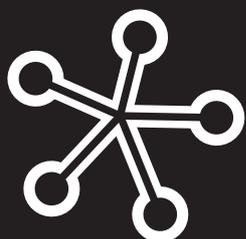




Positive Action in EU Gender Equality Law

Dr. Nuria Elena Ramos Martín



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Positive Action in EU Gender Equality Law: Promoting More Women in Corporate Decision Making?

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Abstract

Equality is a broad and complex concept with various meanings (equal treatment, equal opportunities, formal equality, and substantive or de facto equality). Although there are strong similarities in the definition of key concepts related to equality, the EU and other international organisation have interpreted and applied them differently. The way the concept of positive action, as an expression of the principle of de facto equality, has been understood by these institutions has led to a certain degree of uncertainty and methodological confusion. Similarly, despite the undeniable degree of harmonization that the EU legal framework on this field provides, still key notions of equality law, among them, the term positive action, are defined and applied differently in the various legal systems of the EU Member States. In the first place, this paper provides a comparative legal analysis of the concept of equality. In the second place, attention is paid to the notion of positive action in EU law and, in particular, in the case law of the Court of Justice of the EU. This paper includes an analysis of the interpretative value of that case law to provide guidance for the adoption of positive action measures and the possible clashes with the international and national contexts. Finally, attention is paid to the recent actions adopted by the European Commission to promote gender balance in decision-making positions.

1. Introduction

Equality is a broad and complex concept, with various meanings -equal treatment, equal opportunities, formal equality, and substantive or *de facto* equality-, and whose definition connects to 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 institutions 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 in divergent ways. This plurality of interpretations has led to a certain degree of uncertainty and methodological confusion. Similarly, despite the undeniable degree of harmonization that the European Union -hereinafter EU- legal framework on this terrain provides, still key notions of equality law, among them, the term positive action, are defined and applied in a different way in the various legal systems of the EU Member States.¹ Firstly, this study provides an analysis of the concept of equality and related notions from a comparative law perspective. Secondly, attention is paid to the notion of positive action in EU law and, in particular, in the case law of the Court of Justice of the European Union (hereinafter, CJEU). Moreover, the interpretative and normative value of that case law is discussed, as well as the clashes with the national context. Attention is paid to the controversial ruling *Kalanke*,² which was clarified and softened in *Marschall*.³ Other landmark cases such as *Badeck*,⁴ *Abrahamsson*,⁵ *Lommers*,⁶ *Bribeche*,⁷ *Commission versus Greece*,⁸ and *Roca Álvarez*⁹ - arising questions on the scope of the EU provisions on positive action measures - are assessed as well.

This paper focuses on the positive action measures 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 carried out in order to analyse the juridical development of this legal concept and to examine the constraints and limits for adopting this type of measures.

1 Prechal, S. and C. McCrudden *et al*, *The Concepts of Equality and Non-Discrimination in Europe: A practical Approach*, European Commission, Luxembourg, 2009.

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

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

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

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

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

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

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

9 C-104/09 [2010].

Second, the content and repercussions of the new EU proposed Directive on binding quotas for women on company boards also deserve attention.¹⁰

¹⁰ 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.

2. Different perspectives of the equality principle

Equality is an abstract and developing concept with a variety of meanings. Equality is above all 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 better well-known concept. This idea of formal equality is intrinsically linked to the prohibition of discrimination and it is resumed by the Aristotelian formula: ‘the equal should be treated equal and the unequal in an unequal way’.¹¹ Despite the apparent simplicity of this aphorism, complications arise when trying to determine in each particular case what situations are equal or unequal to others. The examination of the equality of two situations implies a test establishing a comparison between relevant features or characteristics in a specific context -eg the employment relationship-. In this context, the differences based on several pre-determined factors such as sex, 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 its personal or social circumstances and/or characteristics.

When dealing with formal equality it is necessary to draw a distinction between direct and indirect discrimination.¹² Direct discrimination means a different and unfavourable treatment infringing the law because it is directly based on certain personal or social circumstances of the individual. Thus, the concept of direct discrimination is essentially objective. That explains why, in this context, it is irrelevant if there is intention to discriminate or not and justifications to the discriminatory conduct are 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 sex because a man cannot be pregnant.¹³ Conversely, the notion of indirect discrimination refers to practices or measures that, being formally neutral, have unequal consequences for the different social groups, producing an adverse impact in one or more groups of people. Therefore, the concept of indirect discrimination underlines the fact that a person belongs to a disadvantaged group and reflects the supra-individual dimension of the discriminatory phenomenon. Hence,

11 ARISTOTELES, *Política*, Centro de Estudios Constitucionales, Ed. J. Marías-M. Araujo, Madrid, 1983.

12 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).

13 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.

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 the case of direct discrimination, indirect discrimination cases allow 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 where “a national measure, albeit formulated in neutral terms, works to the disadvantage of far more women than men.” For example, 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 excludes those workers from any possibility of obtaining 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 unrelated to any discrimination on grounds of sex.¹⁴

The formal approach to the concept of equality has an essential deficit: It often misses the social inequalities related to the personal or collective background strongly embedded in the society. In this context, firstly, the achievement of real or substantive equality requires a legal framework protecting against discrimination, conceived as a repressive reaction aimed to punish discriminatory acts with sanctions. It is the sort of legal reaction traditionally applied against discrimination, based on ‘an individual-complaint led model’.¹⁵ This type of remedies has the legal consequence of the re-establishment of equality via declaring the nullity of the discriminatory act and its effects. The problem that this re-active protection method poses is that it is not absolutely efficient in order to overcome the deep-rooted discriminatory trends in society. It can be useful to repair the effects of existing discriminatory treatments but it is an inadequate instrument to eradicate the tendency to discriminate and to combat collective discriminatory phenomena different from indirect discrimination cases. Regarding enforcement and compliance of EU gender equality law, studies show that at Member State level often the legal systems provide for high standards as far as the enforcement of individual rights are concerned, whereas collective means of enforcement are still not as well developed as the severity and dimension of sex-related discrimination would require.¹⁶ Taking into account the shortages of the traditional regulation on equality to correct structural discriminations, new mechanisms to remove persistent social inequalities are needed. In this context, promotional activities in favour of disadvantaged

14 *Inter alia*, Case C-385/11, *Elbal Moreno v Instituto Nacional de la Seguridad Social (INSS)* [2012] ECR, not yet published.

15 Fredman, S. ‘Changing the Norm: Positive Duties in Equal Treatment Legislation’, 12 *Maastricht Journal of European and Comparative Law* (2005), 369.

16 For an overview of the divergent impact and enforcement of the EU gender equality legislation at Member States level see: European Network of Legal Experts in the field of Gender Equality, Report: *Gender Equality Law in 33 European Countries*, European Commission, 2010.

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 that compose the society. In order for these measures to be applicable, a discriminatory treatment is presumed for the mere fact of belonging to a disadvantaged social group instead of considering the unjustified different treatment in relative terms through the establishment of a comparison in an *ad hoc* basis. Consequently, 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 introduced to eliminate the situations of social disadvantage at the origin of the discriminatory treatment. The main obstacle for 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 sex. Hence, positive action measures restrict the principle of equality for men and women in its formal dimension because 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’ is justified by the imperative of achieving substantive equality of the groups and individuals, as required by the social democratic state model. 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 aim of organising societal diversity, as long as these measures are proportionate and temporary.¹⁷ In this sense, the strict applicability of the principle of ‘*de facto*’ equality would require the adoption of positive action measures in favour of women in order to correct their disadvantages in employment and labour conditions.¹⁸ Bob Hepple talks about ‘transformative equality’ to refer to affirmative action schemes aimed to achieving 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.¹⁹

In sum, positive action measures are addressed to disadvantaged social groups and aim to eradicate the social component of discrimination through the adoption of promotional activities different from the mere sanction of discriminatory acts. In this paper, we follow the hypothesis that this positive dimension of equality is present, even when restrictively shaped, in EU legislation and in the CJEU’s case law interpreting

17 Schutter, O. and European Network of Legal Experts in the field of Gender Equality, *The Prohibition of Discrimination under European Human Rights Law*, European Commission, Brussels, 2011, 1-89.

18 Palomeque López, M. C. ‘Derechos Fundamentales y Relación Laboral: los derechos laborales inespecíficos’, in Sempere Navarro, A. V. and Martín Jiménez, R., ed. *El Modelo Social en la Constitución Española de 1978*, Ministerio de Trabajo y Asuntos Sociales, Madrid, 2003, 229-248.

19 Hepple, B. ‘Transformative Equality: the Role of Democratic Participation’, *Labour Law Research Network Inaugural Conference*, University Pompeu Fabra, Barcelona, 13-15 June, 2013, 1-29.

it. In fact, the CJEU has proclaimed in several occasions that the result pursued by Article 157(4) TFEU and the equal treatment Directive is substantive, not formal, equality.²⁰

²⁰ *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.

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 in the Charter of fundamental rights of the EU (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.²¹ Moreover, it is widely accepted that aim of positive action measures is to eliminate the inequalities affecting certain social groups and prevent disadvantageous treatments which are unacceptable from a social redistributive perspective.²² 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 the academics and the judiciary about their effective use and conceptual definition.

A revision of the concept of positive action should begin by paying the due attention to the United States of America (hereinafter U.S.) legal order because the very 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 and finally, influenced the EU law approach to the principle of substantive equality.²³

In the U.S., positive action was first developed in relationship with the fight against racial discrimination in education.²⁴ In the case *Brown*²⁵, the Supreme Court proclaimed for the first time the illegality of racial segregation in education. This decision was a turn over 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 Orders²⁶ that pointed out the need for adopting affirmative action measures in favour of Afro-American citizens. Then, Title VII of the Civil Rights Act 1964²⁷, while prohibiting the racial and sexual discrimi-

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

22 Radin, M., 'Las medidas de igualdad de oportunidades a favor de la mujer en el empleo', *Aranzadi Social*, 22, 1999, 69-91.

23 Peters, A., *Women, quotas and Constitutions: a comparative study of the affirmative action for women under American, German, EC and International Law*, The Hague, Kluwer Law International, 1999.

24 *Inter alia*: Regents of the University of California v. Bakke, 438 U.S. 265, 1978. For an analysis of this case law see: Brest *et al*.: *Processes of constitutional decision making*, Aspen Law and Business, 4 ed., Gaithersburg-New York, 2000, 898-926.

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

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

27 42 USC, 2000 e-12, 78 Stat. 265. (Amended by Civil Rights Act 1991).

nation (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 Supreme Court judgment *Griggs*.²⁸ Since then, public bodies and private companies have used these plans with the aim of eradicating racial segregation. From the field of racial equality, these measures have been extended to combat also sexual segregation. The most relevant case on that regard is *Johnson*²⁹, where affirmative action measures in favour of female workers were considered legal. In this case, the possibility of giving preference to women in promotion in sexually segregated categories where women were under-represented was found according to law, if the promoted women fulfilled the requirements of the post.

The concept of positive action in U.S. law is connected with the idea of social discrimination. This legal construction also has its origin in the case law of the Supreme Court.³⁰ The Supreme Court rulings concerning affirmative action measures rely heavily on both distributive and compensative grounds. Consequently, it is considered 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 the groups in the workplace. The main objective of positive action measures is to foster the normal composition of the labour force that would follow 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 enough to prove the existence of an imbalance in the workforce originated by the under-representation of certain groups of workers, without the need of showing a present discriminatory conduct. In addition, 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.

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 pursuing 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

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

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

30 See *Inter alia: Regents of the University of California v. Bakke*, n. 23 supra.

group of people 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 the social imbalance is corrected. Finally, all affirmative action measures must comply with the proportionality principle.³¹ 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 alternative means less harmful for the rights or interest of other individuals potentially affected by them.

An analysis of the concept of positive action measures, from the normative point of view, shows a very ample interpretation, comprising a wide 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 the access to employment and/or promotions. It has been argued that only this last group of measures should be denominated ‘positive action’.³² The rest of measures against segregation in employment are, then, considered as ‘protecting action’ or ‘equal opportunities policies’. This last category would comprise the legal framework for protection of pregnancy and maternity but also some benefits addressed only to a reduced number of social groups. In particular in the case of female workers, these equal opportunities policies are oriented to the elimination of the typical motives of female labour segregation and discrimination without questioning the distribution of caring and domestic tasks in the household or the patriarchal structure of the society as a whole.³³ 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.³⁴ Some measures designed to stimulate labour market participation of women can, at the same time, contribute to reinforce the existing division of social roles between men and women because they maintain the traditional position of women in society as main care provider without questioning the legitimacy of the overall social structure.³⁵ This is for example the case of policies facilitating part-time work for female employees or publicly subsidised nursery places made available only for children of female workers. They have been defined as ‘archaic’ positive action measures due to the fact that they

31 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.

32 Sierra Hernández, E., *Acción positiva y empleo de la mujer*; CES, Madrid, 1999.

33 Weldon-Johns, ‘EU Work – Family Policies – Challenging Parental Roles or Reinforcing Gendered Stereotypes?’, (2013) 19, 5 *European Law Journal*, 662-681.

34 See Lommers, ‘n. 6 supra’.

35 Rosenfeld, M., *Affirmative action and justice. A philosophical and constitutional inquiry*; Yale University Press, New Haven and London, 1991, 163.

are not promoting a rupture with the currently prevailing division of working and family tasks.³⁶ 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 the 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, necessary as a first stage, but they are not suitable to accomplish the aim of substantive equality among the groups that compose the society. In a second stage, more radical measures attacking the gendered division of social roles are needed in order to reach a more egalitarian society. These more radical measures, the positive action measures in strict sense -quotas and targets-, use more drastic means, i.e. giving priority in access to employment, promotion, or continuity in the undertaking to workers who belong to the disadvantaged group, with the objectives of increasing their labour market participation and providing higher gender balance in decision-making positions.

Both types of measures, the equal opportunities policies and the positive action measures *strictu sensu* -preferential treatment-, have been considered by the CJEU as included 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, the CJEU’s case law has evolved from a more permissive policy to a more strict scrutiny of the justifications behind the exclusion of male workers from the entitlement to these rights.³⁷

36 Fernández López, M. F., ‘Igualdad y no discriminación por razón de sexo: planteamiento constitucional’ in Aparicio, J.; Baylos, A. (Ed.), *Autoridad y democracia en la empresa*, Trotta, Madrid, 1992, 135-136.

37 Briheche, n. 7 supra, Commission v. Greece, n. 8 supra, and Roca Álvarez, n. 9 supra.

4. Positive action measures in European Union Law

4.1. EU regulation of positive action

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/ECC 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;³⁸ Article 3 of the Recast Directive 2006/54/EC on equal treatment for men and women in employment;³⁹ and Article 157.4 TFEU -former Article 141(4) of the EC Treaty-. These provisions have permitted derogations from the concept of formal equality and open 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 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.⁴⁰ 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 a positive action policies designed to eliminate existing inequalities affecting women in working life and to promote a better balance between the sexes in employment, comprising 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 roles in society between men and women; (b) to encourage the participation of women in various occupations in those sectors of working life where they are at present under-represented, and at higher levels

38 O.J. L 039, 14/02/1976 0040 – 0042.

39 O.J. L 204, 26/07/2006 0023 – 0036.

40 O.J. L 331, 19/12/1984 0034 – 0035.

of responsibility in order to achieve better use of all human resources. The fact that, for a very long period, this non-binding recommendation has been the only EU text developing the specific use of positive action measures, in tandem with the diluted and imprecise character of the measures to be adopted according to it, reveals the profound divergences in the approach of EU Member States to positive action measures.

The acknowledgement of the legitimacy of pursuing substantive equality by secondary legislation has lately reflected also 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.” It can be criticised the use of the neutral expression ‘under-represented sex’ instead of mentioning women as the historically disadvantaged group, which forced the approval of Declaration number 28, annex to the Final Act of the Treaty of Amsterdam, to clarify that point.⁴¹

Article 23 of the Charter of Fundamental Rights of the EU, reproduces, with some minor deviations, the wording of Article 157 TFEU and maintains the possibility of adopting positive action measures in favour of the sex under-represented in the labour market. Unfortunately, this is the only reference to positive action measures that can be found in the Charter. Therefore, concerning substantive equality, the analysis of this text shows a rather disappointing outcome: the absence of a general 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 comprising positive action. However, in the practice of the Member States social policies, the implementation of positive action measures seems to give more relevance to improve the equal opportunities of disabled workers.

Finally, the current secondary legislation provision on that topic, 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 – Article 157 TFEU currently-. Later in the text, the same Directive establishes a duty on Member States to communicate to the Commission, every four years, 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. On the basis of that information, the Commission adopts and publishes every four years a report establishing a comparative assessment of any national measures aimed to overcome the

⁴¹ This Declaration states: “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.”

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 sex 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 European Union

Once listed the legal provisions dealing with positive action measures, the next section is devoted to the analysis of the CJEU case law interpreting them. It is particularly relevant to draw conclusions on the limits for the adoption or maintenance of affirmative action measures. This analysis starts with the controversial ruling of the CJEU in *Kalanke*⁴², afterwards clarified in other related cases.⁴³ 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 very debated *Kalanke* case,⁴⁴ the CJEU established that in so far 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 sex, were in fact intended to eliminate or reduce actual instances of inequality between men and women which might exist in the reality of social life. It thus permitted national measures relating to access to employment, including promotion, which gave a specific advantage to women with a view to improving their ability

42 *Kalanke*, n. 2 supra.

43 Barnard, D., 'The principle of equality in the EU context: Grant, Kalanke and Marschall: four uneasy bedfellows', *Cambridge Law Journal*, 57(2), (1998), 352-373.

44 In general terms, it can be stated that most of the critics were based on the lack of a solid legal argumentation of the ruling, in this sense: Brems, E., 'Case C-450/93, *Kalanke v. Freie Hansestadt Bremen*, October 17, 1995', *Columbia Journal of European Law*, (1996), 172-179; Lanquentin, M. T., 'De l'égalité de chances. A propos de l'arrêt *Kalanke*, CJCE 17 octobre 1995', *Droit Social*, n. 5, (1996), 494-501; Moore, S., 'Nothing positive from the Court of Justice', *European Law Review*, 21, (1996), 156-161; Prechal, S., 'Case C-450/93, *Kalanke v. Freie Hansestadt Bremen*, [1995] ECR I-3051', *Common Market Law Review*, 33, (1996), 1245-1259; Quintanilla Navarro, B., 'La Sentencia de Tribunal de Justicia de la Unión Europea de 17 de octubre de 1995 sobre el caso '*Kalanke v. Glissman*' *Actualidad Laboral*, 5, (1996), 145-159; Rodríguez-Piñero, M., 'Comentario a la Sentencia *Kalanke*; la discriminación positiva de la mujer.' *Relaciones Laborales*, 22, (1995), 1.; Senden, L., 'Case C-450/93, *Kalanke v. Freie Hansestadt Bremen*, [1995] ECR I-3051', *Maastricht Journal of European and Comparative Law*, 3, (1996), 146-164; and Zuleeg, M., 'Gender equality and affirmative action under the law of the EU', *Columbia Journal of European Law*, vol. 5, (1998/1999), 319-328.

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 which guaranteed women “absolute and unconditional priority” for appointment or promotion was not a measure allowed by EU law, since it went beyond promoting equal opportunities and substituted for it the result “equality of representation” which was only to be arrived at by providing such equality.

After the uncertainty about 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 Communication⁴⁵ 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 clarify precisely that despite rigid quotas other positive action measures were authorized by EU law.

Later on, the position of the CJEU regarding positive action measures was softened⁴⁶ in *Marschall*.⁴⁷ In that case the CJEU notes that, even where candidates are equally qualified for a job, 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. So that the mere fact that a male candidate and a female candidate are equally qualified does not mean that they have the same chances. In the light of those considerations, the Court held, in *Marschall*, that, unlike the rules at issue in *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 tilt the balance in favour of a male candidate. Finally, the Court observed that such cri-

45 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.

46 This is the opinion sustained by Banard, C. and Hervey, ‘Softening the approach to quotas: positive action after Marschall’, *JSWL*, 20, (1998), 333.

47 For comments on this ruling see: Brems, E., ‘Case C-409/95, *Hellmut Marschall v. Land Nordrhein-Westfalen*’, *Columbia Journal of European Law*, Vol. 4, (1998), 668-674; Cabral, M., ‘A step closer to substantive equality’, *European Law Review*, 23, (1998), 481-487; Mertus, J. A., ‘Marschall v. Land Nordrhein-Westfalen. Case n. C-409/95’, *American Journal of International Law*, vol. 92, 2, (1998), 296-300; More, G., ‘Case C-409/95, *Hellmut Marschall v. Land Nordrhein-Westfalen*, [1997] ECR I-6363’, *Common Market Law Review*, 36, (1999), 443-452; Rodríguez-Piñero, M., ‘Igualdad de oportunidades y prioridad de la mujer en los ascensos en la Sentencia Marschall del TJCE’, *Relaciones Laborales*, 24, (1997), 1-8; Sierra Hernaiz, E., ‘La sentencia Marschall ¿Un avance en la acción positiva en el derecho comunitario? Comentario a la sentencia del TJUE de 11 de noviembre de 1997, asunto C-409/95’, *Actualidad Laboral*, 22, (1998), 443-454; and Veldman, A., ‘The lawfulness of women’s priority rules in the EC labour market. Case C-409/95, *Hellmut Marschall v. Land Nordrhein-Westfalen*, [1997] ECR I-6363’, *Maastricht Journal of European and Comparative Law*, 5, (1998), 403-414.

teria 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 seniority in the company (when it is not relevant to perform the tasks of the post) constitutes indirect discrimination on grounds of sex.⁴⁸

This less restrictive approach to strict quota systems was reinforced by the CJEU’s decision in *Badeck*⁴⁹. In this case, the CJEU argues that national rules establishing a 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 proved necessary for ensuring compliance with the objectives of the women’s advancement plan, are consistent with EU law. The German regional legislation assessed in the *Badeck* offers an extensive catalogue of the positive action measures in favour of women that are considered in consistency with the principle of equal treatment and equal opportunities for women and men.

The domestic regulation at issue in *Badeck* assured that all qualified women would be short-listed for an interview, as well as encouraged 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 account of 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 an 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 because the selection criteria in the case, although formulated in terms which were neutral as regards sex and thus capable of benefiting men too, in general favour women. The Court also took into account that the legislation previewed an obligation to give a preferential treatment over women to some groups, namely: former employees who have left the service because of family work, persons who for family reasons work on a part-time basis, temporary voluntary soldiers, seriously disabled persons and long-term unemployed.

48 Charpertier, L., ‘The European Court of Justice and the rhetoric of affirmative action’, *EJL*, 4, (1998), 167.

49 *Badeck*, n. 4 supra. See: Berthou, K., ‘Sur les discriminations positives, CJCE 28 mars 2000, *Badeck*’, *Droit Social*, n. 9/10, septembre-octobre, 2000, 901-908; Küchhold, K., ‘*Badeck* - The third German reference on positive action’, *Industrial Law Journal*, Vol. 30, n. 1, March 2001, 116-120 and Ramos Martín, N. E., ‘Comentario a la sentencia del TJCE de 28 de marzo de 2000, *Badeck*, asunto C-157/97’, *Carta Laboral*, 33, (2000), 59-61.

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

Further, in the case *Abrahamsson*⁵⁰, the CJEU rules that the equal treatment right established in the Directive on equal treatment for men and women precludes national legislation under 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 otherwise have been appointed, even when the difference between the respective merits of the candidates is not so great to lead to a breach of the requirement of objectivity. The opinion of the Court is that such a method of selection is not permitted by EU law since the selection of a candidate from among those who are sufficiently qualified is ultimately based on the mere fact of belonging to the under-represented sex, and this is so even if the merits of the candidate so selected are inferior to those of a candidate of the opposite sex.

Notwithstanding the fact that the CJEU's ruling in *Abrahamsson* is mainly reiterating its previous doctrine in *Kalanke* and *Marschall*, the importance of this case is that it constitutes the first time the CJEU has to deal with interpreting the scope and meaning of paragraph 4 of former Article 141 ECT. Among the academia some were hoping that the CJEU would overrule his previous case law and, once the new Treaty provision would be in force, most of the restrictions to the use of positive action measures would disappear. However, the CJEU took a more conservative approach and continued in the line

50 *Abrahamsson*, n. 5 supra.

of *Kalanke* and *Marschall*.⁵¹

Another case about the interpretation of the derogation to the right of equal treatment between men and women is *Lommers*.⁵² 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 cases of emergency, 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 enjoyment of certain working conditions designed to facilitate their pursuit of and progression in, their career.

The CJEU noted that the Dutch Ministry's measure might *a priori* help to perpetuate a traditional division of roles 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 contained in the equal treatment for men and women Directive, taken into account the insufficiency of supply in the number of nursery places available and the possibility for the employer to grant requests from male officials in cases of emergency. 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 by themselves to have access to that nursery places on the same conditions as female officials. Moreover, the Court sustained that the argument that women are more likely to interrupt their career in order to take care of their young children no longer has the same relevance.

In *Lommers*, the CJEU overrules his previous case law in *Hofmann*.⁵³ In this case, the CJEU ruled that Directive left discretion to Member States concerning the social measures they adopt in order to offset the disadvantages which women, by comparison with men, suffer with regard to the retention of employment. 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 as

51 See Numhauser-Henning, A., 'Swedish sex equality law before the European Court of Justice. Case C-407/98 Katarina Abrahamsson and others v. Elisabeth Fogelqvist [2000] IRLR 732 (CJEU)', *Industrial Law Journal*, Vol. 30, March 2001, p 121-126 and Ramos Martín, N. E., 'Comentario a la STJCE de 6 de julio de 2000, *Abrahamsson*, asunto C-407/1998', *Carta Laboral*, 41, (2000), 33-36.

52 *Lommers*, n. 6 supra .

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

regards both the nature of the protective measures and the detailed arrangements for their implementation. That margin has been narrowed by the CJEU's decision in *Lommers*. Taking into account that the argument that women interrupt their careers more often than men to take care of children is not so strong any longer from the CJEU's point of view, this kind of measures needs to be conformed with the principle of proportionality. This new reasoning has been maintained in more recent CJEU's case law such as *Briheche*,⁵⁴ *Commission versus Greece*,⁵⁵ and *Roca Álvarez*⁵⁶ to justify the extension of privileges previously enjoyed only by female workers to males, as long as they were also involved in caring for their small children.

4.3. New EU Proposal: Directive on Quota 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 Strategy for equality between women and men 2010-2015.⁵⁷ 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% target for women in top-level decision-making positions in academia, where studies shown that women have lower promotion probabilities than men.⁵⁸

In November 2012, the European Commission presented a proposal for an EU Directive to achieve a better gender balance on the corporate boards of European companies.⁵⁹ The overall goal of the proposed Directive is to attaining 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 not exceeding 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 enterprise level is

54 *Briheche*, n. 7 supra.

55 *Commission v. Greece*, n. 8 supra.

56 *Roca Álvarez*, n. 9 supra.

57 COM(2010) 491 final.

58 *Inter alia*, Groeneveld, S., Tijdens, K.G., Van Kleef, D. (2012) 'Gender differences in academic careers. Evidence from personnel data 1990-2006'. *Equality, Diversity and Inclusion*, 36 (7), 646–66.

59 EU Proposal for a Directive – women quota on company boards, n. 11 supra.

also supported by the European Parliament in its resolutions of 6 July 2011⁶⁰ and 13 March 2012.⁶¹

Currently, boards are dominated by one gender: 85% of non-executive board members and 91.1% of executive board members are men.⁶² 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 in the recent years.

The proposed Directive sets 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 shorter -January 2018-. The Directive requires companies to have a transparent recruitment procedure for non-executive directors. Companies which have 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 on the basis of 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.”

In addition, 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 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 set 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 cautious on following closely the CJEU’s 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, where priority to a female applicant is granted only

60 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>>, acceded on 01.06.2013.

61 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>> acceded on 01.06.2013.

62 European Commission, ‘Women in economic decision-making in the EU: progress report’, Luxembourg, Office of Publications of the EU, 2012, < http://ec.europa.eu/justice/gender-equality/files/women-on-boards_en.pdf>, acceded on 01.06.2012.

if her qualifications are equal to a male applicant. Moreover, the CJEU's case law allows for a preferential treatment when one sex is under-represented in a specific professional category, therefore, until there is a balance of 50% of member of that sex, while the proposal of the Commission allows preference to be granted only up to 40% of the positions at the company board. This leads to the conclusion 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 contains also a requirement for companies to provide annually to the competent national authorities information on the gender representation on their boards, as well as 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 set 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 in breach of the Directive.

The proposed Directive aims to be a temporary measure until a better balance between men and women in decision measures is reached. Thus, the proposal anticipates its expiration in 2028 and provides for an evaluation mechanism starting in 2017. The proposal is expected to apply to around 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 have approved the proposal for a Directive establishing an objective of 40% women among on-executive members of company boards. This proposal is now being discussed at the Council.

5. Conclusions

The overview of the CJEU's case law about positive action measures shows a very strict the interpretation of this concept. In addition, the significance of positive action measures has not been the object of a 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 about the use of positive action measures because 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 put the emphasis in the necessity of respecting 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' resumes the requirements for the compliance with EU law imposed by the CJEU's interpretation. This clearer formula can be inferred from several CJEU's decisions, namely, the cases *Lommers*⁶³ and *Briheche*⁶⁴. In these rulings the CJEU focuses on the respect of the proportionality principle as the key element for the validation of positive action measures.

Despite the Court of Justice has reiteratively 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 the EU legal framework, it can be deduced that positive action measures in favour of female workers have been admitted only on a very restricted basis. A provision allowing 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 entered 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 pursuing 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 sex. 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

⁶³ *Lommers*, n. 6 supra.

⁶⁴ *Briheche*, n. 7 supra.

requirement of the equality notion hinders the progress in this area. At EU level, equality of opportunities is still considered equivalent to substantive equality. It can be argued that this assumption represents a misreading of the essence of real equality. Equal opportunities policies lead to situations where some groups are assisted 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 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.⁶⁵ From this point of view, positive action is considered a corollary of the Member States' obligation to promote real equality among their citizens, from an individual as well as from a collective perspective, by the way of removing the obstacles that hinder their full participation in political, economic and social life.

In EU law, positive action is still understood as an exception rather than a concrete substantiation of equality. This approach seems to forget that the EU has a positive duty 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 in article 3 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”. Constitutional and international standards may be relied upon to adopt measures aimed to counteract the labour market inequalities that hindrance 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”.⁶⁶ From this point of view, pro-active measures rather than a restrictively interpreted exception to the equality principle should be considered as an effective tool to achieve social peace, social justice and economic welfare for all.⁶⁷

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,

65 Fredman, S., in ‘Equality: A New Generation’, *Industrial Law Journal*, vol. 30, 2, June (2001), 155.

66 Sheppard, C., ‘Mapping Anti-Discrimination Law onto Inequality at Work: Expanding the Meaning of Equality in International Labour Law’, *International Labour Review*, vol. 152 (2012) n. 1-2, 1-19.

67 Duer, O., ‘Remedying the Past or Reshaping the Future? Justifying Race Based Affirmative Action in South Africa and the USA’, *The International Journal of Comparative Law and Industrial Relations*, Vol. 21, 1, (2005), 89-130.

France, Greece, Germany, Italy, Spain, Sweden and the UK, among others) positive action measures are used widespread and are covered by the legislation, and often by constitutional provisions.⁶⁸ On the other hand, the new EU proposed Directive clearly results from a frustration with the insufficient effects of gender equality law both at European and national levels and express the concern of the European Commission and European Parliament about the lack of quick progress in this field. Taking into account that some governments of the Member States have expressed their opposition to the approval of the proposal for a Directive on women 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 the debate on the necessity of adopting more ambitious positive action strategies and may serve as impulse for binding national measures designed to improve the gender balance in decision making positions.

68 Selanec, G. and Senden, L., 'Positive Action Measures to Ensure Full Equality in Practice between Men and Women, Including on Company Boards', 2011, Brussels, <http://ec.europa.eu/justice/gender-equality/files/gender_balance_decision_making/report_gender-balance_2012_en.pdf>

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