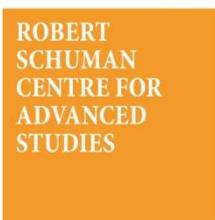




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Women on Company Boards –
An Example of Positive Action in Europe

Álvaro Oliveira & Michał Gondek

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An Example of Positive Action in Europe**

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Abstract

In the last decade there has been a rising pressure in Europe to increase the number of women in the boards of large companies. Starting with Norway in 2003, several countries adopted legislation for this purpose. Building on this evolution, in November 2012 the European Commission presented a proposal for a Directive applicable to big companies listed on the stock exchange. After describing these developments, the paper examines the case law of the Court of Justice of the European Union on positive action for women in employment. On that basis, it is suggested that the Court could accept the Commission's proposal, once adopted, as compatible with the principle of equality. Finally, the paper puts the measures in favour of women in company boards, as an example of positive action, in the context of other national measures in favour of women and of other groups - such as persons with disabilities and ethnic minorities.

Keywords

European law, economic law, fundamental/human rights, gender policy, harmonization, non-discrimination, preliminary rulings

Introduction¹

A major development in positive action in Europe concerns the growing requirement of representation of women on company boards. Starting with Norway in 2003, several European countries have adopted laws demanding a minimum percentage of women in the management and advisory boards of certain companies. Building on these developments, in November 2012 the European Commission presented draft legislation with the same objective.² It would apply to big companies listed on the stock exchange. Part I of this paper describes these developments.

Would the Commission's proposal, once adopted, pass the review by the Court of Justice of the European Union (hereinafter: "the Court")? How did this Court rule on positive action in the past? Part II reviews the existing case law on positive action, which up to now concerns only measures favouring women in employment, and analyses the chances of the proposed European legislation surviving the Court's scrutiny – in case its legality is questioned after its adoption.

In conclusion the paper puts the discussion of women on company boards into a broader context by referring to other positive action measures adopted at national level in favour of women and in favour of other groups, such as persons with disabilities and ethnic minorities. On the basis of that context, does the new legislation on women on company boards sets a new model for positive action in Europe? Our concluding assessment points both to the inherent limits and the interesting potential of the positive action measures for women on company boards.

Before turning to the main text, we would like to make two points of clarification. First, when we use the term "positive action", we refer in principle to one of the two methods mentioned by David Oppenheimer in his seminal articles on "affirmative action" in the US³: either the quota method using absolute floors or ceilings for selection of women and minorities, or the preference method which allows for consideration of characteristics such as the sex, disability or ethnical origin in selection. Unless otherwise clear from the text, we are not referring to softer methods of positive action such as self-studies examining selection procedures, outreach recruitment and counselling, or even active non-discrimination policies like diversity or anti-harassment training.

¹ By Álvaro Oliveira, PhD in law (European University Institute, Florence) and Michal Gondek, PhD in law (Maastricht University). Both authors are currently working for an EU institution. The content of this article does not reflect the official opinion of the European Union. Responsibility for the information and views expressed therein lies entirely with the authors. This text is based on a paper originally presented in April 2013 in the University of California at Berkeley, in the Annual Conference of the Berkeley Anti-Discrimination Study Group and in November 2013 at the E.U.I.. The authors would like to thank Professors David Oppenheimer, Ruth Rubio Marin and Eléonore Lépinard for fruitful discussions and their precious assistance in the drafting of this paper.

² "Proposal for a Directive of the European Parliament and of the Council on improving the gender balance among non-executive directors of companies listed on stock exchanges and related measures", COM(2012) 614 final of 14 November 2012: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2012:0614:FIN:en:PDF> .

³ 'Understanding Affirmative Action', 23 Hastings Const. L.Q. 921 (1995), pgs. 923 and 926-9. See also his 'Distinguishing Five Models of Affirmative Action', 4 Berkeley Women's L.J. 42 (1988), pg. 43-46.

National Legislation and the Proposed Directive on Women on Boards

In Europe, women make up only a small percentage of directors on boards of major companies, including in publicly listed companies (17.8% in October 2013).⁴ Yet, women form almost half of the general workforce⁵ and more than half of university graduates are women.⁶ To remedy this situation, several European countries have recently passed legislation containing mandatory quotas or have promoted voluntary measures to increase the number of women on company boards.

In November 2012, the European Commission proposed that large publicly listed companies increase the percentage of women directors on their boards to at least 40% by 2020. This goal will be achieved mostly by means of transparent recruitment of non-executive board members, as explained below. This first Part gives an overview of the most important national legislation and explains the contents of the proposal of the European Commission.

National Legislation and Other Experiences

National laws ⁷

Norway was a pioneer, with legislation of 2003 prescribing a minimum target of 40% for each sex on each company board. The requirement became binding in 2006. That legislation, which was proposed by a centre-right government, now applies to all public limited liability companies as well as to state-owned enterprises⁸. Penalties for violation of the quota begin with warnings, followed by fines and include the possibility of the court ordering the company's dissolution, although the latter has never occurred.

In 2011, four countries in the European Union adopted legislation providing for quotas for women on the boards of private sector companies. In chronological order, these were France (40% quota to be reached by 2017), the Netherlands (30%), Italy (33,3% by 2015) and Belgium (33,3% by 2019). All these countries have binding quotas, except the Netherlands. In 2007, Spain too established a quota of 40% by 2015 for large companies, but without sanctions.

⁴ *Gender balance on corporate boards - Europe is cracking the glass ceiling*, European Commission, Brussels, March 2014 (with data of October 2013 covering 610 of the largest publicly listed companies from the 28 Member States): http://ec.europa.eu/justice/gender-equality/files/documents/140303_factsheet_wob_en.pdf . In the United States, in 2013, women were 16.9% of corporate board directors in the 500 biggest companies (*Fortune 500*): <http://www.catalyst.org/media/catalyst-2013-census-fortune-500-still-no-progress-after-years-no-progress> .

⁵ 45,7% in 2013, see Eurostat's *Labour market and Labour force survey (LFS) statistics* : [http://epp.eurostat.ec.europa.eu/statistics_explained/index.php/Labour_market_and_Labour_force_survey_\(LFS\)_statistics#Labour_force_in_the_EU](http://epp.eurostat.ec.europa.eu/statistics_explained/index.php/Labour_market_and_Labour_force_survey_(LFS)_statistics#Labour_force_in_the_EU)

⁶ In 2009, in the European Union, on average, 124 women are enrolled in tertiary education for every 100 men, according to the report *Key Data on Education in Europe 2012*, by Eurostat & Eurydice, pg. 84, available at http://eacea.ec.europa.eu/education/eurydice/documents/key_data_series/134en.pdf . Unless otherwise indicated, all European wide statistics mentioned in this paper are taken from the European Commission's report "Women in economic decision-making in the EU - Progress report - A Europe 2020 Initiative" of March 2012: http://ec.europa.eu/justice/gender-equality/files/women-on-boards_en.pdf .

⁷ On national legislation and other measures adopted in Europe, see, respectively, Annexes 1 and 2 of the report of the European Commission "Women in economic decision-making in the EU", quoted above.

⁸ See, for example, "The quota wars" in: *The Atlantic Times*, a newspaper from Germany: http://positive.the-atlantic-times.com/index.php?option=com_content&view=article&id=462%3Athe-quota-wars&catid=25%3Apolitics&Itemid=2 .

The law adopted in France is the one closest to the Norwegian model.⁹ The final objective, like in the Commission proposal, is also to reach 40% of members of each sex on company boards. However, in France the objectives are to be met in two steps. In 2014, at least 20% of board members must belong to the under-represented sex. In 2017, they must be at least 40%. In contrast to the Commission's proposal, in France these quotas apply in the same way to both management boards¹⁰ and supervisory boards. Moreover, in management boards they apply to all board members (executive and non-executive members). In addition, in order to determine if the 40% quota is reached, representatives of other legal entities (such as other companies) are taken into account, but the board members elected by the employees are not.

The French legislation applies to a large number of companies: those which are publicly listed, as well as unlisted companies which have more than 500 workers and average revenues or total assets of more than 50 million euros during the last three consecutive years. It also applies to some state-owned companies.¹¹ Breach of the legislation invalidates the particular appointment of the board member in question. But this invalidity does not affect the legality of decisions adopted with the participation of that board member. In addition, from 2017 onwards, in case of breach of the 40% quota, payment of the benefits normally received by board members, such as board meeting fees, will be suspended.

In Italy, the law imposes a quota for women of one third of members of management and of supervisory boards, which must be met by 2015. The quota applies to publicly listed companies and to state-owned companies. If listed companies do not respect the law, they will be subject to progressive sanctions, beginning with a warning with a deadline of four months to implement the quota. If the company still does not comply, it will be fined from 100,000 to 1 million euro (20,000 to 200,000 euro for supervisory bodies), and will receive a second warning to implement the quota within three months. Finally, if the situation persists, the members elected in contravention of the legislation will lose their positions on the board.

In Belgium the law also provides that at least one third of board members must be of the under-represented sex. This has applied to state owned companies since 2012. To publicly listed companies the quota applies progressively according to their size, with deadlines ranging from six to eight years, up to 2019. If a company has not yet met the one-third quota, a member of the under-represented sex is to be appointed to the next vacancy or the next appointment is invalid. Furthermore, as in France, when listed companies do not reach the quota, any economic compensation received by board members for performing their duties will be cancelled.

In the Netherlands, the law applies to management and supervisory boards of both private and state-owned public limited companies. They should aim for a representation of at least 30% of each sex, "to the extent possible". The law does not establish sanctions if the goal is not reached and, in any event, it will expire on 1 January 2016. But the principle of "comply or explain" applies to large companies. If they do not reach the 30% goal, they must explain why in their annual report, as well as what measures they will adopt in order to achieve it.

Denmark adopted a law, in force since 2013, applying to big companies where one sex has less than 40 percent of board members. These companies have to set a voluntary target for the underrepresented sex. The companies decide both the target and the deadline to reach it, but the latter cannot be longer than 4 years. No sanctions are provided for not reaching the self-defined target.¹²

⁹ Law called «*Copé-Zimmermann*», Law 2011-103 of 27 January 2011 *on the balanced representation of women and men on management and supervisory boards and on professional equality*, *Journal Officiel de la République française*, of 28 January 2011, p. 1680.

¹⁰ These are the *conseils d'administration*. They are different from the *conseils de direction* made only of executive members, running the daily life of the company.

¹¹ Companies concerned by Act 83-675 *on the democratization of the public sector*, of July 1983, later amended.

¹² <http://www.paulhastings.com/genderparity/countries/denmark.html> .

In Germany, the representation of women at the head of large companies has been subject to a lively debate in recent years, including within the federal government. In 2001, the German business organizations and the government had already reached an agreement on the “promotion of equal opportunities in the private sector”, which was supposed to increase the number of women in corporate management. In exchange, the government agreed not to set quotas for the private sector. However, in the higher management of big companies the situation did not change considerably.

Within the previous German federal government (2009-2013), some ministers were in favour of binding quotas, including the Minister of Labour, Ursula von der Leyen. Others favoured a “flexi-quota” plan proposed by Kristina Schröder, Minister of family matters and responsible for gender equality issues. According to her proposal, listed companies and certain other businesses would be required to set themselves a quota for women on their management and supervisory boards.

On 21 September 2012, the *Bundesrat*, the upper house of the German parliament, approved a motion in favour of a proposal presented by the Social Democrat and the Green parties that would impose binding quotas for the 30 largest publicly listed companies. According to the proposal, 20% of board members should be women by 2018 and 40% by 2023. However, in order to be adopted, this proposal would require the agreement of the Lower House, the *Bundestag*, which was controlled by the centre-right governing coalition. The government decided not to act on this matter before the German federal elections of October 2013. Following these elections, the *CDU* and the *SPD* reached a coalition agreement for a new government. They agreed to have a 30% quota for women in large companies that are subject to the system of corporate co-management with workers (around 120 companies). New legislation is expected to be adopted by the end of 2014.

Finally, it should be noted that several European countries have set quotas or targets for women's representation in boards of state-owned companies, for instance Austria, Denmark, Finland, Greece and Slovenia.

Other measures

Some countries have preferred voluntary initiatives, such as clauses in their corporate governance codes encouraging companies to increase the number of women in leadership positions, or actions directed towards the recruitment of women, network creation and monitoring of women careers within companies.

For example, in the United Kingdom, the Lord Davies' report of February 2011, commissioned by the initiative of the Conservative-Liberal Democrat coalition government, recommended that companies listed on the FTSE 100 should have 25% of women in their boards by 2015.¹³ The report also suggested that companies should set their own goals for between 2013 and 2015. The government has encouraged all companies listed on the FTSE 350 to do the same. Meanwhile, between December 2010 and March 2014, the number of women directors in the FTSE 100 companies increased from 12.5 to 20,7%, making the objective of 25% in 2015 within reach. As for the FTSE 250 companies, women directors are 15.6%, up from 7.8% in 2011.¹⁴

¹³ “*Women on Boards* – February 2011.”

https://positive.gov.uk/government/uploads/system/uploads/attachment_data/file/31480/11-745-women-on-boards.pdf.

¹⁴ However, in the FTSE 100, only 6,9% of executive directors are women. *Women on boards: Davies Review annual report 2014 (third annual review)*, London, March 2014: <https://www.gov.uk/government/publications/women-on-boards-2014-third-annual-review> . The report states that “The world is watching to see if the UK can deliver real change in this area without resorting to legislative measures.”, *idem* page 6.

The Proposal for an EU Directive

Origins and main content

The proposal for a European Directive was adopted at the initiative of the Vice-President of the European Commission, Ms Viviane Reding. In March 2011 she asked companies listed in the stock exchanges in the European Union to commit to increase the proportion of women on their boards to 30% by 2015 and to 40% by 2020. However, a year later the Commission found that the situation had not significantly improved. The pledge to increase the number of women on company boards was signed by only 24 companies.¹⁵ Moreover, in large publicly listed companies, the number of women on boards of directors had increased only from an average of 11.8% in October 2010 to 13.7% in January 2012.¹⁶ Even worse, 40% of that increase was attributable to one country only: France, which had just adopted legislation on this matter.¹⁷

The proposed directive, presented in November 2012, would apply both to executive and non-executive directors. As far as non-executive directors are concerned, the overall goal is to achieve a minimum representation of 40% of the under-represented sex by January 1, 2020 for listed companies in the private sector. For state-owned listed companies the implementation period is January 1, 2018. For executive directors, the requirement is more flexible. In the same time scale companies must make individual commitments on equal representation of both sexes.

The Directive would be a temporary measure, expiring in 2028. But it also provides that, beginning in 2017, the Commission every two years must assess the application of the Directive. This leaves the door open for the eventual extension of the Directive beyond 2028.

The proposal applies to large listed companies within the European Union. It does not apply to small and medium enterprises, defined as those that have less than 250 employees, or less than 50 million euro in turnover, or an annual balance sheet of less than 43 million euros. It also applies to both types of listed companies in the EU: those which have a unitary system of administration and those who have a two-tier system. In the unitary system, there is a single board, which includes executive members involved in the management of the current affairs of the company and also non-executive members. In the two-tier system, there is simultaneously a management board and a supervisory board that controls the former. Corporate law in individual Member States generally provides for one or the other model of company structure. For example, in the United Kingdom there is a unitary system and in Germany a two-tier system. Some countries provide for a mixture of both systems and the possibility for companies to choose a system, as for example in France.

Non-executive directors

How can the goal of the Directive be reached? A key provision of the proposed Directive is that it requires a transparent recruitment procedure for non-executive directors. This procedure would apply when the percentage of members of one sex on a company board is less than 40%. Then, a company would have to fill the positions “on the basis of a comparative analysis of the qualifications of each candidate, by applying pre-established, clear, neutrally formulated and unambiguous criteria”.¹⁸

¹⁵ “Women in economic decision-making in the EU”, supra, at pg.15.

¹⁶ Idem, pg.9 and footnote 18. The report refers to the information available in the European Commission database on women and men in decision-making in January 2012. It covers the largest (according to market capitalisation) companies of the main blue-chip index of each national stock exchange : http://ec.europa.eu/justice/gender-equality/gender-decision-making/database/index_en.htm .

¹⁷ Conclusion based on the data of pg.11 of the same report.

¹⁸ Article 4(1) of the proposal.

The proposed Directive also provides that in the selection of non-executive directors priority must be given to the candidate from the under-represented sex (usually women), provided that the candidate is as qualified as the candidate of the opposite sex in terms of suitability, competence and professional performance. This priority would not apply if “an objective assessment taking account of all criteria specific to the individual candidates tilts the balance in favour of the candidate of the other sex.”¹⁹

To ensure that these rules are followed, the proposal also provides that an unsuccessful candidate may obtain from the company “the qualification criteria upon which the selection was based, the objective comparative assessment of those criteria and, where relevant, the considerations tilting the balance in favour of a candidate of the other sex.”²⁰

In addition, the Directive establishes a rule for sharing the burden of proof in favour of an unsuccessful candidate of the under-represented sex that is similar to the rule existing in antidiscrimination and equal treatment directives. It is provided that, when an unsuccessful candidate of the under-represented sex establishes before a court “facts from which it may be presumed that that candidate was equally qualified as the appointed candidate of the other sex”, then it is up to the company to prove that it did not violate the rules for the selection of non-executive directors²¹ – i.e. the rules concerning both the priority to be given in principle to women who have equal qualifications to male candidates and the objective examination of all individual candidates.

The wording used in the proposed Directive concerning the selection of non-executive directors is largely inspired by the case law of the Court of Justice of the European Union on “positive action” for women in employment. Part II explains the case law of the Court on positive action and its possible impact on the Commission’s proposal.

It is also provided that, when transposing the Directive into national law, Member States may decide that companies where members of the under-represented sex are less than 10% of the total workforce are exempt from the objective of gender balance for non-executive directors.²² In addition, Member States may decide that this objective is met when the members of the under-represented sex hold one third of all posts of directors (executive or not).²³

Executive directors

For executive directors, companies only have to make individual commitments regarding “balanced representation” of both sexes. Deadlines for achieving them are identical to those for non-executive directors: 2020 for private companies and 2018 for state owned companies. The consequences of non-compliance with these commitments are not severe; if a company does not achieve the goal it has set itself, it must simply explain the reasons for this failure, as well as describe the measures it plans to adopt to achieve that goal in the future.

Application of the Directive and sanctions

The proposal adds to the requirement of a transparent recruitment process a requirement to provide information. Companies must provide annually to the competent national authorities information on the gender representation on their boards, as well as measures taken to ensure a transparent recruitment process. This information is to be published on their websites in order to ensure that it is

¹⁹ Idem, Article 4(3).

²⁰ Article 4(4).

²¹ Article 4(5).

²² Article 4(6). Recital 31 of the draft Directive explains that «the gender composition of the workforce has a direct impact on the availability of candidates of the under-represented sex».

²³ Article 4(7).

accessible to anyone interested, including unsuccessful applicants for board membership. In addition, if a company does not meet the objectives of the Directive, it must explain why that is the case and what steps it will take to achieve them.²⁴

Member States would themselves decide what exact sanctions they would impose on companies that do not comply with the national laws transposing the Directive. According to the formula used in several equal treatment directives, these penalties must be "effective, proportionate and dissuasive." The proposal refers to penalties such as administrative fines or nullity of the election of non-executive directors, but they are only mentioned as an example and they do not constitute an exhaustive list.²⁵

Positive Action for Women in Employment Before the Court: How Relevant for Women on Boards?

To determine the potential reach of the Commission's proposal on gender balance in company boards, we have to establish one preliminary point. Would the Court of Justice of the European Union accept the legality of the Directive, once it is adopted? Or, in alternative, could the Court consider it a violation of the principle of equality between men and women? How did the Court rule on positive action in the past? What does that indicate for a future discussion on the legality of the Directive, once it is adopted?

This second Part seeks to answer these questions. First, it reviews the existing case law on positive action, which so far concerns measures favouring women in employment only. The European Union has adopted legislation prohibiting discrimination based on other grounds too, including racial or ethnic origin, religion or belief, age, disability or sexual orientation. This legislation also provides for the possibility, but not the duty, of Member States to adopt "positive action" measures based on these grounds.²⁶ However, the Court has not yet dealt with positive action measures concerning these grounds.

Secondly, on the basis of the existing case law, this part analyses the chances of future European legislation on women on boards surviving the Court's scrutiny – if its legality is questioned.

The Case Law on Positive Action for Women in Employment

The first judgments of the Court on positive action were rather negative for women. They invalidated schemes granting general or automatic preferences to women. The reaction against these judgments was quite strong, in particular concerning the *Kalanke* case in 1995. It went as far as to provoke a change to the treaties in 1997, so as to explicitly authorize "positive action" measures in favour of women. Later on, the Court developed and nuanced its case law. It accepted certain preferences in favour of women, but still under rather strict conditions. This doctrine is still valid at the present time.

The first cases – NO to "automatic preferences"

In 1988, in *Commission v. France*,²⁷ the Court had a first chance to interpret the gender "positive action" clause of the then Directive 76/207/EEC on Equal Treatment for Men and Women.²⁸ The relevant provisions of the Directive were the following.

²⁴ Article 5(2) and (3).

²⁵ Article 6.

²⁶ Article 5 of Directive 2000/43/EC allows for "positive action" measures on the grounds of race or ethnic origin and Article 7 of Directive 2000/78/EC contains a similar rule concerning measures based on religion or belief, age, disability and sexual orientation.

²⁷ Case C-312/86 *Commission v. France* ECR [1988] p. 6315.

Its Article 1(1) provided:

The purpose of this Directive is to put into effect in the Member States the principle of equal treatment for men and women as regards access to employment, including promotion, and to vocational training and as regards working conditions (...). This principle is hereinafter referred to as “the principle of equal treatment”.

Article 3(1) established that:

Application of the principle of equal treatment means that there shall be no discrimination whatsoever on grounds of sex in the conditions, including selection criteria, for access to all jobs or posts, whatever the sector or branch of activity, and to all levels of the occupational hierarchy.

Article 2(4) provided for the positive action clause:

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 employment and social security].

The case concerned certain provisions of French labour law that allowed for collective agreements to adopt rules more favourable to women. These rules could concern a wide variety of labour related benefits, including the extension of maternity leave; the shortening of working hours; leave when a child is ill; additional days of annual leave in respect of each child; one day's leave at the beginning of the school year; time off work on Mother's Day; the advancement of the retirement age; the granting of extra points for pension rights in respect of the second and subsequent children; as well as the payment of an allowance to mothers who have to meet the cost of nurseries or child-minders.²⁹

The European Commission brought a procedure before the Court against France because it considered that, “by its generality”, these French provisions made it possible “to preserve for an indefinite period measures discriminating as between men and women”. On the contrary, the French government argued that special rights favouring women were compatible with the principle of equality, since they did “derive from a concern for protection.” It also invoked the “positive action” clause of the Directive in support of this view. Interestingly, it added that the special rights for women were “designed to take account of the situation existing in the majority of French households”.

The Court was not impressed. It distinguished this case from other cases where it had accepted as legitimate certain measures protecting women in connection with maternity.³⁰ Here the Court pointed out that the special rights at stake concerned situations where women are parents or older workers – “categories to which both men and women may equally belong”.

The Court concluded that:

The exception provided for in [the positive action clause of the Directive] 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. Nothing in the papers of the case, however, makes it possible to conclude that a

(Contd.) _____

²⁸ Council Directive 76/207/EEC of 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, OJ L 39, of 14 February 1976, page 40. In 2006, this Directive was replaced by Directive 2006/54/EC on equal treatment of men and women in matters of employment and occupation (recast), OJ L 204, of 26 July 2006, p.23.

²⁹ Case C-312/86 *Commission v. France*, paragraph 8.

³⁰ Case 184/83 *Hofmann v Barmer Ersatzkasse* [1984] ECR 3047. The case concerned a rule of the German law for the Protection of Working Mothers of 1968 providing for a special paid leave for mothers, which went beyond the normal paid leave of then 8 weeks. The Court of Justice declared that measures aiming at protecting the maternity as a biological condition of a woman during maternity and thereafter, as well as those protecting the special relationship between a woman and her child over the period which follows pregnancy and childbirth, could legitimately be reserved to the mother only “in view of the fact that it is only the mother who may find herself subject to undesirable pressures to return to work prematurely”. *Idem*, at paragraph 26.

generalized preservation of special rights for women in collective agreements may correspond to the situation envisaged in that provision.³¹

In 1995, in the *Kalanke* case,³² the Court had to deal with a more concrete scheme. It examined a law of the German Land of Bremen giving a preference to women in the recruitment for or promotion within the civil service. This preference applied when women and men were equally qualified and when women were under-represented in the relevant sectors (in case of recruitment) or pay brackets (in case of promotion). Under-representation of women was deemed to exist when they did not make up at least 50% of the staff in the sector, or in the individual pay bracket in question.

The analysis of the Court starts by paying lip service to the objectives of “positive action”. Nevertheless, in the end it invalidates the measure at stake.

First, the Court recalls the objectives of the positive action clause of the Directive:

That provision is specifically and exclusively designed to allow measures which, although discriminatory in appearance, are in fact intended to eliminate or reduce actual instances of inequality which may exist in the reality of social life (...). It thus permits national measures relating to access to employment, including promotion, which give a specific advantage to women with a view to improving their ability to compete on the labour market and to pursue a career on an equal footing with men.³³

Then, in the same line, the Court also refers to a Recommendation of the EU Council of 1984 on the promotion of positive action for women, which declared that:

(...) existing legal provisions on equal treatment, which are designed to afford rights to individuals, are inadequate for the elimination of all existing inequalities unless parallel action is taken by governments, both sides of industry and other bodies concerned, to counteract the prejudicial effects on women in employment which arise from social attitudes, behaviour and structures.³⁴

After these digressions, the Court explained its position. It considered the positive action clause to be a derogation from the “individual right” to equal treatment. As a derogation, that clause had to be interpreted strictly. Subsequently, the Court centred its reasoning on the fact that the positive action clause allowed for measures to promote “equal opportunities”. The Court ruled that, since the German rules guaranteed women “absolute and unconditional priority”, they did go beyond just promoting equal opportunities. It added that the German scheme had the objective of achieving “equal representation of men and women in all grades and levels within a department”. Therefore, the Court ruled, “such a system substitutes for equality of opportunity as envisaged in [the positive action clause] the result which is only to be arrived at by providing such equality of opportunity.”³⁵ The Court distinguished equality of results from equal opportunities and ruled that only the latter is acceptable.

The Court concluded that:

(...) the Directive precludes national rules such as those in the present case which, where candidates of different sexes shortlisted for promotion are equally qualified, automatically give priority to women in sectors where they are under-represented, under-representation being deemed

³¹ Case C-312/86 *Commission v. France*, paragraphs 14 and 15.

³² Case C-450/93 *Kalanke* [1995] ECR I-3051.

³³ *Idem*, paragraphs 18 and 19.

³⁴ Third recital of the Recommendation 84/635/EEC of 13 December 1984 on the promotion of positive action for women (OJ 1984 L 331, p. 34), quoted in paragraph 20 of the judgment, *idem*.

³⁵ Case C-450/93 *Kalanke*, paragraphs 21 to 23.

to exist when women do not make up at least half of the staff in the individual pay brackets in the relevant personnel group or in the function levels provided for in the organization chart.³⁶

The backlash

The judgment in *Kalanke* created a lot of controversy, perhaps the biggest in the history of the Court's cases on gender equality. Usually, in European equality law there is a positive dynamic between the European legislator and the Court. The usual plot goes as follows: the legislator adopts legislation against discrimination, which the Court interprets in a broad manner to protect victims of discrimination. Then, the legislator accepts this interpretation and formalizes it when it amends the statutory legislation.

But this case was an exception. Against the usual trend, the Court limited the reach of a protective clause in an equality Directive. Contrary to their usual approach, the national governments reinforced the protection afforded by the Directive by changing the Treaties. After the outcry caused by the *Kalanke* judgment, in the next round of revision of the treaties in 1997, all national governments agreed to include a new Treaty provision reinforcing the possibility to adopt positive action measures based on gender.

The Amsterdam Treaty, signed on 2 October 1997, added the following paragraph to the original provision that prohibited sex discrimination concerning pay:

With a view to ensuring full equality in practice between men and women in working life, the principle of equal treatment shall not prevent any Member State from maintaining or adopting measures providing for specific advantages in order to make it easier for the under-represented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers.³⁷

In this new Treaty provision, the references to “full equality in practice”, “specific advantages” and “prevent or compensate for disadvantages” contrast with the simple reference to “equal opportunity” in the abovementioned positive action clause of Directive 76/207/EEC - which had been so much stressed by the Court in the *Kalanke* case. Meanwhile, Declaration No 28 annexed to the Treaty of Amsterdam, stated that:

When adopting measures referred to in Article 141(4) of the Treaty establishing the European Community, Member States should, in the first instance, aim at improving the situation of women in working life.

By including a new provision in the Treaty itself, not only in statutory legislation, the governments of all EU Member States wanted to make sure that positive action was clearly authorized. This unanimity among governments is easier to understand given that positive action is only a legal possibility, not an obligation. The Amsterdam Treaty made significant changes to the structure of the European Union. Among all the important issues that were part of the negotiations of that Treaty, it had no immediate cost for a government to agree with this provision. Nevertheless the message in favour of positive action is quite clear.

The second phase – YES, but only IF

A month after the Amsterdam Treaty was signed, but before its entry into force in 1999, the Court started to refine and develop its case law on positive action – without ever acknowledging any

³⁶ Ibidem, paragraph 24.

³⁷ Article 141(4) of the Treaty establishing the European Community, renumbered, as from December 2009, Article 157(4) of the renamed Treaty on the Functioning of the European Union.

influence of the new Treaty provision. Gradually, the clear rule spelled out in *Kalanke* became more flexible, even if it was not completely abandoned.

In November 1997, in its judgment in the case *Marschall*³⁸ the Court dealt with another German Land scheme on the promotion of civil servants that gave preference to women. Mr Marschall, the plaintiff, a tenured male teacher, had applied for a promotion. But his request was rejected and, instead, a woman was promoted. As before, the German court asked the EU Court whether the scheme was compatible with the abovementioned positive action clause – Article 2(4) of the Gender Equal Treatment Directive 76/207/EEC.

As in *Kalanke*, the priority to the promotion of women over men applied only where women had equal qualifications and were under-represented. However, contrary to the situation in *Kalanke*, in this case the scheme included a saving clause establishing that women would not have priority if “reasons specific to an individual [male] candidate tilt the balance in his favour”. This allowed the Court to make a distinction between the two cases. In this new case, there was no automatic preference to women.

However, it was not only the legislation under examination that was different. The language and analysis of the Court also changed, at least partially.³⁹ The Court stated that:

(...) it appears that even where male and female candidates are equally qualified, male candidates tend to be promoted in preference to female candidates particularly because of prejudices and stereotypes concerning the role and capacities of women in working life and the fear, for example, that women will interrupt their careers more frequently, that owing to household and family duties they will be less flexible in their working hours, or that they will be absent from work more frequently because of pregnancy, childbirth and breastfeeding.

For these reasons, the mere fact that a male candidate and a female candidate are equally qualified does not mean that they have the same chances.⁴⁰

The Court ruled that the German legislation could be accepted as a positive action measure, “if such a rule may counteract the prejudicial effects on female candidates of the attitudes and behaviour described above and thus reduce actual instances of inequality which may exist in the real world.” However, going back to an idea expressed in *Kalanke*, the Court added that since the “positive action” clause of the Directive: “constitutes a derogation from an individual right [to equality], such a national measure specifically favouring female candidates cannot guarantee absolute and unconditional priority for women in the event of a promotion without going beyond the limits of the exception laid down in that provision”.⁴¹

The Court concluded therefore that priority given to the promotion of women in the civil service was acceptable, but only under the following cumulative conditions:

- there are fewer women than men in the relevant post,
- both female and male candidates are equally qualified in terms of their “suitability, competence and professional performance”,⁴²

³⁸ Case C-409/95 *Marschall* [1997] ECR I-6363.

³⁹ Note that in *Kalanke* the German court pointed out that the preference scheme in question was compatible with and had to be interpreted in accordance with the German Federal Constitution, with the result that, “even if priority for promotion is to be given in principle to women, exceptions must be made in appropriate cases.” Nonetheless, this assertion was not sufficient for the EU Court to clear the measure. See *Kalanke*, *supra*, paragraph 9.

⁴⁰ Case C-409/95 *Marschall*, paragraphs 29 and 30.

⁴¹ *Idem*, paragraphs 31 and 32.

⁴² Likewise, in Case C-407/98 *Abrahamsson* [2000] ECR I-5539, the Court invalidated a Swedish scheme under which a sufficiently qualified woman could be granted preference over a man to obtain an university position, even if she had lower qualifications than him.

- the application of each male candidate is “the subject of an objective assessment which will take account of all criteria specific to the individual candidates”, but these criteria must not discriminate against the female candidates, and
- the priority is not automatic and unconditional, since it will not apply “where one or more of those criteria tilts the balance in favour of the male candidate”.⁴³

On the one hand, the Court emphasizes that the new scheme did not grant an automatic preference to women. And it still refers to positive action as a derogation from the principle of equality, not as a rule having the objective of “ensuring full equality in practice” as it is mentioned by the new Treaty provision on positive action.⁴⁴ Moreover, its insistence on an individual assessment, stresses the individual aspect of the equality principle. Group equality in favour of women is limited by individual equality in favour of men.

However, on the other hand, the Court asserts that “the mere fact that a male candidate and a female candidate are equally qualified does not mean that they have the same chances.” This contrasts with its emphasis on the formal equal opportunities in *Kalanke*. Moreover, the Court rules that the individual assessment of male candidates must not take in consideration criteria that discriminate against women.⁴⁵

On the whole, the Court's ruling truly resembles a balancing act between two potentially contradictory positions. One possible position was to follow precedent blindly, to put emphasis on individual equality and reject the measure. The other possible position was, instead, to focus on the result and open the way to measures that attempt to overcome the many difficulties that women face in the labour market. The Court chose the later, but without completely abandoning the reasoning of the former case law.

In 2000, in *Badeck*⁴⁶ the Court confirmed and developed its ruling in *Marschall*. The Court reiterated the basic conditions for giving priority to women in promotion within the civil service. This case concerned a “flexible result quota” in the German Land of Hessen. Preference could be given to women over equally qualified men in order to reach binding targets in the women's advancement plan, “if no reasons of greater legal weight are opposed”.

Preference for women could be overridden on several grounds: because of preference given to former employees who left the service because of family work, or to persons who worked on a part-time basis for reasons of family work and now wish to resume full-time employment, or also to former voluntary soldiers, seriously disabled persons or persons in long-term unemployment.⁴⁷ The Court ruled that this scheme was covered by the positive action clause of the equal treatment Directive and was thus acceptable.

More importantly, the Court developed its previous ruling by applying it now to training and to job interviews. The Court ruled that, in occupations where the State does not have a monopoly of training, the State could decide that half of the training places are reserved to women. The Court distinguished this rule from a reservation of actual jobs for women and pointed out that men could still obtain the

⁴³ Case C-409/95 *Marschall*, supra, paragraph 35.

⁴⁴ As mentioned before, by the time the case *Marschall* was decided, the Treaty of Amsterdam, which included the new positive action provision, had not yet entered into force. However, the Court would normally not explicitly refer to it in the future case law on this matter. Paradoxically, the Court did not acknowledge that the new Treaty provision could be a reason to reconsider its case law. An exception is the case of *Badeck*, infra, where the Court accepted a number of measures under Directive 76/207/EEC on equal treatment and therefore considered unnecessary to rule on the interpretation of Article 141(4) on positive action of the then Treaty establishing the European Community, see paragraphs 5, 6, 14 and 67 of the judgment. This provision was the one introduced by the Treaty of Amsterdam.

⁴⁵ Case C-409/95 *Marschall*, supra, paragraph 33.

⁴⁶ Case C-158/97 *Badeck* [1999] ECR I-1875.

⁴⁷ Moreover, quotas were not determined uniformly for all the sectors and departments concerned. *Idem*, paragraphs 26-38.

training in question in the private sector. It concluded that these measures were authorized by abovementioned Article 2(4) of the sex equal treatment Directive, since they were intended to “eliminate the causes of women’s reduced opportunities of access to employment and careers” and “to improve the ability of women to compete on the labour market and to pursue a career on an equal footing with men.”⁴⁸

Moreover, according to the Court, in sectors where women are under-represented, the State could decide to call for interviews all qualified women. The Court rejected an argument sustaining that this rule constituted a strict quota contrary to the principle of equality. On the contrary, the Court considered that such preference did not attempt “to achieve a final result”, but only gave qualified women “additional opportunities to facilitate their entry into working life and their career.” Therefore, it was intended to promote equal opportunity and it was compatible with the principle of equal treatment.⁴⁹

In 2002, in *Lommers*⁵⁰ the Court applied its case law to a new situation: access to nursery places. It examined a scheme of the Dutch Ministry of Agriculture reserving some subsidized nursery places for women. The objective was to tackle the underrepresentation of women within that Ministry. Women were less than 25% of the total workforce of the Ministry and there were not enough affordable nursery places. Men could have access to such nursery places, but in cases of “emergency” only.

The Court uphold the preferential scheme, but under certain conditions. It noted that the “primary object and effect” of the scheme was to facilitate employment of the women concerned, since the lack of affordable nursery places was likely to push women to give up their jobs. Therefore, the scheme could be considered a measure designed to improve women’s ability to compete on the labour market and to pursue a career on an equal footing with men.⁵¹ However, the Court also ruled that when men “take care of their children by themselves” they must “have access to that nursery places scheme on the same conditions as female officials”. Otherwise, there would be a violation of the principle of proportionality.⁵² Again, the Court considered positive action measures as a derogation from the principle of equality. It stated that:

(...) in determining the scope of any derogation from an individual right such as the equal treatment of men and women laid down by the Directive, due regard must be had to the principle of proportionality, which requires that derogations must remain within the limits of what is appropriate and necessary in order to achieve the aim in view and that the principle of equal treatment be reconciled as far as possible with the requirements of the aim thus pursued.⁵³

Here again, we have the same balancing exercise seen before in *Marschall* and *Badeck*. On the one hand, the Court acknowledges that social structures may create difficulties for women to participate in the labour market. Consequently, albeit under specific conditions, it accepts some preferential treatment for women. On the other hand, the Court insists that the situation of relevant men be individually examined. There must be an analysis on whether or not each single male candidate would deserve the same preferential treatment granted to women.

⁴⁸ Ibidem, paragraphs 49 to 55.

⁴⁹ Ibidem, paragraphs 59 to 63.

⁵⁰ Case C-476/99 *Lommers* [2002] ECR I-2891.

⁵¹ Case C-476/99 *Lommers*, paragraphs 37 and 38.

⁵² The Court added that, if nursery places were reserved for women only, this could “help to perpetuate a traditional division of roles between men and women”. Idem, paragraph 41.

⁵³ Ibidem, paragraph 39. While giving clear guidelines on the matter, the Court recalled that “it is in principle the task of the national court to ensure that the principle of proportionality is duly observed” - paragraph 40.

The Chances of the Directive proposed by the Commission in the Court

On the basis of this case law, does the Directive proposed by the European Commission have a chance of surviving the Court's scrutiny, once it is adopted? For the reasons that follow, we believe that it does.

The question is relevant because the principle of equality between men and women under EU law applies both to employment relationships and to self-employment. Thus, it applies to all members of company boards, whether they are considered employees of the company or independent professionals.

The current legislation on equal treatment of men and women in matters of employment and occupation (Directive 2006/54/EC) applies explicitly not only to employment, but also to self-employment.⁵⁴ This was confirmed by the Court in the case of *Danosa*.⁵⁵ It concerned a woman who was member of a company board and was discharged of her duties when she was pregnant. The Court ruled that, if she was not considered a worker for the purposes of the Directive 92/85/EEC on maternity leave⁵⁶ (which in principle prohibits dismissal of pregnant women), she would nevertheless be protected from being dismissed while pregnant under the Directive on equal treatment in employment since such dismissal would be a discrimination based on her sex.⁵⁷ Consequently, whatever is the qualification of the concrete work relationship between a board member and its company, he or she is protected by the principle of equality.

In any event, there are reasons to believe that the Court could accept the Commission's proposal for a Directive, once adopted, as compatible with EU law on sex equality. These reasons are both of a technical and general political nature.

First, as a preliminary point, it is not clear that the case law of the Court on positive action in employment would automatically apply to the gender composition of company boards. This is an open question. The only occasion where the Court had to deal with a similar situation was in *Badeck*⁵⁸ and its ruling was not conclusive. The Court accepted a provision on the gender composition of administrative and supervisory bodies in the public administration, which set the objective that half the members of those bodies should be women. The rule was not mandatory since it relied on the adoption of further legislation and did not apply to offices for which elections were held. The Court ruled it compatible with the Directive on equal treatment.⁵⁹ However, given its specific characteristics, this case is not a safe legal precedent from which to draw general conclusions.

Moreover, it may be argued that the procedures used to hire workers in general, which are subject to the Court's case law, are quite different from those used to select board members. It is normal to recruit workers on the basis of an objective analysis of their applications, according to their qualifications and experience. However, for members of company boards, what is important, beyond

⁵⁴ See Directive 2006/54/EC, *supra*. Its Article 14 provides that there «shall be no direct or indirect discrimination on grounds of sex in the public or private sectors, including public bodies, in relation to: (a) conditions for access to employment, to self-employment or to occupation, including selection criteria and recruitment conditions, whatever the branch of activity and at all levels of the professional hierarchy, including promotion (...)», emphasis added.

⁵⁵ Judgment of 11 November 2010 in Case C-232/09, [2010] ECR I-11405, paragraphs 66 to 69.

⁵⁶ Article 10 of Council Directive 92/85/EEC of 19 October 1992 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 (tenth individual Directive within the meaning of Article 16 (1) of Directive 89/391/EEC), OJ L 348, of 28/11/1992, p.1.

⁵⁷ The cases concerned Directive 76/207/EEC, replaced meanwhile by Directive 2006/54, which covers explicitly self-employment, as explained above.

⁵⁸ Case C-158/97 *Badeck*, *supra*.

⁵⁹ *Idem*, paragraphs 64 to 66.

their objective skills, is that they are keen to defend the interests of the concrete shareholders who select them. The interests at stake and the procedures used are quite different.

Second, in any case, even if the Court's case law applied to the selection of members of company boards, the European Commission seems to have played on the safe side when it drafted its proposal. The wording used in the Directive on the selection of (non-executive) directors follows closely the Court's case law. The priority to women in the Commission's proposal would not be automatic. It requires a transparent procedure with analysis of individual applications, where priority to a female applicant is granted only if she has the same qualifications of a male applicant. Moreover, the transparent procedure to select non-executive directors only applies if a company does not attain 40% of each sex among non-executive directors.

Third, the proposed Directive does not go as far as the jurisprudence of the Court allows. The case law allows for preferential treatment when one sex is under-represented in a specific category of post – therefore, until there is a perfect balance of 50% of members of each sex. By contrast, the Directive provides that preference should be granted only until the under-represented sex constitutes 40% of the total posts.

Fourth, the Directive may be seen as a balanced piece of legislation, for a number of reasons: it applies to both women and men if they are under-represented; its stronger rules concern only non-executive directors; it covers only large companies; it sets a long deadline for application (2018 for state companies and 2020 for private companies) and it is a temporary measure since it shall cease to apply in 2028.

Finally, more generally, the proposal for a Directive is similar in important respects to several national laws adopted recently by individual countries. If the Court struck down the Directive, it would have also to invalidate those national laws. However, this would be a heavy political price to pay. It would notably mean a restriction by the Court of the power of EU Member States to achieve gender equality in practice. More importantly perhaps, it would also go in a different direction of the Court's case law, which has often been very protective of women.⁶⁰

In conclusion, there are good reasons to believe that the Court could consider the future Directive acceptable from the point of view of equality between men and women.

Conclusion: the Importance of the Context

In order to appreciate the wider significance of the proposed Directive on women on boards it is important to recall the context in which measures in favour of women on company boards have developed. The extent to which positive action is applied in Europe varies depending on the countries concerned. However, one general trend is clear. Two recent studies indicate that in Europe positive action measures are fairly widespread concerning two social groups: women and persons with disabilities. By contrast, they are less common regarding race, religion or sexual orientation.

Regarding women, positive action measures exist in most European countries.⁶¹ Often, they are even required by national constitutions. They usually concern access to employment in and promotion within the civil service. Most of the time, these measures respect the criteria of the case law of the

⁶⁰ For example: it was the Court that developed initially the concepts of indirect discrimination based on sex and of the reversal of the burden of the proof, which later were incorporated in EU legislation.

⁶¹ «Positive Action Measures to Ensure Full Equality in Practice Between Men and Women, including on Company Boards », Goran Selanec and Linda Senden for the European Network of Legal Experts in the Field of Gender Equality, November 2011, Brussels:

http://ec.europa.eu/justice/gender-equality/files/gender_balance_decision_making/report_gender-balance_2012_en.pdf .

Court, but their variety and complexity make it difficult to provide an overall accurate assessment in this respect.

Regarding persons with disabilities, positive action measures are also pervasive in Europe. In most countries, legislation provides for quotas for employment of persons with disabilities, in particular in the civil service and in enterprises of a certain size.⁶²

However, in relation to grounds such as race, religion or sexual orientation, there is less political consensus on the need and justification for positive action measures.⁶³ As a consequence, they are less frequent and even completely prohibited in several countries.

The case of race is particularly striking in comparison with the USA, for example. In Europe, with a few exceptions (the Jewish people, the Roma) the most visible racial or ethnic minorities are recent newcomers: those who arrived just after World War II in Britain, in the sixties and seventies in France or Germany, or much later, in the last 20 or 10 years in countries such as Italy, Spain, Greece, Portugal or Ireland. Moreover, in Europe there is no single racial or ethnic minority spread across the continent and with a common identity that would be similar in size to the Black or Hispanic minorities in the USA. In Europe, even when national Constitutions provide for positive action in favour of women and persons with disabilities, they may exclude it for racial minorities ... in the name of equality.

That important background leads us to consider that the experience with the measures in favour of women on company boards will neither fundamentally change this situation, nor the underlying dynamic. The dynamic created by the measures in favour of women on company boards is unlikely to make it easier to adopt positive action measures in favour of other disadvantaged groups, such as those defined by their racial or ethnic origin. If there is any spill over effect, it will be probably limited to other gender-based measures.

The most important significance of the measures in favour of women on company boards is probably that they express the clear willingness for progress and, at the same time, the feeling of relative frustration by some people with the limited effects of formal equality law in this area. Clearly, prohibiting discrimination alone has not been enough to ensure equality. Something else has to be done.

As noted by Lord Davies' report, which does not itself advocate quotas, if progress in the participation of women on management boards continued at the same pace as in the recent past, it would take 70 years to reach a gender balance in the United Kingdom. In 2012, the European Commission calculated that it would take 40 years for women to reach 40% of boards' members in listed companies in the European Union as a whole.

While this issue has been discussed mostly at national level, the advantage of the Commission's proposal is to make this a European debate.

⁶² See the eighth edition of the comparative analysis « Developing Anti-Discrimination Law in Europe », pages 77 to 80, Isabelle Chopin and Catharina Germaine-Sahl for the European Network of Legal Experts in the Non-discrimination Field, which can be found here :

http://ec.europa.eu/justice/discrimination/files/comparative_analysis_2013_en.pdf .

⁶³ Idem.

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