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Positive Action in EU Gender Equality Law: Promoting Women in Corporate Decision-Making Positions

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Abstract: Equality is a complex concept having a variety of meanings (equal treatment, equal opportunities, formal equality, and substantive or *de facto* equality). Although there are strong similarities in the definitions of key concepts related to equality, the EU and other international organisations have interpreted and applied them differently. Interpretation by these institutions of the concept of positive action, as an expression of the principle of *de facto* equality, has led to uncertainty and methodological confusion. Similarly, despite the undeniable degree of harmonization provided by EU legislation regarding this field, key notions of equality law, among them, the term positive action, are still defined and applied differently in the various legal systems of the EU Member States. First, this paper provides a comparative legal analysis of the concept of equality. Second, it addresses the notion of positive action in EU law and, specifically, in the case law of the Court of Justice of the EU. An analysis of the interpretative value of that case law is included in order to provide guidance for the adoption of positive action measures and potential clashes with the international and national contexts. Finally, recent actions adopted by the European Commission to promote gender balance in decision-making positions are presented.

Keywords: equality, positive action measures, EU law and case law.

1. Introduction

Equality is a broad and complex concept having a variety of meanings –equal treatment, equal opportunities, formal equality, and substantive or *de facto* equality–, and whose definition involves several related concepts, namely: direct discrimination, indirect discrimination, objective justification, and positive action, *inter alia*. Although there are strong similarities in the definition of these key concepts, the European Union and other international organisations and courts, such as the European Court of Human Rights, have interpreted them differently. Thus, the concept of positive action, as an expression of the principle of real or *de facto* equality, has been understood differently. This plurality of interpretations has led to some uncertainty and methodological confusion. Also, despite the undeniable degree of harmonization provided by the European Union –hereinafter EU– legal framework on this terrain, key notions of equality law, including the term positive action, are defined and applied differently in the various legal systems of the EU Member States. First, this study provides an analysis of the concept of equality and related notions from a comparative law perspective. Second, it addresses the notion of

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positive action in EU law specifically in the case law of the Court of Justice of the European Union –hereinafter, CJEU–. In addition, the interpretative value of case law is discussed, along with clashes with the national context. Attention is paid to the controversial *Kalanke* ruling¹ which was clarified and relaxed in *Marschall*.² Other landmark cases such as *Badeck*,³ *Abrahamsson*,⁴ *Lommers*,⁵ *Briheche*,⁶ *Commission versus Greece*,⁷ and *Roca Álvarez*⁸ –questioning the scope of EU provisions on positive action measures– are also assessed.

This paper focuses on positive action measures that have been addressed to female workers. The aim of this study is twofold. First, an assessment of the EU legal provisions and the CJEU's case law regarding positive action is undertaken in order to analyse the juridical development of this legal concept and to examine the constraints and limits for adopting this type of measures. Second, the content and repercussions of the new EU proposed Directive on binding quotas for women on company boards is also attention-worthy.⁹

2. Different perspectives of the equality principle

Equality is a broad concept with a variety of meanings. Above all, it is a relative concept in the sense that any equality judgment implies a comparison between two elements. From a legal point of view, the concept of equality presents multiple aspects. Formal equality or equality of treatment is the first and most well-known concept. This idea of formal equality is intrinsically linked to the prohibition of discrimination and it is summarized by the Aristotelian formula: 'the equal should be treated equal and the unequal in an unequal way' (Marías Araujo, 1983). Despite the apparent simplicity of this aphorism, complications arise when trying to determine what situations are equal or unequal in each particular case. The examination of the equality of two situations requires a test to compare relevant features or characteristics in a specific context –e.g. the employment relationship–. In this context, differences based on several pre-determined factors such as gender, religion, race, nationality, etcetera, have been traditionally considered discriminatory. Discrimination is, then, a key-concept in the definition of equality and refers to any systematic detrimental treatment of an individual or a group based on personal or social circumstances and/or characteristics.

When dealing with formal equality, a distinction must be made between direct and indirect discrimination.¹⁰ Direct discrimination means a different and unfavourable treatment infringing the law because it is based directly on an individual's personal or social circumstances. Thus, the concept of direct discrimination is essentially objective. That explains why, in this context, the intent to discriminate or not is irrelevant and justification of discriminatory conduct is not accepted. This is, for example, the case of any discriminatory treatment based on pregnancy, which have been considered by the CJEU as direct discrimination on grounds of gender since men cannot be pregnant.¹¹

Conversely, the notion of indirect discrimination refers to practices or measures that, being formally neutral, have unequal consequences for different social groups, producing an adverse impact in

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

² C-409/95, Hellmut Marschall v Land Nordrhein-Westfalen, [1997] ECR I-06363.

³ C-158/97, Georg Badeck and Others, [2000] ECR I-01875.

⁴ C-407/98, Katarina Abrahamsson and Leif Anderson v Elisabet Fogelqvist, [2000] ECR I-05539.

⁵ C-476/99, H. Lommers v Minister van Landbouw, Natuurbeheer en Visserij, [2002] I-02891.

⁶ C-319/03, Serge Briheche v Ministre de l'Intérieur, Ministre de l'Éducation nationale and Ministre de la Justice, [2004] ECR I-8807.

⁷ C-559/07, Commission v. Greece [2004] ECR I-

⁸ C-104/09 [2010].

⁹ EU Proposal for a Directive of the European Parliament and the Council on improving the gender balance among non-executive directors of companies listed on stock exchanges and related measures - COM (2012) 614 final.

¹⁰ The origin of this distinction can be found in the US legal concept of 'disparate impact'. See, *inter alia*: United Papermakers & Papermakers v United States, 397 U.S. 919 (1970); Grigs v. Duke Power Co., 401 U. S. 424 (1971) y Washington v. Davis, 406 U.S. 229 (1976).

¹¹ Case C-177/88, Dekker v VJV-Centrum [1990] ECR I-03941 and Case C-32/93, Webb v EMO Air Cargo (UK) Ltd. [1994] ECR I-03567.

one or more group of people. Therefore, the concept of indirect discrimination underlines the fact that someone belongs to a disadvantaged group and reflects the supra-individual dimension of the discriminatory phenomenon. Hence, the comparison in indirect discrimination cases is not established among individuals but among groups distinguished by their common features, leading to a delimitation of generic factors or motives for discrimination. In contrast with direct discrimination, indirect discrimination cases allow for objective justifications for the different in treatment. According to the settled case-law of the Court Justice, indirect discrimination for the purposes of the gender equal treatment directives arises when “a national measure, albeit formulated in neutral terms, works to the disadvantage of far more women than men.” Such is the case with national legislation that works to the disadvantage of part-time workers who have worked part-time for a long time, since, in practice, such legislation inhibits access to a retirement pension. If it can be proved by statistical facts that legislation affects women far more than men, it follows that such legislation is contrary to the principle of equal treatment for men and women, unless it is justified by objective factors that are unrelated to any discrimination on grounds of gender.¹²

The formal approach to the concept of equality has a basic flaw: It often fails to address the social inequalities related to the personal or collective background that is strongly embedded in society. In this context, first, the achievement of real or substantive equality requires a legal framework that protects against discrimination, conceived as a repressive reaction aimed to punish discriminatory conducts with sanctions. It is the sort of legal reaction traditionally applied against discrimination, based on ‘an individual-complaint led model’ (Fredman, 2005). This type of remedy has the legal consequence of re-establishing equality by declaring the nullity of discriminatory behaviour and its effects. The problem posed by this re-active protection method is that it is not absolutely efficient in overcoming deep-rooted discriminatory trends in society. It may be useful in repairing the effects of existing discriminatory treatments but it is an inadequate instrument when it comes to eradicating the tendency to discriminate and to combat collective discriminatory phenomena apart from indirect discrimination cases. Regarding enforcement and compliance of EU gender equality law, studies show that, at a Member State level, the legal systems often set high standards as far as the enforcement of individual rights are concerned, whereas collective means of implementation are still not as well developed as required by EU gender equality legislation (European Commission, 2010). Taking into account the shortages of the traditional regulation on equality in order to correct structural discriminations, new mechanisms to remove persistent social inequalities are necessary. In this context, in promotional activities in favour of disadvantaged groups, ‘so-called’ material, real or substantive equality measures come into play.

Positive action measures provide a tool to fight to the collective dimension of discrimination because they rely on the ideal of substantive equality of the groups making up society. In order for these measures to be applicable, discriminatory treatment is assumed based on the mere fact of belonging to a disadvantaged social group instead of considering the unjustified different treatment in relative terms through the establishment of an *ad hoc* comparison basis. Therefore, the notion of ‘*de facto*’ equality implies a positive (promotion) as well as a negative dimension (prohibition). Thus, along with remedies designed to tackle discriminatory behaviours, levelling measures are also introduced to eliminate the situations of social disadvantage at the origin of the discriminatory treatment. The main obstacle in the applicability of these proactive measures is that, considered in isolation, they are in breach of the formal prohibition of direct discrimination on grounds of gender. Hence, positive action measures restrict the principle of equality for men and women in its formal dimension since they establish distinctions based on the traditionally forbidden factors of differentiation (i.e., the gender of the worker). However, the adoption of this sort of apparently ‘unequal treatment’ has been justified by the imperative of achieving substantive equality of the groups and individuals making up society. A ‘democratic society’ is based on the values of diversity and tolerance and forms of positive action are not premised on pre-existing discrimination but are justified by the goal of organising societal diversity, so long as these measures are proportionate and temporary (Schutter, 2011). In this sense, the strict applicability of the principle of ‘*de facto*’ equality requires the adoption of positive action measures in favour of women in order to correct for their disadvantages in employment and labour conditions (Palomeque López, 2003). Bob Hepple

¹² *Inter alia*, Case C-385/11, Elbal Moreno v Instituto Nacional de la Seguridad Social (INSS) [2012] ECR.

discusses ‘transformative equality’ to refer to affirmative action schemes aimed to achieve the redistributive goals of labour law. He maintains that ‘democratic participation’ of those directly affected by these measures in the making and implementation of these schemes is central to the idea of transforming workplace relations and enhanced equality. (Hepple, 2013)

In summary, positive action measures have been addressed to disadvantaged social groups and aim to eradicate the social component of discrimination through the adoption of promotional activities that differ from the mere sanctioning of discriminatory actions. In this paper, we examine the hypothesis that the positive dimension of equality is restrictively acknowledged in EU legislation and in the CJEU’s case law that interprets it. In fact, on several occasions, the CJEU has proclaimed that the result pursued by Article 157(4) TFEU and the equal treatment for men and women Directive is substantive equality, while limiting the use of this sort of measures.¹³

3. Historical background and conceptual framework

The obligation to respect fundamental rights as general principles of EU law –including the right to equality– has been reinforced by granting legally binding status to the rights, and principles set forth in the EU Charter of Fundamental Rights (Article 6 TUE). The CJEU has held that the national courts, when applying EU law, must observe fundamental rights, which include, *inter alia*, the general principle of equality and non-discrimination.¹⁴ Moreover, it is widely accepted that aim of positive action measures is to eliminate inequalities affecting certain social groups and to prevent disadvantageous treatment which is unacceptable from a social redistributive perspective (Radín, 2014). However, even when affirmative or positive action measures are admitted by several international law instruments, EU law, and the domestic laws of several EU Member States, they are still controversial measures and there are divergent opinions among academics and the judiciary regarding their effective use and conceptual definition.

A revision of the concept of positive action should be initiated, paying due attention to the United States of America (hereinafter U.S.) legal order, since the first examples of affirmative action measures are found in that legal system. From there, this legal concept extended to other Anglo-Saxon common law systems, finally influencing the EU law approach to the principle of substantive equality (Peters, 1999).

In the U.S., positive action was first developed in regards to the fight against racial discrimination in education (Brest, 2000).¹⁵ In *Brown*¹⁶, for the first time, the Supreme Court proclaimed the illegality of racial segregation in education. This decision was a turnover in U.S. Supreme Court case law and in U.S. federal policy. As a result of this judgment, the federal government passed several Executive Orders¹⁷ that suggested the need to adopt affirmative action measures in favour of Afro-American citizens. Then, Title VII of the Civil Rights Act 1964¹⁸, while prohibiting the racial and sexual discrimination (section 703 a), recognised the admissibility of imposing positive action plans (706 g). The legitimacy of this type of measures, in the private sector and on a voluntary basis, was recognised in the *Griggs*¹⁹ Supreme Court judgment. Since then, public bodies and private companies have used these plans with the goal of eradicating racial segregation. From the field of racial equality, these measures have been extended to also combat sexual segregation. *Johnson*²⁰ is the most relevant case, in which affirmative action measures in favour of female workers were considered to be legal. In

¹³ *Inter alia*: C-136/95, Caisse nationale d’assurance vieillesse des travailleurs salariés / Thibault [1998] ECR I-2011; Badeck, ‘n. 4 supra’; Abrahamsson, ‘n. 5 supra’; and, C-342/01, Merino Gómez v Continental Industrias del Caucho SA, [2004] ECR. I-260.

¹⁴ C-81/05, Cordero Alonso v FOGASA, [2006] ECR I-7569.

¹⁵ *Inter alia*: Regents of the University of California v. Bakke, 438 U.S. 265, 1978.

¹⁶ *Brown v Board of Education of Topeka, Kansas* 347 US 483, 1954.

¹⁷ Executive Order No 11246 ratified in 1965 and develop by the Revised Order No 4 (EO 11375) also included gender in its scope in 1968.

¹⁸ 42 USC, 2000 e-12, 78 Stat. 265. (Reformed by Civil Rights Act 1991).

¹⁹ *Griggs v. Duke Power Co.*, 401 US 424, 1971.

²⁰ *Johnson v. Transportation Agency, Santa Clara County, Cal.*, 107 S. Ct. 1442, 1987.

this case, the possibility of giving preference to women in promotion in sexually segregated categories where women were under-represented was found to be in accordance with the law, if the promoted women fulfilled the position's requirements.

The concept of positive action in U.S. law is connected with the idea of social discrimination. This legal construction also has its origins in Supreme Court case law. The Supreme Court rulings concerning affirmative action measures relied heavily on both distributive and compensative grounds. Consequently, it is understood that the aim of positive action policies is to eliminate the racial and sexual barriers that hamper the achievement of equality of opportunities for racial minorities and women and obstruct the sound integration of all groups in the workplace. The main objective of positive action measures is to foster the normal labour force composition that would result from the removal of deep-rooted social discriminatory conducts. In this way, the idea of social discrimination serves to justify the adoption of positive action measures. Therefore, for a positive or affirmative action measure to be justified, it would be sufficient to prove the existence of an imbalance in the workforce originated by the under-representation of certain groups of workers, without the need to reveal current discriminatory conduct. Furthermore, the compensatory values that inspired affirmative action measures are reflected in the remedies granted to victims of present discrimination. Affirmative action measures are, then, configured as a collective remedy, designed to compensate for generalized unjustified unequal treatment and aimed to eradicate systematic discrimination.

From a legal point of view, an analysis of the concept of positive action measures reveals a very wide interpretation, consisting of a large range of measures, including public and private employment benefits, improvements in working conditions, policies facilitating reconciliation of working and family life, or proactive action measures in strict sense, adopted in favour of disadvantaged social groups. This last type of measures implies preferential treatment in access to employment and/or promotions. It has been argued that only this last group of measures should be called 'positive action' (Sierra Hernáiz, 1999). The other measures against segregation in employment are considered to be 'protecting action' or 'equal opportunities policies'. This last category would comprise the legal framework for protection of pregnancy and maternity as well as some benefits addressed to only a reduced number of social groups. In the specific case of female workers, these equal opportunities policies are focused on the elimination of the typical motives of female labour segregation and discrimination without questioning the distribution of care and domestic tasks in the household or the patriarchal structure of society as a whole (Weldon-Johns, 2013). From the point of view of achieving '*de facto*' equality, the efficiency of these measures is dubious, in the sense that they tend to perpetuate the existing intrinsically unequal division of social tasks.²¹ Some measures designed to stimulate female labour market participation may, at the same time, contribute to reinforce the existing division of social roles between men and women since they maintain the traditional position of females as primary care providers without questioning the legitimacy of the overall social structure (Rosenfeld, 1991). This is the case, for example, with policies facilitating part-time work for female employees or publicly subsidised nursery places made available only for the children of female workers. They have been defined as 'archaic' positive action measures due to the fact that they do not promote a rupture with the currently prevailing division of labour and family tasks (Fernández López, 1991). On the contrary, these measures do not confront the imbalanced distribution of paid and unpaid work between men and women. They are mainly intended to support the position of those individuals belonging to the disadvantaged group in their attempt to adjust to the male breadwinner worker pattern. These measures providing equality of opportunities are, therefore, a necessary first stage, but they are not suitable to accomplish the aim of substantive equality among the groups constituting the society. In a second stage, more radical measures attacking the gendered division of social roles are required in order to reach a more egalitarian society. These more radical measures, positive action measures –quotas and targets–, use more drastic means, i.e. giving priority in access, promotion, or continuity in employment to workers belonging to the disadvantaged group, in order to increase their labour market participation and provide higher gender balance in decision-making positions.

²¹ Lommers, n. 6 supra.

Both types of measures, the equal opportunities policies and the positive action measures *strictu sensu* –preferential treatment–, have been considered by the CJEU for inclusion in the ‘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’. Nevertheless, when addressing the legitimacy of equal opportunities policies that restrict advantageous treatment to female workers regarding entitlement to child-care leave, breastfeeding leave, extension of period of services per child, CJEU case law has evolved from a more permissive policy to a stricter scrutiny of the justifications behind the exclusion of male workers from the entitlement to these rights.²²

4. Positive action measures in European Union Law

4. 1. The EU regulation of positive action measures

In EU law, positive action measures have been traditionally considered as an exception to the principle of equal treatment for men and women. This is the approach of several EU provisions, namely, former Article 2(4) of Council Directive 76/207/EEC 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;²³ Article 3 of the Recast Directive 2006/54/EC on equal treatment for men and women in employment;²⁴ and Article 157.4 TFEU. These provisions have permitted derogations from the concept of formal equality and have opened the way for national measures in the form of positive action in favour of women in order to promote equal opportunity for men and women.

For more than two decades, the only existing EU legal provision concerning positive action was the aforementioned Article 2(4) of the equal treatment Directive. This provision was complemented by a so-called ‘soft law’ act: Council Recommendation 84/635/EEC of 13 December 1984 on the promotion of positive action for women.²⁵ According to the third recital in the preamble of that recommendation, 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”. The Council encouraged Member States to adopt positive action policies designed to eliminate existing inequalities affecting women’s work and to promote a better balance between the sexes in employment, including appropriate general and specific measures in order: (a) to eliminate or counteract the prejudicial effects on women in employment or seeking employment which arise from existing attitudes, behaviour and structures based on the idea of a traditional division of societal gender roles; (b) to encourage the participation of women in various occupations in those sectors of working life where they are currently under-represented, and at higher levels of responsibility in order to attain improved use of all human resources. The fact that, for a very long period, this non-binding recommendation was the only EU text developing the specific use of positive action measures, in tandem with the diluted and imprecise nature of the measures to be adopted according to it, reveals the profound divergences in the approach of EU Member States towards positive action measures.

The acknowledgement of the legitimacy of pursuing substantive equality by secondary legislation has recently been reflected in primary EU law. Article 157 TFEU declares: “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.” The use of the neutral expression ‘under-represented sex’ may be criticized as the article failed to refer to women as the historically disadvantaged group,

²² Briheche, n. 6 supra, *Commission v. Greece*, n. 7 supra, and *Roca Álvarez*, n. 8 supra.

²³ O.J. L 039, 14/02/1976 0040 - 0042.

²⁴ O.J. L 204, 26/07/2006 0023 - 0036.

²⁵ O.J. L 331, 19/12/1984 0034 - 0035.

and led to the adoption of Declaration number 28, annex to the Final Act of the Treaty of Amsterdam, clarifying this point.²⁶

Article 23 of the Charter of Fundamental Rights of the EU, reproduces the wording of Article 157 TFEU with some minor deviations, and maintains the possibility of adopting positive action measures in favour of the under-represented sex in the labour market. Unfortunately, this is the only reference to positive action measures that can be found in the Charter. Thus, concerning substantive equality, the analysis of this text reveals a rather disappointing outcome: the absence of an overall recognition of the legitimacy of positive action measures to improve the situation of all disadvantaged groups and a certain hierarchy in the level of protection provided against the different grounds of discrimination. Hence, it apparently establishes a prevalence of gender oriented active labour policies consisting of positive action. However, in the practice of Member States social policies, the implementation of positive action measures seems to highlight the importance of improving the equal opportunities of disabled workers.

Finally, Article 3 of the Recast Directive 2006/54/EC makes a remission on positive action measures to the wording of former Article 141(4) ECT (currently Article 157 TFEU). Later in the text, the same Directive establishes the duty of Member States to communicate the texts of laws, regulations and administrative provisions of any measures adopted pursuant to Article 157.4 TFEU, as well as reports on these measures and their implementation information, every four years. The Commission shall adopt and publish a report establishing a comparative assessment of any national measures aimed to overcome the under-representation of women in working life. Moreover, the Recast Directive 2006/54/EC reinforces positive action policies by imposing an obligation on the Member States to design one or more institutions responsible of the promotion, analysis, support, and follow up of equal treatment measures aimed to eliminate gender discrimination. The fact that the promotion of equal treatment between men and women is mentioned as one of the tasks of these institutions is a step forward in legitimating the adoption of this type of measures.

4.2. The concept of positive action in the case law of the Court of Justice of the EU

Having listed the legal provisions dealing with positive action measures, the next section is devoted to the analysis of CJEU case law that interprets them. Conclusions should be drawn on the limits for the adoption or maintenance of affirmative action measures. This analysis starts with the controversial ruling of the CJEU in *Kalanke*²⁷, afterwards clarified in other related cases. (Barnard, 1998). In *Kalanke*, the Luxemburg Court had to decide if some positive action measures adopted with the aim of improving women's professional situation were compatible with the principle of equality between men and women.

As it has been mentioned above, former Article 2(4) of Council Directive 76/207/EEC provided that the directive was to be without prejudice to measures that promote equal opportunity for men and women, in particular by removing existing inequalities which affect women's opportunities. In the much debated *Kalanke* case, the CJEU established that in so far as this provision constituted an exception to the principle of equality, it had to be interpreted strictly and was specifically and exclusively designed to allow measures which, although apparently giving rise to discrimination on grounds of gender, were in fact intended to eliminate or reduce actual instances of inequality between men and women that may exist in the reality of social life. Therefore, it permitted national measures relating to access to employment, including promotion, which gave a specific advantage to women in order to improve their ability to compete on the labour market and to pursue a career on an equal footing with men. Nevertheless, in *Kalanke* the CJEU ruled that EU law precludes national rules that give automatic priority on a promotion to women, in sectors where there are fewer women than men at the level of the relevant post. The Court held that a national rule guaranteeing women "absolute and unconditional priority" for appointment or promotion was not permitted by EU law, since it went beyond promoting equal opportunities,

²⁶ This Declaration states that: "when adopting measures referred to in Article 141(4) of the Treaty establishing the European Union, Member States should, in the first instance, aim at improving the situation of women in working life."

²⁷ *Kalanke*, n. 1 supra.

substituting it for the “equality of representation” which was only to be attained by providing such equality. The *Kalanke* case aroused criticism amongst academics. Most of the critiques were based on the lack of a solid legal argumentation behind the ruling (Brems, 1996; Lanquentin, 1996; Moore, 1996; Prechal; Quintanilla Navarro, 1996; Rodríguez-Piñero, 1995; Senden, 1996; and Zuleeg, 1998).

After the uncertainty regarding the legitimacy of quota systems and other positive action measures in favour of women in employment created by the *Kalanke* ruling, the European Commission approved a Communication²⁸ intended to soften the effect of that judgment by proposing an amendment to Directive 76/207/EEC to reflect the legal situation after *Kalanke* and to clarify that despite rigid quotas, other positive action measures were authorized by EU law.

Later, the CJEU position regarding positive action measures was softened in *Marschall*²⁹ (Banard and Hervey, 1998; Brems, 1998; Cabral, 1998; Mertus, 1998; More, 1999; Rodríguez-Piñero, 1997; Sierra Hernaiz, 1998; and Veldman, 1998). In this case, the CJEU noted that, even when candidates are equally qualified for a job, male candidates tend to be promoted in preference to female candidates, particularly due to prejudices and stereotypes concerning the role and capacities of women in the workplace. So that the mere fact that a male and female candidate are equally qualified does not mean that they have the same possibilities. In light of these considerations, in *Marschall*, the Court held that, unlike *Kalanke*, a national rule which contains a saving clause does not exceed the limits of the exception in the Directive if it provides for male candidates who are 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 a male candidate. Finally, the Court observed that such criteria should not discriminate against the female candidates. Concerning this issue, the CJEU has pointed out that the use of criteria such as civil state, ‘breadwinner status’, or company seniority (when it is not relevant to performing the tasks of the post) constitutes indirect discrimination on grounds of gender (Charpertier, 1998).

This less restrictive approach to strict quota systems was reinforced by the CJEU’s decision in *Badeck*³⁰. In this case, the CJEU argued that national rules establishing priority for female candidates in promotion, access to temporary posts and training places in sectors where women are under-represented, providing that they have equal qualifications and when this rule has been found necessary for ensuring compliance with the objectives of the women’s advancement plan, are consistent with EU law. German regional legislation assessed in *Badeck* offers an extensive catalogue of the positive action measures in favour of women that are considered to be consistent with the principle of equal treatment and equal opportunities for women and men.

The domestic regulation at issue in *Badeck* ensured that all qualified women would be short-listed for an interview, while also encouraging the presence of women in employees’ representative bodies and administrative and supervisory bodies. The CJEU observed that these rules were valid only if no reasons of greater legal weight were opposed and providing that candidatures were the subject of an ‘objective assessment’ which takes into account the specific personal situations of all candidates. In the Court’s view in *Badeck*, the national legislation at issue opted for what is generally known as a “flexible result quota”. This system provided for the assessment of the candidates’ suitability, capability and professional performance with respect to the requirements of the post to be filled or the office to be conferred. Accordingly, the CJEU estimated that the priority rule introduced by the national rules was not absolute and unconditional since the selection criteria in the case, although formulated in neutral terms in regards to gender and thus capable of benefiting men too, generally favoured women. The Court also considered that the legislation previewed an obligation to offer preferential treatment over women to some groups, namely: former employees who have left the position due to family work, individuals who, for family reasons, work on a part-time basis, temporary voluntary soldiers, seriously disabled persons and the long-term unemployed.

²⁸ 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/96/0088 FINAL.

²⁹ *Marschall v. Land Nordrhein-Westfalen*, C-409/95, *op. cit.*

³⁰ *Badeck*, n. 3 *supra*.

It is clear that the CJEU ruling in *Badeck* consolidated the line of reasoning initiated in *Kalanke* and *Marschall* (Berthou, 2000; Küchhold, 2001). However, the CJEU's argumentation in *Badeck* also widened the scope of applicability of positive action measures (Ramos Martín, 2000). In *Badeck*, the CJEU reiterated the need for positive action measures to include a flexibility clause in order to prevent "intolerable discriminatory treatment" of male workers. In addition, the requirement of objective assessment of the candidatures that considered the specific personal situations of all candidates persisted. However, advancements were introduced in regards to a measure establishing preferential access of women to training positions in the public sector. According to *Badeck*, in EU law, the principle of equal treatment for men and women does not preclude a national rule for the public service which, in trained occupations in which women are under-represented and in which the State does not have a monopoly of training, allocates at least half of the training spots to women. The Court considers that, taking an overall view of training –public and private sectors–, no male candidate is definitively excluded from training. Surprisingly, the CJEU is accepting a rigid quota for access to training positions, as long as it is not leading to "absolute rigidity".

Further, in *Abrahamsson*³¹, the CJEU ruled that the equal treatment right established in the Directive on equal treatment for men and women precludes national legislation by which a candidate for a post who belongs to the under-represented sex and possesses sufficient qualifications for that post must be chosen in preference to a candidate of the opposite sex who would have otherwise been appointed, even when the difference between the respective merits of the candidates is not so great as to lead to a breach of the requirement of objectivity. The opinion of the Court is that such a selection method is not permitted by EU law since the selection of a candidate from amongst those who are sufficiently qualified is ultimately based on the mere fact of belonging to the under-represented sex, and this is so even if the merits of the selected candidate are inferior to those of a candidate of the opposite sex.

Notwithstanding the fact that the CJEU's ruling in *Abrahamsson* mainly reiterates its previous doctrine in *Kalanke* and *Marschall*, the importance of this case is that it constitutes the first time the CJEU had to deal with interpreting the scope and meaning of paragraph 4 of former Article 141 ECT. Some academics hoped that the CJEU would overrule its previous case law and, once the new Treaty provision went into force, most of the restrictions to the use of positive action measures would disappear. However, the CJEU took a more conservative approach and continued along the lines of *Kalanke* and *Marschall* (Numhauser-Henning, 2000 and Ramos Martín, 2000).

Another case regarding the interpretation of the derogation to the right of equal treatment between men and women is *Lommers*.³² Here, the CJEU deals with subsidised nursery places made available by the Dutch Ministry of agriculture to its staff. The Ministry, aiming to tackle extensive under-representation of women within it and in a context characterised by a proven insufficiency of proper, affordable care facilities, reserved places in subsidised nurseries only for children of female officials, whilst male officials had access to them only in emergency situations, to be determined by the employer. The Dutch Ministry's measure was considered to form part of the restricted concept of equality of opportunities in so far as it was not places of employment which were reserved for women, but specific working conditions designed to facilitate the pursuit of their careers.

The CJEU noted that the Dutch Ministry's measure might *a priori* assist the perpetuation of traditional role division between men and women, arguing that, the promotion of equality of opportunity between men and women pursued by the introduction of a measure benefiting working mothers could also be achieved if its scope is extended to include working fathers. However, the Court finally concluded that the measure at issue fell within the scope of the positive action exception found in the equal treatment for men and women Directive, taking into account the insufficiency of supply in the number of available nursery places and the possibility for employers to grant requests from male officials in emergency situations. The national measure is considered to be in accordance with the principle of proportionality in so far as the exception in favour of male officials is construed as allowing those of them who take care of their children on their own to have access to those nursery places under the same con-

³¹ *Abrahamsson*, n. 4 *supra*.

³² *Lommers*, n. 5 *supra*.

ditions as female officials. Moreover, the Court sustained that the argument that women are more likely to interrupt their careers in order to take care of their young children no longer had the same relevance.

In *Lommers*, the CJEU overruled its previous case law from *Hofmann*.³³ In this case, the CJEU ruled that the Directive on equal treatment for men and women left discretion open to Member States concerning the social measures to be adopted in order to offset the disadvantages which women, as compared to men, suffer with regards to employment retention. Such measures are closely linked to the general system of social protection in the various Member States. Therefore, Member States were supposed to enjoy a reasonable margin of discretion regarding both the nature of the protective measures and the detailed arrangements for their implementation. That margin was narrowed by the CJEU's decision in *Lommers*. Taking into account that the argument that women interrupt their careers more often than men in order to take care of children is no longer as relevant from the CJEU's point of view, these kinds of measures need to be conformed with the principle of proportionality. This new reasoning has been maintained in more recent CJEU case law such as *Briheche*,³⁴ *Commission versus Greece*,³⁵ and *Roca Álvarez*³⁶ to justify the extension of privileges that were previously enjoyed only by female workers, to men, so long as they were also involved in caring for their young children.

4.3. New EU Proposal: Directive on Quotas for Women in Company Boards

Since 2010, the European Commission has adopted several new initiatives to promote gender equality for women and men such as the Women's Charter and the Strategy for equality between women and men 2010-2015.³⁷ These actions aim to give a new impulse to promoting more women in decision-making positions. For instance, the Commission monitors progress made towards achieving the 25% female target in top-level decision-making positions in academia, where studies have shown that women have lower promotion probabilities than men (Groeneveld, Tijdens, and Van Kleef, 2012).

In November 2012, the European Commission presented a proposal for an EU Directive to achieve improved gender balance on the corporate boards of European companies.³⁸ The overall goal of the proposed Directive is to attain a minimum representation of 40% of the under-represented sex in non-executive board-member positions in publicly listed companies, with the exception of small and medium enterprises. Small and medium-sized enterprises are defined as companies with less than 250 employees and an annual worldwide turnover that does not exceed 50 million EUR, or an annual balance sheet of less than 43 million euros.

This initiative dealing with enhanced equality for women and men in decision making at an enterprise level is also supported by the European Parliament in its resolutions of 6 July 2011³⁹ and 13 March 2012.⁴⁰

Currently, boards are dominated by one gender: 85% of non-executive board members and 91.1% of executive board members are men (European Commission, 2012). Despite some initiatives at national (binding legislation adopted in France, Belgium and Italy, and non-binding quota systems in Spain and the Netherlands) and EU level, this unbalanced situation has not changed significantly over recent years.

The proposed Directive establishes an objective of a 40% presence of the under-represented sex among non-executive directors of companies listed on stock exchanges by January 2010 for companies in the private sector. For State owned companies, the implementation period will be two years

³³ Case 184/83, *Hofmann v Barmer Ersatzkasse*, [1984] ECR I-03047.

³⁴ *Briheche*, n. 6 supra.

³⁵ *Commission v. Greece*, n. 7 supra.

³⁶ *Roca Álvarez*, n. 8 supra.

³⁷ COM(2010) 491 final.

³⁸ EU Proposal for a Directive on female quota on company boards, n. 9 supra.

³⁹ European Parliament resolution of 6 July 2011 on women and business leadership (2010/2115(INI)) <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2011-0330+0+DOC+XML+V0//EN>, accessed on 01.06.2013.

⁴⁰ European Parliament resolution of 13 March 2012 on equality between women and men in the European Union - 2011 (2011/2244(INI)), <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2012-0069+0+DOC+XML+V0//EN> accessed on 01.06.2013.

less (January 2018). The Directive requires companies to have a transparent recruitment procedure for non-executive directors. Companies having a lower share (less than 40%) of the under-represented sex among the non-executive directors will be required to make appointments to those positions based on a comparative analysis of the qualifications of each candidate, by applying clear, gender-neutral, and unambiguous criteria. Given equal qualification, priority shall be given to the under-represented sex. This priority would not apply if “an objective assessment taking into account of all criteria specific to the individual candidates tilts the balance in favour of the candidate of the other sex.”

Furthermore, the proposed Directive establishes a rule for sharing the burden of proof that is similar to the formula used by existing anti-discrimination and equal treatment Directives. It provides 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 established by the Directive for the selection of non-executive directors.

The wording of the Directive concerning the rules for the selection of non-executive directors follows nearly literally the case law of the CJEU on “positive action” for women in employment, explained above. The Commission has been careful to closely follow CJEU case law in order to avoid non-compliance with the CJEU’s position regarding positive action for men and women. It requires a transparent procedure with analysis of the individual applications, giving priority to a female applicant only if her qualifications are equal to those of the male applicant. Moreover, the CJEU’s case law permits preferential treatment when one gender is under-represented in a specific professional category, therefore, until reaching a balance of 50% of members of that gender, while the Commission’s proposal allows for preference to be granted for only up to 40% of the positions at the company board. Thus it can be concluded that the proposed Directive is likely to be acceptable also from the point of view of the strict scrutiny applied by the CJEU to positive action measures in favour of the under-represented sex.

The Directive also includes a requirement for companies to annually provide information to the competent national authorities regarding gender representation of their boards, as well as the measures taken to fulfil the obligation of a transparent recruitment process. This information should be made public. Besides, if the company does not meet the objectives established by the Directive, it must explain the reasons for the failure and the steps taken to correct that situation. Moreover, the proposed Directive states that Member States will have to lay down effective, appropriate, and dissuasive sanctions for companies that are in breach of the Directive.

The proposed Directive aims to be a temporary measure until a better balance is reached between men and women in decision-making. Thus, the proposal anticipates its expiration in 2028 and provides for an evaluation mechanism starting in 2017. The proposal is expected to apply to approximately 5000 listed companies in the European Union.

In October 2013, the committee on gender equality and the committee of legal affairs of the European Parliament approved the proposal for a Directive establishing an objective of 40% females amongst non-executive members of company boards. This proposal is now being discussed at the Council.

5. Conclusions

The overview of the CJEU’s case law regarding positive action measures reveals a very strict the interpretation of this concept. In addition, the significance of positive action measures has not been the object of solid legal argumentation. The main problem is that the CJEU’s approach to this concept relies heavily on undetermined expressions such as: ‘rigid result quota’, ‘flexible result quota’ and ‘saving clauses allowing an objective assessment’. These terms create legal uncertainty regarding the use of positive action measures since they have been established by the CJEU as the parameters of the legitimacy of affirmative action measures without previously defining their full significance. Instead of using such obscure terminology, the Court of Justice could emphasize the need to respect the proportionality principle when applying the positive action measure. The simple maxim: ‘A positive action measure in favour of disadvantaged groups can be adopted in order to achieve substantive equality providing that its

respects the principles of rationality and proportionality’ summarizes the requirements for compliance with EU law imposed by the CJEU’s interpretation. This clearer formula may be deduced from several CJEU decisions, namely, the cases *Lommers*⁴¹ and *Briheche*⁴². In these rulings the CJEU focuses on respect of the proportionality principle as the key element for the validity of positive action measures.

Despite the fact that the Court of Justice has repeatedly praised substantive equality as the ultimate goal of EU law, its case law has traditionally reflected a rigid and formal concept of equality. From the observation of EU Law, it can be deduced that positive action measures in favour of female workers have been admitted only on a very limited basis. A provision allowing for the use of positive action measures in favour of women was introduced in the 70s by the first Directive on equal treatment and opportunities for men and women. At the end of the 90s, a similar provision was included in the Treaty. Finally, after the inclusion of a reference to positive action measures in the Charter of Fundamental Rights of the EU and the recast Directive on gender equality in employment, the notion of substantive equality has been strengthened. The pursuit of ‘full equality in practice’ is explicitly stated in these legal measures when legitimating the use of pro-active measures to prevent or compensate for disadvantages linked to the worker’s gender. Notwithstanding the relevance of these developments, the fact that this sort of favourable treatment is still considered an exception to the equal treatment rule rather than an intrinsic requirement of the equality principle hinders progress in this area. At the EU level, equality of opportunities is still considered equivalent to substantive equality. It may be argued that this assumption represents a misreading of the essence of real equality. Equal opportunity policies lead to situations where some groups are assisted in order to achieve access to education, training, and employment, but they are not granted equal results in relationship with their individual capacities. This type of policies is not very effective in removing the negative stereotypes that are deeply rooted in the society. In this context, an alternative approach is feasible, to consider positive action as a useful instrument to prevent social exclusion of minorities, –informed by dignity, restitution and redistribution as values linked to equality– rather than an exceptional equal opportunities policy (Fredman, 2001). From this perspective, positive action is considered to be a corollary of the Member States’ obligation to promote real equality among their citizens, from an individual as well as a collective perspective, by removing the obstacles that hinder their full participation in political, economic and social life.

In EU law, positive action is still understood to be an exception rather than a concrete substantiation of equality. This approach seems to forget that the EU has a positive responsibility to promote equality between men and women and combat social discrimination (Article 3 TUE and Article 8 TFEU). Guidance on this issue is provided by international instruments such as the UN Convention on the Elimination of All Forms of Discrimination against Women, which expressly encourages the adoption of “measures, including legislation, to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men” in its article 3. Constitutional and international standards may be relied upon to adopt measures aimed to counteract the labour market inequalities that hinder the career advancement of certain social groups. In this context, equality law is not just about how to regulate employment; “it is about how to create the socio-economic, community and labour market conditions for social equality” (Sheppard, 2012). From this point of view, pro-active measures, rather than a restrictively interpreted exception to the equality principle, should be considered to be an effective tool for achieving social peace, social justice and economic welfare for all. (Duer, 2005).

When applying positive action measures, attention should be paid to the emerging clash of interests and rights between the individual right to equal treatment and the collective right to ‘*de facto*’ equality. Due to this tension between the pursuit of substantive equality and the legitimate individual rights and expectations, the boundaries of positive action policies need to be precisely determined. First, these policies should only be adopted when there is objective evidence of the existence of a homogenous group of individuals suffering a generalized discriminatory treatment. Second, the temporary character of the proactive measure should be acknowledged. In other words, the use of proactive measures should end when social imbalance is corrected. Finally, all affirmative action measures must comply with the

⁴¹ Lommers, n. 5 supra.

⁴² Briheche, n. 6 supra.

proportionality principle.⁴³ Therefore, the adopted measures should be necessary and appropriate to overcome the situation of discriminatory disadvantage and should only be used when there are no other less harmful alternative means for the rights or interest of other individuals potentially affected by them.

On the one hand, the new EU proposal for a Directive establishing a binding quota for women in companies could be interpreted as a reaction to the increasing willingness of some EU Member States to adopt broader affirmative action policies concerning women. In several EU countries (Austria, Belgium, France, Greece, Germany, Italy, Spain, Sweden and the UK, among others) positive action measures are used in a widespread manner and are covered by legislation, as well as by constitutional provisions (Selanec and Sende, 2011). On the other hand, the new EU proposed Directive clearly results from a frustration with the insufficient effects of gender equality law and policies at both European and national levels and shows the concern of the European Commission and European Parliament regarding the lack of quick progress in this field. Considering that some Member States governments have expressed their opposition to the approval of the proposal for a Directive on female quotas on company boards, the chances of success of this legal text at the co-decision process is uncertain. Nonetheless, the mere fact that there is a proposal on the table has stimulated debate on the need to adopt more ambitious positive action strategies and may serve as an impulse for several legally binding national measures designed to improve the gender balance in decision making positions.

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⁴³ The proportionality test was set up for the very first time in case 170/84, *Bilka*, [1986] ECR I-01607 and consolidated in further case law, *inter alia*: C-273/97, *Sirdar v The Army Board and Secretary of State for Defence*, [1999] ECR I-7403 and C- 285/98, *Kreil v Bundesrepublik Deutschland*, [2000] ECR I-69.

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