decree-Law No. 426/88 of 18 November 1988.

of course other ‘sex-neutral’ measures (e.g. measures related to the reconciliation of family and professional life) can complement these measures.

However, whenever the practical implementation of these measures in concrete areas is discussed, they are not welcomed by some circles (including political circles) that claim that the implementation of gender equality through these measures is based on numbers rather than on the quality or merit of women.

1.2. Positive action measures/gender quotas in employment and self-employment

1.2.1. The public sector

I. Positive action measures for the implementation of gender equality in employment in the public sector were contemplated for the first time in the Gender Equality Act for Employment in the Public Sector in Decree-Law No. 426/88, of 18 November 1988. After this Decree-Law and between 2003 and 2008, employees of the public sector were subject to the Labour Code of 2003, with respect to this issue.

In 2008, new legislation regarding employment in the public sector was issued: Law No. 59/2008 of 11 September 2008. In this law, gender equality issues are addressed and positive action measures are specifically allowed (Article 16). These rules are applicable to all public employees, regardless of the nature of their contract with Public Administration services (Article 8 of Law No. 59/2008 of 11 September 2008 – preliminary legislation).

Since these rules are similar to the rules of the Labour Code in this area, we will consider them together (see below).

II. *Public administration*, apart from state-owned companies, which we will consider below, only includes public employees. Therefore they are subject to the rules mentioned above.

1.2.2. The private sector

I. Legislative provisions regarding positive action measures for the implementation of gender equality in employment in the private sector are well-established in Portugal. These measures were introduced for the first time in the Gender Equality Act for Employment of 1979,⁴⁰⁸ and subsequently they were contemplated in the first Labour Code (of 2003)⁴⁰⁹ and in its Regulation Act (of 2004).⁴¹⁰ They are now addressed in the new Labour Code (LC), approved by Law No. 7/2009, of 12 February 2009, effective since 2009.

II. As in the previous Labour Code, the LC of 2009 regulates positive measures in the area of gender equality in combination with positive action measures regarding other grounds of discrimination in employment.

In this general approach to the issue, Article 27 of the LC states that ‘temporary and concrete measures, defined by the law, in order to benefit disfavoured groups, on grounds related to sex, lower capacity for work, disability or chronic disease, nationality or ethnic origin, are not considered as discrimination when those measures aim to ensure the exercise of the rights granted by the Code, in conditions of equality and the correction of a factual situation of inequality that persists in social life’.⁴¹¹

⁴⁰⁸ Decree-Law No. 392/79, of 29 September 1979.

⁴⁰⁹ Law No. 99/2003, of 27 August 2003, entered into force on 1 December 2003.

⁴¹⁰ Law No. 35/2004, of 29 July 2004, entered into force on 30 August 2004.

⁴¹¹ This is our own rough translation of the rule.

This provision is integrated in the section of the Code related to equality in general and not in the section related to gender equality.⁴¹² Unlike the similar rule in the Labour Code of 2003, this rule is no longer applicable to workers of the public sector, since these workers now fall under the provisions of Law No. 59/2008, described above (under 1.2.1). However, the content of the provisions in both laws is the same.

As we can see, under the LC positive measures are considered as a necessary tool to achieve gender equality in practice, rather than as an exception to equal treatment. Also, the justification of such measures are the factual inequalities between men and women in a particular situation and these measures may involve preferential treatment of women, rather than being 'sex-neutral' measures. Finally, the Code insists on the fact that these measures have to be temporary.

In our view, this provision in general complies with EU law, but the more general and integrated perspective on the issue risks diminishing the visibility and the importance of positive action measures specifically on the grounds of sex, and therefore may go against the final part of Consideration (22) of Directive 2006/54, in the sense that this perspective does not give 'priority to the effort to improve the professional situation of women',⁴¹³ over the elimination of other sources of discrimination. Also, the reference of this provision to the rules regarding this issue being 'defined by the law' seems unclear and rather limited, since neither Article 157(4) of the TFEU nor Article 3 of Directive 2006/54 restrict these measures to the law. This specific reference to the law will be easily interpreted as meaning that these measures cannot be included in collective agreements or in codes of conduct without specific legal permission.

As a general rule, it is also worth mentioning the rule of the LC regarding the content of collective agreements in the area of gender equality. Article 492 No. 2 d) of the LC states that collective agreements should establish 'measures that contribute to the effective implementation of equality and non discrimination principle'. Under this rule, equality plans and concrete measures for the promotion of equality (on several grounds, including sex) at professional or company level can be defined by collective agreements directly. These measures can include positive action and preferential treatment, if, in the concrete situation, they meet the legal requirements for such action measures

However, this rule is a non-binding recommendation, since there are no sanctions attached to the absence of such measures or plans.

III. Apart from the general rules mentioned above, we can find specific rules in the LC and in the Code's complementary legislation, that already *develop positive action measures in specific areas*. We would like to emphasise two rules:

- a) *Professional training*: Article 30 No. 3 of the LC states that, when professional training regards professional areas dominated by workers of one sex, workers of the under-represented sex have priority in access to the training activities; the same priority is generally granted to workers with low academic formation or no specific skills, as well as to workers responsible for (one)parent families, and to those that have been on leave for reasons related to maternity, paternity or

⁴¹² The picture was different under the Gender Equality Act in Employment, of 1979. Since this legislation was dedicated only to gender equality issues, positive measures were expressly addressed to the gender perspective.

⁴¹³ Again, this is our own rough translation of the provision.

adoption. This measure may clearly favour women since they are more likely to be in the situations described by the rule.

- b) *Parental leave*: although parental leave is not paid nor compensated by the social security system, Article 15 No. 1 b) of Decree-Law No. 91/2009, of 9 April 2009, establishes that, if this leave is taken by the *father* immediately after the end of maternity/paternity leave, the first 10 days of the leave give right to a compensation (equivalent to 100 % of the salary) paid by the social security system. This measure, which comes from the legislation prior to the LC (it was first established in the Maternity and Paternity Act) and that has been kept since, encourages working fathers to participate in family life and, therefore, contributes to a more balanced distribution of family responsibilities between men and women, and, thus, to the active promotion of gender equality.

IV. Finally, we would like to point out that there is no specific legislation concerning the *members of the boards of the private sector companies, from the perspective of gender*.

We should emphasise that, under the Portuguese legislation, members of company boards are considered as independent workers and treated as such.

1.2.3. State-owned companies

I. State-owned companies, unlike administrative services, are governed by the Labour Code, and therefore subject to the same principles. There are no specific rules related to positive action measures in these companies, in what concerns the *employees*.

II. In what concerns the *members of the boards of state-owned companies*, the situation is the same, but we must also consider the IV National Plan for Gender Equality covering the period 2011/2013, which was recently approved by the Portuguese Government (Ministers Council Resolution No. 5/2011, of 18 January 2011).

In this Plan, some goals deal directly or indirectly with positive action measures in state-owned companies, since the Plan aims to implement equality plans in companies from the public sector.

This legislation is not binding, but it can be seen as a sign of a new approach of the public authorities to the issue of practical implementation of gender equality. However, it is still too soon to see if and how this objective is going to be put in place.

1.2.4. Differences between the public and the private sector

Apart from the formal distinction that results from the fact that private and public workers are now subject to different rules in this area, as we described above (under 1.2.1.), there are no differences between these two sectors, in what concerns the employees, since the content of the rules is similar.

In what concerns the members of company boards, the IV National Plan is more demanding for state-owned companies in this respect, as we have just seen.

1.3. Positive action measures/gender quotas in the access to and supply of goods and services

In the area of access to and supply of goods and services, Portugal has transposed Directive 2004/113, by Law No. 14/2008, of 12 March 2008.

Article 4 No. 7 of this legislation allows positive action measures, stating as follows: ‘the guarantee of full equality between men and women does not prejudice

specific positive measures, already in place or to be implemented in order to prevent or to compensate factual inequalities or disadvantages related to sex’.

This rule formally complies with Article 6 of Directive 2004/113. However, we have no information regarding the practical implementation of positive measures in this area.

1.4. Positive action measures/gender quotas in the field of research and education

We have no information regarding positive action measures in the field of research and education, apart from those already mentioned above regarding professional training.

1.5. Positive action measures/gender quotas in legislature, political parties and/or political bodies

In the area of legislature, gender quotas are imposed for elections for the National Parliament, for the European Parliament and for local political representatives, by Law No. 3/2006, of 21 August 2006 (known as the Parity Law). This Law establishes that the lists presented by the political parties for these elections must include at least 33.3 % of women, in eligible positions.

These rules are slightly binding, since if the list of candidates does not comply with the proportion requirements, the party responsible is officially notified and requested to correct the list. If such correction is not made, the list is accepted with reservations and the party responsible suffers a serious reduction of the public subsidies for campaign expenses.

1.6. Positive action measures/gender quotas in other decision-making bodies or other areas

There is no binding legislation at national level concerning quotas for women on company boards or in other decision-making bodies, applying either to private companies or to state-owned companies or other bodies.

Some of the goals of the IV National Plan for Gender Equality covering the period 2011/2013, mentioned above (under 1.2.3.), deal directly or indirectly with positive action measures: in this sense, the Plan enhances the importance of a gender perspective in all areas of political action as a condition for good governance, it aims to implement equality plans in companies in the public sector, intends to implement action measures to promote female entrepreneurship, and also states the importance of promoting the emancipation and empowerment of young women.

This legislation is not binding, as we stated above, but it can be considered a sign of a new approach of the public authorities to the issue of practical implementation of gender equality.

1.7. Conformity of gender quotas with equality legislation

In the Portuguese system, gender quotas would be considered to be in conformity with equality legislation, since equality is considered from a substantive perspective rather than from a formal perspective, thus meaning that equal situations must be treated equally but different situations should be treated differently, in order to pursue equality.

Under this substantive approach, equality is not considered equivalent to non-discrimination practices let alone to neutral practices, but can and must be pursued in a proactive way, namely by the eradication of all forms of discrimination that exist in society, if necessary by adopting different procedures.

In this light, positive action measures (quotas included) are considered as a *condition for equality*, on the condition that they are objectively justified by a previous ‘de facto’ situation of inequality and on the condition that they are adopted on a temporary basis. On these conditions, quotas (as a positive action) are considered as a material condition and a useful instrument to achieve substantive equality rather than an exception to equal treatment.

2. Positive action measures for women and gender quotas in practice

2.1. Implementation of positive action measures for women and/or gender quotas

2.1.1. Implementation in employment, self-employment and vocational training

The practical implementation of positive action measures in relation to gender equality in employment, self-employment and vocational training is not very significant in Portugal.

In fact, apart from the legislative measures described above, under 1.2.2. (preferential treatment of women in professional training, on specific conditions, in Article 30 No. 3 of the LC, and parental leave public allowance only for the father, under certain circumstances, in Article 15 No. 1 b) of Decree-Law No. 91/2009, of 9 April 2009), we are not aware of other concrete measures in this area that may contribute to the practical implementation.

Also, despite the legal recommendation made to the social partners, regarding the adoption of concrete measures in this area by collective agreements (Article 492 No. 2 d) of the LC), we have no information regarding the taking of these kinds of measures in collective bargaining. Indeed, this issue does not seem to be a concern of the labour unions or of the employers’ associations.

Finally, we would like to emphasise that the successive Plans for Gender Equality adopted by the Portuguese Governments over the years have traditionally contemplated positive action measures to promote gender equality in specific areas. Some of them are:

- creation of the ‘Equality is Quality Prize’, which distinguishes companies with Good Practices in the field of gender equality;
- creation of benefits to companies that adopt policies that favour a more equal representation of men and women by areas and professions;
- campaigning for the increase of women in the military sector;
- reinforcement of the participation of women in professional training;
- adoption of specific measures regarding the self-employment of women, and women working from home.

Some of these measures are already in place (for instance, the Equality is Quality Prize and other policies that distinguish companies for their ‘family-friendly policies’). However, most of these measures need further legislative development, and this development remains insufficient.

2.1.2. Implementation in the access to and supply of goods and services

We have no information regarding positive action measures already in place or to be implemented in this area.

2.1.3. Implementation in research and education

We have no information regarding positive action measures already in place or to be implemented in this area.

2.1.4. Implementation in legislature, political parties and/or political bodies

During the process of approval of parity legislation, that we mentioned above (under 1.5.), regarding the binding participation of women in the lists of candidates for elections for the National Parliament, the European Parliament, and local power structures, this legislation was severely criticised in some circles, that kept saying that it would result in the promotion of women on the basis of statistical data rather than on qualification or other merits and criteria.

However, the practical result of this legislation is that we now have more female Members of Parliament, both national and European, and in local political administration than ever before, since the legal percentage of women on the lists (33.3 %) has been respected by the parties.

2.1.5. Implementation in other decision-making bodies or areas

In 2010, some news was published concerning the possible intention of the Socialist Party (now in Government) to launch a legislative proposal regarding the imposition of quotas for women in directive positions in Public Administration, as well as on the boards of state-owned companies. This possible legislation would impose a minimum of 33 % of women on these boards, as a sort of extension of the Parity Law,⁴¹⁴ which imposes the same quota for women in political elections.

However, we have no information regarding any follow-up on this news and we are not aware of recent legislative proposals in this area, or of any serious debate on the issue at other levels.

2.2. Effects of the positive action measures

Since Portugal has no significant experience in positive action measures, we cannot answer this question in a general way. However, we can say that in the few areas where these kinds of measures have been put in place (e.g. the public allowance for fathers who take parental leave, or the women quotas in the elections), the results have been spectacular, in the sense that it has become normal for fathers to take the period of parental leave that is paid, and the number of women in Parliament and in local elected authorities has reached the minimum percentage fixed by law.

3. Case law

Case law of national courts; case law of equality bodies; case law of other bodies

We are not aware of case law at any of these levels in Portugal.

4. Proposals

In our view, the imposition of positive action measures (including quotas) on the Member States as a normal tool to promote gender equality in practice, rather than in law, should be considered.

In fact, in countries like Portugal, this would make a big difference, because the development of the legal system is not followed by practical policies and concrete measures that are essential for gender equality principles to become effective. In

⁴¹⁴ Please see below, under 3.

short, the national legal system is, in general, up-to-date and in compliance with EU law, but it does not necessarily guarantee that gender equality is in fact pursued.

On the contrary, the results of the few positive action measures now taken demonstrate that these measures can make the difference between law in text and law in action in this area.

In this context, we now suggest *some positive action measures in some specific areas*, where they might have significant impact in Portugal:

- a) *Gender equality plans at professional level or at company level*, established as compulsory content of collective agreements, or as a subject of agreement between employers' and employees' representatives at company level;
- b) *Quotas for the members of company boards*: quota measures would make a great difference for the practical implementation of gender equality in Portugal, since there is a huge gap between the educational level of Portuguese women (with more young women than men with a university degree and with higher qualifications) but, despite that fact, their access to decision-making levels both in the private and in the public sector is much more difficult (few women reach high positions in companies and even fewer succeed in becoming a member of company boards).⁴¹⁵ For companies in the public sector, quotas could be imposed directly; in the private sector, a practical way to encourage 'quotas' would be by giving tax benefits or social security benefits to employers that comply with a certain percentage of women on the board.
- c) *Positive measures directed at men, in order to promote their role as parents* (and, more broadly speaking, as carers within the family) and improve the balance between fathers and mothers. Being directed at men, these measures leave room for more intensive participation of women in professional life, thus contributing to the practical implementation of gender equality.

ROMANIA – Roxana Teşiu

1. National legislation on positive action measures/gender quotas

1.1. Positive action measures in the national legal system

Article 2(3) of the Governmental Ordinance no. 137 of 2000⁴¹⁶ provides that 'provisions, criteria and practices apparently neutral that disadvantage certain persons as opposed to other persons on the ground of the criteria provided under paragraph 2(1)⁴¹⁷ are considered to be discriminatory, excepting the case when these provisions,

⁴¹⁵ In fact, statistical data have demonstrated that this assumption is correct. In 2004, 23 000 men had a university degree against 45 000 women; however, in 2009, only 10 women were Member of the Government, against 44 men; in the *Banco de Portugal* (National Bank), in 2006, the board had 6 men and no women; in 2008, in the 20 largest Portuguese companies, board members included 106 men (96.4 %) against 4 women (3.6 %). Even at university level, where the number of women teachers has increased significantly, for instance in the National Council of Deans, there were 15 men against 1 woman, in 2008.

⁴¹⁶ Governmental Ordinance no. 137 of 2000 of 31 August 2000 on preventing and sanctioning all forms of discrimination, republished in the Official Gazette no. 99 of 8 February 2007.

⁴¹⁷ Race, nationality, ethnicity, language, religion, social category, beliefs, sex or sexual orientation, age, handicap, non-contagious chronic disease, HIV infection, belonging to a disfavoured category, as well as any other criterion aiming to or resulting in the restriction or elimination of the recognition, use or exercise, in conditions of equality, of human rights and fundamental liberties or

criteria and practices are objectively justified by a legitimate aim and the ways of reaching that aim are adequate and necessary.’ Furthermore, Article 2(9) defines positive measures as representing an exemption from the prohibition against discrimination: ‘Measures taken by public authorities or by legal entities under private law in favour of a person, a group of persons or a community, aiming to ensure their natural development and the effective achievement of their right to equal opportunities as opposed to other persons, groups of persons or communities, as well as positive measures aiming to protect disfavoured groups, shall not be regarded as discrimination.’ The definition of positive measures in Romanian legislation is not limited to racial or ethnic origin, religion or belief, disability, age or sexual orientation. The definition covers all protected grounds as mentioned by Article 2(1) of the 2000 Ordinance on Anti-discrimination.

In several of its decisions pertinent to the matter of positive measures, the National Council of Combating Discrimination (NCCD) stated that ‘the measures adopted by the Romanian authorities, in particular by the Ministry of Education in relation to Roma students, had the purpose of ensuring the equality of opportunities, resulting in the implementation of affirmative measures. By nature such affirmative measures had the purpose of gradual equalization of the situation of Roma children from the perspective of opportunities in education, in order to bring them in a situation similar to that of other students.’ The NCCD also stated that ‘employment of persons belonging to a certain minority implies an affirmative measure in relation to that particular community. Such a measure can be maintained only until its objectives are met. When the percentage of the employees from a community in a particular institution corresponds with the percentage of the respective community in the area of its location, affirmative measures cannot be further maintained as they would create a situation of inequality.’

Besides the definition of affirmative measures as provided by the 2000 Ordinance on Anti-discrimination, specific legislation introduces affirmative measures in relation to particular groups such as Roma, children and youth, children and youth with HIV/AIDS, persons with disabilities, single parents, unemployed, socially vulnerable or senior citizens. No positive actions have been reported in relation to religious minorities.

In its Article 78(2), Law no. 488 of 2006 on the promotion and protection of the rights of persons with disabilities provides for the obligation on all authorities and public institutions, public or private legal persons with a minimum of 50 employees, to hire persons with disabilities in a percentage of at least four per cent of the total manpower. Employers that fail to hire persons with disabilities according to the law can choose between:

- Monthly payment of an amount representing 50 per cent of the minimum average salary for each position that they were supposed to open up for a person with disabilities and failed to;
- Using products and services from authorised protected units on the basis of a partnership amounting to the quantity owed to the state budget.

Specifically related to gender, Act on equal opportunities no. 202 of 2002⁴¹⁸ defines positive action measures in Article 4(e) as representing ‘those special action measures

of rights granted by law in the political, economic, social and cultural field or in any other domains of public life.

⁴¹⁸ Act no. 202 of 2002 on equal opportunities and equal treatment for women and men, republished in the Official Gazette no. 150 of 1 March 2007.

taken on a temporary basis with the aim of *de facto* accelerating the achievement of equal opportunities between women and men that are not viewed as discrimination.’ Furthermore, Article 6(5) stipulates that the following measures are not considered as discrimination:

- Special measures provided for by the law on maternity protection;
- Positive action measures aimed at protecting certain categories of women or men, such as single parents;
- A difference in treatment based on sex for jobs where the nature of the professional activity requires a gender-related trait as a professional and real requirement for as long as the objective is legitimate and the requirement is proportional.

With regard to gender representation in various bodies, Article 22(1) of the 2002 Act on equal opportunities for women and men stipulates that the local and central public authorities, social and trading companies, as well as political parties, trade union organisations, employer organisations and other non-profit organizations shall promote and support the balanced participation of women and men concerning management acts and the decision-making process. From the way this legal provision is articulated, an individual cannot deduce any individual rights. There appears to be an imperative obligation for equal participation of women and men in decision-making bodies as described by Article 22(1). However, it is not clear who owns such obligation and what the legal consequences are if such ‘promotion and support’ are not exercised. These provisions also apply to the appointment of members and/or participants in any council, group of experts and other managerial and/or consultative lucrative structures.

Furthermore, in order to accelerate the *de facto* achievement of equal opportunities between women and men, the central and local public institutions and authorities, social dialogue structures, employers’ associations and trade union associations and political parties shall adopt measures seeking fair and balanced representation of women and men in all decision levels. All parliamentary and governmental commissions and committees shall ensure equitable representation and parity between women and men in their structure. Similarly to the imperative obligation contained in Article 22(1) as described above, from the way this legal provision is articulated, an individual cannot deduce any individual rights. There appears to be an imperative obligation to ensure equitable representation and parity between women and men. However, it is not clear who owns such obligation and what the legal consequences are if such ‘fair and balanced representation’ is not achieved.

1.2. Positive action measures/gender quotas in employment and self-employment

In its Article 9(1)(a), the 2002 Act on equal opportunities provides that in employment, i.e. in the recruitment for vacancies in the public and private sector as well as in relation to the selection of candidates, employers are forbidden to use discriminatory practices that disfavour persons of a certain gender in relation to advertising and organizing job contests or exams. However, such practices are not deemed to represent discrimination for those jobs where, due to the particularities of certain professional activities or to the special working conditions, gender particularities are decisive and authentic professional requirements, provided that the objective sought is legitimate and the requirement proportional.

Provisions of the 2002 Act on equal opportunities address measures aimed at promoting equal opportunities between women and men, with a view to eliminating direct and indirect gender discrimination, in all fields of Romania's public life. The measures for promoting equal opportunities between women and men and for eliminating direct and indirect gender discrimination are applied in the fields of labour, education, health, culture and information, decision-making process, as well as in other fields regulated by specific laws, except religious cults, and do not interfere with the private life of citizens. Hence, the positive action measures as provided for by the 2002 Act on equal opportunities apply to both the public and the private sector, as well as to state-owned companies.

1.3. Positive action measures/gender quotas in the access to and supply of goods and services

The implementation of the principle of equal treatment between women and men in the access of goods and services is provided for by Law no. 62 of 2009⁴¹⁹ on the approval of Emergency Ordinance no. 61 of 2008. Ordinance 61 of 2008 does not regulate mass media, education and employment. With regard to positive action measures, Article 5(b) of the Ordinance stipulates that 'treatment differences based on a sex characteristic are not to be viewed as discrimination in case the need for the supply of goods and services is justified by a legitimate aim and the means for achieving such aim are adequate and necessary.'

Furthermore, Article 7(6) provides that it is forbidden to 'maintain in insurance contracts any clause that for the insured person creates differences related to monthly contributions and benefits as a consequence of the existence of costs related to pregnancy and maternity.'

1.4. Positive action measures/gender quotas in the field of research and education

Although the 2002 Act on equal opportunities contains a specific chapter on 'Equality of opportunities and treatment as regards the access to education, health, culture and information', no specific positive action measures are provided. The 2000 Ordinance on anti-discrimination provides in Article 11(3) with regard to access to education that requiring a declaration to prove a person's or a group's belonging to an ethnic group as a condition for access to education in their mother tongue shall constitute a contravention. The exception to the rule is the situation of candidates in the secondary and higher education system applying for places allotted specifically to a certain minority, in which case they must prove their belonging to that minority by means of a document issued by a legally established organization of the respective minority.

1.5. Positive action measures/gender quotas in legislature, political parties and/or political bodies

Specifically related to positive actions in legislature, political parties and/or political bodies, Article 22(1) of the 2002 Act on equal opportunities for women and men stipulates that political parties 'shall promote and support the balanced participation of women and men' concerning the decision-making process. The formulation of the respective legal provision is vague and there are no means specified by the law aimed at assessing what 'balanced representation' means. The usage of such vague

⁴¹⁹ Law no. 62 of 1 April 2009 on the approval of the Emergency Governmental Ordinance no. 61 of 2008 on the implementation of the principle of equal treatment between women and men in the access of goods and services and supply of goods and services, published in the Official Gazette no. 229 of 8 April 2009.

terminology and concepts is an indication of the legislator's lack of will to make this provision effective in implementation. While the legal provision's formulation is very general and it could be viewed as a positive action, it does not offer any basis for the necessary implementation mechanism that could be monitored in terms of practical impact. Thus, it is rather a legal provision aimed at encouraging certain behaviour related to supporting balanced participation of women in the decision-making process of political parties. Such legal provision is not built on the concept of underrepresented sex, nor does it indicate the legal consequences of not achieving the proclaimed balance. Gender quotas are not provided for by the law.

Article 23(3) of the 2002 Act on equal opportunities stipulates that 'in their statutes and internal regulations, political parties have the obligation to provide for positive action measures in the favour of the sex which is underrepresented at decision-making level and to ensure balanced representation of women and men in the candidates nominated for local and general elections, as well as for elections in the European Parliament.' Violation of this legal provision may be assessed by the NCCD and sanctioned with a written warning or administrative fine. So far, no decisions have been issued by the NCCD with regard to the implementation of Article 23 of the 2002 Act on equal opportunities.

1.6. Positive action measures/gender quotas in other decision-making bodies or other areas

With regard to gender representation in decision-making bodies, other than political parties or legislature, Article 22(1) of the 2002 Act on equal opportunities for women and men stipulates that the local and central public authorities, social and trading companies, trade union organisations, employers' organisations and other non-profit organizations shall promote and support the balanced participation of women and men concerning management acts and the decision-making process. Such provisions also apply to the appointment of members and/or participants in any council, group of experts and other managerial and/or consultative lucrative structures.

Violation of this legal provision may be assessed by the NCCD and sanctioned with a written warning or administrative fine. So far, no decisions have been issued by the NCCD with regard to the implementation of Article 22 of the 2002 Act on equal opportunities.

1.7. Conformity of gender quotas with equality legislation

Positive action measures for women as provided for by Romanian legislation do not create any specific problems in the light of equality legislation. In its Article 9(1)(a), the 2002 Act on equal opportunities provides that in employment, i.e. in the recruitment for vacancies in the public and private sector as well as in relation to the selection of candidates, employers are forbidden to use discriminatory practices that disfavour persons of a certain gender in relation to advertising and organizing job contests or exams. However, provisions of this Article can be offset by the provisions of Article 4(e) stipulating the possibility of adopting positive action measures, aimed to support *de facto* accelerating the achievement of equal opportunities between women and men, for as long as it takes to achieve equal representation.

2. Positive action measures for women and gender quotas in practice

Despite the existence of a legal framework providing the basis for action measures aimed at reaching balanced representation for women and men in various fields of public life, such provisions do not prove to have any practical impact. The lack of

impact is caused by the fact that the legal provisions mentioning the obligation to reach balanced representation of women and men do not clarify or provide for any means of assessing when this balanced representation shall be considered as having been achieved or not. Consequently, it is impossible to assess whether the respective legal provisions have been implemented. In practice, political parties do not consider the provisions of the 2002 Act on equal opportunities on balanced representation for women and men in their leading bodies and in fact women are hardly represented in these bodies. With regard to company boards, such practice is even harder to detect, as the business world would always consider that board seats should be filled by the best-equipped individuals and argue that such individuals are appointed as board members based on their competencies. Consequently, it is only a coincidence that it is usually men who are the majority in company boards. In the business media there are statements of business women who have become members of company boards or even CEOs attesting to the fact they did not feel it was harder for them than for men to become members of such bodies.

After the abolition of the National Agency on Equal Opportunities (NAEO) and after its transformation from a state agency into a General Direction within the Ministry of Labour, Family and Social Protection, it is quite difficult, if not impossible to assess to which extent the institutional infrastructure accompanying and facilitating the implementation of gender equality legislation and policies in Romania, including the positive action policies, is still functional. The NAEO acted as a coagulator of initiatives aimed at building gender equality policies and gender awareness programmes through the National Commission on Equal Opportunities (CONES), which was set up under its coordination. The Commission was formed by representatives of all ministerial bodies and local public authorities, trade unions and employers' associations' representatives at national level. The Commission also organised the coordination of all Equal Opportunities Commissions that were set up at county level. Once the NAEO was abolished, the CONES was also abolished, together with all similar structures set up at county level.

On March 2010, the Romanian Government adopted Governmental Decision no. 237⁴²⁰ on approving the National Strategy on equality between women and men for 2010–2012. This programmatic document indicates the NAEO as the main institutional pillar in implementing the National Strategy on equal opportunities between women and men. Three months later, the NAEO was abolished.⁴²¹ It is still not clear how the new General Direction on equal opportunities between women and men placed within the Ministry of Labour, Family and Social Protection will be taking over the former role and mandate of the NAEO. No information is publicly available on the website of the Ministry of Labour, Family and Social Protection in this regard.

Articles 24 to 30 of the 2002 Act on equal opportunities provided for public authorities with a mandate to apply and monitor the implementation of the national legislation on equal opportunities between women and men. The NAEO having been abolished, it could be argued that the former Agency's tasks were to be assigned to the new General Direction. However, such legal clarifications have not been adopted

⁴²⁰ Governmental Decision no. 237 of 24 March 2010 on approving the National Strategy on equal opportunities between women and men for 2010-2012 and the General Action Plan on implementing the Strategy.

⁴²¹ Governmental Emergency Ordinance no. 68 of 1 July 2010 on some measures of reorganization of the Ministry of Labour, Family and Social Protection and of the activities of the institutions under its subordination or coordination.

so far. From that perspective, it could be stated that currently there is no specific specialised state body/authority in Romania in charge of ensuring the active and visible gender mainstreaming into all national policies and programmes, and of controlling the implementation and observance of the regulations in its field of activity. Consequently, it is currently impossible to assess the level of implementation of positive action measures based on gender in any of the given fields.

2.2. Effects of the positive action measures

There is no public data available on any analysis conducted at government level on the effects of the specific positive action measures as provided for by the Romanian legal framework. Effectiveness of such measures is not measured nor assessed in terms of practical impact.

Since the National Agency on Equal Opportunities has been restructured and transformed into a General Direction within the Ministry of Labour, Family and Social Protection, the basis of the government system aimed to promote gender equality policies and to ensure coordination with other relevant state stakeholders has ceased to exist. On the website of the Minister of Labour, Family and Social Protection there is no information related to specific programmes or policies on gender equality and equal opportunities for women and men. The former website of the NAEO is no longer available and all the information stored there can no longer be accessed.

Public discourse of the state bodies and the public debate have moved towards targeting the problem of equal opportunities in general, with a specific focus on the unemployed and the retired population. Such a shift can be easily linked to the severe economic crisis affecting Romania since the end of 2009. Hence, in the overall debate on the consequences of the economic crisis, the matter of equal opportunities between women and men has moved down on the public agenda, or has even been dropped.

3. Case law

No relevant case law applicable to the matter of positive action measures or gender quotas has been found.

4. Proposals

There are no proposals pending or discussions on-going in relation to any proposed new positive action measures.

SLOVAKIA – Zuzana Magurová

1. National legislation on positive action measures/gender quotas

1.1. Positive action measures in the national legal system

Neither the Antidiscrimination Act nor any other act provides for the possibility to take positive action on the ground of sex.

In July 2008 the CEDAW Committee in its Concluding Observations addressed to Slovakia criticised the unwillingness of the Government to adopt any temporary special measures on the ground of sex and called upon the Government to take efficient legislative measures.

The general basis for a constitutional interpretation of equality depends on the interpretation and application of Article 12 of the *Constitution*.⁴²² It reads as follows:

‘(1) All people are free and equal in their dignity and in their rights. The fundamental rights and basic freedoms are inherent, inalienable, non-prescriptible and not subject to repeal.

(2) The fundamental rights and basic freedoms are guaranteed in the territory of the Slovak Republic to everyone regardless of sex, race, colour of skin, language, creed and religion, political or other beliefs, national or social origin, affiliation to a nation or ethnic group, property, descent, or another status. No one must be harmed, preferred, or discriminated against on these grounds.’

According to the Finding of the Constitutional Court of the Slovak Republic Ref. PL. ÚS 37/95 of 12 September 1996,⁴²³ ‘Article 12 (2) of the Constitution is often described as a provision establishing the prohibition of discrimination and, on the other hand, the prohibition of the provision of advantages in a specific fundamental right and freedom to anyone entitled to this right.’

Discussions among lawyers surrounding the issue of whether or not the adoption of positive action measures is in compliance with the Constitution, or whether Article 12 of the Constitution should be amended to allow the adoption of positive action measures, are still ongoing. Several lawyers emphasize that positive action contradicts Section 12 paragraph 2 of the Slovak Constitution.

On the other hand, the Constitution contains articles that derogate from the above-mentioned prohibitions, thereby permitting special protection and preferential treatment for certain groups, and these articles, under certain circumstances and in some cases, may be regarded as provisions allowing for positive action. These include Chapter five – economic, social and cultural rights – Article 38 (1) and (2) of which guarantees to women, minors and the disabled an increased level of health protection at work and special working conditions, and to minors and the disabled the right to special protection in labour relations and to assistance in vocational training. Article 41 (2) guarantees to pregnant women special care, protection in labour relations and corresponding working conditions. The increased protection of these groups, as defined in the Constitution and further specified in special laws (the Labour Code), is regarded in Slovak society as being legally and socially acceptable and, to date, it has not resulted in any major controversies. The approach of equality of opportunities is politically and socially more feasible, but it would be premature to state that such an equality approach has already won wider support.

Another constitutional provision having the character of a provision allowing for positive action towards individuals determined on the basis of group characteristics is Article 34. It reads:

‘(1) The comprehensive development of citizens representing national minorities or ethnic groups in the Slovak Republic is guaranteed, particularly the right to develop their own culture, together with other members of the minority or ethnic group, the right to disseminate and receive information in their mother tongue, the right to associate in national minority associations, and the right

⁴²² Constitution of the Slovak Republic No. 460/1992 Coll. as amended. The English text of the Constitution can be found at www.concourt.sk. All other laws published in the Collection of Laws can be found in the Slovak language at www.zbierka.sk.

⁴²³ Published in the Collection of Laws of the Slovak Republic under No. 286/1996.

to set up and maintain educational and cultural institutions. The details will be set out in a law.

- (2) In addition to the right to master the state language, citizens belonging to national minorities or ethnic groups also have, under conditions defined by law, a guaranteed a) right to education in their own language, b) right to use their language in dealings with the authorities, c) right to participate in the solution of affairs concerning national minorities and ethnic groups.
- (3) The enactment of the rights of citizens belonging to national minorities and ethnic groups that are guaranteed in this Constitution must not be conducive to jeopardising the sovereignty and territorial integrity of the Slovak Republic or to discrimination against its other inhabitants.'

The text of this article has led to controversial discussions and has become subject to interpretation by the Constitutional Court.

The discussion relating to the constitutionality of positive action measures started intensively with the adoption of the *Antidiscrimination Act* in 2004.⁴²⁴ Temporary compensatory measures – *literally a temporary balancing measure* – were regulated in Article 8(8) entitled 'permissible differential treatment' as a result of the implementation of the Racial Equality Directive. This section was not included in the Government's initial draft of the act. It was later added to the draft by deputies during the discussion of the act in Parliament.

It read 'With a view to insuring full equality in practice and compliance with the principle of equal treatment specific balancing measures to prevent disadvantages linked to racial or ethnic origin may be adopted.'

This provision resulted in perhaps the most serious controversies in relation to the conception of equality in Slovakia and aroused turbulent political discussions. Immediately after its adoption, in October 2004 the Ministry of Justice initiated proceedings before the Constitutional Court to establish whether this provision was in conformity with the Constitution. The submission of the said petition to the court created a rather peculiar situation, because only a few months earlier the same Government had adopted a set of affirmative measures aimed at achieving equality and integration among the Roma minority.⁴²⁵

The provision has been repealed by the decision of the Constitutional Court because it contradicts Art. 1 par. 1 and Article 12 section 1 first sentence and section 2 of the Slovak Constitution. From the reasoning in the decision it follows that the weakness of this provision on temporary balancing measures was its generality and ambiguity.

The amendment of the Antidiscrimination Act,⁴²⁶ with effect from 1st April 2008, reintroduced the regulation of temporary balancing measures in Article 8a. Although

⁴²⁴ Article 8(8) Act no. 365/2004 Coll. of Laws on Equal Treatment in Certain Areas and on Protection against Discrimination Amending and Supplementing Certain Other Laws (the Anti-discrimination Act) as amended. This section was not included in the governmental proposal for the act. It was added by deputies during the discussion of the act in Parliament.

⁴²⁵ 'The Main Thesis of the Policy of the Slovak Republic in the Integration of the Roma Community', adopted in 2003 as the Decree of the Government of the Slovak Republic No. 278/2003 of 23rd of April 2003. The document was based on the policy of positive action or compensatory measures in the areas of education, employment, social security, housing and healthcare and it is aimed at members of the Roma community with the aim being to attain equality of opportunities.

⁴²⁶ Act No. 85/2008 Coll. amending Act No. 365/2004 Coll. on Equal Treatment in Certain Areas and on Protection against Discrimination Amending and Supplementing Certain Other Laws (the Anti-discrimination Act).

the said amendment had also transposed Directives 76/207/EEC and 2004/113/EC, in the final version the possibility to adopt temporary balancing measures *on the ground of sex has been completely omitted*. In contrast with the initial draft,⁴²⁷ during the discussion of the Act in Parliament the grounds of race and sex were replaced by the grounds of membership of a national or ethnic minority and social and economic disadvantages. This was the reaction to the objections raised by a deputy who argued that the ground of ethnicity was contrary to the Constitution. (This deputy was the former Minister of Justice who initiated the action before the Constitutional Court in 2004. By its decision of 18 October 2005 the Constitutional Court repealed the provision on temporary balancing measures contained in Article 8/8.) Although the deputy only objected to the unconstitutional character of ethnicity, the other deputies removed the ground of sex as well.

Article 8a reads:

- ‘(1) The adoption of temporary balancing measures by state administrative bodies targeted to eliminate forms of social and economic disadvantages and disadvantages arising due to age or disability, with the aim to ensure equality of opportunities in practice, is not considered discrimination. Such temporary balancing measures, in particular, are measures
 - a) consisting of the promotion of the interests of members of disadvantaged groups in employment, education, culture, healthcare and services;
 - b) ensuring equality in access to employment and education especially through targeted vocational training programmes for members of disadvantaged groups or through the dissemination of information on these programmes or on possibilities to apply for jobs or places in the system of education.
- (2) Temporary balancing measures may be adopted if
 - a) obvious inequality exists;
 - b) the aim of such measures is to decrease or eliminate this inequality;
 - c) temporary balancing measures are appropriate and essential to achieving the aim set.
- (3) Temporary balancing measures may be adopted only in the areas provided for in this act. Such measures shall terminate once the inequality, which led to the adoption of these measures, is eliminated. The state administration bodies shall be obliged to terminate the performance of these measures after achieving the established aim.
- (4) The state administration bodies are obliged to continuously monitor, evaluate and publish adopted temporary balancing measures with the aim being to reconsider the justification of their further existence and to submit reports to the Slovak National Centre for Human Rights on these facts.’

The provision of Article 8a is based on the concept of equality of opportunities. For the adoption of temporary balancing measures the following conditions must also be fulfilled. The measures must be aimed at the elimination of social and economic disadvantages and disadvantages on the ground of age and disability. They must ensure equality of opportunities in practice and must be adopted by the state

⁴²⁷ The original proposition contained the following wording: The adoption of temporary balancing measures by state administrative bodies targeted to eliminate disadvantages arising due to racial or ethnic origin, nationality or ethnic group, sex, age or disability, with the aim being to ensure equality of opportunities in practice, is not considered discrimination.

authorities (i.e. the Government, ministries, other central authorities, local authorities such as district authorities, regional authorities, and the offices of labour, social affairs and the family).

The Act contains a demonstrative enumeration of forms of temporary balancing measures (e.g. measures supporting the interest of members of disadvantaged groups in work, education, culture, health care and services leading to equality in access to employment and education).

These temporary balancing measures can only be taken if obvious inequality exists, and are aimed reducing or eliminating this inequality. They must be adequate and necessary. The temporary balancing measures can only be taken in areas specified in the Antidiscrimination Act. They must be temporary (provisional), i.e. they will only last until the elimination of the inequality that led to their adoption. The temporary balancing measures must be continuously monitored and evaluated, and information thereon must be published to allow the justification of their continuation to be monitored. The state administrative bodies are not required to collect statistics and they have no duty to report to Parliament on how these measures are enforced, but they must report therein to the Slovak National Centre for Human Rights.

During 2008, 2009 and 2010 the Centre did not register any report. Certain information about the implementation of temporary balancing measures was however collected by using questionnaires that the Centre circulated to the relevant state authorities. From the answers in these questionnaires it may be concluded that the state administrative bodies themselves do not have a clear and unambiguous view of the legal institution of temporary balancing measures or their application. If we add to this the rather vaguely formulated obligation laid down in the Antidiscrimination Act on the submission of reports to the Centre (without an exact definition of the parameters of such reports), we can state that in these circumstances the satisfactory fulfilment of this legal obligation on the part of the state administrative bodies cannot be reasonably expected.

The problem also lies with the very small group of bodies that can adopt temporary balancing measures (only state authorities). When the Government or the ministries take these measures, they usually cannot implement them directly. Due to the decentralisation of the competences of public administration in the areas of education, health and social assistance, which have been delegated to self-government, self-governing bodies are not authorized to take temporary balancing measures. A major portion of employers and entities providing goods and services are private persons and the Antidiscrimination Act does not permit them to take temporary balancing measures either. Commercial entities (in which the state can effectively participate and have an influence in decision-making) have also not adopted temporary balancing measures.

Within the framework of the interdepartmental amendment procedure the Slovak National Centre for Human Rights has proposed that the list of bodies authorized to adopt temporary balancing measures, besides state authorities, should be extended to all entities that are liable according to the Antidiscrimination Act, e.g. to municipalities, higher territorial units, employers, universities and others. From these entities greater flexibility and effectiveness, a sharper focus and more realistic possibilities for assessing the impacts of the implemented measures could be expected. Unfortunately, these proposals have not been taken into account, as a result of which only state authorities are currently authorized to adopt temporary balancing measures.

Another weakness is the restrictive scope of the grounds for adopting temporary balancing measures. The *grounds of race and sex* have been replaced by social and economic disadvantages, which is justified in the social security system, rather than in the antidiscrimination legislation.

1.2. Positive action measures/gender quotas in employment and self-employment

In view of the limited number of bodies which are authorised to take temporary balancing measures and the impossibility of taking measures on the ground of sex, these are not applied in the area of employment at all (including ‘state-owned’ companies).

Legislation on quotas for women on company boards does not exist in Slovakia.

No codes of conduct or corporate governance codes for companies (private or state-owned) concerning the regulation of these quotas are known. No company has published its policy on quotas or the higher representation of women on company boards.

1.3. Positive action measures/gender quotas in the access to and supply of goods and services

No temporary balancing measures, no positive action measures, and no gender quotas have been taken in this field. However, there are some differences in entrance fees for certain bars and discos, where women sometimes pay a reduced or no entrance fee at all (during certain hours or on certain days).

1.4. Positive action measures/gender quotas in the field of research and education

No temporary balancing measures, no positive action measures, and no gender quotas have been taken in this field.

1.5. Positive action measures/gender quotas in the legislature, political parties and/or political bodies

Like in many countries of the former Eastern Bloc, the formal 30 % quota for the participation of women in Parliament existed in Slovakia, but it mostly applied to women nominated by the Communist Party. Due to these negative experiences⁴²⁸ from the socialist era the current attitudes to quotas are rather negative, which was reflected in the reluctance to introduce quotas in the 1990s.

In the Concluding Observations of the Initial Reports of Slovakia to CEDAW (1998 and 2008) the CEDAW Committee reproached Slovakia, among other things, for the passive attitude of the Government in the area of women’s empowerment and it recommended that the Government should adopt appropriate mechanisms in order to achieve at least a 30 % representation of women in politics.

Not one of the successive Slovak governments has seriously dealt with the need to increase the number of women represented in political and other decision-making processes. Moreover, the adoption of regulations for these purposes is not supported by the law. In 2001 the political document ‘Conception of Equal Opportunities between Men and Women’ was adopted, in which the Government also undertook to ‘support the modification of the law on political parties and elections with a view to securing the representation of women in politics and in political parties, for example

⁴²⁸ During the socialist era women occupied about one-third of the seats, but the Communist Party determined the candidates and the elections were formal. Their participation in shaping policies was merely formal, as these policies were adopted in an undemocratic framework.

by means of introducing quotas and other short-term temporary measures'. This effort failed, however. Ten years later, none of it has been adopted.

Four attempts to introduce formal quotas (three parliamentary proposals and one government proposal to amend the Election Act) were made, but all these proposals were dismissed. Introducing quotas for political parties' lists of candidates, which has been discussed in Parliament on three occasions – in 2001, 2002 and 2004 – was met with a derisory response, even on the part of female MPs. The female MPs pointed out that via the introduction of quotas women would only get to Parliament because they were women, not because of their abilities. The idea of quotas never gained enough support due to the general argument that opportunities for women in parliamentary elections are equal to those of men and quotas are discriminatory. The political representation at that time did not respect the fact that most of the Slovak public were convinced of the disadvantaged position of women in politics and were therefore open to practical measures for increasing the representation of women in politics.

The persistent negative attitude to the introduction of quotas for women is also evidenced by the statements of female politicians themselves, e.g. by the statement by the chairwoman of the Parliamentary Committee for Human Rights and Minorities (of 24 February 2011), who regards the EU proposal for the introduction of quotas for women in politics or other managerial posts as hypocritical. She believes that the problem of the unfavourable position of women in society cannot be solved in this way. Determining quotas for women is even insulting, she says, because women are clever enough to enter politics, but only when barriers preventing women from entering politics have been removed on a nationwide scale.

A female member of the European Parliament also had a negative attitude to the introduction of quotas (7 February 2011). In her opinion quotas for women in politics, determined by law, generally do not motivate a higher representation of women in politics and, in many aspects, they have a degrading effect.

1.6. Positive action measures/gender quotas in other decision-making bodies or other areas

As regards the representation of women in Parliament and the Government, Slovakia currently lags behind the European average. Parliament has only 16 percent which are female members and the Government has only one female minister, besides the Premier Minister, who manages the Ministry of Justice.

1.7. Conformity of gender quotas with equality legislation

No legislation concerning gender quotas has been adopted. The current Slovakian legislation does not allow for gender quotas.

2. Positive action measures for women and gender quotas in practice

No temporary balancing measures, no positive action measures on the ground of sex, and no gender quotas have been taken in Slovakia.

3. Case law

In view of the current legislation only one case is known, namely the decision of the Constitutional Court from 2005 that annulled the initial provision of the Antidiscrimination Act relating to the adoption of temporary balancing measures (on the grounds of race and ethnicity).

The Government initiated the action before the Constitutional Court immediately following the adoption of the Antidiscrimination Act in 2004. By its decision of 18 October 2005⁴²⁹ the Constitutional Court repealed the provision on temporary balancing measures contained in Article 8/8.

The provision at issue has been repealed by the decision of the Constitutional Court because it contradicts Art. 1 par. 1 and Art. 12 par.1 first sentence and par. 2 of the Slovak Constitution. From the reasoning in the decision it follows that the weakness of the provision on temporary balancing measures was its generality and ambiguity.

In its petition, the Government objected that the purpose of temporary balancing measures was not clear; the conditions under which temporary balancing measures may be adopted were not clearly defined; the addressees authorised to adopt temporary balancing measures were not clearly defined; their scope and content were not clear; as well as the overall ambiguity and incomprehensibility of the provision.

The Constitutional Court granted the Government's petition and in its judgement it rejected temporary balancing measures. As a matter of fact, by this decision the court also rejected, contradicting its previous judgements, the material understanding of equality.

The decision of the Court found the provision on temporary balancing measures to be unconstitutional due to the fact that:

- the adoption of special positive action, including temporary balancing measures, constituted more favourable treatment (so-called positive discrimination) for persons related to race or ethnic origin;
- the provision itself failed to address the subject and content of measures as well as the criteria for adopting such measures and therefore it violated legal certainty in legal relations;
- the omission of the temporary character of measures as a main factor could result in so-called 'inverted discrimination' against other groups without a legally justifiable basis.

This controversial decision was adopted by a majority of 8 judges, 5 judges voted against. The Court stated that the material approach to equality alone did comply with the principle of the rule of law and resulted from 'general values of the human dignity, autonomy and equal value of each individual'. According to the material understanding of equality, 'in different cases individuals should be given treatment that will reflect their different position'. Besides equality in results, the Court also recalled that equality of opportunities is one of the material approaches to equality. According to the Court the rule of law requires the observance of equality of opportunities in practice. In case of a derogation from the general prohibition of discrimination, the means must be necessary and proportional to the achievement of the intended purpose. But, according to the Court, the failure to reflect the criterion of the temporary nature of such measures might lead to reverse discrimination against persons and hence to a breach of the general principle of equality. Finally, the Court stated that the provision on the 'adoption of positive measures, that are also compensatory measures, leads to the positive discrimination of persons related to racial or ethnic origin.'

⁴²⁹ Finding of the Constitutional Court of the Slovak Republic PL.ÚS 8/04-202 published in the Collection of Laws of the Slovak Republic under No. 539/2005.

This argument is also related to the confusion between positive discrimination and temporary balancing measures. On the one hand, the Court distinguished balancing measures or positive measures from the prohibited positive or reverse discrimination. The Court pointed out that the purpose of balancing measures is to ensure equality of opportunities in practice. These measures are temporary, because they countervail and compensate certain disadvantages and do not breach the general principle of equality. But if such measures were not declared to be temporary, a situation might occur where they would unreasonably privilege certain groups of persons, which would lead to prohibited positive discrimination. This argument may be regarded as comprehensible and fairly convincing. However, the following text, where the Court paradoxically identified temporary balancing measures with prohibited positive discrimination pursuant to Art. 12 (2), is unclear. The relevant quotation from the decision of the Court is worth noting.

‘A legal provision allowing the adoption of special balancing measures from the point of view of the concepts of equal opportunities and non-discrimination and the techniques used could therefore be constitutionally acceptable. (...) Such legal provisions must fully respect the national regulation of the general principle of equality and the prohibition of discrimination; otherwise it conflicts with the constitutional order. From Article 12 (2) of the Constitution as well as from the existing interpretation adopted by the Constitutional Court, that must be retained, it must be ensured that the *Constitution prohibits both positive and negative discrimination* for reasons that are stated in this Article, i.e. on grounds of sex, race, colour, religion or beliefs, political or other opinion, nationality or membership of an ethnic minority, property, birth or other position. *Therefore the adoption of special balancing measures and otherwise generally accepted legislative techniques for the prevention of discrimination on the grounds of race or ethnic origin are contrary to Art. 12 (2), and hence also contrary to Art. 12 (1) of the Constitution.*’

Special balancing measures are, as the Court mentioned, qualitatively different from positive discrimination.

In its judgment the Court cited two cases of the ECJ – *Johnston* and *Kreil*, but did not mention the ECJ’s case law on positive action – *Kalanke*, *Marschall*, *Badeck*, *Abrahamsson*, *Lommers*, *Briheche*.

4. Proposals

After the decision of the Constitutional Court in October 2005 to the effect that the provision of the Antidiscrimination Act on temporary balancing measures in favour of an ethnic minority is unconstitutional, all discussions on quotas have ceased.

Information about any prepared legislative proposals on gender quotas is not available. The trade unions, employers, the Department of Gender Equality and Equal Opportunities of the Ministry of Labour, Social Affairs and the Family, and the political parties are not dealing with this issue.

Only NGOs representing women’s interests deal with the issue of quotas. Some of them have published analyses on the elections from the point of view of gender perspectives.

SLOVENIA – Tanja Koderman Sever

1. National legislation on positive action measures/gender quotas

1.1. Positive action measures in the national legal system

The Constitution of the Republic of Slovenia⁴³⁰ (hereinafter the Constitution) determines that Slovenia is a democratic republic, governed by the rule of law, and a social state which guarantees human rights and fundamental freedoms for all, irrespective of their national origin, race, sex, language, religion, political or other conviction, material standing, birth, education, social status, disability or any other personal circumstance.

On the basis of the Constitution the Act Implementing the Principle of Equal Treatment⁴³¹ (hereinafter the AIPET) and the Act on Equal Opportunities for Women and Men⁴³² (hereinafter the AEOWM) were adopted. The AIPET is a general Act and was adopted in 2004. It defines the adoption and description of positive action measures, designed to ensure actual equality of persons which are placed in a less favourable position, in particular due to their sex, nationality, racial or ethnic origin, religious or other belief, disability, age and sexual orientation. Positive action measures may be adopted with the purpose of preventing or eliminating the consequences of such a position or as compensation for a less favourable position. They include: positive measures, which under the condition of equal fulfilment of the prescribed criteria and conditions give priority to persons with a particular personal circumstance and are applied in cases where an obvious disproportion of the representation of persons with that particular personal circumstance exists; or incentive measures, which give special benefits or implement special incentives for persons in a less favourable position. The AEOWM is in relation to the AIPET a 'lex specialis'. It was adopted in 2002 and defines common grounds for the improvement of the status of women and the establishment of equal opportunities for women and men in various fields of social life. According to the AEOWM positive action measures are defined as temporary measures aimed at establishing equal opportunities for women and men, and promoting gender equality in specific fields of social life in which non-balanced representation of women and men (which exists when the representation of one gender in a specific field of social life or in a part of such a field is lower than 40 %) or unequal status of persons of one gender is ascertained. They can be used to remove objective obstacles that bring about a non-balanced representation of women and men or an unequal status of persons of one gender, as well as to give special benefits in the form of incentives to the underrepresented gender or to the gender experiencing unequal status. These incentives must be justified and in proportion to the purpose of the positive action measure. The AEOWM includes the following positive action measures: positive measures that give priority in the case of an equal degree of fulfilment of the prescribed standards and conditions to persons of that gender which is underrepresented or which is experiencing unequal status, until balanced or equal representation is achieved; encouraging measures that provide special benefits or introduce special incentives for

⁴³⁰ *Ustava Republike Slovenije* (URS, *Uradni list RS*, Nos 33/91-I, 42/97, 66/2000, 24/03, 69/04 and 68/06), <http://www.us-rs.si/o-sodiscu/pravna-podlaga/ustava/?lang=1>, accessed 1 March 2011.

⁴³¹ *Zakon o uresničevanju načela enakega obravnavanja* (ZUNEO-UPB1, *Uradni list RS*, No. 93/2007), http://zakonodaja.gov.si/rpsi/r08/predpis_ZAKO3908.html, accessed 1 March 2011.

⁴³² *Zakon o enakih možnostih žensk in moških* (ZEMŽM, *Uradni list RS*, Nos 59/2002, 61/2007), http://zakonodaja.gov.si/rpsi/r08/predpis_ZAKO3418.html, accessed 1 March 2011.

the purpose of eliminating non-balanced representation of women and men or unequal status on account of gender; and programme measures in the form of awareness-raising activities and action plans for the promotion and establishment of equal opportunities and gender equality.

Furthermore, there is a general policy commitment to 'mainstreaming'. According to the AIPET and the AEOWM the National Assembly, the Government, Ministries and other state bodies and bodies of self-governing local communities shall establish conditions for equal treatment of persons, regardless of any kind of personal circumstance, through raising awareness and monitoring the situation in this field, as well as through measures of a normative and political nature. Offices and governmental services, active in the field of equal treatment of persons regardless of personal circumstances, shall especially strive to implement the above-mentioned aims within the framework of their field of work. The implementation of gender mainstreaming is binding on the Government of the Republic of Slovenia, line ministries and local government authorities.

All positive action measures are defined in the Resolution on the National Programme for Equal Opportunities for Women and Men, 2005–2013⁴³³ (hereinafter the National Programme) and periodical plans adopted on the basis of this. The National Programme is a strategic document which defines objectives and measures as well as key policy makers for the promotion of gender equality in different areas of life of women and men in the period 2005–2013.

The positive action measures introduced until now are legally binding. In the event of non-compliance, an individual may first complain to a responsible and competent administrative or other body (for example the Commission for Elections if quotas have not been respected). If the administrative or other competent body rejects the complaint, an individual may file a lawsuit with the competent court. An individual can also complain to the Ombudsman or to the Advocate of the Principle of Equality working within the Office for Equal Opportunities.

1.2. Positive action measures/gender quotas in employment and self-employment

1.2.1. The public sector

The Government adopted the Regulation on Criteria for Respecting the Principle of Gender Balanced Representation⁴³⁴ (hereinafter the RCRPGBR) in 2004. According to the RCRPGBR, the principle of gender-balanced representation must be applied in the composition of governmental bodies; in nominating or appointing government representatives in public enterprises and other entities of public law; and in the composition of expert councils, established by the Ministers. The principle is therefore applied when the representation of one sex is at least 40 %. The RCRPGBR only applies to the above-mentioned public officials, which means that it only applies to those in governmental bodies, government representatives in public enterprises etc.

⁴³³ *Resolucija o nacionalnem programu za enake možnosti žensk in moških, 2005–2013* (ReNPEMZM, Uradni list RS, No. 100/2005), http://www.uem.gov.si/fileadmin/uem.gov.si/pageuploads/ReNPEMZM_EN.pdf, accessed 1 March 2011.

⁴³⁴ *Uredba o o kriterijih za upoštevanje načela uravnovežene zastopanosti spolov* (Uradni list RS, No 103/04), <http://www.uradni-list.si/1/objava.jsp?urlid=2004103&stevilka=4407>, accessed 1 March 2011.

Furthermore 2 %, 3 % and 6 % quotas were introduced in 2008 with the Regulation on Establishing Employment Quota for Persons with Disabilities,⁴³⁵ but they apply to both men and women.

1.2.2. The private sector

According to the third Periodic Plan for Implementation of the Resolution on the National Programme for Equal Opportunities for Women and Men for 2010 - 2011⁴³⁶ (hereinafter the Periodic Plan for 2010 - 2011) the Ministry of Labour, Family and Social Affairs supports programmes to promote self-employment and entrepreneurship, which are not exclusively geared towards enhancing female entrepreneurship. The inclusion of women in these programmes is at least 40 %.

The above-mentioned quotas for persons with disabilities apply to the private sector as well. All companies with more than 20 people employed are obliged to respect the quotas.

There are no rules to enhance female representation in company boards of private companies.

1.2.3. State-owned companies

According to the RCRPGBR, the principle of gender-balanced representation must be applied in nominating or appointing government representatives in public enterprises and other entities of public law. This rule refers to supervisory boards and executive boards. The principle is therefore applied when the representation of one sex is at least 40 %.

There are no other positive action measures/quotas regarding actual employment or promotion in state-owned companies.

1.2.4. Differences between the public and the private sector

Besides the principle of gender-balanced representation that must be applied in the composition of governmental bodies and in the composition of expert councils established by the Ministers, there are no other differences in the approach to positive action measures and gender quotas in the public and the private sector.

1.3. Positive action measures/gender quotas in the access to and supply of goods and services

Although they are allowed, there are no positive action measures/gender quotas in the access to and supply of goods and services.

1.4. Positive action measures/gender quotas in the field of research and education

1.4.1. Research and academics

The Ministry of Higher Education, Science and Technology is committed to complying with the principle of gender-balanced representation in the composition of all bodies appointed in the field of science in accordance with the RCRPGBR.

⁴³⁵ Uredba o določitvi kvote za zaposlovanje invalidov (Uradni list RS, Nos 32/07 and 21/08), <http://www.uradni-list.si/1/content?id=79610>, accessed 1 March 2011.

⁴³⁶ Periodični načrt za izvajanje nacionalnega programa za enake možnosti žensk in moških 2010 - 2011, <http://www.uem.gov.si/fileadmin/uem.gov.si/pageuploads/UEMPeriodNactReNPEMZM1011.pdf>, accessed 1 March 2011.

1.4.2. Primary, secondary and higher education

Although they are allowed under the AEOWM and AIPET, there are no positive action measures/gender quotas in the field of primary, secondary and higher education.

1.5. Positive action measures/gender quotas in legislature, political parties and/or political bodies

Due to a very low representation of women in politics the General Assembly decided to adopt positive action measures in the political field in order to promote gender-balanced representation in the decision-making processes. To this end, the European Parliament Elections Act was adopted in 2002, the Act amending the Local Elections Act in 2005 and the Act amending the General Assembly Elections Act in 2006. With those Acts they introduced 40 % women quotas on candidate lists that need to be respected for elections in the European Parliament and local elections, and 35 % women quotas on candidate lists for parliamentary elections. In addition, there is a requirement that every second candidate in the first half of the candidate list has to be a woman. This rule will enter into force for the next local elections in 2014. For elections in the European Parliament there is a rule that in the first half of the candidate list both genders must be represented by at least one candidate. No similar rule exists for parliamentary elections.

Furthermore, according to the RCRPGBR in the composition of governmental bodies; in nominating or appointing government representatives in public enterprises and other entities of public law; and the composition of expert councils, established by the Ministers the representation of one sex must be at least 40 %.

1.6. Positive action measures/gender quotas in other decision-making bodies or other areas

There are no other relevant positive action measures.

1.7. Conformity of gender quotas with equality legislation

Gender quotas are in conformity with national equality and EU legislation. Quotas and other positive action measures that have been implemented until now apply only to women, since they are the underrepresented sex in decision-making processes and have more difficulties than men to find a job or to become self-employed.

2. Positive action measures for women and gender quotas in practice

2.1. Implementation of positive action measures for women and/or gender quotas

The Slovenian gender equality policy has been designed, on the one hand, to introduce the horizontal approach of gender mainstreaming, and, on the other hand, to implement specific measures and activities aimed at improving the status of women and men in the areas where gender inequality prevails. According to the AIPET and the AEOWM there is a general policy commitment to gender mainstreaming. Gender mainstreaming implies a horizontal approach taking into account differences in conditions, situations and needs of women and men in all social areas. Consequently, the line ministries, government offices and local self-governing communities design policies and measures contributing to achieving equal opportunities for women and men. Therefore, conditions and capacity for gender mainstreaming are to be strengthened within individual bodies. By appointing the coordinators for equal opportunities operating at all Ministries and several local self-governing communities,

the basic condition has been met for mainstreaming gender into all policies and at all levels. However, for the comprehensive and systematic implementation of gender mainstreaming, it is essential to ensure that all actors in the process of designing, planning, implementing, monitoring and supervising policies and programmes are appropriately qualified. The coordination and support for the introduction and implementation of gender mainstreaming and monitoring the implementation of gender equality policy fall within the competence of the Office for Equal Opportunities. However, there are certain areas that require more vigorous activities aiming at ensuring equal opportunities for women and men and the adoption and implementation of positive action measures. According to the AIPET and the AEWOM such temporary positive action measures in the context of equal opportunities for women and men provide to persons of one gender particular advantages in certain areas with the sole purpose to eliminate the discrimination and achieve gender equality. They do go beyond formal equality. All positive action measures are defined in the National Programme and the periodic plans adopted on the basis of this. With a view to ensuring that the objectives and measures as planned for the entire eight-year period will not remain mere policy orientations, every two years a periodic plan is prepared, specifying the activities and measures to be carried out over the next two years. Periodic plans are therefore implementing instruments of the National Programme, establishing priorities and activities for the implementation of the objectives and measures thereof in particular areas. The Equal Opportunities Office is responsible for its monitoring and implementation and reports on it regularly. The implementation of the National Programme is monitored on the basis of the activities carried out in the framework of two-year periodic plans. Pursuant to the AEOWM line ministries and government offices report to the Office for Equal Opportunities on the implementation of the measures taken and activities under their responsibilities two months before the expiry of each two-year periodic plan. On the basis of these reports, the Office for Equal Opportunities prepares a new periodic plan and submits it to the Government for adoption. In addition, the Government reports to the National Assembly every two years. Besides this, the statistical data gathered by the responsible Ministries, government offices and other bodies, the analyses and surveys are also important tools for monitoring the situation and achievements.

2.1.1. Implementation in employment, self-employment and vocational training

According to the special goal, defined by the National Programme to reduce differences in employment and unemployment rates of women and men some positive action measures have been taken in 2010 and 2011. They are defined in the Periodic Plan for 2010-2011 and include implementation of special programmes for the promotion of employment and work activities of women within the framework of the active employment policy and programmes to promote self-employment and entrepreneurship of women. The positive action measures are the following:

- a programme to promote employment of long-term unemployed persons in 2009/2010, where the share of women is 60 %;
- a programme of training in the workplace in 2009 to 2011 in order to increase the competitiveness of the unemployed in the labour market, where the share of women involved in the programme is 55 %;
- a programme to increase the employment possibilities of fresh graduates in the labour market, where the share of women is 55 %;
- a programme to promote employment of unemployed persons that are difficult to employ, where the share of women is 55 %;

- programmes to promote self-employment and entrepreneurship, where the inclusion of women is at least 40 %.

These measures are binding and have been implemented by the Ministry of Labour, Family and Social Affairs and by the Employment Service of Slovenia.

Furthermore, the RCRPGBR is being implemented. Therefore the share of nominated and appointed female government representatives in public enterprises and other entities of public law is at least 40 %.

2.1.2. Implementation in the access to and supply of goods and services

There are no positive action measures/gender quotas in the access to and supply of goods and services.

2.1.3. Implementation in research and education

There are no positive action measures/gender quotas in the field of primary, secondary and higher education.

2.1.4. Implementation in legislature, political parties and/or political bodies

In order to promote a more balanced representation of women and men in politics, women quotas were introduced with the adoption of the European Parliament Act, the Act amending the Local Elections Act and the Act amending the General Assembly Elections Act. According to these Acts, the representation of women on candidate lists must be 40 % for elections in the European Parliament and local elections and 35 % for parliamentary elections. These quotas are to be achieved gradually until 2012 (parliamentary elections) and 2014 (local elections), when the laws will be fully enforced. This means that women quotas for local elections in 2006 were 20 %, in 2010 30 % and will finally be 40 % in 2014. And women quotas on parliamentary elections in 2008 were 25 % and will finally be 35 % in 2012. Quotas must be applied. If they are not applied, the candidate lists are not valid. Unfortunately, there are no sanctions if the goal (more balanced representation of women and men in politics) is not achieved.

2.1.5. Implementation in other decision-making bodies or areas

There are no other relevant positive action measures.

2.2. Effects of the positive action measures

Positive action measures to achieve a more balanced representation in politics unfortunately do not contribute to a greater representation of women in municipal councils and in the National Assembly because the 'zipper rule' has not been introduced yet. The 'zipper rule' means that male and female candidates are alternately arranged on candidate lists, which allows equal distribution of candidates by gender on voting lists. These findings are supported by the Report on the Implementation of the National Programme in 2008 and 2009⁴³⁷ (hereinafter RINP 2008–2009) by the Office for Equal Opportunities, statistical data on the number of women elected in the municipal councils and in the National Assembly by the Statistical Office of the Republic of Slovenia, the Government, the Commission for

⁴³⁷ Poročilo o izvajanju Resolucije o nacionalnem programu za enake možnosti žensk in moških za leti 2008 in 2009, <http://www.uem.gov.si/fileadmin/uem.gov.si/pageuploads/UEMPorociloReNPEMZM0809.pdf>, accessed 1 march 2011.

Elections etc. and by several studies, among them a study entitled ‘Candidate Lists and Results of Local Elections in 2010’⁴³⁸ prepared by the Agency for the technical support for public policies.

The analysis of the effectiveness of the above-mentioned positive action measures in 2010 and 2011 in employment and self-employment has not been made yet. However, an analysis was made in the RINP 2008-2009. This includes an analysis of positive action measures in employment and self-employment taken in 2008 and 2009, which were more or less the same as the measures taken in 2010 and 2011. It showed that the implemented positive action measures contributed to the reintegration and employment of the long-term unemployed, unemployed persons that are difficult to employ and fresh graduates, and promoted self-employment, which included very high proportion of women.

Furthermore, according to the RINP 2008–2009, the share of women in governmental bodies and expert boards and in appointed and nominated government representatives in public enterprises and other entities of public law increased. According to the available statistics provided by the Ministry of Public Administration in 2008 the number of female heads of governmental offices had increased by 5.5 %, the number of heads of administrative authorities within Ministries by 0.8 % and the number of directors general of directorates by 1.4 % compared to 2007.

3. Case law

3.1. Case law of national courts

There is no case law of national courts with respect to positive action measures.

3.2. Case law of equality bodies

There is no case law of the Advocate of the Principle of Equality working within the Office for Equal Opportunities with respect to positive action measures.

3.3. Case law of other bodies

There is no case law of other bodies with respect to positive action measures.

4. Proposals

There are no proposals or discussions with respect to new positive action measures.

SPAIN – Berta Valdés de la Vega

1. National legislation on positive action measures/gender quotas

1.1. Positive action measures in the national legal system

Positive action is not directly regulated in the Spanish Constitution but articles 14 and 9.2 provide a basis to declare positive action to be in conformity with the principle of equality. In fact, article 14 recognises equality before the law without discrimination on any of the grounds listed there, and article 9.2 requires public authorities to

⁴³⁸ *Analiza kandidatnih list in rezultatov volitev za članice in člane občinskih svetov ter županje in župane*, <http://www.uem.gov.si/fileadmin/uem.gov.si/pageuploads/GradivoMediji.pdf>, accessed 1 march 2011.

promote certain conditions in order to make equality real and effective. Positive action is not regarded as an exception to the principle of equality but as an instrument to obtain effective equality and to eradicate discrimination.⁴³⁹

Law 3/2007 on effective equality between women and men (LOI) further develops article 14 of the Constitution and is the basic legislation for all of Spain nationwide. The LOI regulates minimum aspects which should be guaranteed to all people regardless of where they live in Spain. Besides the LOI, which is generally applicable to the Spanish state in its entirety, the *Comunidades Autonomas* can further develop the principle of equality within their individual competences (labour legislation is only a state competence).⁴⁴⁰ There are laws for effective equality between women and men in several *Comunidades Autonomas* with some references to positive actions⁴⁴¹ (País Vasco,⁴⁴² Galicia,⁴⁴³ Andalucía,⁴⁴⁴ Murcia,⁴⁴⁵ Valencia,⁴⁴⁶ Castilla-La Mancha,⁴⁴⁷ Canarias,⁴⁴⁸ Navarra,⁴⁴⁹ Baleares,⁴⁵⁰ Castilla y León).⁴⁵¹

Article 11 LOI justifies the use of positive action to make the constitutional right of equality effective and to rectify situations of discrimination between women and men. They are temporary measures which should meet certain conditions (they must be reasonable and proportional in relation to their aims) and they are legal as long as

⁴³⁹ In the first draft of the Integral Law for equal treatment and no discrimination, article 4 established that a 'failure to comply with measures concerning positive action' will be regarded as a breach of the equality principle.

⁴⁴⁰ The distribution of competences between the State and the *Comunidades Autónomas* is established in the Constitution and it is complemented by the *Estatutos de Autonomía*. The competences in the regulation of labour are reserved to the State, which is responsible for all legislation on the matter. The *Comunidades Autónomas* only have execution and administration competences, including organizational or internal regulatory authority. The distribution of competences in equal opportunities will depend on the specific field. For example, the *Comunidades Autónomas* could assume competences in housing or social services.

⁴⁴¹ Due to the high number of laws for effective equality in the *Comunidades Autonomas* and the similarities between them, I will analyse only the LOI, the Law of Castilla-La Mancha and the Law of Galicia.

⁴⁴² Ley 4/2005, de 18 de febrero, para la Igualdad de Mujeres y Hombres. Boletín Oficial País Vasco núm. 42, de 2 de marzo de 2005.

⁴⁴³ Ley 7/2004, de 16 julio, gallega para la igualdad de mujeres y hombres. Diario Oficial Galicia (DOG) núm. 228, de 21 de septiembre de 2004 y Ley 2/2007, de 28 de marzo, del trabajo en igualdad de las mujeres de Galicia. Diario Oficial Galicia (DOG) 72, de 13 de abril de 2007.

⁴⁴⁴ Ley 12/2007, de 26 noviembre, de promoción de la igualdad de género en Andalucía, Boletín Oficial Andalucía (BOJA) núm.247, de 18 de diciembre de 2007 y BOE 13 febrero 2008, núm. 38.

⁴⁴⁵ Ley 7/2007, de 4 abril, para la Igualdad entre Mujeres y Hombres, y de Protección contra la Violencia de Género en la Región de Murcia. Boletín Oficial Región de Murcia (BORM) núm. 91 de 21 abril 2007. BOE 22 julio 2008, núm. 176.

⁴⁴⁶ Ley 9/2003, de 2 abril para la igualdad de mujeres y hombres. Diario Oficial de la Generalitat Valenciana núm. 4474 de 4 de abril de 2003. BOE 8 mayo 2003, núm. 110.

⁴⁴⁷ Ley 12/2010, de 18 de noviembre, de Igualdad entre Mujeres y Hombres de Castilla-La Mancha. Diario Oficial de Castilla-La Mancha num 228, de 25 de 2010.

⁴⁴⁸ Ley 1/2010 de de 26 de febrero, Canaria de Igualdad entre Mujeres y Hombres. Boletín Oficial de Canarias (BOC) núm. 45 de 5 de marzo de 2010, BOE 18 marzo 2010, núm. 67.

⁴⁴⁹ Ley Foral 33/2002, de 28 de noviembre, de fomento de la igualdad de oportunidades entre mujeres y hombres. Boletín Oficial Navarra (BON) núm. 150, de 13 de diciembre de 2002. BOE 15 enero 2003, núm. 13.

⁴⁵⁰ Ley 12/2006 de 20 de septiembre para la mujer. Boletín Oficial de les Illes Balears, núm. 135 de 26 septiembre 2006. BOE 17 octubre 2006, núm. 248.

⁴⁵¹ Ley 1/2003, de 3 de marzo, de Igualdad de Oportunidades entre Mujeres y Hombres en Castilla y León. Boletín Oficial Castilla y León (BOCL) núm. 46, de 7 de marzo de 2003 BOE 24 marzo 2003, núm. 71, modificada por la Ley 7/2007, de 22 de octubre. Boletín Oficial Castilla y León (BOCL) núm. 210 de 29 octubre 2007.

gender discrimination remains an issue. Positive action can be established by public authorities, but also by enterprises – themselves or through social dialogue – within the terms established in the LOI. There is no direct obligation to introduce positive measures but as public authorities have the constitutional commitment to attain real and effective equality, positive action seems to be the best instrument for this.

Quotas are also introduced in the LOI as a means to attain gender equality. They are mainly applied with regard to public employment and Government Administration, while the compulsory or voluntary nature of their fulfilment depends on the terms according to which they are regulated in the LOI and in the development legislation. For example, article 52 LOI states that ‘the Government will attain a balanced composition between women and men in the appointment of managerial staff of the General State Administration’. Article 53 LOI lays down, for employment committees or evaluation commissions, the same balanced composition unless there is otherwise ‘a well-founded and objective reason which is properly justified’. Finally, the LOI modifies article 44 bis Law 5/1985 on the General Electoral System and states that ‘a balanced composition of women and men must be applied to all candidate lists for deputies’ elections’. Quotas introduced in the LOI but relating to private employment (a balanced composition on company boards) are not compulsory as they are established as a ‘strong’ recommendation with no sanction. The definitions of these quotas are based on a percentage clause. The general clause is the ‘balanced composition or balance presence’ of women and men in, for example, selection and valuation committees, lists of candidates in political elections, managing positions in public Administration etc. According to the first Additional Disposition of the LOI a ‘balanced composition’ is a certain proportion of women and men so that persons of each sex do not surpass sixty percent or are less than forty percent. A ‘balanced composition’ is also used in the majority of laws on equality in the Comunidades Autonomas. For example, in article 4 of the Law on Equality between Women and Men of Castilla-La Mancha a balanced composition in decision bodies is a principle which is the responsibility of the Administration in order to eradicate gender discrimination.

There are also positive action measures which are used for grounds other than gender. In fact, different laws provide that the principle of equal treatment will not prevent positive action in favour of certain groups. The aim is to prevent or compensate disadvantages and to guarantee equality with regard to, for example, racial or ethnic origin, religious or other convictions, disability, age and sexual orientation at work (articles 30 and 35 Law 62/2003 on fiscal, administrative and social measures, article 37 bis Law 13/1982 on the social integration of the disabled). A quota system for public or private enterprises with 50 employees or more is established in article 38 Law 13/1982, so that at least 2 % of employees must be disabled workers (or alternative measures).⁴⁵² In public employment there must be a quota of at least 5 % of vacancies to be filled by disabled persons so that the aforementioned 2 % in public employment in the administration can be attained on a step-by-step basis (article 59 Law 7/2007: the basic statute for civil servants). Articles 8 and 9 Law 51/2003 on equal opportunities, non-discrimination and universal accessibility for the disabled also regulate positive action. The aim of these measures is to compensate disadvantages or difficulties in political, economic, cultural and social life. Positive action measures could take the form of complementary economic

⁴⁵² Royal Decree 27/2000 on alternative measures for compliance with the quota of 2 % in favour of disabled workers in companies with 50 or more employees.

or technical support, or even personal assistance. They could also be established through rules, criteria or practices.

Concerning equality in education article 81 Law 2/2006 on Education establishes that the authorities should develop compensatory actions for people, groups and areas which experience unfavourable situations. The aim is to combat inequalities resulting from social, economic, cultural, geographic, ethnic or any other factors.

1.2. Positive action measures/gender quotas in employment and self-employment

1.2.1. The public sector

The principle of a balanced composition is applied throughout the State Government Administration and in all public bodies or entities which are dependent thereon. There is some discussion about the compulsory or promotional nature of the principle of a balanced composition. Sometimes the law is not clear thereon. As this principle is widely applied the consequences of its non-fulfilment will depend on the situation in question.⁴⁵³ A balanced composition is applied in the following situations:

- a) Appointment of managing personnel (article 52 LOI).
- b) The establishment of all employment committees or evaluation commissions (article 53 LOI).
- c) The appointment of representatives in all bodies, national or international consultative committees or committees of experts. Also the appointment of representatives on company boards in whose capital the state administration participates (article 54 LOI).

Castilla-La Mancha's law on equality applies the same principle and in the same situation in relation to the autonomic Administration (article 5).

Public employment policies have introduced some positive action measures which are aimed at increasing employment among women aged between 45 and 64, and to improve their professional level and their capacity to adapt to the labour market. Article 31 of Galicia's Law 2/2007 on women's work and equality provides for public employment policies aimed mainly at women as an under-represented group. Some of these policies concern women's self-employment in agriculture and fishing.

Positive action in vocational or occupational training activities

- Preferential access, for one year, to training activities for employees who have been out of work due to any kind of leave motivated by the reconciliation of work and family life (article 42 Castilla-La Mancha's Law on equality and article 60.1 LOI).
- Quota: a minimum of 40 % of places on training courses are reserved for women employed in the Administration who meet the necessary requirements to follow the course (article 60.1 LOI).

Article 36 of Castilla-La Mancha's Law on equality establishes the possibility to introduce quotas to stimulate women's employment in local and autonomic administration. Jobs can be reserved for women in employment-promoting policies and directly in employment. These reserved posts will be in percentage terms, i.e. the same percentage that corresponds to unemployed women in relation to the unemployed in their entirety.

⁴⁵³ For example, if it concerns an evaluation commission, its composition could be considered invalid.

Article 38 of Castilla-La Mancha's Law on equality allows positive actions to be established in public contracts between the Administration and private companies. In order to award contracts to companies, the Administration of Castilla-La Mancha has the possibility to establish preferences towards entities which have taken measures to avoid any kind of gender discrimination and to attain a situation of equal opportunities between women and men. This preference will apply provided that the company's technical or professional level (for the work to be done) is recognized.

1.2.2. The private sector

Positive action measures in the private sector can also be established by means of collective negotiation. The aim of positive action can be preferential treatment in access to employment and/or measures to attain effective equality in working conditions (article 43 LOI). Positive action to promote women's access to all professions can also be determined. The law (article 17.4 Worker's Statute) provides that the preferential hiring of persons from the less represented sex in the group or professional category can take place when the candidates are equally qualified. The same condition is required when the preferences are made in promotion and professional training.

Article 75 LOI encourages large companies to gradually place women on their boards, until an even number of male and female members is achieved. These companies should, within eight years, gradually modify the composition of their boards until a proportion of between 40 % and 60 % is achieved. This is merely a recommendation and there is no sanction for a failure to comply with the obligations, but it will be taken into account in, for example, obtaining the equality label,⁴⁵⁴ public subsidies or state administration contracts.

Castilla-La Mancha's Law on equality (article 5) promotes women's rural/agricultural work (self-employment) and the target of a balanced composition in cooperative associations is also set.

1.2.3. State-owned companies

Article 37.2 LOI establishes that the radio and television public enterprise (*Radio Televisión Española, RTVE*) will promote women's participation in management functions. The same provision is laid down in Article 38.2 LOI for the Spanish press agency EFE. These two articles do not establish a quota but the provisions are legally binding.⁴⁵⁵

1.2.4. Differences between the public and the private sector

Access to the civil service is subject to the principles of equality, merit and capacity as laid down in article 103 of the Spanish Constitution. Access is by means of a competitive examination for the Public Service in which those principles should be guaranteed. Basic public employees' pay is determined by the State General Budget and this applies to all without gender discrimination, although many variable aspects can lead to being placed at various levels on the salary scale and can lead to inequalities, which are currently being analysed. This situation, together with the

⁴⁵⁴ The equality label will be given to enterprises (private or state-owned) which meet certain requirements and subject to specific criteria, one of which could be a balanced composition on company boards.

⁴⁵⁵ *RTVE* and *EFE* are regulated in some detail under the title 'equality and media' in the LOI. The regulation of private media enterprises is vaguer and relies on private initiative, although with legislative backing.

measures provided by the LOI and by the ‘I Plan for equality between women and men in the State General Administration and its public bodies’ (*‘I Plan para la igualdad entre mujeres y hombres en la Administración General del Estado y en sus organismos públicos’*),⁴⁵⁶ signed in January 2011, have led to greater equality between men and women in the civil service. The majority of positive actions concern a balanced composition in different administration bodies or committees. These measures mainly have a legal origin since they have been directly provided by the LOI and by the *Comunidades Autónomas’ equality laws*.

The situation in the private sector is somewhat different. Here, there are less legal provisions and the most relevant element is to set the necessary basis so that the social partners have the possibility to take provide positive actions through social dialogue. Collective agreements (sector level) and equality plans in companies are instruments which are currently making use of positive actions.

1.3. Positive action measures/gender quotas in the access to and supply of goods and services

It is difficult to find any positive action measures in this field.

1.4. Positive action measures/gender quotas in the field of research and education

Research and academia; primary, secondary and higher education

Article 24 LOI provides for the promotion of a balanced composition of women and men in management positions in all educational institutions. This applies in general to all the education administrations. The same principle of a balanced composition is applied in Castilla-La Mancha for primary and secondary schools as well as universities.⁴⁵⁷

1.5. Positive action measures/gender quotas in the legislature, political parties and/or political bodies

Management and representative positions appointed by government powers should comply with the balanced composition of women and men (article 16 LOI).

According to Law 5/1985 on the General Electoral System (article 44 bis), a balanced composition of women and men must be applied to all candidate lists for deputies’ elections to the National Parliament, the *Comunidades Autónomas’* Legislative Assemblies, the European Parliament and in local elections. The minimum proportion of forty percent for one sex must apply in each section of the five positions’ candidates. In *Comunidad Autónoma del País Vasco’s Law 4/2005 on equality between women and men* all candidate lists must integrate a minimum of 50 % women. In some *Comunidades Autónomas* the principle of a balanced composition has been organized by putting candidates of one sex in even positions and the other sex in odd positions (example: article 23 of Castilla-La Mancha’s Electoral Law (5/1986) or article 16 of the *Comunidad Autónoma* of the Illes Balears’ Electoral Law (8/1986)).

⁴⁵⁶ Signed by most representatives’ unions CCOO (*Comisiones Obreras*) y UGT (*Unión General de Trabajadores*) and the representative union for civil servants CSIF (*Central Sindical Independiente de Funcionarios*).

⁴⁵⁷ Due to the Spanish *Comunidades Autónomas*, the general obligation established in the LOI applies to the state administration as autonomic administration is governed by each *Comunidad Autónoma*.

1.6. Positive action measures/gender quotas in other decision-making bodies or other areas

All structures of culture administrations relating to management positions should (under article 26 LOI):

- a) promote a balanced composition of women and men in all artistic and cultural public functions
- b) guarantee a balanced representation in the different consultative, scientific and decision-making bodies.
- e) adopt all the necessary positive action measures in order to correct unequal situations in artistic, cultural and intellectual women's productions and creations.

A balanced composition is also applied to:

- Management and responsibility positions within the National Health System (article 27 LOI and article 48 of Castilla-La Mancha's Law on equality).
- The public media of Castilla-La Mancha (article 48 of Castilla-La Mancha's Law on equality).

Vocational training committees for the Personnel of the Armed Forces and the the Civil Guard: they should adopt, as far as possible, the principle of a balanced composition (additional Dispositions 20 and 24 LOI).

1.7. Conformity of gender quotas with equality legislation

See section 1.1.

2. Positive action measures for women and gender quotas in practice

2.1. Implementation of positive action measures for women and/or gender quotas

The LOI provides for the creation of an Equality Unit in each Ministerial Department and, in addition, each Ministry annually informs the Ministry of Health, Social Politics and Equality of the application and effects of effective equality measures, including positive actions. These Equality Units are responsible for evaluating the implementation of the LOI and will also be responsible concerning the 'I Plan for equality between women and men in the State General Administration and its public bodies'.

2.1. Effects of the positive action measures

According to the last evaluation of the application of the LOI in the public service, the principle of a balanced composition is being implemented to a high degree in the various branches of the administration.⁴⁵⁸ The percentage of women and men in the State Administration has reached a parity since the average is 52 % women and 48 % men. Despite this, in certain ministries (Construction, Public Infrastructure, the Environment, Internal Affairs) the number of men is almost double that of women, while in others (Education and Health, Social Policy and Equality) the percentage is the opposite (so women far outnumber men). Nevertheless, this evaluation changes when the data on more qualified jobs are analysed. In these cases a balanced composition has not been fulfilled at administration levels 29 and 30 (higher salary

⁴⁵⁸ Information available on the website of *Instituto de la Mujer, mujeres en cifras*, http://www.inmujer.es/ss/Satellite?c=Page&cid=1264005600670&pagename=InstitutoMujer%2FPa ge%2FIMUJ_Generico, accessed 20 March 2011.

and responsibilities within the organization).⁴⁵⁹ A balanced composition has also not been fulfilled in positions of free designation. For example, in one of the Sub-groups within the 29th level there is a balanced composition – 50.65 % men and 49.34 % women – but those positions of free designation within this sub-group are occupied by 71 % men and 29 % women.

Women's representation on Company Boards in Spain has increased (from 29 % in 2008 to 31 % in 2010). Taking into account only those companies which have the obligation to attain a balanced composition on the company board, the percentage has changed from 36 % in 2008 to almost 56 % in 2010.⁴⁶⁰ The general characteristics of companies without women's presence on their boards are the following: located in the south of the Spain and belonging to traditional men's working sectors. In fact there are sectors which are clearly 'male sectors' such as construction, where the percentage of companies without women on their boards is 79.50 %, or energy production (79.79 %), or the heavy metal industries (72.43 %).⁴⁶¹

The data relating to women in management positions are quite poor as a high number of companies, 73 %, have not appointed any women in these positions. This will probably change in years to come when the equality plans will be implemented.

Companies with state participation: the proportion of women as managing directors has increased from 25.22 % in 2009 to 28.14 % in 2010. Only one company has a female majority on its board and only five companies with state participation surpass 40 %.⁴⁶²

3. Case law

3.1. Case law of national courts

The Constitutional Court (Ruling 13/2009, 19 January 2009) examined certain paragraphs of the Basque Parliament's Law on Equality between Women and Men, no. 4/2005 of 18 February 2005, for a possible violation of the Spanish Constitution.⁴⁶³ The first issue is the obligation to ensure that, in the public sector, committees (for selection for employment and promotion in the public sector) and juries (for the granting of prizes or subsidies by the Public Administration) are composed of a well-balanced number of women and men. The problem of this balanced composition, where each of the sexes must be represented by at least 40 %, had already been solved in a judgment of the Constitutional Court, sentence 12/2008, of 29 January.⁴⁶⁴ This condition imposed by Law 3/2007 does not violate the Constitution, as political parties have constitutional functions and the freedom to

⁴⁵⁹ Within these levels the percentage of men is 67.31% – level 30 – and 68.88 % – level 29 –, compared with the percentage of women at the same levels, which is 32.69 % and 31.12 %. The difference in these levels is related to age and the late engagement of women in work.

⁴⁶⁰ Report by INFORMA D&B *Las mujeres en los Consejos de Administración de las empresas españolas. Estudio comparativo 2009/2010* (Women on Company Boards in Spanish companies. Comparative study 2009/2010).

⁴⁶¹ Report by INFORMA D&B *Las mujeres en los Consejos de Administración de las empresas españolas. Estudio comparativo 2009/2010* (Women on Company Boards in Spanish companies. Comparative study 2009/2010).

⁴⁶² Information available on the website of *Instituto de la Mujer, mujeres en cifras*, http://www.inmujer.es/ss/Satellite?c=Page&cid=1264005600670&pagename=InstitutoMujer%2FPa ge%2FIMUJ_Generico, accessed 20 march 2011.

⁴⁶³ Available on the webpage of the Constitutional Court: <http://www.tribunalconstitucional.es/es/jurisprudencia/Paginas/Sentencia.aspx?cod=9628> (accessed 20 March 2011).

⁴⁶⁴ Available on the webpage of the Constitutional Court: <http://www.tribunalconstitucional.es/jurisprudencia/Paginas/Sentencia.aspx?cod=9438> (accessed 20 March 2011).

present a list of candidates can have some limits. The minimum of 40 % for each sex is a limit which is justified by a higher constitutional value such as the aim of attaining real equality in areas of political participation. The second issue concerns the lists of candidates for elections to the Basque Parliament, which must include at least 50 % women. Law 4/2005 of the Basque Parliament in conjunction with the General Electoral Law provides that in the autonomic electoral process women must have a minimum presence of 50 % in electoral lists, whereas men only have a guaranteed 40 %. The Constitutional Court determined that these positive action measures introducing this differentiated treatment are justified due to the necessity to correct a historical situation of discrimination against women.

SWEDEN – Ann Numhauser-Henning

1. National legislation on positive action measures/gender quotas

The use of *positive action measures proper* – as different from so-called *active measures*, see further below under 1.1 – is, generally speaking, of a voluntary character in Sweden. This means that there is no quota legislation of any kind. Employers are not known to use quotas to any considerable extent and earlier practices of this kind in the area of education have now been abolished.

1.1. Positive action measures in the national legal system

The Swedish Instrument of Governance (1974:152) contains some background rules on sex equality including a permissive rule on positive action. Such a rule is included in Chapter 2, Section 16 of the Instrument of Governance. Since 2002 Chapter 1, Article 2, Paragraph 4 states a more general duty for public institutions to ‘counteract discrimination against persons on the grounds of (among other things) gender’. Ethnic minorities may never be the victims of legislated negative differential treatment, i.e. there is no room for positive action acting against them (Chapter 2 Section 15).

As of 1 January 2009 earlier non-discrimination legislation in Sweden is ‘merged’ into *the 2008 Discrimination Act (Diskrimineringslagen 2008:567)*, covering discrimination on the grounds of sex/gender, transsexual identity/expression, ethnicity, religion and other belief, sexual orientation, disability and age. As regards gender equality this Act replaces the 1991 Equal Opportunities Act⁴⁶⁵ covering discrimination in employment, the 2003 Prohibition of Discrimination Act⁴⁶⁶ covering goods and services as well as a number of other sectors of society, the 2001 Students at Universities Act⁴⁶⁷ covering higher education and the 2006 School Discrimination Act⁴⁶⁸ covering basic schooling. Generally speaking, the 2008 Discrimination Act implements all EU legislation in the area of discrimination.⁴⁶⁹

The 2008 Discrimination Act contains a general set of definitions in Chapter 1, Section 4. The Act is truly ‘horizontal’ in character in that the general definitions cover all grounds of discrimination within the scope of the Act, which thereafter in its

⁴⁶⁵ *Jämställdhetslagen* (1991:433).

⁴⁶⁶ *Lagen (2003:307) om förbud mot diskriminering*.

⁴⁶⁷ *Lagen (2001:1286) om likabehandling av studenter i högskolan*.

⁴⁶⁸ *Lagen (2006:67) om förbud mot diskriminering och annan kränkande särbehandling av barn och elever*.

⁴⁶⁹ Directives 92/85/EC and 2010/18/EU, however, are mainly implemented through the Parental Leave Act, *Föräldraledighetslagen* (1995:584).

Chapter 2 states the prohibitions of discrimination in employment, education, etc., area by area.

The scope for affirmative action proper or *positive action* (*positivsärbehandling*) is dealt with in Chapter 2 on the bans of discrimination and designed as exception rules. Despite this, in the *travaux préparatoires* the Government states that positive action aiming to ‘ensure full equality’ should be regarded as part of the equal treatment principle as such.⁴⁷⁰ According to Chapter 2 Section 2.2, the prohibition against discrimination in Section 1 does not prevent ‘measures that contribute to efforts to promote equality between women and men and that concern matters other than pay or other terms of employment’. Chapter 2 Section 2 also contain exception rules concerning age and genuine occupational requirements. A later section on education (Chapter 2, Section 6.1) contains a similar permissive rule ‘on measures that contribute to efforts to promote equality between women and men in admissions to education’ other than basic schooling. There are also exceptions concerning education and age. Also the bans on discrimination in labour market political activities (Chapter 2, Section 9) and professional access and activities (Chapter 2, Section 10) contain an opening for efforts to promote equality between the sexes, whereas the rule on membership of certain organisations (Chapter 2, Section 11) permits benefits for members of a certain sex provided that this is a similar effort to promote equality. Sections 9 and 10 also contain exceptions concerning ethnicity and age. Chapter 2 Section 12 on goods, services and housing concerns all grounds covered by the 2008 Act except age, and includes an exception rule with regard to sex – see further section 1.3 below. – It is implicitly understood that when applying the exceptions, a proportionality rule applies.⁴⁷¹

All these permissive rules contain *openings* in the terms of positive action for employers/educators, etc., and are to no extent compulsory. The construction of the rules are quite openly formulated so as to ‘promote equality between women and men’. As was already indicated, the rules on positive action proper are voluntary in character.

Chapter 3 of the 2008 Discrimination Act deals with what is called ‘active measures’ (*aktivaåtgärder*) in working life and education, respectively. There are no such express rules regarding other regulated areas of society. Chapter 3 concerns proactive measures such as the requirement of equality plans, etc. These rules on active measures include quite far-reaching requirements on periodical action plans for equal pay by employers with 25 or more employees. Whereas the general obligation to have a goal-oriented policy to actively promote equal rights and opportunities in working life applies to sex, ethnicity, religion or other belief the requirement to actually draw up equality plans applies only to gender. Also in the area of education an active approach and goal-oriented policy as well as equality plans are required. Here, however, *annual* plans are required and they shall cover all grounds except age covered by the 2008 Act.

The rules on active measures in Chapter 3 of the 2008 Discrimination Act are by nature obligatory. They are, however, partly quite imprecise and the sanctions provided cannot be said to be very efficient. The Equality Ombudsman – the special body monitoring non-discrimination legislation⁴⁷² – can impose fines after an administrative procedure before the special Board against Discrimination. However, the rules on positive action proper – exceptions from the bans on discrimination,

⁴⁷⁰ Prop. 2007/2008:95 p. 166.

⁴⁷¹ Prop. 2007/2008:95 p. 168.

⁴⁷² See the (2008:568) Act concerning the Equality Ombudsman.

contained in Chapter 2 of the 2008 Discrimination Act – are thus discretionary in character.

Traditionally in Sweden positive action proper was understood as giving preference to one candidate despite his or her being less qualified than a competitor (compare the ECJ's case *Abrahamsson*) or 'strong preference'. However, the wording of Swedish legislation is now such as to be in compliance with Community law and in the *travaux préparatoires* it is now clearly stated that giving preference when there are equal qualifications also amounts to positive action.⁴⁷³ Among the justifications for keeping a permissive rule on positive action with regard to gender compensatory measures for former wrong-doing are mentioned.⁴⁷⁴ At the same time the Government rejects positive actions proper on the grounds of ethnicity. Among the reasons against this are the difficulties in monitoring ethnicity at the workplace.⁴⁷⁵

1.2. Positive action measures/gender quotas in employment and self-employment

According to Chapter 2 Section 2.2, the 2008 Discrimination Act – concerning working life including vocational training and hired workers – the prohibition against discrimination does not prevent 'measures that contribute to efforts to promote equality between women and men and that concern matters other than pay or other terms of employment'. The rule is 'gender-neutral' in its design. Chapter 2 Sections 9, 10 and 11 concern labour market policy activities and employment services, the starting or running of a business and professional recognition as well as membership of certain organisations including trade unions and other professional organisations and contain parallel exceptions 'to promote equality between women and men'.

1.2.1. The public sector

Generally speaking, the requirements for *public bodies in their capacity of employers* are the same as those outlined for private employers in the aforementioned provisions of the 2008 Discrimination Act – see above under 1.2 and also 1.2.2 below. No special rules apply – see however under 1.2.4 below – and there is no legislation on quotas.

However, public bodies get a 'letter of governance' from the Government each year with more detailed requirements on their activities for that year. These instructions might include requirements on gender equality management. They are normally quite general in character, asking for statistics or reports on a certain issue but leaving it to the public body itself to decide on substantial solutions/measures. In no event do they imply quotas.

1.2.2. The private sector

The general rules that apply in working life are outlined in section 1.2 above.

As was also indicated above under 1.1 there is a duty for *employers*, whether private or public, to engage in active measures according to Chapter 3 of the 2008 Discrimination Act. This requires co-operation with trade unions, goal-oriented policy to actively promote equal rights in general, more detailed efforts as regards working conditions, recruitment, matters of pay including drawing up an action plan, and, finally, drawing up a gender equality plan every three years if there are 25 employees or more.

⁴⁷³ Prop. 2007/2008:95 p. 166.

⁴⁷⁴ Prop. 2007/2008:95 p. 168.

⁴⁷⁵ Prop. 2007/2008:95 pp. 170-171.

There is no quota legislation regarding women's representation on company boards – compare, however, under 2 and 4 below.

1.2.3. State-owned companies

The general rules that apply in working life are outlined in section 1.2 above.

There is no quota legislation regarding women's representation on company boards – compare, however, under 2 and 4 below. There are, however, 'general owner policies' concerning state-owned companies, where the ambition has long been that the boards should be gender equal, i.e. there should be 40 % of each sex. If we look at statistics this goal was reached already in June 2003. As of 2008 the share of women on state-owned company boards was 49 % compared to 19 % in private companies.⁴⁷⁶ Although we are talking about a soft rule – or rather a political ambition – it has been rather effective. This is most certainly due to the fact that the State is also the owner, following its own policy.

1.2.4. Differences between the public and the private sector

As regards legislation, the same legislation applies, i.e. the 2008 Discrimination Act. However, there is a constitutional background rule concerning state employment. Generally speaking, according to Chapter 11 Section 9 of the Instrument of Governance, only objective criteria are to be taken into account when appointments to State posts are made, including such criteria as merits and abilities. However, there is a long-term practice within Swedish public administrative law admitting *a certain scope for positive action within this constitutional rule on objective grounds*. This practice has a legal 'support' in Section 4 of the (1994:373) Appointments Ordinance (*Anställningsordningen*) stating that besides merits and abilities account must also be taken 'of objective reasons consistent with the general aims of policies relating to the labour market, equality, social matters and employment'. The rule is generally referred to as the basic rule on the permissive 'equality interval'. In *Abrahamsson* the ECJ held Swedish administrative practice under this regulation, according to which the rule of preference for the underrepresented sex is applied when candidates possess 'equivalent or substantially equivalent' merits, to be in accordance with Community Law providing there is a savings clause. This leaves an opening for the application of the positive action measures most frequently used in the Swedish labour market.

1.3. Positive action measures/gender quotas in the access to and supply of goods and services

The ban on discrimination regarding goods, services and housing is contained in Chapter 2 Section 12 of the 2008 Discrimination Act. According to Paragraph 3 the 'prohibition of discrimination associated with sex does not apply to the supplying of insurance services,⁴⁷⁷ nor does it prevent women and men from being treated differently with regard to other services or housing if there is a legitimate purpose and the means that are used are appropriate and necessary to achieve that purpose'. In the *travaux préparatoires* it is said that the room for exceptions is small and that guidance must be taken from the case law of the ECJ. Sheltered living for battered women, positive action measures for women starting a company and municipal measures to support the underrepresented sex in relation to certain sports activities are mentioned

⁴⁷⁶ <http://www.regeringen.e/sb/d/10100/a/121598>, accessed 17 February 2011.

⁴⁷⁷ This will of course have to be changed in due course following the ECJ's judgment in C-236/09. As for now, however, no initiatives have, to my knowledge, been taken for such a reform. It has long been an issue within the government administration, however - compare Prop. 2007/08:95 p. 247.

as examples. This rule seems to be based on Articles 4(2), 4(5) and Article 6 in the Directive 2004/113/EC in an intrinsic way. There is thus no express reference to positive action in the areas of goods and services, but an exception to the ban on discrimination much in the wording of Article 4(5) of the Directive also covering – in my opinion – positive action measures.

In the *travaux préparatoires*, sheltered living for female victims of domestic violence is especially mentioned as an example when the exception rule concerning housing/services can be applied.

1.4. Positive action measures/gender quotas in the field of research and education

1.4.1. Research and academics

The main rules on a ban on gender discrimination as well as a scope for positive action in Chapter 2 Sections 1 and 2 the 2008 Discrimination Act also applies to educators as employers, whether private or public. Moreover there are the special rules on appointments in the state sector described in Section 1.2.4 above on the ‘equality interval’ allowing for the practices admitted by the ECJ in *Abrahamsson*. In *Abrahamsson*, however, the ECJ also rejected two other sets of rules on positive action in the area of higher education, i.e. *Chapter 4 Section 16 of the Higher Education Ordinance* and the special *Ordinance (1995:936) concerning certain professors’ and post-doctoral fellows’ posts*. As a consequence, these rules are now abolished and practices are taken to be in line with the *acquis communautaire*.

1.4.2. Primary, secondary and higher education

The 2008 Discrimination Act, as was already explained, does contain rules on active measures in the area of education. These apply both to public (being the absolute majority) and private *educators*. Chapter 2 Section 6 thus contains a permissive rule allowing ‘measures that contribute to efforts to promote equality between women and men in admissions to education’ other than ‘basic schooling’.

In the area of higher education there is a certain legal scope for local selection rules with regard to the admission of new students. The Government recently (18 March 2010) informed the Parliament that as of 1 August 2010 they were going to abolish the then-existing possibility to give preferential treatment to equally qualified applicants of the underrepresented sex.⁴⁷⁸ Until then the regulation in Chapter 7 Section 12 of the (1993:100) Ordinance of Higher Education had mostly been used to give preference to male applicants, women being over-represented in many educational programmes – see further under 3 below.

1.5. Positive action measures/gender quotas in legislature, political parties and/or political bodies

There is no quota legislation in place in these areas. However, there is a duty of gender mainstreaming with regard to public inquiries and the like – very important in the Swedish legislative process. According to the (1998:1474) Ordinance on Inquiries and its Section 15 there is a duty to explicitly consider the consequences for gender equality of any proposal.⁴⁷⁹

⁴⁷⁸ <http://www.regeringen.se/sb/d/12473/a/141904>, accessed 23 March 2011.

⁴⁷⁹ See further Ds 2000:1.

1.6. Positive action measures/gender quotas in other decision-making bodies or other areas

There is no explicit quota legislation in place regarding these issues. However, as regards higher education there are two rules of interest in the (1993:100) Ordinance of Higher Education (*högskoleförrordningen*). According to Chapter 4 Section 5 whenever a group of people are to deliver a proposal on an appointment for a teaching/researcher position ‘women and men shall be equally represented’ within the group. According to Chapter 4 Section 6 the same applies when two or more experts are used for assessment purposes.

1.7. Conformity of gender quotas with equality legislation

Traditionally in Sweden positive action proper was understood as giving preference to one candidate despite his or her being less qualified than a competitor when both candidates are ‘sufficiently qualified’ (compare the ECJ’s case *Abrahamsson*). However, there are no rules on quotas whatsoever in the Discrimination Act and the general rule is, as described above, very open in character; ‘efforts to promote equality between women and men’. The legislator has now explicitly accepted the ECJ’s concept of positive action, i.e. that the concept also applies when qualifications are equal (see above). Any practice is of course supposed to correspond with the *acquis communautaire*.

2. Positive action measures for women and gender quotas in practice

2.1. Implementation of positive action measures for women and/or gender quotas

2.1.1. Implementation in employment, self-employment and vocational training

The use of positive action measures is generally voluntary on behalf of employers. This means that there is no quota legislation of any kind. My impression is that positive action (in the Swedish sense, i.e. giving priority to the underrepresented sex despite a difference in merits) had not – and still has not – been practised to any massive extent on the Swedish labour market, whereas giving preference to the underrepresented sex in an equal-merits situation may seem the natural thing to do without there being any special provisions on quotas, etc. A rule to this end – complemented with a savings clause as prescribed by the ECJ – is quite frequent in equality plans, at least in the area of higher education. There is also the Swedish administrative practice in the public sector to give preference to the underrepresented sex when candidates possess ‘equivalent or substantially equivalent’ merits, approved by the ECJ in *Abrahamsson*.

With respect to women’s representation on company boards therefore there is no quota legislation in place. There is, however, a ‘Swedish Code on Corporate Governance’ (*Svensskodförlagsstyrning*) valid for listed private and public limited-liability companies. The Code is monitored by the Swedish Corporate Governance Board and applies to all companies listed at the OMX Nordic Exchange Stockholm and NGM Equity.⁴⁸⁰ The Code includes a rule (4.1) that ‘an equal distribution among the sexes shall be the goal’. This is a voluntary rule, but according to another rule (2.6) there is also an obligation to motivate the final proposal regarding the composition of a board. In March 2009 the conservative Government approached all

⁴⁸⁰ <http://www.corporategovernanceboard.se>, accessed 17 February 2011.

listed companies requiring this information.⁴⁸¹ Another example of self-regulatory instruments are the ‘general owner policies’ concerning state-owned companies, where the ambition has long been that the boards should be gender equal, i.e. there should be 40 % of each sex. If we look at statistics this goal was reached already in June 2003. As of 2008 the share of women on state-owned company boards was 49 % compared to 19 % in private companies.⁴⁸²

2.1.2. Implementation in the access to and supply of goods and services

I have no knowledge of this aspect.

2.1.3. Implementation in research and education

There is no explicit regulation on quotas as such and the only general example I can think of is the Government’s targets regarding female professors in the area of higher education. In the area of higher education, during the period 1997-2008 the Government used ‘targets’ to make higher education institutions work more actively to recruit/promote female professors. The goals varied according to the profile of the individual HEI or in 1997-1999 between 6 and 23 % and in 2005-2008 between 15 and 40 %. During the latter period some HEIs had as their general goal to recruit 40-60 % of each sex among professors and lecturers. These targets were only ‘goal-setting’ and not used as quotas to be applied in the employment process as such, however.

In the area of higher education there is a certain legal scope for local selection rules with regard to admission of new students. Some universities applied selection criteria giving preference to the underrepresented sex (normally men!) in the case of equal merits (compare under 3 below). The Government as of 1 August 2010 abolished the then-existing possibility to give preferential treatment to equally qualified applicants of the underrepresented sex.⁴⁸³

2.1.4. Implementation in legislature, political parties and/or political bodies

There is no quota legislation in place in these areas. Nevertheless, for quite some years now political parties themselves have set ‘targets’ as to the share of female politicians eligible for elections – normally 50 %. These are also governmental practices when appointing ministers and some other higher political offices. In politics thus a soft quota system can be said to be generally applied.

2.1.5. Implementation in other decision-making bodies or areas

No comments.

2.1. Effects of the positive action measures

Since there is no quota legislation in place there is, of course, no such monitoring of results as suggested in the Questionnaire either. Nevertheless, it may be worth mentioning that in October 2008 the Government commissioned an inquiry with the special aim to investigate the effects of existing legal rules on active measures in the legislation preceding the 2008 Discrimination Act (Dir. 2008:05). The inquiry presented its results in February 2010, SOU 2010:7 (*Aktiva åtgärder för att främja lika rättigheter och möjligheter – ett systematiskt målinriktat arbete på tre samhällsområden*), a comprehensive report of about 400 pages. The report has not led

⁴⁸¹ <http://www.regeringen.e/sb/d/10100/a/121598>, accessed 17 February 2011.

⁴⁸² <http://www.regeringen.e/sb/d/10100/a/121598>, accessed 17 February 2011.

⁴⁸³ <http://www.regeringen.se/sb/d/12473/a/141904>, accessed 23 March 2010.

to any legal initiatives, so far. Among the evaluated rules were the existing rules on active measures regarding sex/gender in the then 1991 Equal Opportunities Act. The Inquiry Chair was not impressed by the effects of the existing regulation but still suggested future legal requirements on systemic and active goal-oriented policy concerning all grounds covered by legislation and presented in a programme every three years, followed up on a yearly basis, within the areas of working life and education.

The memorandum '*Utvärdering av kvantitativa rekryteringsmål för högskolans personal*' by the Delegation for Equality in Higher Education Institutions (HEI) of 14 October 2009 assessed the targets set for recruitment of female professors 1997-2008. The targets were set by the Government itself, for each HEI individually and were based on the current academic recruitment basis and representation of female professors in the disciplines concerned. Although only about 50 % of the HEIs met their respective goals during the last period (2005-2008) and the effects on the numbers of female professors were therefore limited the overall conclusion is that these targets had had a positive impact on equality in HEIs in a more general sense. Equality in recruitment became a continuous concern and the subject of identification and active measures.⁴⁸⁴ As regards the effects so far of rule 4.1 of the Swedish Corporate Governance Code it is said to have led to a significant increase in the number of female board members in listed companies, which has increased from 18 % in 2003 to 28.6 % in 2009 according to the European Commission's *Report on Progress on Equality between Women and Men in 2010, The gender balance in business leadership*, p. 58 footnote 21. As for political life, the share of women in the Swedish Parliament is now 45 %. It has been increasing steadily since 1970 (when it was 13 %) with only one lapse in 1991. In the Government, 11 out of 24 Ministers are women.

3. Case law

3.1. Case law of national courts

The scope of positive action has only to a minor extent been put to the test in case law.

3.1.1 Employment

The scope for positive action in working life is interpreted by the Swedish Labour Court in last instance. Here there is no case law of relevance for quotas.⁴⁸⁵

With regard to academic positions/employment, however, there is also the Higher Education Appeals Board (*Överklagandenämnden för högskolan*). This Board was the referring tribunal in the ECJ's case *Abrahamsson* C-407/98. In *Abrahamsson* the ECJ rejected parts of the Swedish higher education legislation regarding the appointment of certain positions or first and foremost the special Ordinance (1995:936) concerning certain professors' and post-doctoral fellows' posts. According to this ordinance it was compulsory to appoint a person of the underrepresented sex 'who, although

⁴⁸⁴ Regarding the so-called 'Tham professors', at stake in the *Abrahamsson* case, there is also an evaluation report, HSV 2006:2 R.

⁴⁸⁵ There are a few cases from the period before Sweden became an EU Member State. In Labour Court judgment 1981 No. 171, the positive special treatment of a less qualified man (underrepresented sex) was not accepted. Other cases are 1982 No. 139 (preferential treatment of a less qualified man not accepted) and 1990 No. 34 (did a collective agreement require positive action?).

sufficiently qualified, does not possess qualifications equal to those of other candidates of the opposite sex' if this proved necessary in order for a candidate of the underrepresented sex to be appointed. In the same case the ECJ, however, held Swedish administrative practice, according to which the rule of preference for the underrepresented sex is applied when candidates possess 'equivalent or substantially equivalent merits' to be in accordance with Community law providing there is a savings clause. The case was later settled by the Swedish Appeals Board⁴⁸⁶ which found the complainant, a man, to be substantially better qualified than the female competitor and appointed him to the post with a reference to the ECJ's judgment. The special regulations concerned were later abolished.

A Higher Education Appeals Board's decision of 21 April 2006 (reg. Nr. 26-1264-05) concerned the 'equality interval', i.e. the administrative practice confirmed by the ECJ as expressed in Section 4 of the (1994:373) Appointments Ordinance. The appeal concerned an appointment made by the Swedish Research Council. The Appeals Board found that one sex is underrepresented when it is represented by less than 40 % – in this case among the Council's appointments in the last five years. Although there was a slight under-representation for women found, the Appeals Board did not make use of the 'equality interval' but stressed that this rule was facultative, not compulsory, when candidates were basically equal in merits and referred to another rule also applicable in such cases: to accept the choice of the appointing authority. In another decision, of 28 January 2004 (reg. Nr. 21-758-03), concerning a professorship in Art the Appeals Board made it clear that the rule on the 'equality interval' is not applicable when there is a clear difference in merits between candidates.

3.1.2 Education

Outside employment, claims regarding discrimination are brought before the general court system, i.e. District Court (*Tingsrätt*) in the first instance, then the Appeals Court (*Hovrätt*) and, finally, the Supreme Court (*Högstadsdomstolen*). There is one Supreme Court judgment concerning positive action and ethnicity in education.⁴⁸⁷ For 30 out of 300 openings preference – absolute and with no savings clause – was given to candidates with foreign-born parents when sufficiently qualified despite there being better qualified competitors without this background. This was labelled 'strong positive action' by the Court. The practice was rejected as contradictory to national legislation and there was, according to the Court, therefore no need to assess whether it was also in breach with Community law.

Later – in its judgment of 21 December 2009 (Case T3552-09) the appeal court *SveaHovrätt* found positive action measures for men, being the underrepresented sex, when admitting students to the veterinary programme to be contrary to both the then current Swedish legislation and EU law. Since female students far outnumbered the men in this educational programme, in a limited quota for applicants coming from a certain type of secondary education (*folkhögskolekvoten*) and when applicants had equal merits, men were given priority to access the programme. The background to these practices were mainly labour market reasons (both sexes being represented among veterinarians) and reasons connected to the social study environment (both sexes being represented). The Court, although accepting a certain scope for positive action, found the preferential treatment to be disproportionate. To in practice totally

⁴⁸⁶ Decision 2000.

⁴⁸⁷ NJA 2006 p. 683.

exclude women in this quota group from accessing the programme was according to the Court probably unacceptable *per se* and definitely not proportionate to the limited effect this measure had on the number of students of each sex – the group concerned 5 out of 100 openings – and its discriminatory effect on female applicants. Indemnification was set at approximately EUR 3 500 (SEK 35 000) for each female applicant.

3.2. Case law of equality bodies

There is no such case law of relevance.

3.3. Case law of other bodies

There is no such case law of relevance.

4. Proposals

There are no current legislative proposals on quotas of any kind. Quotas for women on company boards, however, have been discussed for quite some time in Sweden. A few years ago, a proposal on legislation concerning quotas was presented by a governmental inquiry initiated by the then social-democratic government, Ds 2006:11, entitled *Könsfördelningen i bolagsstyrelser* (Company boards and gender distribution). The inquiry assignment was to design rules for the Swedish Companies Act to ensure that at least 40 % of the members of the boards of public limited-liability companies (*publikaaktiebolag*) were of each sex. The proposal implied that public limited-liability companies which were listed on the stock exchange, as well as all state-owned public and private limited-liability companies, should be covered by new and compelling rules in the Swedish Companies Act requiring 40 % of each sex on company boards. Non-compliance could result in having to pay a special fee of approximately 15 000 EUR (150 000 SEK) and the Swedish Companies Registration Office was to be the monitoring agency. The proposed rules should not apply, however, to employee representatives on the board. For employee representatives a non-compelling rule was proposed in the (1987:1245) Act on Employee Representation in Private Companies on consultations to the end of equal representation.

The proposal – presented in June 2006 – never led to legal reform, however, since a new conservative government was in place in the Autumn of 2006. As a proposal it is now ‘dead’. Despite the fact that the proposal just described above is no longer relevant, there currently is a political debate pro and against legislated quotas for women on company boards. Thus, the question of quotas was an issue of debate during the election year 2010. The (then and still) opposition parties of the social democrats, greens and the left party promised to introduce legislation on quotas at the latest by 2012 should they get elected (which they did not!).⁴⁸⁸ Within the conservative Alliance – re-elected in September 2010 for another four years – the opinion on quotas seems to be divided, however. Whereas the Conservative Party proper (*Moderaterna*) seems to have taken a positive stand on quotas⁴⁸⁹ the opposite is true for the Liberal Party and the Centre Party,⁴⁹⁰ also members of the Alliance. There is no clearly distinguishable ‘strong movement’ for quotas in Sweden, not even within women’s organisations. Nevertheless, debates pop up now and then and a

⁴⁸⁸ Compare *Aftonbladet* 3 December 2010, *Sahlin*: ‘Vi lovar att det blir en ny lag’.

⁴⁸⁹ Compare *Veckans Affärer* 21 January 2010, *Schlingmann*: 2014 blir det kvotering, as well as *Expressen* 5 July 2010, *Littorin*: Kvotera in kvinnor i styrelserna.

⁴⁹⁰ *Dagens Nyheter* 4 March 2009, *Maud Olofsson and Nyamko Sabuni*.

recent example is one in the Swedish newspaper *Svenska Dagbladet* in February 2011.⁴⁹¹ There was also a social-democrat motion (2010/11:C259) to the Swedish Parliament to take a positive stand on quotas on company boards of listed companies which was recently turned down by Parliament. According to a survey in March 2010, ordered by the private employers' association *Svenskt Näringsliv*, as many as 63 % of the public was against quotas on company boards at that time.⁴⁹²

To my knowledge, no new initiatives have so far been taken by the Government on this issue.

TURKEY – Nurhan Süral

1. National legislation on positive action measures/gender quotas

1.1. Positive action measures in the national legal system

Positive discrimination included in the Constitution

The Turkish Parliament adopted a constitutional amendment package on 7 May 2010.⁴⁹³ Article 10 of the Constitution on equality before the law now has an addendum that allows positive discrimination: 'Precautions taken with this goal (achieving equality through positive discrimination) cannot be considered violations of the principle of equality.' Article 10 now confirms that measures taken to achieve substantive equality are not to be deemed contradictory to the principle of equality, thus potentially providing for increased use of temporary special measures. Now the way has been cleared for the application of positive discrimination not only for women, but also children, the handicapped, the elderly, martyrs (those who lost their lives in combating terrorism, especially soldiers), widows, orphans and war veterans (soldiers/military personnel who became handicapped in combating terrorism).

Initiatives to establish an equality body

In January 2010, the Government proposed the introduction of an Anti-Discrimination and Equality Board for the long term to create a society where differences are respected. The Board's task is to help people who face discrimination for one or more reasons. The decisions of the Board will be binding and it will also be authorized to impose administrative sanctions, namely fines. The Board is to actively promote equality as well as ensure that individuals have access to justice if they are treated unfairly. In such cases, the decision of the Board will serve as an expert witness report before the court. The Government aims to produce its final plans after more debate.

Prime Ministerial circular

A recent Prime Ministerial circular⁴⁹⁴ on enhancement of female employment and the provision of equality of opportunities envisages gender equality mainstreaming. The circular starts by stating that the principles of enhancement of female employment and

⁴⁹¹ See the articles 'Jag tänker aldrig låta mig kvoterat!' 27 February 2011 and 'Kvotering ger mer kompetens' 28 February 2011.

⁴⁹² Compare the article in *Svenska Dagbladet* 26 March 2010, *Svenskarna vill inte ha kvotering*.

⁴⁹³ Law No. 5982, Official Gazette 13 May 2010, No. 27580. The Law was adopted by a referendum on 12 September 2010.

⁴⁹⁴ *Başbakanlık Kadın İstihdamının Artırılması ve Fırsat Eşitliğinin Sağlanması Genelgesi*, Official Gazette 25 May 2010, No. 27591.

the provision of equal wages are essential to strengthen women's socio-economic status, to ensure equality between women and men in society, and to achieve sustainable economic growth and social development. With this objective a Female Employment National Monitoring and Coordination Board (*Kadın İstihdamı Ulusal İzleme ve Koordinasyon Kurulu*) will be established to monitor, evaluate, and provide coordination and cooperation of all works undertaken by all stakeholders with the aim of diagnosing and eliminating current problems that hinder women's employment.

1.2. Positive action measures/gender quotas in employment and self-employment

Turkey has one of the lowest overall employment rates, particularly for women, in the OECD.⁴⁹⁵ As stated in 'Female Labour Force Participation in Turkey: Trends, Determinants, and Policy Framework,' a report prepared jointly by Turkey's State Planning Organization and the World Bank,⁴⁹⁶ the share of women holding or looking for jobs in 2008 was below 22 % as compared to an average of 62 % in OECD countries and to an average of 33 % in a group of selected comparison countries with similar levels of economic development. The report reveals that pregnancy and childcare are important constraints on women's employment. Of the working population, 15 598 000 are men and 5 595 000 are women.⁴⁹⁷ There are no legislated or voluntary quotas. There are only action plans and government circulars providing not quotas but proactive measures, affirmative actions and a gender mainstreaming approach to enhance female employment and gender equality at work.

1.2.1. The public sector

There are no legislated or voluntary quotas. There are protective rules on pregnancy and births. These rules are aimed at facilitating the reconciliation of professional and family life.

34 % of public officials are women. Women are a lot less represented in higher levels of bureaucracy (decision-making ranks). 7 % of top administrators are women. 11 out of 110 ambassadors are women. There are no women governors (highest provincial administrative authority, *vali*) at the moment. Of 464 deputy governors, 10 are women. Of 801 sub-governors (head official of a district attached to a province, *kaymakam*) 13 are women. There is only one female vice-secretary (*müsteşar*). 5.2 % of prosecutors and 28 % of judges are women.⁴⁹⁸ There are no quotas and no specific legislative measures that allow for better female representation in public offices.

1.2.2. The private sector

There are no legislated or voluntary quotas. There are family-friendly rules on pregnancy and births. For example, upon the worker's request, she has to be granted an unpaid leave of up to six months following the post-natal period. The two periods, compulsory and additional, run consecutively, to give an entitlement of 16 weeks (18 in case of multiple pregnancy) plus 6 months' leave. There can be no gap between the two periods. Maternity leave and additional maternity leave are limited to women. Where a woman worker leaves her job because of getting married within one year

⁴⁹⁵ OECD Economic Surveys Turkey, Vol. 2008/14, July 2008, p. 70.

⁴⁹⁶ <http://www.worldbank.org.tr>, accessed 14 February 2011.

⁴⁹⁷ Statement by Selma Kavaf, Minister of State responsible for women and family, at the closing session of the Strategy Development for Enhancement of Female Labour Project on 25 February 2010.

⁴⁹⁸ Directorate of Women's Status (*Kadının Statüsü Genel Müdürlüğü*), *Kadının Durumu* (Women's Status), February 2011, pp. 28-29, <http://www.ksgm.gov.tr>, accessed 14 February 2011.

following the marriage, she will be paid severance pay (lump-sum payment made to a worker for specified reasons for contract termination). This provision is criticized for promoting women to quit work upon marriage.

Under the By-law on the Working Conditions for Pregnant or Nursing Workers, and Nursing Rooms and Day Nurseries, workplaces employing between 100 and 150 female workers are to establish nursing rooms while those employing more than 150 female workers have to establish day nurseries consisting of a nursing room and a day nursery (Article 15). The fact that it is not the total number of workers but the number of female workers in the workplace being considered emphasises the norm that women are mainly responsible for the rearing of children. The children of the working men are to benefit if the mother has died or if parental authority has been given to the father by a court decision (Article 16). Access of male workers is limited to single-parent fathers and fathers with parental authority. The fact that establishment and functioning of nurseries are solely at the expense of the employers discourages them from hiring more than 150 female workers.

Article 18 of the Labour Act provides, on the basis of the ILO C158,⁴⁹⁹ a non-exhaustive list of incidents that do not constitute a valid reason for contract termination, *inter alia*, sex, marital status, family obligations, pregnancy, delivery, and absenteeism due to maternity leave. This was merely a repetition of the ILO Convention. The underlying idea was to comply with the Convention rather than to develop positive action policies.

Similarly, there are protective rules in social security legislation. During a period of unpaid maternity leave, neither the worker nor the employer will be expected to contribute. The worker may, if she chooses, pay contributions for the statutory (compulsory) maternity leave but the employer will not have a duty to contribute. If the worker pays contributions for the statutory maternity leave period, this period counts as pensionable service. Also, where a worker gives birth to a child after quitting work, she may, if she chooses, pay contributions for at most the two-year period during which she remains unemployed. This period starts on the date of the birth and the worker may benefit from this provision for two separate births (Law no. 5510, Article 41). If a female worker is the mother of a disabled child in need of constant care, she will be entitled to early retirement: 90 extra pensionable days will be added to each year of service (Law no. 5510, Article 28). This is only for mothers. It is hoped that as a result of such measures working mothers will not lose the hope of becoming entitled to old-age benefits and therefore be encouraged not to stop working or to re-enter work following a break.

According to a study by the Egon Zehnder International Istanbul office, at the end of 2010, in 100 companies analysed, the ratio of women on company boards is 10.5 %. In 49 out of these 100 companies, there are no women on the company board. The 10.5 % ratio drops to 6 % if the women on company boards in the capacity of 'family member' or 'partner' are disregarded.⁵⁰⁰

1.2.3. State-owned companies

There are no legislated or voluntary quotas.

⁴⁹⁹ Convention on the termination of employment relationship at the employer's initiative, 1982.

⁵⁰⁰ <http://muratyesildere.com/yonetim-kurulunda-kadinlarin-sesi-yukseliyor>, accessed 27 April 2011.

1.2.4. Differences between the public and the private sector

Under Article 70 of the Constitution, every Turkish citizen has the right to enter the public service. No criteria other than the qualifications for the office concerned shall be taken into consideration for recruitment into the public service. A central examination system for recruitment secures equal treatment in the practices relating to conditions of access and selection for jobs or positions in the public sector. There is also a 2004 Prime Ministerial circular on Acting in Accordance with the Principle of Equality in Employee Recruitment⁵⁰¹ stating that unless there is a genuine and determining occupational requirement, job notices of public bodies and organizations cannot specify the sex of the applicants. In the private sector, discrimination in selection procedures is not prohibited by Article 5 of the Labour Code on the equality principle but according to Article 122 of the Criminal Code (*Türk Ceza Kanunu*) on discrimination, any person who makes employment or non-employment conditional on discrimination on the basis of language, race, sex, disability, political opinion, philosophical belief, religion, sect and similar grounds shall be sentenced to 6 months to 1 year of imprisonment or a fine. *ISKUR*, the Turkish Employment Office, issued a notice in April 2006 outlawing discriminatory job advertisements.

The worker, if she so requests, has to be granted unpaid leave of up to six months (one year for public officials) following the post-natal period (Labour Act, Article 74).

1.3. Positive action measures/gender quotas in the access to and supply of goods and services

In the health sector, there are too many projects/programmes targeting women on reproductive health, birth-control methods, family health, adolescent health, reduction of infant and maternal mortality rates, and so on. All soldiers⁵⁰² are educated on reproductive health and birth-control methods during the period of compulsory military service.

Women wearing headscarves are denied access to university education and public employment.

1.4. Positive action measures/gender quotas in the field of research and education

1.4.1. Research and academics

In the 2009/2010 academic year, 95 % (40 647) of all (42 716) pre-school teachers, 52 % (25 2729) of all (48 5677) primary school teachers and 41.9 % (86 688) of all (206 862) secondary education teachers were women. About 40 % of academics (teaching staff at universities) are women. Women constitute 27.4 % of professors and 31.6 % of associate professors. This is a high figure but when it comes to administrative posts in universities, women are less well represented: 5.2 % of rectors (8 out of 154 universities) and 15.3 % of deans are women. 36% of lawyers, 5.6 % of

⁵⁰¹ *Personel Temininde Eşitlik İlkesine Uygun Hareket Edilmesi ile İlgili 2004/7 Sayılı Başbakanlık Genelgesi 2004/7*, Official Gazette 22 January 2004, no. 25354.

⁵⁰² In Turkey, military service for a specified period is compulsory for males. In Turkish, different terms are used for those performing their military service: 'Reserve conscript officers (supplementary officers)' for university graduate soldiers (*yedek subay*) and 'privates' (*er*) for primary or secondary education graduate soldiers.

the security force (police), 50.2 % of bankers, and 39 % of architects are women.⁵⁰³ There is no law allowing or prohibiting quotas or positive action measures in this area.

1.4.2. Primary, secondary and higher education

In 2009, there were about 4 million illiterate women, about 2.5 % of these women being over 50 years of age and 220 000 in the 6-24 age group. Poverty and cultural traditions have traditionally kept girls at home especially in some rural areas. There are various projects to enhance girls' education. Local female primary school teachers serve as role models and are very important in convincing families in rural areas to send their daughters to schools. There is a conditional cash transfer for poor families who send their children to school with an extra incentive for girls. Poor families are paid TL 30 (EUR 1 = TL 2.2) per month for each male child and TL 35 per month for each female child having primary education. This is increased to TL 45 and TL 55 respectively for secondary education and these payments are made into the bank accounts to be opened by the mothers. In 2009, TL 345.05 were paid to 2 118 821 beneficiaries.⁵⁰⁴

In the 2009/2010 academic year, transportation and lunch were provided for 667 475 (of whom 323 971 were girls) poor primary education students. In the 2010-2011 academic year such services were also provided to secondary education students, covering 69 395 students (of whom 28 265 were girls) until the end of December 2010.⁵⁰⁵

There are 589 regional primary education board schools where the population is scarce and dispersed in a locality. 150 330 students (of whom 58 222 are girls) are educated in these schools. In the Strategic Plan 2010-2014 at least one of these schools in the same province will become a boarding school for girls.⁵⁰⁶

In 2003, the project 'Off to school, girls (*Haydi kızlar okula*)' was launched by UNICEF and the Ministry of Education in the ten provinces with the lowest rates of enrolment for girls. In 2006, the project covered the whole country. The campaign depends on a vast network of volunteers who go door-to-door to lobby parents regarding the value of education. The education campaign 'Father, send me to school (*Baba, beni okula gönder*)' and 'Snowdrops (*Kardelenler*)' are some of the other campaigns/projects aiming at increasing girls' education. There is no legal framework apart from an understanding reached with UNICEF/international organizations or internal regulations of the NGOs concerned.

1.5. Positive action measures/gender quotas in legislature, political parties and/or political bodies

The 1982 Constitution,⁵⁰⁷ the product of the 12 September 1980 military takeover, forbade the establishment of youth and women's branches of political parties. This prohibition was lifted in 1995.⁵⁰⁸ Today, institutional dimensions for gender equality and formulation of gender mainstreaming policies are prioritised. The Law on the

⁵⁰³ Directorate of Women's Status (*Kadının Statüsü Genel Müdürlüğü*), Kadının Durumu (Women's Status), February 2011, p. 12, <http://www.ksgm.gov.tr>, accessed 14 February 2011.

⁵⁰⁴ Directorate of Women's Status (*Kadının Statüsü Genel Müdürlüğü*), Kadının Durumu (Women's Status), February 2011, p. 14, <http://www.ksgm.gov.tr>, accessed 14 February 2011.

Directorate of Women's Status (*Kadının Statüsü Genel Müdürlüğü*), Kadının Durumu (Women's Status), February 2011, <http://www.ksgm.gov.tr>, accessed 14 February 2011.

⁵⁰⁶ Directorate of Women's Status (*Kadının Statüsü Genel Müdürlüğü*), Kadının Durumu (Women's Status), February 2011, p. 13, <http://www.ksgm.gov.tr>, accessed 14 February 2011).

⁵⁰⁷ Official Gazette, 20 October 1982, no. 17844.

⁵⁰⁸ Law no. 4121, Official Gazette, 26 July 1995, no. 22355.

establishment of a parliamentary commission was put into effect in March 2009.⁵⁰⁹ The Women and Men Equal Opportunities Commission was established mainly to follow the national and international developments in gender equality and to inform the relevant parliamentary expertise commissions on the compatibility of (draft) laws with international developments and Turkey's international commitments. Quotas and Equal Representation were on the agenda for the 11 November 2010 meeting of the Commission. The Commission listened to the representatives of various NGOs. As the coming general elections are on 12 June 2011, demands concentrate on quotas to be developed by political parties for women for the coming elections. The Commission did not take a particular position.

In Turkey, there are no legislated gender quotas for national and local elections but soft voluntary party quotas. Political party leaders and political parties' central organs are the gatekeepers to gender balance in political decision-making as they make the list of nominees for Parliament for the general elections. At present, Turkish women are represented with a ratio of 9.1 % (48/550) in Parliament (Tables 1, 3 and 4). Of 27 Ministers, two are women. The December 2010 Report prepared by the General Directorate of Women's Status (*KSGM*) revealed that women's participation in local governments is too low. According to the report, 44 women were nominated as candidates for mayor in cities and 321 were nominated as district mayors in the 2009 local elections, but only 27 (0.9 %) of the 2 948 district and city mayors across Turkey are women. The report states that only two of these 27 women hold positions as city mayor and only 1 340 (4.21 %) of 31 790 city council members are women (Table 2).⁵¹⁰

1.6. Positive action measures/gender quotas in other decision-making bodies or other areas

There is nothing to report under this heading.

1.7. Conformity of gender quotas with equality legislation

There is no equality legislation on the issue. If quotas are legislated, this will be in conformity with the recently amended Article 10 of the Constitution.

2. Positive action measures for women and gender quotas in practice

2.1. Implementation of positive action measures for women and/or gender quotas

2.1.1. Implementation in employment, self-employment and vocational training

Of 100 working women, 12.8 are self-employed, 51.1 are wage earners, and 34.8 are unpaid family workers. 62 out of 100 non-working women state 'being a housewife' as the reason for not working.⁵¹¹ There are no state initiatives to enhance women's position in public offices but there are initiatives to increase the number of working women.

Domestic production (e.g. weaving sweaters, making embroidery) has been exempted from taxes. Women do not have to pay taxes for the income they receive

⁵⁰⁹ Law on the Establishment of Women and Men Equal Opportunities Commission (*Kadın Erkek Fırsat Eşitliği Komisyonu Kanunu*), Official Gazette, 24 March 2009, no. 27179.

⁵¹⁰ <http://www.ksgm.gov.tr>, accessed 14 February 2011.

⁵¹¹ Directorate of Women's Status (*Kadının Statüsü Genel Müdürlüğü*), *Kadının Durumu* (Women's Status), February 2011, p. 21, <http://www.ksgm.gov.tr>, accessed 14 February 2011.

from the sales of products that they make at home. They may become voluntarily insured at reduced premium rates.

In order to support women's entrepreneurship, micro-credits and start-up support credits are given. In some types of credit, women starting or developing businesses are supported by higher loans. In the regions of agricultural development cooperatives, trainings have been given to the women farmers on general cooperation and on the cooperative trading system and its field of activity.

Incentives such as lifted or lowered social security contributions (premiums) are applied for employers to promote employment of youth and women. In Turkey, there is a substantial informal sector, typical of most developing countries. About 10.4 million of about 22 million total employed are undeclared. Undeclared work occurs especially in the sector of construction, services, and agriculture.⁵¹² In the informal sector, women and youth are assumed to be paid considerably less than men doing the same or similar work. There are various initiatives including a comprehensive action plan and strategy to combat the informal economy 2008-2010,⁵¹³ in order to establish an open and non-discriminatory business environment. The hotline *ALO 170* to register reports was established on 28 May 2008 to operate on a 24/7 basis for the elimination and evaluation of informal employment. There also is *ALO Maliye 189*, a hotline established in 2003 for reports and complaints, to strengthen the audit capacity of the Minister of Finance. Complaints may also be made online or by post.

2.1.2. Implementation in the access to and supply of goods and services

Access to education, including university education, and access to public employment are denied to women wearing headscarves. A better educated female population is likely to have a positive effect on their employment since higher education is associated with increased participation in the labour force. Beyond cultural constraints, poorly educated women in urban areas may be facing what has been referred to as an 'under-participation trap.'⁵¹⁴ There are no statistics on the relationship between wearing a headscarf and education or employment.

The quite detailed By-law on the Garments of Public Personnel⁵¹⁵ covers officials and workers employed in the public sector. The garments have to be contemporary, clean, plain and appropriate for the services provided (Article 1). Both males and females have to work bareheaded (Article 5). The prevalent idea is that staff has to represent the State's neutrality. This view also covers staff that do not typically represent the State, such as the cleaning, catering or delivery workers. The prohibition of the headscarf is one of the major reasons for the low number of women in public and private employment. There is no case law trying to balance religious freedom against entrepreneurial freedom in private workplaces. Under the Labour Act, there is entrepreneurial freedom in selection. However, Article 122 of the Criminal Code⁵¹⁶ on discrimination, any person who makes employment or non-employment conditional

⁵¹² Statement by Fatih Acar, Vice Director, Social Security Institution, Bugün daily newspaper, 21 February 2011.

⁵¹³ *Kayıt Dışı Ekonomiyle Mücadele Stratejisi Eylem Planı 2008-2010*, Official Gazette 5 February 2009, no. 27132. For the text in English: http://www.gib.gov.tr/fileadmin/beyannamerehberi/Kayit_disi_2009.pdf, accessed 15 February 2011.

⁵¹⁴ Turkey's State Planning Organization and World Bank, *Female Labour Force Participation in Turkey: Trends, Determinants and Policy Framework*, Report no. 48508-TR, 23 November 2009 (<http://www.worldbank.org>).

⁵¹⁵ *Kamu Kurum ve Kuruluşlarında Çalışan Personelin Kilik ve Kiyafetine Dair Yönetmelik*, Official Gazette, 25 October 1982.

⁵¹⁶ Law no. 5237, Official Gazette, 12 October 2004.

on discrimination on the basis of language, race, sex, disability, political opinion, philosophical belief, religion, sect and similar grounds shall be sentenced to 6 months to 1 year of imprisonment or a fine. In practice, rejected job applicants do not apply to the courts with a claim of discrimination most probably due to the widespread belief that employers have absolute discretion as to such decisions. Applicants choose to apply at those workplaces where they can freely wear their religious or non-religious outfits. However, protection is available during the course of employment and at its termination.

2.1.3. Implementation in research and education

There is nothing to report under this heading.

2.1.4. Implementation in legislature, political parties and/or political bodies

There are only voluntary party quotas. These quotas apply to the male/female candidate ratio to be nominated or elected to local or central organizations of political parties or to be elected as representatives (parliamentarians, MPs). This quota for female representatives for the coming general elections is highest in the Peace and Democracy Party (*Barış ve Demokrasi Partisi, BDP*): 40 %. There is co-leadership in the Peace and Democracy Party and one of the political party leaders is a woman. In fact, co-leadership is not possible according to the Political Parties Law but it does occur in practice. 7 out of its 20 representatives (MPs) are women (Tables 3, 4). Its Party Assembly (*Parti Meclisi*) is composed of 60 members and 24 are women. In its Central Executive Board (*Merkez Yönetim Kurulu*), 8 out of 21 members are women. The voluntary party quota of the Republican Peoples' Party (*Cumhuriyet Halk Partisi, CHP*) is 25 % for its Party Assembly and local executive boards. On 12 January 2011, Masum Türker, leader of the Democratic Leftist Party (*Demokratik Sol Parti, DSP*), upon a visit by an association that supports women nominees (*Kadın Adayları Destekleme ve Eğitim Derneği, KADER*) promised a quota of 50 % for the coming general elections to be held on 12 June 2011. The largest political party, the AK Party, does not have established voluntary quotas but is sensitive to having female candidates/ representatives. The AK Party Women's Branch Organization is, at present, the largest political women's organization with its 1 400 000 registered female members. The organization takes office with delegate elections in 81 provinces, 900 counties and in all districts with a population over 5000. The women's branches continue their field work in accordance with the so-called 'one-to-one relationship model' with the local people. The Headquarters of the Women's Branch Organization is made up of a chairwoman who has taken office with the congress, an administrative board of 50 people, and an executive committee of 12 people who have been assigned by the chairperson of the administrative board.⁵¹⁷

2.1.5. Implementation in other decision-making bodies or areas

There is nothing to report under this heading.

2.2. Effects of the positive action measures

Positive action measures exist especially in education, health and labour policies. Enhancement of girls' education, improvement of women's health and an increase in female labour are anticipated. About 700 000 jobs were created between November

⁵¹⁷ <http://kadinkollari.akparti.org.tr/turkce/english.asp>, accessed 27 April 2011.

2008 and November 2009 and about 500 000 of these jobs were filled by women.⁵¹⁸ There are no statistics on the reasons for this. But it may be stated that such an increase is due not only to initiatives to enhance female employment but also to the need of having a job upon loss of employment by the husband or father as a result of the adverse effects of the global economic crisis on Turkey. The target set in the 9th Development Plan (2007-2013) is to achieve a 29.6 % labour force participation rate for women by the end of 2013.⁵¹⁹ In education, the target is to reach 100 % enrolment for girls and boys in 2013. In the last two years, 859 000 workers in the informal sector have become registered workers.⁵²⁰

3. Case law

3.1. Case law of national courts

Preferential treatment of women is regarded as positive discrimination and not found to be violating the principle of equality before the law. Here, two such constitutional court decisions will be cited.

According to Article 110(2) of the Law on Execution of Penalties and Safety Measures,⁵²¹ house arrest (home detention or home confinement, ankle bracelet) is a substitute to serving jail time for the whole portion of the prison term. Women irrespective of age and males above 65 years of age may have the option to be placed under house arrest if they are sentenced to at most six months' imprisonment. This rule was challenged before the Constitutional Court but the court rejected the claim in December 2010.⁵²²

Another case regards the preferential treatment of female children as regards coverage of survivors' benefits. A male child is considered a dependant until he reaches 18 years of age. This age limit is increased to 20 if he is receiving secondary education and to 25 if he is a university student. If the male child is disabled to an extent that makes it impossible for him to work, there is no age limit. For the female child, there is no age limit as long as she is unmarried, divorced or widowed and not covered by the social security scheme. In October 1996, the Court rejected the claim of unconstitutionality, ruling that this did not violate the principle of equality before the law.⁵²³ This decision is in fact incompatible with EU Directive 79/7.

These decisions merely reflect the fact that the terminology is used improperly; any preferential legal or practical treatment is viewed as positive action or positive discrimination.

3.2. Case law of equality bodies

At the moment, there is no equality body but there are initiatives to establish one.

⁵¹⁸ Statement by Ömer Dinçer, Minister for Labour and Social Security, at the closing session of the Strategy Development for Enhancement of Female Labour Project on 25 February 2010.

⁵¹⁹ *Dokuzuncu Kalkınma Planı (2007-2013)*, Official Gazette 1 July 2006, no. 26215 bis.

⁵²⁰ Statement by Fatih Acar, Vice Director, Social Security Institution, Bugün daily newspaper, 21 February 2011.

⁵²¹ *Ceza ve Güvenlik Tedbirlerinin Infazı Hakkında Kanun*, Official Gazette 29 December 2004, no. 25685.

⁵²² Constitutional Court decision 8 December 2010, E2005/86, K.2010/111, Official Gazette 5 February 2010, no. 27837.

⁵²³ Constitutional Court decision 22 October 1996, E1996/10, K.1996/40, Official Gazette 21 October 1997, no. 23147.

3.3. Case law of other bodies

There is nothing to report under this heading.

4. Proposals

Turkey should have separate equality legislation and an equality body. The next general election will be held on 12 June 2011. The public debate is on quotas to be voluntarily developed by the political parties. Especially NGOs on gender issues suggest and claim that half of the representatives in the new Parliament should be women. There is no public debate on the introduction of quotas for company boards.

THE UNITED KINGDOM – Aileen McColgan

1. National legislation on positive action measures/gender quotas

1.1. Positive action measures in the national legal system

Prior to the implementation of the Equality Act in October 2010 and April 2011 (see further below), the scope for positive action in the sense of more favourable treatment targeted at a disadvantaged group in UK law was very narrow indeed, being limited to the provision of targeted training and encouragement to apply for employment together with some measures permitting reserved seats on elected bodies and preferential treatment in the selection of candidates for election.

The pre-Equality Act position is discussed below to the extent that it is still of relevance in Northern Ireland. In Great Britain, however, significant liberalisation of the scope for positive action has resulted from the (still ongoing) implementation of the 2010 Act whose provisions are considered below. There are no, and are no plans as yet to introduce, binding quotas. The use of such quotas was considered in a recent exercise which resulted in the publication in February 2011 of *Women on Boards*.⁵²⁴ That report did not recommend the use of binding quotas though it did suggest that FTSE (Financial Times and Stock Exchange) companies aim for a minimum representation of women on boards of 25 % by 2015 by appointing one woman for every two men appointed between now and then (oddly not *at least* one woman for every two men). The report and its recommendations are considered below (1.7). The rationale it used (unsurprisingly, given that it was business-led) was less about equality or fairness and more that the statistical evidence showed that companies with more women on their boards did better (p.7); that ‘women have become the majority in the highly qualified talent pool’ (9); that women are responsible for 70 % of household spending in the UK and that their increased presence on boards will ‘lead to more informed decision making’ (p.9) and that increased presence of women on boards is associated with better corporate governance (p.10).

Where the Government has introduced targets for increasing women in the senior civil service and public appointments (see further below), these have been driven by the desire to achieve ‘a more equal society’ by including ‘a diversity of experiences and voices (...) in all areas of public life’.⁵²⁵ Preferential treatment was provided for in the election context because of concerns about very severe under-representation of

⁵²⁴ www.bis.gov.uk/assets/biscore/business-law/docs/w/11-745-women-on-boards.pdf, accessed 6 April 2011.

⁵²⁵ ‘PSA 9 Gender Equality’, www.communities.gov.uk/corporate/about/howwework/publicserviceagreements/publicserviceagreements200508/psa-notes/psa-target9/, accessed 6 April 2011; ‘Women’s Social and civic inclusion’.

women in elected positions, the woman-unfriendly nature of the House of Commons and the sense that significant progress would not be made in the face of entrenched tradition and selector prejudice without the radical step of permitting preferential treatment.

The rationale for the Equality Act's loosening of positive action is not really discussed in the Explanatory Notes to the Act or to the predecessor Bill and there is a certain lack of clarity in the political discussions of preferential treatment, with 'positive action' being distinguished from 'positive discrimination' on the basis, largely, that the former is lawful and the latter unlawful, but without any principled attempt to explain where the normative boundaries of positive action should lie.

1.2. Positive action measures/gender quotas in employment and self-employment

Since October 2010 the Equality Act 2010, applicable in Great Britain (but not Northern Ireland) has provided (Section 158) that a person (including an employer) may 'tak[e] any action which is a proportionate means of achieving the aim of ameliorating what the person reasonably regards as disadvantage connected with a 'protected characteristic' (sex, gender reassignment, pregnancy/ maternity, being married or a civil partner, race, disability, sexual orientation, religion or belief or age); or addressing what the person reasonably regards as the particular needs of persons with a 'protected characteristic'; or 'enabling or encouraging persons who share the protected characteristic to participate' in an activity in which the person reasonably regards participation by persons sharing that protected activity as being 'disproportionately low'. Importantly, Section 158 does not permit action falling within Section 159 or (see further below) 104 (which applies to the selection of candidates for election).

Section 159 of the 2010 Act will not come into force until 1 April 2011. It provides that, where 'a person (P) reasonably thinks that (a) persons who share a protected characteristic suffer a disadvantage connected to the characteristic, or (b) participation in an activity by persons who share a protected characteristic is disproportionately low' P may 'treat[] a person (A) more favourably in connection with recruitment or promotion than another person (B) because A has the protected characteristic but B does not' 'with the aim of enabling or encouraging persons who share the protected characteristic to (...) overcome or minimise that disadvantage, or (...) participate in that activity'. Importantly, P is not permitted to take such action unless it is proportionate, unless 'A is as qualified as B to be recruited or promoted', or if P generally has a policy (which would be unlawful in any event) of discriminating in favour of persons of the disadvantaged or under-represented group.

It is possible that Section 159 will be construed as an exception to the general principle of equal treatment, though the legislative fore-runner to Section 158 (Section 35 of the Race Relations Act 1975) was interpreted by the High Court in *R (Kaur) v Ealing London Borough Council* [2008] EWHC 2062 (Admin), [2008] All ER (D) 08 (Oct) as 'not an exception to the (...) Act. It does not derogate from it in any way. It is a manifestation of the important principle of anti discrimination and equality measures that not only must like cases be treated alike but that unlike cases but must be treated differently.'

Sections 158 and 159 apply equally to the public and private sector, and to state-owned companies. The same is true in Northern Ireland where the Sex Discrimination (Northern Ireland) Order 1976, as amended, provides 'general exceptions' governing 'Discriminatory training etc.' (Articles 48 and 49, applicable to non-employers and employers respectively, the latter permitting targeted encouragement to apply to

under-represented women (or men) but neither allowing preferential treatment at the point of selection).

The implementation of Section 159 will be a significant step in Great Britain towards permitting preferential treatment of the under-represented sex, though it is a narrow provision (requiring, as it does, that the person preferred is 'as qualified' as the other). The extent to which it will be utilised remains uncertain, given that it will leave employers open to challenge and does not *require*, as distinct from *permitting*, preferential treatment. It may be that Section 158, which applies other than in relation to recruitment/ promotion, may facilitate greater use of positive action by employers and others.

Such differences as do exist between public authorities and others as regards positive action will result from the application of positive *obligations* on the former. The SDA as amended currently requires public authorities to pay 'due regard' to the need to eliminate unlawful gender discrimination and harassment and to promote equality of opportunity between men and women. This applies to their employment as well as to their other functions but does not permit them to take positive action of a sort which is not otherwise permitted by the Act. The SDA duty will be replaced as from 1 April 2011 by Section 149 of the Equality Act 2010 which requires public authorities in the exercise of their functions to 'have due regard to the need' so far as relevant 'to (a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act [and] (b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it'. Section 129(3) goes on to provide that 'Having due regard to the need to advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to (a) remove or minimise disadvantages suffered by persons who share a relevant protected characteristic that are connected to that characteristic; (b) take steps to meet the needs of persons who share a relevant protected characteristic that are different from the needs of persons who do not share it; (c) encourage persons who share a relevant protected characteristic to participate in public life or in any other activity in which participation by such persons is disproportionately low (...)' and 149(6) that 'Compliance with the duties in this Section may involve treating some persons more favourably than others; but that is not to be taken as permitting conduct that would otherwise be prohibited by or under this Act'.

The case law on positive obligations is in relatively early stages of development but it is likely in future that Section 149 may be relied on to push public authorities into utilizing their powers under Sections 158 and 159 of the Equality Act 2010 and, possibly, exerting pressure on private sector contractors to do likewise. Private sector employers may well be deterred from using positive action by the threat of legal action by disgruntled applicants/employees from relatively advantaged groups, and uncertainty generated (for example) by the requirements for proportionality and equal qualifications.

There are no binding quotas in the UK and any attempt by employers to achieve self-imposed quotas would be lawful only insofar as it corresponded with Sections 158 and 169 above. In the public sector there have been a variety of targets on race, gender and disability in place over the last couple of decades, in particular attempting to drive up the proportion of women at higher levels in the civil service. These did not however permit the use of preferential treatment other than that allowed by the SDA,

in particular, training and encouragement, and much of the progress made may have resulted from the institution of more family-friendly working practices.

1.3. Positive action measures/gender quotas in the access to and supply of goods and services

Section 158 of the Equality Act 2010 will apply to the supply of goods and services as it does to employment. It is too early to speculate as to how the courts might apply this provision in the context of goods and services.

1.4. Positive action measures/gender quotas in the field of research and education

1.4.1. Research and academics, 1.4.2. Primary, secondary and higher education

Sections 158 and 159 of the Equality Act 2010 will apply to research and education as they do to employment. It is too early to speculate as to how the courts might apply these provisions in the context of research and education.

1.5. Positive action measures/gender quotas in legislature, political parties and/or political bodies

Remedial measures have been permitted in this context since 2002 in relation to gender alone, Section 42A of the SDA as amended permitting arrangements made by a registered political party which regulated the selection of the party's candidates in a relevant election, and which were adopted for the purpose of reducing inequality in the numbers of men and women elected, as candidates of the party, to be members of the body concerned, in relation to certain elections. The elections included parliamentary elections, elections to the European Parliament, elections to the Scottish Parliament, elections to the National Assembly for Wales, and some local government elections. Since 1 October 2010, Section 104 of the Equality Act 2010 has permitted, again in relation to registered political parties making selection arrangements regulating the selection of candidates in a 'relevant election' (defined as before), arrangements 'the purpose of which is to reduce inequality in the party's representation in the body concerned'. Such arrangements may not include 'short-listing only such persons as have a particular protected characteristic' except in the case of sex (so women-only shortlists remain lawful), and other than in the case of single-sex shortlists are lawful only to the extent that they are a proportionate means of reducing inequality 'between

- (a) the number of the party's candidates elected to be members of the body who share a protected characteristic, and
- (b) the number of the party's candidates so elected who do not share that characteristic'.

1.6. Positive action measures/gender quotas in other decision-making bodies or other areas

Sections 158 and 159 are of general application and so would apply to appointment to other decision-making bodies whether or not they were regarded as entailing 'employment' for the purposes of the Act. Section 159 of the Equality Act 2010 expressly provides that the 'recruitment' to which it applies includes, *inter alia*, a process for deciding whether to 'make contract work available to a contract worker', or to 'offer a person a position as a partner in a firm or proposed firm [or] (...) an appointment to a personal office [or] (...) a public office [or to] (...) recommend a person for such an appointment or approve a person's appointment to a public office'.

In August 2010 the Government appointed Lord Davies (a man) to ‘develop a business strategy to increase the number of women on the boards of listed companies in the UK’.⁵²⁶ The appointment was announced as part of a ‘new aspiration, by the end of the Parliament [that] at least half of all new appointees being made to the boards of public bodies will be women’. Women accounted for only 12.2 % of directors of the FTSE 100 companies in 2009, only 7.3 % of the FTSE 250 companies almost half of which had no women in the boardroom. Lord Davies was asked to identify the obstacles to women becoming directors of listed company boards and make proposals on what action Government and business should take to improve the position. There was much speculation as to whether quotas would be introduced along the Norwegian model but the review, which reported on 24 February 2010,⁵²⁷ stated that ‘On balance the decision has been made not to recommend quotas’, though ‘Government must reserve the right to introduce more prescriptive alternatives if the recommended business-led approach does not achieve significant change’. The review cited a 2008 report from the Equality and Human Rights Commission which ‘suggested that at the current rate of change it will take more than 70 years to achieve gender-balanced boardrooms in the UK’s largest 100 companies’, and made recommendations in lieu of mandatory quotas. These recommendations included the adoption of targets for appointments of women by FTSE companies; obligations on quoted companies to publish information about the proportion of women at various levels in the company and to establish policies concerning boardroom diversity; and the advertisement of *some* non-executive board positions.

1.7. Conformity of gender quotas with equality legislation

To the extent that gender or other quotas entailed discrimination at the point of recruitment or promotion other than as permitted by Section 159 of the Equality Act 2010 they would be unlawful (see also Section 1.2?). This is not to say that the setting of targets is unlawful, or the adoption of proportionate measures such as targeted advertisements, training and mentoring. But operating a system of appointment according to quotas is simply unlawful in the UK at present except in the sole case of recruitment to the police service in Northern Ireland, where special domestic legislation (and a particular provision in Directive 2000/78) permits the creation of a pool of prospective appointees from which recruits are drawn on the basis of a balance between Catholics and Protestants.

2. Positive action measures for women and gender quotas in practice

2.1. Implementation of positive action measures for women and/or gender quotas

2.1.1. Implementation in employment, self-employment and vocational training

There has been little systematic research of how far the voluntary positive action provisions have been taken up in practice by employers and others, apart from the use of advertisements that encourage women to apply for particular employment opportunities. What limited research was conducted on the use of equivalent provisions in the context of racial equality, shows very little reported use beyond this

⁵²⁶ Press release “Mervyn Davies in new drive to boost women in the boardroom” from the Department for Business, Innovation and Skills, 6 August 2010.

⁵²⁷ www.bis.gov.uk/assets/biscore/business-law/docs/w/11-745-women-on-boards.pdf, accessed 6 April 2011.

in the 1990s.⁵²⁸ There was some evidence after this date that training providers and employers used the positive action provisions more widely,⁵²⁹ but this was generally the product of unilateral decisions by employers and others, rather than legislation or negotiations with the social partners. Evidence is too sketchy to draw any conclusion as to whether there are significant differences in the approach to positive action measures in the public and private sectors or the extent to which positive measures are taken and encouraged in each sector. It is worth mentioning however that the 'Public Service Agreement' gender equality objective was introduced in 2003 with a target of increasing women in the senior civil service to 37 %, with 30 % of top management posts to be filled by women. Between April 2003, when the PSA was introduced, and April 2008, the proportion of senior women in the civil service and of women in top management posts increased from 26.4 % to 32.6 % and 22.9 % to 25.5 %. Neither target was satisfied but significant progress was made on the first of these targets. In July 2008 fresh targets were set at 39 % and 34 % by 2013. It remains to be seen what the impact of the recession will be on the achievement of these targets.⁵³⁰

2.1.2. Implementation in the access to and supply of goods and services

There is no information available on this.

2.1.3. Implementation in research and education

There is no information available on this.

2.1.4. Implementation in legislature, political parties and/or political bodies

The Labour Party used all-women shortlists in the 1997 and 2005 general elections (a legal challenge to such shortlists preventing their use in 2001 and resulting in the amendment of the SDA to permit preferential treatment in this context). In 1997 the number of women Labour Party MPs rose from 37 to 101 (from 13.7 % to 24.2 % of the parliamentary party). This fell to 95 (23.1 %) in 2001 and rose to 98 (27.5 %) in 1995 when the majority of Labour MPs first elected were women.⁵³¹

2.1.5. Implementation in other decision-making bodies or areas

Trade unions have taken advantage of the provisions to run women-only education courses for their members⁵³² and to introduce national women's officers, national women's committees, and reserved seats on the national executive committees for women.⁵³³

Targets set in 2003 for 'a clear majority' of government departments to have 40 % of women in public appointments for which they were responsible by 2008 do

⁵²⁸ C. Welsh, J. Knox and M. Brett, *Acting Positively: Positive Action Under the Race Relations Act 1976* (Employment Department, 1994).

⁵²⁹ Department of Trade and Industry, Women and Equality Unit, *Delivering on gender equality: supporting the PSA objective on gender equality, 2003-2006* (DTI, 2003).

⁵³⁰ <http://www.civilservice.gov.uk/about/working/diversity/previous-targets.aspx>, accessed 6 April 2011.

⁵³¹ *Speaker's Conference (on Parliamentary Representation) Final Report*, www.publications.parliament.uk/pa/spconf/239/ 239i.pdf, paragraph 126, accessed 6 April 2011.

⁵³² A.-M. Greene & G. Kirton 'Advancing Gender Equality: The Role of Women-Only Trade Union Education', *Gender, Work and Organization* 9(1) 2002, p. 39.

⁵³³ G. Kirton & A.-M. Green 'The dynamics of positive action in UK trade unions: the case of women and black members', *Industrial Relations Journal* 32(2), 2002, p. 157.

not appear to have been met. In March 2009 it was reported that ‘women held just under a third (32.6 %, down from 33.3 % in 2008) of public appointments’.⁵³⁴

3. Case law

3.1. Case law of national courts

In *Hughes v London Borough of Hackney* [1988] IRLR 55 an Employment Tribunal ruled that the London Borough of Hackney had discriminated unlawfully on grounds of race when, in the context of an outreach programme intended to help in the recruitment and training opportunities of members of ethnic minorities it created a number of ‘apprenticeships’ specifically for BME candidates. Judicial discomfort with the concept of positive discrimination is also evident from the decision of the Court of Appeal in *Lambeth London Borough Council v Commission for Racial Equality* [1990] ICR 768 in which that Court (per Balcombe LJ) declared itself: ‘wholly unpersuaded that one of the two main purposes of the Act is to promote positive action to benefit racial groups’ and went on to take a narrow approach to the genuine occupational requirement defence allowed by the Race Relations Act. In *ACAS v Taylor* EAT/788/97 (unreported, 11 February 1998) the EAT rejected an appeal against a tribunal decision that Mr Taylor had been discriminated against by being refused promotion. The tribunal took the view that Mr Taylor had been the victim of a policy of positive discrimination, a decision reached, in part, because ACAS had circulated the following recruitment guidelines to its recommending officers:

‘Please remember that more needs to be done to ensure the reality of the claim that ACAS is an equal opportunity employer. For example women make up only 17 per cent of those at SEO level at present and ethnic minorities staff less than 1 per cent. All staff should be considered on their merits as individuals. Where you have any doubts about the fairness of the Annual Reports you should not hesitate to take appropriate action.’

Morison J, for EAT, ruled that ‘the guidance provisions (...) should be reconsidered by ACAS. The sentence ‘Please remember that more needs to be done to ensure the reality of the claim that ACAS is an equal opportunity employer’ is readily capable of being misconstrued. Furthermore, it begs the question as to what is to be done and by whom. It seems to us that it would have been more appropriate and quite sufficient for the guidance to have reminded the line managers that ACAS was an equal opportunity employer and to draw attention to the fact that women and ethnic minorities staff at SEO level were poorly represented. Such poor representation was itself suggestive of potentially discriminatory practices in the past and the employers were entitled to draw that to the attention of those who had the responsibility for making decisions about promotions in the future. The way the guidance was composed seems to us to be capable of leading the unwary into positive discrimination’.

More recently, though not in the context of employment, the High Court ruled in *R (Kaur) v Ealing London Borough Council* [2008] EWHC 2062 (Admin), [2008] All ER (D) 08 (Oct) that a positive action provision in the RRA (Section 35) was ‘not an exception to the (...) Act. It does not derogate from it in any way. It is a manifestation

⁵³⁴ http://www.equalities.gov.uk/what_we_do/representation_in_public_life.aspx accessed 6 April 2011.

of the important principle of anti discrimination and equality measures that not only must like cases be treated alike but that unlike cases but must be treated differently.’

3.2. *Case law of equality bodies*; 3.3. *Case law of other bodies*

There is no case law for equality bodies or other bodies.

4. Proposals

This has been dealt with above.

Annex I

Questionnaire for the report *Gender quotas and other positive action measures to ensure full equality in practice between men and women. The transposition of EU provisions on positive action and gender quotas in employment, in the access to and supply of goods and services, in education, and in decision-making and political bodies in 33 European countries* (working title)

European Network of Legal Experts in the Field of Gender Equality

Introduction

The issue of positive action measures and quotas has been addressed in several of the Network's publications. The Network produced an extensive report on *Positive Action Measures* in April 2005, for internal use of the Commission. This report provided information on existing national legislative provisions in relation to positive action measures both in the public and in the private sector, within the meaning of Article 141(4) of the EC Treaty (now Article 157(4) TFEU) and Article 2(4) of Directive 76/207/EEC (now Article 3 Recast Directive 2006/54/EC). It also gave details about what was in progress or proposed in the 25 Member States, the (then) candidate countries (Bulgaria and Romania) and the EEA countries (Iceland, Liechtenstein and Norway). In March 2007, the Network reacted very promptly (within three days) to an ad hoc request from the Commission regarding quotas, in particular legislative proposals on gender quotas. In addition, the report *Making Equality Effective: The role of proactive measures in 30 European Countries*, which was published in December 2009, also includes information about positive action measures and quotas in employment, education, and in legislature and other decision-making bodies. The national reports in this publication were meant for internal use of the Commission, only the first part of this report is published on the Commission's website.¹

The aim of this new report is to update, gather and elaborate on the information provided in the above-mentioned publications in order to assess the experiences with such measures at national level and the support for certain types of measures, to analyse the effectiveness of existing measures and to identify best practices that might be useful for other countries. The report should provide in-depth information from all 33 countries now participating in the Network² with respect to the kind of measures that have been taken or proposed in different areas covered by the gender equality directives that include provisions on positive action. This basically covers Article 157(4) TFEU, Directive 2006/54/EC on matters in employment and occupation (Recast)³ and Directive 2004/113/EC on the access to and supply of goods and

¹ European Network of Legal Experts in the Field of Gender Equality, Sandra Fredman, *Making Equality Effective: The role of proactive measures in 30 European Countries*, European Commission, December 2009, available on: <http://ec.europa.eu/social/main.jsp?catId=641&langId=en>, accessed on 28 January 2011.

² In addition to the 27 Member States: three EEA countries (Iceland, Liechtenstein and Norway) plus Croatia, FYR of Macedonia and Turkey.

³ Measures applying to (occupational) old-age pensions will not be addressed in this report, as this issue has been addressed in a recent report of the Network. Directive 79/7/EEC does not contain

services. These provisions are now drafted in a similar way and allow measures to ensure full equality in practice between men and women. Article 157(4) reads:

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.

Article 3 on positive action of the Recast Directive stipulates that:

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.

Article 6 of Directive 2004/113 on goods and services is drafted slightly differently:

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.

This new publication should also update and provide additional information on measures which are aimed at improving the gender balance in economic and political decision-making in the 33 European countries that are the subject of this report and should thus cover a larger scope than the previous reports. Such measures may apply to company boards, management and higher management, specific levels or all levels of public institutions and/or education in general and higher education, political institutions, etc. Some of these fields fall outside the scope of the gender directives, but lessons learnt from gender quotas there (e.g. the political field) may be useful if gender quotas (or other positive action measures) are to be implemented in relation to employment, self-employment, etc. The form of such measures can be rather diverse: different kinds of positive action measures, soft quotas or even binding quotas. In this new report, we will use the term *soft quotas* when no sanction applies in case of non-compliance with a given measure and *binding quotas* when a sanction is foreseen in the relevant legislation or policy.

The report should provide information on the national legal provisions and relevant case law which contain such measures in constitutional law, equality law, labour law, company law or any other type of law. In addition, it should give insight into provisions of positive action measures/gender quotas in collective labour agreements and self-regulatory tools. The report should also provide information on the legal nature of such measures, whether they are binding or not, how compliance is ensured and whether there are sanctions in case of non-compliance with the legal requirements. Wherever possible, the effectiveness and impact of such measures in practice should also be described.

In the first synthesis part of the report, the relevant EU law provisions and case law of the Court of Justice of the EU will be described. Against that background, the

any general provisions on positive action; statutory social security therefore falls outside the scope of this report.

main findings of the national reports will be summarized and analysed. The question of competence of the EU in relation to positive action measures for women/gender quotas will also be addressed in the light of conferred powers (distribution of competences). The following questions seem particularly relevant:

- a. What could be a viable legal basis for EU positive action policy containing measures that are mandatory for Member States? What should be the role of the subsidiarity principle in this respect?
- b. Does membership of an executive board fall within the scope of the concept of 'worker' and/or the field of employment as covered by Article 157 TFEU and the Recast Directive?
- c. If not, does the EU have competence to regulate that particular area?

Attention will also be paid to the conceptualization of positive action measures in EU law, which will also be compared to the approach on these issues in CEDAW, in particular Article 4 on temporary special measures and General Comment No. 25 of CEDAW.

In the second part of the report, the national reports will be published.

The report will also include a bibliography.

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QUESTIONNAIRE

1. Legislation

In Section 1, please provide legislation details (such as aims, scope, targets, modalities) on the *national legislative provisions* on positive action measures for women⁴ and/or gender quotas⁵ (unless otherwise specified) and the *legal nature* of each of these provisions (are they legally binding or not, what mechanisms are there for ensuring compliance, are sanctions available etc.). Also mention the references to the relevant legislation/provisions.

1.1. Positive action measures in the national legal system (e.g. are provisions included in the Constitution, in general Equal Treatment Acts, in Equal Opportunities Acts, in Gender Equality Acts etc.?).

Please describe both positive action provisions/quotas which generally apply to various groups (e.g. ethnic minorities, people with disabilities, women) and those which apply only to women (underrepresented sex)⁶. Please note that the description of positive action measures for other grounds than gender is only meant for the

⁴ The above-mentioned EU provisions allow measures for the underrepresented sex. In most areas, women will be underrepresented, but also describe positive action measures for men where relevant. Whenever relevant please specify if the measures in question apply to women or underrepresented sex generally.

⁵ Also include regionally applicable provisions, such as in Germany in the *Länder*, if any and if possible.

⁶ The above-mentioned EU provisions allow measures for the underrepresented sex. In most areas, women will be underrepresented, but also describe positive action measures for men where relevant. Whenever relevant please specify if the measures in question apply to women or underrepresented sex generally.

purpose of exploring in a comparative way the questions below. The description should be exhaustive only for gender.

Please pay attention to the following aspects as much as possible:

- Are positive measures perceived/legally construed as an exception to the equal treatment principle or are they a competing but equally valuable interpretation of the equal treatment principle?
- How is positive action justified in normative terms? What value-based reasons are used to explain the need for positive action: for example biological differences, compensation for past discrimination, structural barriers and systemic discrimination, welfare state (*Sozialstaat*), value of diversity, proportional distribution of social goods, opportunities and power?
- What is the value of numerical targets/proportional representation? Is proportional representation relevant as proof of discriminatory barriers? Is it relevant as a yardstick of effectiveness of positive action efforts? Is it relevant as a self-sufficient normative goal signifying equality?
- Are numerical targets (quotas) to be achieved through sex-neutral measures (redefinition of 'merits', insistence on apparently neutral criteria that tend to favour women in practice) or openly preferential treatment for women or specific groups?

When you describe positive action measures/quota systems please take into consideration the following features:

- Are they binding or not?
- What level of representation do they aim to ensure?
- What type of preference do they provide: equal qualifications, strong preference (lesser but minimum qualifications) or absolute preference (sex is the only criterion)?
- How strong is the preference (is the preference automatic or conditional on some type of a saving clause)?
- What is the role of the proportionality principle?

1.2. Positive action measures in employment (including vocational training, see Article 14 of Directive 2006/54, and self-employment). Please describe here and in the following sections on legislation only the positive action provisions for women⁷/gender quotas. Also pay attention to the aspects mentioned in Section 1.1. as much as possible.

1.2.1. In the public sector (including public administration)

1.2.2. In the private sector

Please pay specific attention to gender quotas in legislation concerning company boards of private companies.

1.2.3. Applicable to state-owned companies

Please pay specific attention to gender quotas in legislation concerning company boards of such stated-owned companies.

⁷ The above-mentioned EU provisions allow measures for the underrepresented sex. In most areas, women will be underrepresented, but also describe positive action measures for men where relevant. Whenever relevant please specify if the measures in question apply to women or underrepresented sex generally.

1.2.4. Differences between the public and the private sector

Please provide details of differences (if any) in the approach to positive action measures and gender quotas in the public and private sectors and the extent to which such measures are taken and encouraged in each sector.

1.3. Positive action measures in the access to and supply of goods and services

Are there any positive action measures for women⁸/gender quotas in the field of access to and supply of goods and services? If so, please describe these measures and their legal nature (binding or not, are there any sanctions?).⁹ Please also pay attention to the aspects mentioned in Section 1.1. insofar as relevant.

1.4. Positive action measures in the field of research/academics and education

Are there any positive action measures for women¹⁰/gender quotas in the field of research and academics (thus in the field of employment)?

If possible and relevant, also describe measures in the field of education (primary education, secondary education and/or higher education). If such measures exist, please also describe their legal nature (binding or not, are there any sanctions?) and pay attention to the aspects mentioned in Section 1.1. insofar as relevant.

1.5. Positive action measures in legislature, political parties and/or political bodies

Are there any positive action measures for women¹¹/gender quotas in the political field? For example with respect to the list of candidates of political parties, representatives of political parties, measures applying to political bodies, advisory councils, measures applying to legislature (e.g. members of national parliament, representatives at regional or local level etc.)? If so, please describe these measures and their legal nature (binding or not, are there any sanctions?). Please also pay attention to the aspects mentioned in Section 1.1. insofar as relevant.

1.6. Positive action measures in other decision-making bodies or other areas

Provide additional examples and information on positive action measures for women¹²/gender quotas not yet described and their legal nature. Please also pay attention to the aspects mentioned in Section 1.1. insofar as relevant.

⁸ The above-mentioned EU provisions allow measures for the underrepresented sex. In most areas, women will be underrepresented, but also describe positive action measures for men where relevant. Whenever relevant please specify if the measures in question apply to women or underrepresented sex generally.

⁹ The reports produced by the Gender Network on sex discrimination in the access to and supply of goods and services might provide some information on this issue: *Sex-Segregated Services (2008)* and *Sex Discrimination in the Access to and Supply of Goods and Services and the Transposition of Directive 2004/113/EC (2009)*. Both reports are available on: <http://ec.europa.eu/social/main.jsp?catId=641&langId=en&moreDocuments=yes>, accessed 2 February 2011.

¹⁰ The above-mentioned EU provisions allow measures for the underrepresented sex. In most areas, women will be underrepresented, but also describe positive action measures for men where relevant. Whenever relevant please specify if the measures in question apply to women or underrepresented sex generally.

¹¹ The above-mentioned EU provisions allow measures for the underrepresented sex. In most areas, women will be underrepresented, but also describe positive action measures for men where relevant. Whenever relevant please specify if the measures in question apply to women or underrepresented sex generally.

¹² The above-mentioned EU provisions allow measures for the underrepresented sex. In most areas, women will be underrepresented, but also describe positive action measures for men where relevant. Whenever relevant please specify if the measures in question apply to women or underrepresented sex generally.

1.7. Conformity with equality legislation

Do positive action measures for women¹³/gender quotas create specific problems in the light of equality legislation (EU and/or national)? If so, please explain.

2. Positive action measures for women and gender quotas in practice

2.1. Implementation of positive action measures for women¹⁴ and/or gender quotas

Please provide details on how positive action measures for women¹⁵ and gender quotas have been implemented in relevant policies and in practice. Also describe the aim and scope of such measures, e.g. positive action training measures, quotas, targets, etc. and their legal nature (binding or not, are there any sanctions?). Also explain whether there is an institutional infrastructure accompanying/facilitating a positive action policy or efforts. Pay attention to the following aspects, for example:

- Are there equal opportunities officers within public administration bodies?
- Is there a requirement to elaborate positive action plans by public administration bodies and state-established entities (ministries, schools, universities, national/public media, procurement agencies, local government bodies, national banks etc.)?
- What are the competences and responsibilities of such bodies regarding the implementation of positive action measures (how are these measures monitored)?
- Are there any 'effectiveness scrutiny' requirements (e.g. evaluate actual effects of a particular measure in a particular period)?

Please provide this information with respect to:

2.1.1. Employment (including self-employment and vocational training)

Please also pay attention to the two following questions if relevant in your national system:

- Does the national system contain a positive duty to evaluate the supposed 'objectivity' of professional qualifications used as selection criteria (are they related to gender roles and existing inequalities, and, if so, to what extent, are they really necessary for the performance of a particular job, how much do they actually contribute to the effectiveness of performance, etc).
- Are numerical targets (quotas) to be achieved through sex-neutral measures (redefinition of 'merits', insistence on apparently neutral criteria that tend to favour women in practice) or openly preferential treatment?

2.1.2. The access to and supply of goods and services

2.1.3. The field of research/academics and education

¹³ The above-mentioned EU provisions allow measures for the underrepresented sex. In most areas, women will be underrepresented, but also describe positive action measures for men where relevant. Whenever relevant please specify if the measures in question apply to women or underrepresented sex generally.

¹⁴ The above-mentioned EU provisions allow measures for the underrepresented sex. In most areas, women will be underrepresented, but also describe positive action measures for men where relevant. Whenever relevant please specify if the measures in question apply to women or underrepresented sex generally.

¹⁵ The above-mentioned EU provisions allow measures for the underrepresented sex. In most areas, women will be underrepresented, but also describe positive action measures for men where relevant. Whenever relevant please specify if the measures in question apply to women or underrepresented sex generally.

2.1.4. Legislature, political parties and/or political bodies

2.1.5. Other decision-making bodies or areas

The information provided under this heading should include an indication of whether the measures are a result of

- legislation;
- negotiations between the social partners at national or enterprise level (collective labour agreements);
- self-regulation (corporate governance codes)
- a unilateral decision of the employer; etc.

2.2. *Effects of the positive action measures*

Please provide details of any analysis of the effects of the specific measures described up to now in Sections 1 and 2 so far as possible. Explain in particular how the effectiveness of policies is being measured and how is assessed whether certain targets are met or not.

3. Case law

Please describe in short relevant national case law on positive action measures for women¹⁶ and/or gender quotas, also mentioning the exact references to the cases.

3.1. *National courts*

3.2. *Equality bodies*

3.3. *Other bodies (e.g. ombud, specialised courts)*

4. Proposals

Please provide details of any proposals or discussions in relation to any proposed new positive action measures.

Explain how overall, existing law and policy on positive action/quotas (in particular positive action measures for women/gender quotas) is assessed, why certain new proposals have been made and by whom (if applicable) and what responses there are to these proposals (on different levels; political, social, companies).

¹⁶ The above-mentioned EU provisions allow measures for the underrepresented sex. In most areas, women will be underrepresented, but also describe positive action measures for men where relevant. Whenever relevant please specify if the measures in question apply to women or underrepresented sex generally.

Annex II

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EUROPEAN NETWORK OF LEGAL EXPERTS IN THE FIELD OF GENDER EQUALITY