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Gender-based positive action in employment in Europe

A comparative analysis of legal and policy approaches in the EU and EEA

Including summaries in English, French and German

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Gender-based positive action in employment in Europe

A comparative analysis of legal and policy approaches in the EU and EEA

A special report

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The text of this report was drafted by Christopher McCrudden and coordinated by Linda Senden for the European network of legal experts in gender equality and non-discrimination.

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Abstract

This report considers the use of 'positive action' as a key mechanism to advance women's equality in employment, and to ensure gender-balanced company boards. 'Positive action' involves the use of measures that are taken by Governments or other actors to: enable or encourage members of 'protected groups' (such as women) to overcome or at least reduce current or past disadvantages (including discrimination); to meet the needs of the protected group that differ from other groups; or to enable or encourage those in the protected groups to participate in a particular activity where they might otherwise be under-represented. The report identifies the current legal and regulatory frameworks and scope of positive action in European Union law and policy, and in the 28 European Union Member States (including the United Kingdom), and the three members of the European Economic Area (comprising Iceland, Liechtenstein and Norway). The report aims to lay bare tensions and gaps that may arise in the applicable legal framework between different levels of legal authority, but in particular between EU law and national approaches to positive action. Addressing this issue involves a reflection on whether there are possible inconsistencies or shortcomings in the current EU legal treatment of positive action (including the jurisprudence of the Court of Justice of the European Union). In light of this analysis, the report makes recommendations for possible European Union action, including suggestions for actions that may be included in any forthcoming EU gender strategy.

Executive summary

The current state of affairs

Since the 1980s, the European Union has advocated the use of 'positive action' as a mechanism to advance women's equality in employment. It has sought to persuade Member States and employers that positive action (a term that is somewhat flexible, as we shall see) is a necessary part of a gender equality strategy, along with other measures, such as: prohibiting sex discrimination in several parts of the economy; enforcing the principle of equal pay for work of equal value; securing a more sustainable work-life balance; and ensuring that men and women who choose to raise children are able to continue to participate fully in the labour market. Along with measures to advance those policies, positive action remains a central element in EU policy pronouncements to this day. Positive action cannot be viewed by itself, but should be regarded as an important part of a wider strategy to address gender inequality.

The debates over the appropriate response to the disadvantaged position of women in the labour market have given rise to an important distinction – that is, the distinction between discrimination and inequality, which are both terms that have a wide range of meanings. Discrimination is considered to be one reason for inequality, but not the only reason. Discrimination and inequality are neither the same thing nor merely two sides of the same coin. Removing discrimination will assist in tackling inequality but would not in itself do so. Reducing inequality is regarded as a policy aim, in addition to tackling discrimination, for both moral and economic reasons. Gender equality in the EU is mostly pursued through non-legal measures, while anti-discrimination goals are mostly grounded in legally enforceable obligations.

These separate but overlapping policy agendas are pursued in various different ways, including through positive action, which is sometimes (wrongly) regarded as the same as 'positive discrimination'. The different ways in which positive action relates to the concepts of gender equality and non-discrimination illustrates their divergence. The EU advocates positive action as a method of pursuing gender equality and to that extent considers that the EU has an interest in employers and others buying into that policy – it is not indifferent. After all, since the various reforms of the Treaties, women's equality has become a task of the European Union. Positive action is not only a significant feature of EU gender policy statements, but the EU has also sought to reduce at least one of the possible barriers to its adoption, namely the possibility that some forms of positive action may be in breach of the prohibition of discrimination in EU law. Thus, hand in hand with the advocacy of positive action, in the gender equality directives, a limited exception in EU anti-discrimination law for positive action measures has been created. This exception fits squarely into the subsidiarity/self-regulation approach: the exception makes the adoption of positive action possible, although it does not require its adoption. In general, positive action is mostly advanced by the EU through a combination of subsidiarity (as between the EU and the Member States) and voluntarism (as between the states and employers).

Whether a Member State in fact buys into positive action, and to what extent, is in the hands of the Member States themselves (subsidiarity). Most Member States adopt a policy of self-regulation in this area (voluntarism), meaning that organisations set their own standards, deciding what, if any, level and type of equality is being pursued. What positive action standards they adopt are either so low that they do not merit monitoring, or, if more ambitious standards are set, employers monitor their own adherence to these standards, rather than them being monitored and enforced by an outside, independent agency, such as a governmental body. The combination of both subsidiarity and voluntarism has resulted in a situation where both Member States and industry in practice set their own standards, and monitor their own adherence to these standards, without significant intervention by the EU. There exists no outside,

independent body at the EU level (and very few at the national level) that seeks to set or enforce positive action in employment.

One of the potential advantages of subsidiarity and self-regulation is that Member States and employers have the opportunity to experiment, exploring different ways in which to deliver this policy, rather than having to adopt a 'one-size-fits-all' approach, which may stifle innovation, and reduce the opportunities of learning across borders and across industry. The costs of compliance for both industry and the public purse are likely to be reduced, and compliance with a potentially controversial policy may be eased if it is not seen to be coerced. The overwhelming preponderance of EU Member States have implemented EU anti-discrimination law in such a way as to reflect in national law the approach adopted to positive action in the directives: positive action by employers is permissible within limits, but voluntary. The effect has been that while there are examples of positive action being adopted by employers, this is the exception rather than the norm.

A depressingly familiar picture of the state of gender-based positive action in employment emerges from the research conducted for this project. In the states of the EU and the EEA: the concept of 'positive action' is not well understood; what constitutes positive action varies considerably between states; there is almost no monitoring of the effectiveness of positive action measures that have been adopted, let alone enforcement of these standards; the influence of the EU in securing understanding and development of positive action at the national level is widely seen as weak – it is often either misinterpreted or ignored; there is considerable divergence as to what positive action is for; there is little learning between states as to what works and what does not; and the use of different terminology in the Member States is a cause of considerable terminological confusion, but also betrays underlying conceptual confusion. When positive action occurs, it is sporadic, time-limited, and of uncertain effectiveness.

This is not to say that all Member States have failed to adopt positive action programmes. There are several examples that are significant. However, in each of these cases the reasons why such programmes have been adopted seems to have little relationship to the advocacy of positive action by the EU. Instead, local reasons tend to predominate, in some cases supplemented by the influence of the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW). Even in those cases in which Government action has been taken either to strongly encourage the uptake of positive action, or to make it mandatory, there is little attempt to monitor the extent to which it has been adopted by employers, and even less attempt to test which types of measures are effective and under what conditions.

The full extent of this regulatory divergence, both between states and within states, is unknown but problematic, not only because a potentially effective tool to promote gender equality remains under exploited, but also because it may deter states and employers from embarking on a more systematic use of positive action measures, even when they consider it to be in the interests of the state or the company to do so, because the costs of doing so will often be unknown. Uncertainty breeds risk aversion. One potential risk is that a state or company will end up losing out to another less responsible state or corporation. This regulatory divergence does not square well with the original economic rationale of Article 119 EEC, the equal pay provision.

Unfortunately, none of this will come as any surprise to those who have followed the regular analysis of positive action trends in Europe since the late 1970s, when the European Commission began to monitor its uptake by Member States, not least the analysis that this Network has been commissioned to produce. Report after report, assessment after assessment, and study after study have concluded something very similar, time after time. The labour market progress of women is perhaps the most profound change in the European labour market of the last 50 years, yet the need for extensive measures to address and rectify widespread inequality between men and women in the labour market remains undimmed. This report suggests that, as regards securing positive action, the combination of deference to the Member States, and self-regulation by industry, should now be rethought.

This report suggests that more can be done to further clarify the idea of positive action itself, and proposes some additional tools for understanding the concept, in part by providing examples of positive action measures in different fields, and by drawing on the relevant scholarly and policy literature. However, this report will also attempt a rather more ambitious approach: rather than just reiterating the same pattern of findings and urging greater attention be given to the same EU policy agenda, it seeks to move beyond this dismal narrative. Bluntly, it is pointless only to highlight once again the deficiencies of the delivery of positive action at national level, without addressing what can be done about it.

The wrong strategy?

The reasons for the limited exploitation of the freedom provided by the EU to engage in positive action initiatives differs from state to state. In some cases, Governments pander to populist resistance. In others, positive action is conceived of in highly negative terms. In others, it is poorly understood. The overall result is that there is little positive action in practice. To the extent that EU institutions have sought to bring to bear their influence to change the domestic pressures against positive action, they have largely failed. The reason why the unsettling picture sketched out above recurs consistently over time is because the EU has continued to follow a strategy that is no longer fit for purpose. If a different strategy is not forthcoming, subsequent reports will make similar findings of lack of progress. The suggestion that the EU's positive action strategy has failed is nothing new; it is a familiar trope in the extensive academic and policy literature that has also emerged since the 1970s. But its very familiarity should not disguise the importance of the conclusion reached: it is important to put the current strategy radically into question. We have to fully realise that it does not work before taking the next step. The fact that 60 years after the Treaty of Rome we still have significant problems of gender inequality in the European labour market is clear evidence that the EU needs to rethink its approach.

Identifying why the strategy does not work is more problematic, but since a radical shift in policies is recommended, it is necessary to provide – at least briefly – an overview of these deficiencies. There are several dimensions to the current policy that appear to have contributed to its failure. The 10 most problematic elements in the current strategy may be identified as follows.

First, EU *anti-discrimination* law has been largely successful in embedding itself in European law and in the national law of many Member States. As a result, direct discrimination appears to have been reduced, with the notable exception of pregnancy discrimination. Whilst its relative success in this regard is something to be welcomed, it has had certain unintended effects. In particular, it has had the effect of substantially confining EU legal obligations on the Member States to the prohibition of discrimination. The emphasis on discrimination feeds a narrative that emphasises individual decision-making, securing justice for the individual, and penalising the individual perpetrator, rather than securing justice between groups and tackling systematic inequality in the market. Group justice tends to be downplayed, in pursuit of individual justice, and the extent to which the individual's welfare is often determined by that person's membership in the group is ignored.

Second, flowing from the dominance of the anti-discrimination approach, a significant barrier to the adoption of positive action is the primary emphasis of the EU on *process*, rather than *results*. An anti-discrimination-based strategy was always in danger of becoming focused only on *how* decisions are taken in the labour market rather than on what the *results* of those decisions are, and this danger has become a reality.

Third, this emphasis on process has become particularly accentuated in part because of the relative lack of emphasis in anti-discrimination policy on tackling *indirect discrimination*, which tends to focus more than direct discrimination on the effects of the contested measure on the protected group. Had a more effective approach been taken to enforcing EU law's prohibition of indirect discrimination in pay and in access to employment, for example, then there would have been more likelihood of employers

adopting positive action in order to avoid a finding of indirect discrimination. However, here too, either an individual-rights approach was adopted, or voluntary measures were relied on. Perhaps the CJEU could also have done more to make more explicit the link between avoiding indirect discrimination and taking positive action, but the Member States bear the principal responsibility in their role as treaty drafters and EU legislators. The emphasis in EU anti-discrimination law on cleansing the process of decision-making from (mostly direct) discrimination has also been based on a presumption that if the process is cleansed, then real equality will follow, even though there is now overwhelming evidence that this is not necessarily the case and, indeed, is contradicted by the EU's own policy stance.

Fourth, even if it were correct that reducing discrimination would be enough in itself to ensure equality (which it is not), that would be the case only if these norms were effectively enforced, and often they are not. The limits of European anti-discrimination law practice are now clear as regards the *enforcement of anti-discrimination norms*. As highlighted repeatedly in many reports of the Network over the past decades, an individual rights-based approach that relies on individuals going to court to enforce their rights does not lead to significant societal change, not least because of the numerous hurdles that women face in taking cases to court. So, the rate of litigation on gender equality remains generally low. This is becoming more recognised by the EU institutions, but that very realisation also creates unintended consequences: EU gender equality strategy becomes dominated by attempts to ensure the increased effectiveness of the anti-discrimination principle, leading to an emphasis on reform of the individualised enforcement model, which is based on making victim-driven, complaint-based litigation more effective.

Fifth, given the dominance of the anti-discrimination model, it is also not surprising that positive action is seen by the Member States largely through the anti-discrimination lens. We have seen that positive action comes to be viewed simply as *an exception to the anti-discrimination principle*. This approach derives from the conceptualisation of positive action in the history of Directive 76/207 and the case law of the CJEU on positive action. However, there is a perception in some states that the EU law itself significantly limits legitimate positive action measures. This is sometimes viewed as a failure by the Court to recognize the necessity of positive action measures, but whether the responsibility is the Court's or the Council's is a moot point. It can be argued that the Court has mostly faithfully executed the mandate it has been given by the other European institutions, and that any problems with the positive action regime lie not in the Court, but in the legal regime of gender equality within which the Court operates.

Sixth, where the EU does see the need to go beyond the anti-discrimination principle, it is substantially restricted to the adoption of a highly voluntarist approach to positive action, led by the Member States. The ineffectiveness of that approach is consistently demonstrated in these pages. There are three independent problems, each of which is separately problematic, but taken together amount to a significantly flawed strategy. The approach encourages self-regulation by economic actors, *voluntarism*, rather than state enforcement. The EU constrains some state regulation, as we have seen, but that does not appear to be the most significant factor; the most significant factor is that much of EU rhetoric on positive action emphasises positive action as a matter of corporate social responsibility, rather than as one of corporate social *obligation* – it is seen as a matter of corporate choice, rather than one of corporate duty. EU actors are effectively reduced to accepting a mode of 'regulation', if indeed it can be called that, which relies on persuasion to introduce more effective mechanisms of incentives. Furthermore, such attempts at persuasion are apparently unsuccessful where the state considers that the general approach should be not to interfere by putting strict obligations on companies, but rather to let gender equality evolve without interference.

Seventh, as well as relying substantially on voluntarism, the EU (acting under the constraints of the Member States), considers that positive action is an issue that is better left to the Member States, and has become a matter of *subsidiarity*, which results in the triumph of national political constraints on the adoption of positive action, or positive action being ignored. In the current political situation, progressive developments are more likely to occur if there is an appropriate degree of compulsion, preferably resulting from legislative measures at the EU level.

Eighth, when subsidiarity and voluntarism are combined, various additional problems arise, in particular the vagueness that surrounds the idea of positive action, and the *absence of specific guidance* as to what effective positive action measures would consist of. There is a significant lack of conceptual understanding and acceptance of positive action as a tool for establishing gender equality. The EU framework on positive action also appears 'blurred', and it would be desirable to have more precise criteria and definition of what positive action means. Current EU law on positive action is seen as difficult to interpret, in particular since not only the treaty provisions, but also the directives dealing with gender equality in employment are quite general.

Ninth, there is a significant degree of uncertainty as to the ultimate goals that positive action is supposed to contribute to achieving. As we shall see in the next chapter, the Member States, EEA states, and the European Union have identified a considerable array of different end goals. Different countries have very different stories of why positive action has developed, with very different implications for the subsequent development of positive action in that jurisdiction. Is the primary aim of positive action to remove discrimination from the labour market? If the aim is the broader aim of securing greater equality for women, what type of equality is the EU pursuing? Is the basic aim to increase the area of individual freedom of choice, to achieve a more efficient labour market, to secure human dignity, to bring about increased social cohesion, to engage in the redistribution of resources for reasons of fairness, or is it all of these? It is not surprising that with this plethora of potential goals, states are so significantly at odds with each other as to how to approach positive action as a matter of practical policy making. Any assessment of effectiveness is made more difficult (if not impossible) if the goal is not clear.

Tenth, a highly selective approach is taken to the integration of international human rights thinking into EU gender equality policy, in particular the alternative approach to women's equality based on CEDAW is substantially sidelined. The CEDAW approach challenges the dominant mode of regulation adopted in EU law, emphasising instead an approach that sees positive action as central to tackling inequality and discrimination rather than an exception, views positive action predominantly asymmetrically, and consistently emphasises group justice. This is not to say that relying on CEDAW would be an adequate alternative to EU law for *enforcement* purposes (CEDAW remains significantly under-enforced), only that the standard that CEDAW adopts is significantly broader than current EU law.

Towards a European model of positive action for gender equality

The EU has often sought, rightly, to define itself in terms of its values. One of those values is the value of equality between men and women – equality not just in theory, not just as a rhetorical flourish, but as a lived reality. The failure to live up to these values contributes to cynicism about the European project. If half the population of Europe feels effectively cut adrift from the benefits of European integration, that is not simply unjust, but is dangerous. Living up to its values is not only a matter of internal policy concern, important though that is, but is also a matter of what face is presented to the rest of the world. It is a consistent theme in commentaries on the European approach to positive action that its Member States fall short of the international standards contained in CEDAW. The regular criticism of EU Member States by the CEDAW Committee for their failure to use the positive action tools available to produce real change should now be seen as a real cause for concern for the European Union, calling for concerted EU action. In a world where the EU is a voice of sanity in supporting the rules-based international system, this shortfall in one of the most basic requirements of a civilized society is troubling, but it can be addressed. This report attempts to set out a revised EU strategy, which is based on actions already underway in Member States, and thus constitutes a truly European model of positive action.

1) Clarify the objectives positive action is intended to achieve.

In practice most jurisdictions tend to use a combination of justifications, and sometimes these may differ over time, with one justification becoming fashionable but then being replaced by another. Given this pluralism of aims in space and time, EU policy has primarily involved seeking as much of an overlapping

consensus as possible among these different positions, resulting in somewhat vaguely articulated policy aims. The overlapping consensus would appear to be that the EU's aim should be to eradicate discrimination, but also to go beyond that and attempt to seek greater equality in the labour market. In practice, this has meant reducing gender segregation, lessening pay differentials, addressing work-life balance issues, and increasing the proportion of women in positions of power and responsibility in the public and private sectors. These are not ends in themselves, but means by which three principal goals can be better achieved: (i) women will have access to increased material resources, helping to secure their independence and autonomy, and thus their dignity as human persons; (ii) women will have access to work opportunities which are themselves part of a flourishing life of living as an individual and consequently provide more than simply material benefits to that individual; and (iii) greater equality for women will lead to increased economic and other benefits for all, including men, such as greater productivity, efficiency and growth. This pluralism of aims has important implications for positive action. EU policy should in future reflect how positive action might be appropriate in advancing this range of possible legitimate aims. The appropriate role of gender-based positive action in employment in the future should be primarily to address 'underrepresentation', not as an end in itself but as a means by which full equality in practice may be achieved. It would thus be formally symmetrical, although in practice it would primarily address the underrepresentation of women. This would not be the only function of positive action, but it would become the main function, with important implications for issues of equal pay, given the extent to which unequal pay is often related to job segregation. Whether a similar approach to positive action should be adopted in areas other than gender, for example in the context of ethnic inequality or disability, is an important question, but not one that this report considers.

2) Introduce positive obligations.

Central to this alternative strategy is the suggestion that legal regulation has an important role to play vis-à-vis positive action. A positive duty to promote gender equality should become a legal obligation – if it has not become one already – both on Member States and on employers. Positive action would be one means to give substance to this positive duty. There would be a switch from negative to positive obligations, an emphasis on what companies must do (promote equality) rather than simply what they must not do (prevent discrimination). This regulatory approach views the prohibition of discrimination as one element in what it means to have a coherent gender equality strategy, but only as one element. The existing anti-discrimination *acquis* would remain largely intact, but equal treatment would come to embrace more than just a rhetorical commitment to equality, and would incorporate a positive obligation to seek greater equality in practice.

3) Be specific.

Were such a positive obligation to be developed in the private sector as well as the public sector, what method of regulation is best adopted to secure compliance with this positive duty? Key to this would be a much greater specificity of what results are required, particularly at the level of individual public and private bodies, including employers. Therefore, in addition to a positive obligation, a second element should be introduced – a much clearer end-point must be identified for specific companies, most often as a statistical target that needs to be achieved. The scope of what the positive obligation requires is thus articulated in some detail, but an initial starting point is often the requirement to reduce 'underrepresentation', as a means by which full equality in practice may be furthered, although the aim of positive action, as laid down in Article 157(4) TFEU is much broader than reducing underrepresentation. An obligation of result would replace the process-led approach of the previous strategy. Coupled with this, a much more precise timeframe should be identified by which that firm-level numerical target is to be achieved, based on what appears to be achievable by the good-faith efforts of the company.

4) Use the full range of positive action measures available.

There is a considerable range in the different positive action measures that states have experimented in using. However, few, if any, states appear to engage with all of these, and reports from national experts indicate a significant degree of unfamiliarity with many of them. There is an opportunity to bring these

different measures to the attention of states, and a new positive action strategy would set out a full menu of measures available, with the advantages and potential disadvantages of each one.

5) Clarify the relationship between merit and gender preferences.

Whilst use of the broad range of possible measures should be encouraged therefore, a modest degree of preferential treatment should be required of employers who are unable to achieve the goals set in other ways, but with the constraint that such preferences should be symmetrical (redressing the underrepresentation of men as well as women), and respect the merit principle at least to the extent of allowing preferences only between candidates who are broadly equivalently qualified.

6) Encourage reflexivity by giving employers a degree of flexibility as to how best to achieve the goals.

The role of regulation should be to require employers and other economic actors to reflect on how best to achieve the result specified ('reduce underrepresentation'). It is a regulatory approach that views 'reflexivity' as a critical element in introducing change. There would be a default standard that employers will be required to meet, but a degree of flexibility in how to meet it. The proposal allows for flexibility in the sense that, if states are able to demonstrate an equally effective approach, its requirements would not apply. The type of positive action that employers would adopt would be determined by such reflexivity, and would not be confined by any arbitrary limits. The benefits that should derive from this approach are that it encourages each organisation to engage in its own assessment of the problem, but to deliberate with others in reconsidering whether this is adequate and how far its assessment needs to be reconstructed in light of that deliberation. In so doing, the organisation is encouraged to 'own' the solutions that it devises. The approach encourages mutual learning within and between organisations and encourages each organisation to deliberate on the solutions that are best for it and thus accepts that pluralistic solutions are desirable. Furthermore, it encourages the involvement of different stakeholders to agree to the definition of the problem and the best method of solving it in ways that stimulate consensus, and thus increases social harmony. But the critical point is this: it should be more successful in bringing about the regulatory goals than other competing systems of regulation. A reflexive approach is consistent with arguing against an undue emphasis on subsidiarity and voluntarism, since a reflexive approach is designed to operate by reference to central structuring regulatory norms.

7) Target selected employers only.

There is a significant difference between states in how comprehensive regulatory requirements have been established, in particular as to which companies are subject to this regulation. There appear to be at least five considerations that should be taken into account in deciding which employers to include in any positive action regulation: first, the importance of the firm in terms of the number of employees affected, because the larger the firm in terms of the number of employees, the greater the impact if that firm changes its composition and reduces the underrepresentation of women; secondly, the ability of the firm to internalise the regulatory requirements, with the larger the firm in terms of annual turnover, the more likely it will be able to comply effectively, for example by having a well-resourced human resources department; thirdly, the extent to which the firm is a market-leader, that is, how far change in the firm will be likely to lead to emulation by other firms in that firm's market (the likelihood that the change in the (regulated) firm leads to change in other (non-regulated) firms); fourthly, the fair sharing of burdens among employers – special duties create special burdens and offer an advantage to competitors that are not subject to these special burdens, and so the more inclusive the coverage of employers, the better it is from the perspective of achieving a fair balance of burdens; and fifthly, a large majority of workers in the EU are employed by SMEs – if the goal is to tackle underrepresentation, any policy that is limited only to large firms will struggle to address sectorial segregation, therefore limiting action to large firms risks not achieving the goal of tackling underrepresentation.

8) Require the development of the appropriate regulatory institutions and practices.
Reflexivity is a key component of the proposed strategy, but it should not be confused with traditional self-regulation, in that a moderate degree of compulsion will be involved, not only in establishing a positive equality obligation and in requiring the establishment of enforceable goals and timetables, but also in specifying two further elements. Whilst flexibility is encouraged, and firms would be required to identify for themselves what goals are appropriate and how they envisage that the targets will be achieved, it would be important to specify the regulatory structure within which these decisions need to be situated. Usually this should be in the form of a published equality plan, but these plans would need to be subject to review by an independent monitoring body, which would have the power to require the firm to revise these if the methodology adopted by the firm in assessing underrepresentation, and the potential for redressing this over time, was not adequate. There would also be a need to introduce not only *ex-ante* monitoring, but also *ex-post* monitoring. Significant transparency would be required from the firm as to its progress in meeting the goals set, by imposing reporting requirements and governmental mechanisms that are adequately equipped to monitor progress on the basis of this reporting. A set of incentives and sanctions should be put in place to ensure each employer's compliance, whether in the form of awards recognising firms' achievements beyond what was required, or penalties where the goals have not been met.

9) Revisit subsidiarity.
The hitherto accepted view within the EU Council appears to have been that the pursuit of women's equality (other than the eradication of discrimination, and very broad standard setting) is best handled at the national level. This should be replaced with a view that women's equality is too important to be left primarily to the Member States, that the 'experiment' of doing so has produced a plethora of information but patchy results, and that it is now past time for the Member States to approve a coordinated approach at the EU level. Women's equality is not only important in human rights terms, and as a matter of justice, but also in economic terms: individual bodies risk losing out economically if they do not adopt positive action to increase the diversity of their workforce. There is also a significant economic reason for more systematic action being taken at the European level to increase the take-up of positive action. The considerable gap that currently exists between Member States in their approaches to gender equality and positive action now threatens to grow into significant regulatory divergence, threatening the coherence of the Single Market. The roots of the original equal pay provision in the Treaty of Rome (Article 119 EEC) lay in the concern of those Member States that had already introduced equal pay for women not to be undercut by those states that had not, and thus it was agreed that the EU (or the EEC, as it was then) should act to prevent a race to the bottom by requiring all Member States to accept this policy. The full extent of regulatory divergence on positive action, both between states and within states, is problematic not only because a potentially effective tool to promote gender equality remains under exploited, but also because it may deter states and employers from embarking on the more systematic use of positive action measures even when they consider it to be in the interests of the state or the company to do so, because the costs of doing so will often be unknown. Uncertainty breeds risk aversion. One potential risk is that a state or a company will end up losing out to another less responsible state or corporation.

10) Take action within the existing acquis.
It is clear that there is considerable reluctance at the level of the Member States to cede more power or responsibilities to the EU institutions in the social field more generally (the proposal on company boards and the discussions on the recent agreement on the work-life balance directive are still unresolved), and so any strategy developed by the EU institutions must take this resistance into account. There are, however, actions that the Commission may take, short of proposing a new directive, which would be legally binding. An interpretative *Communication* could describe and consolidate the existing legal framework on positive action, taking account of CJEU case law. A *Recommendation* could set forth the Commission's detailed strategy for gender equality, incorporating positive action. This would not be legally binding but would be addressed to the Member States to guide their legislative and policy agendas. If the Commission decides that it will not propose a new directive, it is suggested that it

consider a recommendation that would specify a detailed approach to positive action that should be adopted at the national level. This would comprise the eight elements identified above: (1) the goals that positive action seeks to achieve; (2) the need for positive obligations; (3) the role of numerical targets and timetables; (4) the full range of positive action measures available; (5) the inter-relationship of the merit principle and gender preferences; (6) the importance of reflexivity by employers in terms of how to meet targets; (7) the appropriate scoping criteria for identifying which firms should be covered by regulatory requirements; (8) the regulatory context of these requirements, including the use of equality plans, the need for monitoring, and enforcement by an independent national authority.

11) Encourage buy-in to the new policy by the CJEU.

We have seen that, both for the purposes of fairness and for purposes of securing the political legitimacy of positive action involving preferences, there should be limits to what should be permissible positive action. In this context, it is important for the Commission to be open about the trade-offs that adopting a policy that incorporates a greater role for preferences would bring. The right strategy to win legitimacy for positive action is not to deny these trade-offs, but to show that the interest in equality outweighs legitimate concerns. These concerns include the potential impact on particular groups of men (and not necessarily those who are currently most advantaged), and the limits that would be introduced on the freedom of private employers to organise and run their businesses. Positive action involves a modest degree of redistribution and regulation, which need to be justified and appropriately limited. Experience teaches that positive action is a potential Pandora's Box, in that it allows volatile politicians to introduce measures that are intentionally or unintentionally contrary to women's equality under the guise of positive action, and therefore such constraints are particularly necessary because positive action can be used to disadvantage women themselves. The constraints that the CJEU currently adopts are, broadly, those that should be endorsed by any new policy. In the main, despite the criticism of the Court, its general approach is worthy of support, based as it is on a broadly proportionality-based assessment. Nevertheless, further clarification by the Court would be useful. Ideally, it should make it clear that, in the context of the EU's own broadly Aristotelian understanding of equality, positive action is one aspect of equality, rather than an exception to it. The Court could usefully revisit what constitutes justifiable objectives that positive action can legitimately pursue, and make it clear that there is a range of legitimate objectives. The CJEU should be pressed to clarify further when positive action slides into stereotyping, as opposed to simply recognising the reality of women's lived experience. There is a distinct need for greater clarity concerning what the CJEU means by 'qualifications' in this context, and how strict the need is for the qualifications to be 'equal', in order for positive action to be lawful. Similarly, the Court could be asked to clarify, in a suitable case, how far a symmetrical approach to positive action is, in fact, the only approach that the Court will permit, or whether an asymmetrical approach is sometimes permitted. The Commission has an important role in this context in drawing the attention of the Court to the realities of the situation on the ground, and urging clarification. More generally, it is suggested that when the Commission intervenes in cases, it should be anxious to adopt positions that would be more likely than not to further the type of positive action strategy recommended earlier. In short, the Commission may wish to consider a more strategic use of litigation opportunities to advance positive action, even in the absence of a new directive.

12) Propose a new directive.

Bluntly, it is pointless only to highlight once again the deficiencies of the delivery of positive action at national level, without addressing what can be done about it. EU strategies attempting to bring to bear influence have not been successful in changing the domestic pressures against positive action. Binding legal norms are necessary. The experience of Recommendation 84/635 shows that a non-binding recommendation may not be successful. A new directive should turn the elements of the suggested recommendation into EU legal obligations on Member States and (some) employers: (1) the goals that positive action seeks to achieve; (2) the need for positive obligations; (3) the role of numerical targets and timetables; (4) the full range of positive action measures available; (5) the interrelationship of the merit principle and gender preferences; (6) the importance of reflexivity by employers in how to meet targets; (7) the appropriate scoping criteria for identifying which firms should be covered by regulatory

requirements; and (8) the regulatory context of these requirements, including the use of equality plans, the need for monitoring, and enforcement by an independent national authority. A new directive should also address issues that are still to be addressed by the Court under the existing *acquis*. It is suggested above, for example, that preferences might be permitted where two candidates (one male, one female) are 'broadly equivalently qualified', but there is little guidance available from the Member States so far as to what exactly this means in practice. A new directive would have the important role of clarifying how to deal with the issue of equal qualifications, perhaps by adopting an approach closer to 'substantially' equal qualifications, as well as addressing more fully the difficult issues of adverse impacts on third-parties and gender stereotyping in the context of positive action.

Résumé

La situation actuelle

Depuis les années 1980 au moins, l'Union européenne préconise le recours à «l'action positive» en tant que moyen de faire progresser l'égalité des femmes dans le domaine de l'emploi. Elle s'est attachée à convaincre les États membres et les employeurs que l'action positive (un terme assez flexible, comme nous le verrons plus loin) doit faire partie intégrante de toute stratégie en faveur de l'égalité hommes-femmes au même titre que d'autres mesures telles que l'interdiction de discrimination fondée sur le sexe dans plusieurs secteurs de l'économie, la mise en application de l'égalité de rémunération pour un travail de même valeur, la recherche d'un équilibre durable entre vie professionnelle et vie privée et la garantie pour les hommes et les femmes qui choisissent d'élever des enfants de pouvoir participer pleinement au marché du travail. Parallèlement aux mesures destinées à promouvoir ces autres politiques, l'action positive demeure à ce jour un élément central des prises de position de l'UE: elle ne peut être envisagée de façon isolée mais doit constituer un axe majeur d'une stratégie plus vaste visant à lutter contre les inégalités entre les femmes et les hommes.

Les débats font apparaître une distinction importante quant à la réponse adéquate à fournir face à la situation défavorisée des femmes sur le marché du travail: il s'agit de la distinction majeure entre discrimination et inégalité, deux termes qui peuvent avoir de multiples sens. La discrimination est considérée comme une cause d'inégalité, mais non comme sa cause unique. La discrimination et l'inégalité ne sont pas envisagées comme une même réalité; elles ne sont pas les deux faces d'une même pièce. L'élimination de la discrimination contribuera à lutter contre l'inégalité mais ne pourra y parvenir à elle seule. La réduction des inégalités est considérée comme un objectif stratégique, tout comme la lutte contre la discrimination, pour des raisons à la fois morales et économiques. L'objectif d'une égalité hommes-femmes au sein de l'UE est principalement poursuivi au moyen de mesures non juridiques; l'objectif d'une non-discrimination se fonde principalement pour sa part sur des obligations juridiquement contraignantes.

Ces programmes d'action, qui sont distincts mais se recoupent, sont menés selon des modalités diverses au nombre desquelles figure l'action positive – parfois considérée (à tort) comme étant simplement synonyme de «discrimination positive». La manière dont l'action positive est mise en corrélation avec l'égalité hommes-femmes et avec la non-discrimination illustre bien la divergence entre ces deux concepts. L'UE prône l'action positive en tant que moyen de parvenir à l'égalité entre les sexes et estime dès lors avoir intérêt à ce que les employeurs et d'autres parties prenantes adhèrent à cette politique; elle n'y est donc pas indifférente. Après tout, les réformes successives des traités ont fait de l'égalité des femmes une mission de l'Union. L'action positive n'est pas seulement un élément important des déclarations de l'UE en matière de politique d'égalité entre hommes et femmes: l'Union a également cherché à lever un obstacle au moins à son adoption, à savoir le risque de voir certaines formes d'action positive enfreindre l'interdiction de discrimination consacrée par le droit de l'UE. C'est ainsi que l'on a assisté avec les directives sur l'égalité hommes-femmes, conjointement à la préconisation de l'action positive, à la création en droit antidiscrimination européen d'une exception limitée concernant les mesures d'action positive. Cette exception s'inscrit parfaitement dans l'approche subsidiarité/autorégulation: elle rend l'adoption d'actions positives possible, mais ne l'exige pas. L'action positive est, de façon générale, principalement encouragée par l'UE au moyen d'une combinaison de subsidiarité (entre l'Union et les États) et de volontarisme (entre les États et les employeurs).

Il appartient à chaque État membre de décider s'il doit effectivement adhérer à l'action positive et dans quelle mesure (subsidiarité). Et l'option la plus fréquente est une politique d'autorégulation dans ce

domaine (volontarisme): autrement dit, les organisations fixent leurs propres normes et décident partant, le cas échéant, du niveau et du type d'égalité recherchés. Soit les normes ainsi adoptées sont tellement peu contraignantes qu'elles ne méritent pas de contrôle, soit, lorsqu'elles sont plus ambitieuses, elles font l'objet d'un autocontrôle par les employeurs plutôt que d'une surveillance et d'une mise en application par un organisme externe indépendant (organisme public ou autre). La combinaison de la subsidiarité et de l'autorégulation a conduit à une situation dans laquelle, en pratique, tant les États membres que l'industrie établissent leurs propres normes et s'assurent qu'elles sont respectées, sans intervention significative de la part de l'UE. Il n'existe pas à l'échelon de l'Union (et rarement au niveau national) d'organisme externe indépendant s'efforçant de fixer ou de faire appliquer des mesures d'action positive dans le domaine de l'emploi.

L'un des avantages de la subsidiarité et de l'autorégulation est d'offrir aux États membres et aux employeurs la possibilité d'explorer et d'expérimenter différents moyens de concrétiser cette politique, au lieu de leur imposer l'adoption d'une approche universelle qui risque de compromettre l'innovation et de réduire les opportunités d'apprentissage transfrontalières et intersectorielles. Les frais de mise en conformité en sont probablement réduits tant pour l'industrie que pour les deniers publics, et le respect d'une politique potentiellement controversée peut être plus aisément obtenu s'il n'est pas perçu comme une obligation. L'écrasante majorité des États membres de l'Union européenne ont mis en œuvre son droit antidiscrimination de manière à refléter en droit national l'approche des directives en matière d'action positive, à savoir que celle-ci est permise de la part d'employeurs dans les limites prescrites, mais qu'elle est volontaire. Il en résulte que s'il existe des exemples de mesures d'action positive adoptées par des employeurs, elles sont l'exception plutôt que la norme.

Les travaux de recherche effectués dans le cadre du présent projet dressent un état des lieux tristement familier pour ce qui concerne l'action positive dans le domaine de l'emploi. Le concept même d'action positive reste mal compris dans les États membres de l'UE et de l'EEE; ce qui constitue une action positive varie considérablement d'un pays à l'autre; pratiquement aucun contrôle de l'efficacité de ce type de mesures, et a fortiori de leur application, n'a été mis en place; l'influence de l'UE en vue de faire comprendre et de promouvoir l'action positive au niveau national est généralement perçue comme faible; elle est souvent mal interprétée ou ignorée; on note de fortes divergences quant à l'objectif de l'action positive; l'apprentissage entre États quant à ce qui fonctionne et ce qui ne fonctionne pas reste très limité; l'utilisation de terminologies différentes selon les États membres crée une grande confusion au niveau du vocabulaire, mais traduit également une confusion sous-jacente au niveau du concept. Lorsqu'une action positive est instaurée, elle est sporadique, limitée dans le temps et incertaine en termes d'efficacité.

Il ne faudrait pas conclure pour autant qu'aucun État membre n'a adopté de programme d'action positive. Il existe plusieurs exemples majeurs de démarches dans ce sens mais force est de constater que, dans chaque cas, les motifs qui sous-tendent l'adoption des mesures en question semblent n'avoir qu'un rapport lointain avec la promotion de l'action positive par l'UE. Les raisons locales prédominent systématiquement, étayées dans certains cas par l'influence de la Convention sur l'élimination de toutes les formes de discrimination à l'égard des femmes (CEDEF). Même lorsqu'une action gouvernementale a été décidée pour inciter fortement à leur adoption, ou lorsque celle-ci est rendue obligatoire, peu d'efforts sont déployés pour contrôler à quel point les employeurs adhèrent à ces mesures, et moins encore pour tester quels types de mesures sont les plus efficaces et dans quelles conditions.

L'ampleur exacte de cette divergence réglementaire, tant entre les États qu'à l'intérieur de leurs propres frontières, n'est pas connue – mais elle pose problème non seulement parce qu'un outil potentiellement efficace de promotion de l'égalité entre les hommes et les femmes demeure sous-exploité, mais également parce qu'elle risque de dissuader des États et des employeurs de recourir plus systématiquement à des mesures d'action positive, même s'ils estiment que la démarche serait de leur propre intérêt, car ils n'en maîtrisent généralement pas le coût. L'incertitude alimente l'aversion au risque – et l'un des risques potentiels est qu'un pays ou une entreprise soit déforcé(e) face à un autre pays ou une autre entreprise

moins responsable. Cette divergence réglementaire cadre mal avec la logique économique initiale de l'article 119 du traité CEE, disposition qui consacre l'égalité de rémunération.

Ce qui précède ne surprendra guère, hélas, ceux qui ont suivi l'analyse régulière de l'évolution de l'action positive en Europe depuis la fin des années 1970 lorsque la Commission européenne a commencé d'en surveiller l'adoption par les États membres, en commanditant notamment une étude à ce sujet à notre Réseau. Rapport après rapport, évaluation après évaluation, étude après étude ont abouti à chaque fois à une conclusion très similaire: si la progression des femmes sur le marché du travail marque sans doute la transformation la plus profonde de celui-ci en Europe au cours des cinquante dernières années, la nécessité d'adopter des mesures exhaustives visant à pallier et à corriger l'inégalité entre hommes et femmes qui y est largement répandue reste tout aussi impérative. Le présent rapport suggère que le moment est venu, pour concrétiser l'action positive, de repenser la combinaison entre respect dû aux États membres et autorégulation de la part de l'industrie.

Le rapport ci-après laisse évidemment entendre que des efforts supplémentaires pourraient contribuer à clarifier la notion même d'action positive, et propose quelques outils complémentaires pour mieux comprendre ce concept en décrivant notamment des exemples de mesures adoptées dans différents domaines et en s'inspirant de la littérature érudite et stratégique pertinente; mais son approche se veut plus ambitieuse car il ne se contente pas de réitérer les mêmes conclusions et de réclamer instamment davantage d'attention vis-à-vis d'un même agenda de politique européenne: il s'efforce de dépasser ce triste bilan. En clair, mettre une nouvelle fois en évidence les carences de la mise en œuvre de l'action positive au niveau national ne sert à rien si l'on aborde pas la question de savoir comment y remédier.

Une erreur de stratégie?

Les raisons qui sous-tendent cette exploitation limitée de la liberté offerte par l'UE de prendre des initiatives en matière d'action positive varient d'un pays à l'autre. Dans certains cas, les gouvernements plient devant la réticence populiste. Dans d'autres, l'action positive est perçue en termes extrêmement négatifs. Ailleurs encore, elle est mal comprise. Le bilan global est une action positive très peu développée sur le terrain. Mais pour autant qu'elles ont tenté d'user de leur influence pour faire évoluer les pressions nationales à l'encontre de l'action positive, les institutions de l'UE ont largement échoué. Et la raison pour laquelle l'inquiétant constat décrit plus haut se répète inlassablement au fil du temps est la persistance de l'UE à suivre une stratégie qui ne répond plus à l'objectif; si une stratégie différente n'est pas adoptée sous peu, les prochains rapports concluront eux aussi à une absence d'avancées. L'idée que la stratégie de l'UE en matière d'action positive a échoué est loin d'être neuve: ce trope est présent dans les multiples ouvrages universitaires et stratégiques parus également depuis la fin des années 1970. Ceci étant dit, ce n'est pas parce que ce trope est aussi familier qu'il doit occulter l'importance de la conclusion, à savoir la nécessité impérative de mettre radicalement en question la stratégie actuelle. Il nous faut prendre pleinement conscience de son non-fonctionnement avant de passer à l'étape suivante. Le constat selon lequel, soixante ans après la signature du traité de Rome, nous restons confrontés à des problèmes majeurs en termes d'égalité hommes-femmes sur le marché européen du travail est la preuve manifeste que l'UE doit repenser son approche.

Il n'est guère aisé de déterminer pourquoi l'approche adoptée jusqu'ici n'a pas donné les résultats escomptés mais, étant donné qu'une réorientation radicale est recommandée, il s'impose de donner – ne serait-ce que brièvement – un aperçu des carences en cause. Plusieurs éléments de la stratégie actuelle semblent avoir contribué à son échec et ses dix aspects les plus problématiques peuvent être décrits comme suit:

Premièrement, le droit *antidiscrimination* de l'UE est largement parvenu à s'inscrire dans le droit européen et dans le droit national de nombreux États membres avec pour conséquence que la discrimination directe semble avoir été réduite, à l'exception notoire de la discrimination fondée sur la grossesse. S'il

convient de se réjouir de ce succès relatif, on ne peut ignorer certains de ses effets involontaires. L'un de ceux-ci a été de confiner notablement les obligations juridiques imposées par l'UE aux États membres à l'interdiction de discrimination. Or cet accent mis sur la discrimination alimente un discours qui met au premier plan la prise de décision individuelle, la justice rendue à la personne et la pénalisation de l'auteur particulier, plutôt que l'instauration d'une justice entre groupes et la lutte contre une inégalité systématique sur le marché. La tendance est de minimiser la justice collective en faveur d'une justice individuelle, et d'ignorer la mesure dans laquelle le bien-être d'une personne est souvent conditionné par son appartenance au groupe.

Deuxièmement, la prédominance de l'approche antidiscrimination a pour effet que l'adoption de mesures d'action positive se trouve fortement entravée par le fait que l'UE cible avant tout *le processus plutôt que les résultats*. Une stratégie fondée sur l'antidiscrimination a toujours comporté le risque de se focaliser davantage sur *la façon* dont les décisions sont prises sur le marché du travail plutôt que sur *les résultats* desdites décisions, et ce risque est devenu réalité.

Troisièmement, cet accent sur le processus a encore été renforcé, entre autres, par l'absence relative d'accent mis par la politique antidiscrimination sur la lutte contre la *discrimination indirecte*, laquelle se concentre davantage que la discrimination directe sur les effets de la mesure contestée sur le groupe protégé. Si une approche plus efficace avait été adoptée pour faire appliquer l'interdiction de discrimination indirecte consacrée par la législation européenne en matière de rémunération et d'accès à l'emploi, par exemple, il est probable que les employeurs se seraient davantage tournés vers des mesures d'action positive pour éviter qu'une discrimination indirecte soit établie; mais, une fois encore, c'est une approche fondée sur les droits individuels qui a été adoptée, ou des mesures volontaires qui ont été privilégiées. Sans doute la CJUE aurait-elle pu, elle aussi, s'attacher à rendre plus explicite le lien entre la prévention d'une discrimination indirecte et l'instauration d'une action positive, mais la responsabilité principale incombe aux États membres en leur qualité de rédacteurs des traités et de législateurs européens. L'accent mis par le droit de l'UE sur l'élimination de toute discrimination (principalement directe) du processus décisionnel trouve également son origine dans la présomption voulant qu'un processus ainsi assaini se traduise par une véritable égalité – bien qu'il soit largement démontré aujourd'hui que tel n'est pas nécessairement le cas, et que ce postulat soit contredit par la prise de position de l'UE elle-même.

Quatrièmement, même s'il avait été exact que la réduction de la discrimination suffirait à elle seule à garantir l'égalité (ce qui n'est pas le cas), encore aurait-il fallu que ces normes soient effectivement appliquées; or, très souvent, elles ne le sont pas. Les limites de la pratique juridique relative au droit européen antidiscrimination sont désormais claires en ce qui concerne la *mise en application des normes antidiscrimination*. Comme l'ont souligné à de multiples reprises des rapports du Réseau au cours des quelques dernières dizaines d'années, une approche fondée sur les droits individuels et s'en remettant aux personnes concernées pour saisir la justice en vue de faire valoir leurs droits ne conduit pas à un changement sociétal important, ne serait-ce qu'en raison des nombreux obstacles auxquels se heurtent les femmes pour porter une affaire devant les tribunaux. Il en résulte que le taux de litiges en matière d'égalité des sexes reste généralement faible. Ce constat est de plus en plus largement reconnu par les institutions de l'UE, mais cette prise de conscience a elle-même certaines conséquences non intentionnelles. La stratégie de l'UE en faveur de l'égalité entre les hommes et les femmes est en effet dominée désormais par une volonté d'assurer davantage d'efficacité au principe de la non-discrimination, ce qui conduit à mettre l'accent sur la réforme du modèle individualisé de mise en application, autrement dit essentiellement à vouloir renforcer l'efficacité de contentieux fondés sur des plaintes et impulsés par les victimes.

Cinquièmement, la prédominance du modèle antidiscrimination fait qu'il n'est guère surprenant que l'action positive soit, elle aussi, largement abordée sous cet angle par les États membres. Nous avons vu que *l'action positive en vient à être considérée comme une simple exception au principe de la non-discrimination*. Cette approche trouve son origine dans la manière dont l'action positive a été conceptualisée dans l'historique de la directive 76/207 et dans la jurisprudence de la CJUE à son égard. Mais on relève

dans certains États membres le sentiment que le droit même de l'UE limite considérablement les mesures légitimes d'action positive – ce qui est parfois perçu comme une non-reconnaissance par la Cour de leur nécessité; ceci dit, que la responsabilité en incombe à la Cour ou aux États membres reste un point discutable. On peut en effet faire valoir que la Cour a, de façon générale, exécuté fidèlement le mandat que lui ont conféré les autres institutions européennes, et que tout problème lié au système de mesures d'action positive ne vient pas de la Cour mais du régime juridique en matière d'égalité hommes-femmes dans lequel elle est appelée à fonctionner.

Sixièmement, lorsque l'UE est consciente de la nécessité d'aller au-delà du principe de non-discrimination, sa démarche se limite essentiellement à l'adoption d'une approche hautement volontariste dont l'impulsion revient aux États membres. Le manque d'efficacité de cette approche est mis en évidence tout au long des pages qui vont suivre. On constate trois problèmes distincts qui, constituant déjà chacun une source de difficulté, se traduisent par une stratégie quasiment vouée à l'échec lorsqu'ils se cumulent. Cette stratégie prône une autorégulation par les acteurs économiques (*volontarisme)* plutôt qu'une mise en application par l'État. Comme nous l'avons vu, l'UE restreint dans une certaine mesure la réglementation par l'État, mais il semble que ce ne soit pas le facteur principal – lequel serait davantage le fait que le discours européen sur l'action positive présente surtout celle-ci comme une question de responsabilité sociale des entreprises et non comme une question *d'obligation* sociale des entreprises; autrement dit, comme une question de choix d'entreprise plutôt que de devoir d'entreprise. Les acteurs de l'UE en sont effectivement réduits à accepter un mode de «régulation», pour autant qu'on puisse l'appeler ainsi, qui compte sur la persuasion pour instaurer des mécanismes d'incitation plus efficaces. Or il apparaît que les tentatives de persuasion s'avèrent infructueuses lorsque l'État estime qu'il doit avoir pour approche générale de ne pas interférer en imposant des obligations strictes aux entreprises, mais de laisser évoluer librement l'égalité entre les hommes et les femmes.

Septièmement, outre le fait qu'elle s'appuie fortement sur le volontarisme, l'UE, compte tenu des contraintes imposées par les États membres, estime que l'action positive est une question qu'il vaut mieux laisser à ceux-ci et qui relève désormais de la *subsidiarité* – ce qui peut donner lieu au triomphe des contraintes politiques nationales en matière d'adoption de mesures d'action positive, ou à une négligence totale de ce type d'action. Dans le contexte actuel, des avancées positives seraient plus probables s'il existait un niveau adéquat de contrainte découlant de préférence de mesures législatives prises à l'échelon de l'UE.

Huitièmement, le fait de combiner subsidiarité et volontarisme engendre une série d'autres problèmes; on peut plus particulièrement évoquer ici le flou qui entoure la notion d'action positive, et l'*absence d'indications précises* quant à la teneur de mesures de ce type. On observe un manque majeur de compréhension conceptuelle et d'acceptation de l'action positive en tant qu'outil d'instauration d'une égalité hommes-femmes. Le cadre européen en matière d'action positive apparaît également «flou» et il serait souhaitable de disposer de critères et de définitions plus précis quant à la signification du concept. La législation actuelle de l'UE relative à l'action positive est perçue comme difficile à interpréter du fait notamment que les dispositions des traités tout comme les directives traitant de l'égalité hommes-femmes dans le domaine de l'emploi sont de nature assez générale.

Neuvièmement, il existe une forte incertitude quant aux objectifs ultimes que l'action positive est censée contribuer à réaliser. Comme nous le verrons au chapitre suivant, les États membres de l'UE et de l'EEE comme l'Union européenne elle-même ont recensé un large éventail d'objectifs finaux divers. Les motifs qui ont impulsé le développement de l'action positive, et les implications qui en découlent pour son évolution future, varient très fortement selon les ordres juridiques nationaux. S'agit-il avant tout d'éliminer la discrimination du marché du travail? S'il s'agit de l'objectif plus général d'assurer davantage d'égalité aux femmes, quel est le type d'égalité que l'EU recherche? L'objectif fondamental est-il d'étendre l'espace de liberté de choix individuelle, de parvenir à un marché du travail plus efficace, de veiller au respect de la dignité humaine, de favoriser une plus grande cohésion sociale, de contribuer à une redistribution dans un souci d'équité, ou est-il tout cela à la fois? Nul ne s'étonnera que, face à cette

pléthore de buts potentiels, les États soient en désaccord sur la manière d'aborder la question en tant que processus décisionnel concret. Toute évaluation de l'efficacité devient également plus difficile (voire impossible) si l'objectif n'est pas clairement défini au départ.

Dixièmement, la politique d'égalité hommes-femmes de l'UE intègre la réflexion internationale en matière de droits de l'homme de façon très sélective, en écartant notamment substantiellement l'approche alternative de l'égalité des femmes basée sur la CEDEF. Cette Convention conteste la prédominance du mode de régulation adopté en droit de l'UE et privilégie plutôt une approche qui fait de l'action positive un élément essentiel de la lutte contre l'inégalité et la discrimination au lieu d'une exception; qui envisage l'action positive de façon largement asymétrique; et qui met systématiquement l'accent sur la justice collective. Il ne faut pas en conclure que le recours à la CEDEF serait une alternative valable à la législation de l'UE pour ce qui concerne la *mise en application* (la CEDEF restant fortement sous-appliquée), mais simplement que la norme adoptée par la CEDEF est sensiblement plus large que le droit actuel de l'UE.

Vers un modèle européen d'action positive en faveur de l'égalité hommes-femmes

L'UE a souvent cherché, à juste titre, à se définir sur la base de ses valeurs et l'une de celles-ci est l'égalité entre les hommes et les femmes – une égalité qui ne relève pas d'une simple théorie ou expression rhétorique, mais qui soit une réalité vécue. Le non-respect de ces valeurs attise le cynisme à l'égard du projet européen. Que la moitié de la population de l'Europe ait effectivement le sentiment d'être privée des bienfaits de l'intégration européenne serait non seulement injuste, mais dangereux. Le respect de ses propres valeurs est bien davantage qu'une question de politique intérieure, aussi importante soit-elle. C'est également une question de politique extérieure, puisqu'il s'agit du visage que l'UE présente au reste du monde. L'un des thèmes récurrents dans les commentaires relatifs à l'approche européenne de l'action positive est le fait que ses États membres ne satisfont pas aux normes internationales énoncées dans la CEDEF. Les critiques régulièrement adressées aux pays de l'Union par le Comité CEDEF en raison de leur non-utilisation des instruments d'action positive proposés pour engendrer un véritable changement devraient susciter aujourd'hui une réelle inquiétude au niveau de l'UE, et une action concertée de sa part. Sur une scène mondiale où la voix de l'UE exprime le bon sens lorsqu'elle soutient un système international fondé sur des règles, ce manquement à l'égard de l'une des exigences les plus fondamentales d'une société civilisée est préoccupant, mais peut être résolu. Le présent rapport vise à définir une stratégie révisée de l'UE qui, s'appuyant sur des actions déjà en cours dans les États membres, constitue un modèle d'action positive véritablement européen.

1) Préciser les objectifs que l'action positive est destinée à réaliser.

Dans la pratique, la plupart des systèmes juridiques tendent à utiliser une combinaison de justifications qui peuvent varier considérablement au fil du temps, une justification en vogue cédant la place à une autre. Face à cette pluralité de buts à la fois spatiale et temporelle, la politique de l'UE s'est attachée avant tout à rechercher un dénominateur commun aussi large que possible couvrant ces diverses positions – ce qui a abouti à un ensemble d'objectifs plus ou moins définis. Le large dénominateur commun en question serait apparemment que l'UE s'efforce d'éradiquer la discrimination, mais également d'aller plus loin en cherchant à assurer davantage d'égalité sur le marché du travail. Cette ambition s'est traduite dans la pratique par une réduction de la ségrégation entre les sexes, une atténuation des écarts de rémunération, la recherche d'un meilleur équilibre entre vie professionnelle et privée, et l'augmentation de la proportion de femmes occupant des postes de pouvoir et de responsabilité dans le secteur public et privé. Il ne s'agit pas de fins en soi, mais de manières de mieux atteindre trois objectifs principaux: (i) les femmes accéderont à des ressources matérielles accrues, ce qui contribuera à garantir leur indépendance et leur autonomie et, partant, leur dignité en tant que personnes humaines; (ii) les femmes auront accès à des opportunités professionnelles qui contribuent intrinsèquement à leur épanouissement personnel et

leur offrent dès lors davantage dans la vie que de simples gains matériels; et (iii) l'égalité accrue des femmes permettra d'améliorer les performances économiques et autres au profit de tous, y compris des hommes, en termes notamment de productivité, de rentabilité et de croissance. Cette pluralité de buts a des répercussions importantes en termes d'action positive. Il faudra en effet que la future politique de l'UE montre comment l'action positive peut contribuer à faire progresser cette série d'objectifs légitimes éventuels. Dans le domaine de l'emploi, l'action positive liée au genre devrait dorénavant avoir pour rôle principal de remédier à la «sous-représentation», non comme une fin en soi mais comme un moyen de parvenir concrètement à une pleine égalité. Elle serait donc formellement symétrique tout en visant essentiellement, dans la pratique, la sous-représentation des femmes. Ce ne serait pas son unique fonction, mais sa fonction principale avec des répercussions majeures en termes d'égalité de rémunération, étant donné le lien fréquent entre l'inégalité salariale et la ségrégation professionnelle. Une autre question importante consisterait à déterminer si l'adoption d'une approche similaire de l'action positive serait possible dans d'autres domaines que le genre (inégalité ethnique ou handicap notamment), mais elle dépasserait le cadre du présent rapport.

2) Introduire des obligations positives.

Cette stratégie s'articule essentiellement autour de la proposition selon laquelle la réglementation juridique a un rôle important à jouer en matière d'action positive. L'obligation positive de promouvoir l'égalité entre les hommes et les femmes devrait, si tel n'est pas encore le cas, devenir une obligation légale imposée à la fois aux États membres et aux employeurs. L'action positive serait l'un des moyens de donner un contenu à ce devoir. On passerait ainsi d'obligations négatives en obligations positives; l'accent serait mis sur ce que les entreprises doivent faire (promotion de l'égalité) plutôt que simplement sur ce qu'elles ne doivent pas faire (prévention de la discrimination). Cette approche réglementaire envisage l'interdiction de discrimination comme un élément – mais un élément seulement – de ce que signifie avoir une stratégie cohérente d'égalité hommes-femmes. L'acquis antidiscrimination existant resterait en grande partie intact, mais l'égalité de traitement irait dorénavant bien au-delà du simple engagement rhétorique en intégrant une obligation positive de veiller à une plus grande égalité dans la pratique.

3) Être plus spécifique.

Si une obligation positive de ce type devait être développée dans le secteur privé comme dans le secteur public, quelle serait la meilleure méthode de réglementation à adopter pour en assurer le respect? Il s'imposerait dans cette perspective d'être beaucoup plus spécifique quant aux résultats exigés, en particulier au niveau de chaque organisation publique et privée, y compris les employeurs. Il conviendrait alors d'introduire, en complément de l'obligation positive, un second élément qui serait la fixation, à l'intention d'entreprises spécifiques, d'un objectif final clairement défini (objectif statistique le plus souvent). Si la portée des obligations positives est exposée de façon assez détaillée, le point de départ est souvent l'exigence d'une réduction de la «sous-représentation» en tant que moyen de faire progresser concrètement la pleine égalité – alors que le but de l'action positive tel qu'énoncé à l'article 157, paragraphe 4, du TFUE dépasse largement la réduction de la sous-représentation. L'approche axée sur les processus qui caractérisait la précédente stratégie cèderait le pas à une obligation de résultat. Cette démarche devrait s'accompagner de la fixation d'un calendrier beaucoup plus précis pour la réalisation des objectifs numériques fixés au niveau de chaque entreprise, compte tenu de ce qui semble possible moyennant des efforts de bonne foi de la part de celle-ci.

4) Recourir à la panoplie complète des mesures d'action positive disponibles.

Il existe un large éventail de mesures d'action positive diverses dont les États membres ont expérimenté l'usage. Mais peu d'entre eux, voire aucun, ne les ont apparemment appliquées toutes et les rapports des experts nationaux signalent un manque considérable de familiarité avec plusieurs d'entre elles. Il existe une opportunité de porter ces différentes mesures à l'attention des États, et une nouvelle stratégie d'action positive exposerait l'ensemble complet des mesures disponibles en précisant les avantages, et les inconvénients éventuels, de chacune.

5) Clarifier le lien entre le principe du mérite et la préférence selon le sexe.
S'il convient donc d'encourager le recours au large éventail des mesures possibles, un léger traitement préférentiel devrait être exigé des employeurs se trouvant dans l'incapacité d'atteindre les objectifs autrement – étant entendu que ces préférences doivent impérativement être symétriques (en visant à remédier à la sous-représentation des hommes aussi bien que des femmes) et respecter le principe du mérite du moins dans la mesure où elles ne seraient admissibles qu'entre candidats ayant des qualifications globalement équivalentes.

6) Encourager la réflexivité en accordant aux employeurs une certaine flexibilité quant à la meilleure manière d'atteindre les objectifs.
La régulation devrait avoir pour rôle d'obliger les employeurs et autres acteurs économiques à réfléchir à la façon optimale de parvenir au résultat escompté («réduire la sous-représentation»). Il s'agit d'une approche réglementaire qui envisage la «réflexivité» comme un élément déterminant lors de l'introduction d'un changement. Elle prévoit une norme par défaut à respecter par les employeurs, mais accorde à ceux-ci une certaine flexibilité quant aux moyens d'assurer cette conformité. La proposition admet de la flexibilité en ce sens que ses exigences ne sont pas d'application à partir du moment où les États peuvent démontrer une approche alternative tout aussi efficace. Le type d'action positive adoptée par les employeurs serait déterminé par cette réflexibilité, et ne se verrait imposer aucune limite arbitraire. Une telle approche offre l'avantage d'encourager chaque organisation à entreprendre sa propre évaluation du problème tout en l'incitant à débattre avec d'autres de la pertinence de cette évaluation et de la nécessité de la repenser à la lumière de la discussion. Ce faisant, elle encourage l'organisation à «s'approprier» les solutions qu'elle conçoit; elle encourage l'apprentissage mutuel au sein des organisations et entre elles; elle encourage chaque organisation à débattre des solutions les mieux adaptées à son cas et admet par conséquent que des solutions pluralistes sont souhaitables; elle encourage la participation de différentes parties prenantes à la recherche d'une définition commune du problème et de la meilleure façon de le résoudre, selon des modalités qui favorisent le consensus et, partant, l'harmonie sociale. Le point essentiel réside toutefois dans le fait que cette approche serait mieux à même de concrétiser les objectifs réglementaires que d'autres systèmes concurrents de régulation. Une approche réflexive implique une absence de contradiction et une cohérence, plaidant à l'encontre d'un accent excessif sur la subsidiarité et le volontarisme dans la mesure où elle vise à fonctionner en référence à des normes réglementaires centrales et structurantes.

7) Cibler exclusivement des employeurs déterminés.
Il existe une différence considérable entre États quant à l'ampleur des exigences réglementaires qu'ils ont fixées, notamment en ce qui concerne les entreprises visées par ladite réglementation. Il semble que cinq considérations au moins doivent être prises en compte au moment de décider quels employeurs une réglementation en matière d'action positive doit inclure: premièrement, l'importance de la firme en termes de nombre de salariés concernés, car plus ses effectifs sont nombreux, plus l'impact y sera grand si elle modifie sa composition et atténue la sous-représentation des femmes; deuxièmement, la capacité de la firme d'assimiler les exigences réglementaires: la capacité probable de la firme de se mettre effectivement en conformité augmente avec sa taille exprimée en termes de chiffre d'affaire annuel (car elle dispose par exemple d'un département de ressources humaines doté de moyens importants); troisièmement, la mesure dans laquelle la firme est leader sur son marché et peut inciter, partant, d'autres firmes du secteur à l'imiter – autrement dit, un changement au sein de cette firme (réglementée) engendrera-t-il un changement au sein de ces autres firmes (non réglementées)?; quatrièmement, la répartition équitable des charges parmi les employeurs: des obligations particulières engendrent des charges spéciales et, partant, un avantage pour les concurrents qui n'y sont pas soumis, de sorte que plus la couverture des employeurs est inclusive, plus une équité de répartition des charges est assurée; et, cinquièmement, étant donné qu'une large majorité des travailleurs de l'UE sont employés par des PME, si l'objectif est de lutter contre la sous-représentation, toute politique qui se limiterait aux grandes entreprises s'attacherait à lutter contre la ségrégation sectorielle et risquerait donc de ne pas réaliser l'objectif de la lutte contre la sous-représentation.

8) Requérir la mise en place d'institutions et de pratiques réglementaires adéquates.
La réflexivité est un élément clé de la stratégie proposée, mais il convient de ne pas la confondre avec l'autorégulation classique puisqu'elle s'accompagne de certaines contraintes, à savoir non seulement l'instauration d'une obligation positive d'égalité ainsi que l'établissement d'objectifs et d'échéances réalistes, mais également la spécification de deux éléments complémentaires. Même si la flexibilité est encouragée et que les entreprises pourraient être invitées à définir elles-mêmes des objectifs adéquats et les moyens d'y parvenir, il n'en restera pas moins important de préciser le cadre réglementaire dans lequel ces décisions doivent s'inscrire. Cette démarche se concrétisera le plus souvent par la publication d'un plan en faveur de l'égalité, lequel devra cependant faire l'objet d'un examen par un organisme de surveillance indépendant habilité à en exiger la révision par l'entreprise s'il estime inadéquate la méthode adoptée par celle-ci pour évaluer la sous-représentation en son sein et les possibilités d'y remédier au fil du temps. Il faudra instaurer en outre non seulement un contrôle *ex ante* mais aussi un contrôle *ex post*. Une réelle transparence sera exigée de l'entreprise concernant ses progrès dans la réalisation des objectifs fixés, et obtenue en imposant des obligations de rapport ainsi que des mécanismes gouvernementaux capables d'assurer le suivi adéquat des avancées sur la base des rapports en question. Une série d'incitations et de sanctions devraient être mises en place pour garantir la conformité de chaque employeur, que ce soit sous la forme de récompenses décernées aux firmes ayant été au-delà des exigences ou d'amendes infligées à celles qui n'ont pas atteint leurs objectifs.

9) Repenser la subsidiarité.
Le Conseil de l'UE a apparemment considéré jusqu'ici que le niveau national était le mieux placé pour réaliser l'égalité des femmes (en dehors de l'élimination de la discrimination et de la fixation de normes très générales). Ce point de vue devrait faire place à une vision considérant que l'égalité des femmes est trop importante pour être laissée prioritairement aux États membres, que «l'expérience» dans ce sens a généré une masse d'informations mais des résultats très inégaux, et qu'il est plus que temps que les États membres approuvent une approche coordonnée au niveau de l'UE. L'égalité des femmes n'est pas seulement importante en termes de droits humains et de justice: elle est également importante sur le plan économique, étant donné les pertes que pourraient subir les entités individuelles qui n'adopteraient pas de mesures d'action positive pour accroître la diversité de leurs effectifs. Il existe également un motif économique sérieux d'agir plus systématiquement au niveau européen en faveur de l'adoption de ce type de mesures. L'écart considérable actuellement observé entre les États membres dans leur approche de l'égalité des sexes et de l'action positive menace aujourd'hui de se transformer en divergence réglementaire majeure et de mettre dès lors en péril la cohérence du marché unique. La disposition initiale en matière d'égalité des rémunérations figurant dans le traité de Rome (article 119 du traité CEE) trouve son origine dans l'inquiétude des États membres ayant déjà instauré une égalité de rémunération pour les femmes de se voir concurrencés par des États n'ayant pas instauré cette égalité: il a donc été convenu que l'UE (ou la CEE selon l'appellation de l'époque) devrait agir en vue d'éviter un nivellement par le bas en exigeant de tous les États membres qu'ils adhèrent à cette politique. L'ampleur exacte de cette divergence réglementaire, tant entre les États qu'à l'intérieur de leurs propres frontières, n'est pas connue – mais elle pose problème non seulement parce qu'un outil potentiellement efficace de promotion de l'égalité entre les hommes et les femmes demeure sous-exploité, mais également parce qu'elle risque de dissuader des États et des employeurs de recourir plus systématiquement à des mesures d'action positive, même s'ils estiment que la démarche serait de leur propre intérêt, car ils n'en maîtrisent généralement pas le coût. L'incertitude alimente l'aversion au risque – et l'un des risques potentiels est qu'un pays ou une entreprise soit déforcé(e) face à un autre pays ou une autre entreprise moins responsable.

10) Agir dans le cadre de l'acquis existant.
On observe une réticence manifeste de la part des États membres à céder davantage de pouvoirs ou de compétences aux institutions de l'UE dans le domaine social de façon plus générale (la proposition relative aux conseils d'administration des entreprises et les débats autour du récent accord sur la directive relative à la conciliation entre vie professionnelle et vie privée n'ont toujours pas abouti), et

toute stratégie développée par les institutions de l'Union doit prendre cette réticence en compte. La Commission est néanmoins habilitée à prendre certaines mesures qui, sans aller jusqu'à une nouvelle directive, auraient un caractère juridiquement contraignant. Une *Communication* interprétative pourrait décrire et consolider le cadre juridique existant en matière d'action positive compte tenu de la jurisprudence de la CJUE. Une *Recommandation* pourrait exposer la stratégie détaillée de la Commission en faveur de l'égalité hommes-femmes, en ce compris l'action positive. Ces dispositions ne seraient pas juridiquement contraignantes mais s'adresseraient aux États membres afin d'orienter leurs agendas législatifs et stratégiques. Il est suggéré à la Commission, au cas où elle déciderait de ne pas proposer de nouvelle directive, qu'elle envisage une Recommandation exposant une approche précise de l'action positive à adopter au niveau national. Elle inclurait les huit éléments énoncés plus haut: (1) les buts que l'action positive ambitionne d'atteindre; (2) la nécessité d'obligations positives; (3) le rôle des objectifs chiffrés et des calendriers; (4) la panoplie complète des mesures d'action positive disponibles; (5) la corrélation entre le principe du mérite et les préférences selon le sexe; (6) l'importance d'une réflexivité du côté des employeurs pour ce qui concerne les moyens d'atteindre les objectifs; (7) des critères adéquats en termes de portée pour déterminer les entreprises qui seront visées par les exigences réglementaires; (8) le contexte réglementaire de ces exigences, y compris l'usage de plans d'égalité, la nécessité d'un contrôle, et la mise en application par une autorité nationale indépendante.

11) Encourager l'adhésion de la CJUE à la nouvelle politique.

Nous avons vu que, tant à des fins d'équité que pour assurer la légitimité politique d'actions positives impliquant des préférences, des limites devraient être imposées à ce qui est admissible à cet égard. Il est important dans ce contexte que la Commission soit ouverte aux compromis inhérents à l'adoption d'une politique prévoyant un rôle accru pour les préférences. La bonne stratégie pour conférer une légitimité à l'action positive doit éviter de nier ces compromis mais montrer que l'intérêt pour l'égalité prime sur certaines préoccupations légitimes telles que l'incidence éventuelle sur certains groupes particuliers d'hommes (et pas nécessairement ceux qui sont actuellement les plus favorisés) ou les limites imposées à la liberté des employeurs privés en ce qui concerne l'organisation et la gestion de leurs entreprises. L'action positive implique une légère redistribution et régulation qu'il conviendra de justifier et de limiter de façon appropriée. Ces restrictions sont d'autant plus nécessaires que l'action positive peut être utilisée en défaveur des femmes – l'expérience ayant montré en effet que l'action positive peut être une boîte de Pandore permettant à des politiciens versatiles d'introduire sous ce couvert des mesures allant délibérément ou involontairement à l'encontre de l'égalité des femmes. Les limites actuellement imposées par la CJUE sont globalement celles que toute nouvelle politique devrait prévoir. En dépit des critiques dont la Cour fait l'objet, son approche générale mérite, dans l'ensemble, d'être soutenue puisqu'elle se fonde sur une évaluation largement basée sur la proportionnalité. Des éclaircissements supplémentaires de la part de la Cour seraient néanmoins utiles. Elle devrait idéalement établir clairement qu'en vertu de la vision largement aristotélicienne de l'égalité qui est celle de l'UE, l'action positive est une composante de l'égalité plutôt qu'une dérogation à celle-ci. Il serait pertinent en effet que la Cour réexamine ce qui constitue des objectifs justifiables qu'une action positive peut légitimement poursuivre, et qu'elle établisse clairement l'existence d'un large éventail d'objectifs légitimes. Il conviendrait d'insister auprès de la CJUE pour qu'elle précise mieux le moment où l'action positive glisse vers le stéréotype au lieu de reconnaître simplement la réalité de l'expérience vécue par les femmes. Davantage de clarté s'impose manifestement quant à ce que la CJUE entend par «qualifications» dans ce contexte, et quant à savoir à quel point les qualifications doivent être «égales» pour qu'une action positive soit légitime. De même, on pourrait demander à la Cour de préciser, dans un cas qui s'y prête, dans quelle mesure une approche symétrique de l'action positive est, en fait, la seule approche qu'elle autorise ou si une approche asymétrique est parfois admise. La Commission remplit un rôle important dans ce contexte en attirant l'attention de la Cour sur les réalités de la situation sur le terrain, et en réclamant instamment des éclaircissements. Il est suggéré de façon plus générale que la Commission veille, lorsqu'elle intervient dans des affaires, à adopter des positions davantage susceptibles de promouvoir une stratégie d'action positive telle que recommandée plus haut. En résumé, la Commission pourrait vouloir envisager un

usage davantage stratégique des litiges pour promouvoir l'action positive même en l'absence de nouvelle directive.

12) Proposer une nouvelle directive.

Pour parler franc, souligner une fois encore les carences de la mise en œuvre de l'action positive au niveau national ne sert à rien si l'on n'aborde pas la question des moyens d'y remédier. Les stratégies par lesquelles l'UE a cherché à exercer son pouvoir d'influence ne sont pas parvenues à faire évoluer les pressions nationales à l'encontre de l'action positive. Des normes juridiquement contraignantes s'imposent. L'expérience de la recommandation 84/635 montre qu'une recommandation non contraignante peut échouer. Une nouvelle directive devrait faire des éléments énoncés dans la Recommandation suggérée des obligations juridiques imposées par l'UE aux États membres et à certains employeurs: (1) les buts que l'action positive ambitionne d'atteindre; (2) la nécessité d'obligations positives; (3) le rôle des objectifs chiffrés et des calendriers; (4) la panoplie complète des mesures d'action positive disponibles; (5) la corrélation entre le principe du mérite et les préférences selon le sexe; (6) l'importance d'une réflexivité du côté des employeurs pour ce qui concerne les moyens d'atteindre les objectifs; (7) des critères adéquats en termes de portée pour déterminer les entreprises qui seront visées par les exigences réglementaires; (8) le contexte réglementaire de ces exigences, y compris l'usage de plans d'égalité, la nécessité d'un contrôle, et la mise en application par une autorité nationale indépendante. Une nouvelle directive devrait également aborder les aspects qui doivent encore être examinés par la Cour dans le cadre de l'acquis existant. Il est notamment suggéré plus haut que des préférences seraient admises lorsque deux candidats (un homme et une femme) ont «des qualifications globalement équivalentes», mais peu d'orientations ont été données jusqu'ici aux États membres quant à ce que cela signifie concrètement. Une nouvelle directive aurait pour rôle important de préciser la manière de traiter la question des qualifications égales (adoption éventuelle d'une vision se rapprochant de la notion de qualifications «substantiellement» égales) et d'examiner de façon plus approfondie les points épineux que sont les effets préjudiciables à l'égard de tiers et les stéréotypes liés au genre dans le cadre de l'action positive.

Zusammenfassung

Aktueller Stand

Spätestens seit den 1980er Jahren hat sich die Europäische Union für den Einsatz von „positiven Maßnahmen“ als Mechanismus zur Förderung der Gleichstellung von Frauen im Beschäftigungsbereich ausgesprochen. Sie hat sich bemüht, die Mitgliedstaaten und Arbeitgeber davon zu überzeugen, dass positive Maßnahmen (ein Begriff, der, wie wir sehen werden, ziemlich flexibel ist) notwendiger Bestandteil einer Gleichstellungsstrategie sind, die daneben noch andere Maßnahmen umfasst, z. B. das Verbot geschlechtsspezifischer Diskriminierung in verschiedenen Teilen der Wirtschaft, die Durchsetzung des Grundsatzes des gleichen Entgelts für gleichwertige Arbeit, die Gewährleistung einer nachhaltigen Work-Life-Balance und die Garantie, dass Männer und Frauen, die sich dafür entscheiden, Kinder großzuziehen, weiter uneingeschränkt am Berufsleben teilnehmen können. In den Strategieankündigungen der EU sind positive Maßnahmen – neben Maßnahmen zur Förderung dieser anderen politischen Ziele – bis heute ein zentrales Element. Positive Maßnahmen können nicht isoliert betrachtet werden, sondern sind als wichtiger Bestandteil einer umfassenderen Strategie zur Bekämpfung von Geschlechterungleichheit anzusehen.

Eine wichtige Unterscheidung geht aus den Debatten über die richtige Antwort auf die benachteiligte Stellung von Frauen auf dem Arbeitsmarkt hervor: Es ist die wichtige Unterscheidung zwischen Diskriminierung und Ungleichheit – beides Begriffe, die ein breites Bedeutungsspektrum haben. Diskriminierung gilt als ein Grund, der zu Ungleichheit führt, nicht jedoch als der einzige. Diskriminierung und Ungleichheit werden nicht gleichgesetzt, sind nicht einfach zwei Seiten derselben Medaille. Die Beseitigung von Diskriminierung trägt dazu bei, Ungleichheit zu bekämpfen, tut dies aber nicht *per se*. Die Verringerung von Ungleichheit gilt ebenso wie die Bekämpfung von Diskriminierung als politisches Ziel, sowohl aus moralischen als auch aus wirtschaftlichen Gründen. Die Gleichstellung von Frauen und Männern wird in der EU überwiegend mit nicht-rechtlichen Maßnahmen verfolgt; Antidiskriminierungsziele basieren größtenteils auf einklagbaren Verpflichtungen.

Diese voneinander unabhängigen, sich jedoch überschneidenden politischen Ziele werden auf verschiedene Art und Weise, unter anderem mit positiven Maßnahmen verfolgt, die manchmal (fälschlicherweise) einfach mit „positiver Diskriminierung“ gleichgesetzt werden. Der unterschiedliche Zusammenhang, der zwischen positiven Maßnahmen und den Konzepten der Geschlechtergleichstellung bzw. der Nichtdiskriminierung besteht, verdeutlicht deren Verschiedenheit. Die EU befürwortet positive Maßnahmen als eine Methode zur Förderung der Geschlechtergleichstellung und ist insofern der Auffassung, dass es in ihrem Interesse liegt, dass Arbeitgeber und andere Akteure diese Strategie übernehmen; sie ist nicht indifferent. Schließlich ist die Gleichstellung der Frauen seit den diversen Vertragsreformen eine unionspolitische Aufgabe. Positive Maßnahmen sind nicht nur ein wichtiges Element in den geschlechterpolitischen Aussagen der Union, die Union hat sich auch bemüht, zumindest eines der potenziellen Hemmnisse für ihre Anwendung abzubauen, nämlich die Möglichkeit, dass bestimmte Formen positiver Maßnahmen gegen das im Unionsrecht verankerte Diskriminierungsverbot verstoßen könnten. Einhergehend mit dem Eintreten für positive Maßnahmen wurde daher in den Richtlinien zur Geschlechtergleichstellung eine beschränkte Ausnahme für positive Maßnahmen im Antidiskriminierungsrecht der Union geschaffen. Diese Ausnahme steht in vollem Einklang mit dem Grundsatz der Subsidiarität/Selbstregulierung: Sie ermöglicht die Anwendung positiver Maßnahmen, schreibt deren Anwendung jedoch nicht vor. Generell werden positive Maßnahmen von der Union meist durch eine Kombination aus Subsidiarität (zwischen Union und Mitgliedstaaten) und Freiwilligkeit (zwischen Mitgliedstaaten und Arbeitgebern) gefördert.

Ob, und in welchem Maße, Mitgliedstaaten positive Maßnahmen tatsächlich anwenden, bleibt ihnen selbst überlassen (Subsidiarität). Die meisten Mitgliedstaaten verfolgen in diesem Bereich eine Politik der Selbstregulierung (Freiwilligkeit), was bedeutet, dass Unternehmen eigene Standards festsetzen und entscheiden, ob sie Gleichstellung anstreben und, wenn ja, in welchem Maße und welche Art von Gleichstellung. Die Standards, die Unternehmen für positive Maßnahmen festlegen, sind entweder so niedrig, dass es sich nicht lohnt, sie zu überwachen, oder, wenn strengere Standards festgelegt werden, wird deren Einhaltung von den Unternehmen selbst überwacht, anstatt diese von einer externen, unabhängigen Stelle (z. B. einer staatlichen Einrichtung) überwachen und durchsetzen zu lassen. Die Kombination von Subsidiarität und Freiwilligkeit hat dazu geführt, dass in der Praxis sowohl die Mitgliedstaaten als auch die Industrie ihre eigenen Standards festlegen und die Einhaltung dieser Standards selbst überwachen, ohne nennenswerte Eingriffe seitens der EU. Auf Unionsebene gibt es keine externe, unabhängige Stelle (und auf nationaler Ebene nur sehr wenige), deren Ziel es ist, positive Maßnahmen im Beschäftigungsbereich festzulegen oder durchzusetzen.

Einer der potenziellen Vorteile von Subsidiarität und Selbstregulierung besteht darin, dass Mitgliedstaaten und Arbeitgeber auf diese Weise Gelegenheit haben, zu experimentieren und verschiedene Möglichkeiten für die Umsetzung dieser Politik auszuprobieren, anstatt ein allgemeingültiges Konzept anwenden zu müssen, das unter Umständen Innovationen behindert und Möglichkeiten eines grenz- und branchenübergreifenden Lernens beschränkt. Die Kosten für die Einhaltung der Standards fallen sowohl für die Wirtschaft als auch für die öffentliche Hand wahrscheinlich geringer aus, und die Einhaltung einer potenziell umstrittenen Maßnahme dürfte leichter fallen, wenn diese nicht als Zwang empfunden wird. Die überwiegende Mehrzahl der EU-Mitgliedstaaten hat das Antidiskriminierungsrecht der Union so umgesetzt, dass das nationale Recht den Ansatz der Richtlinien in Bezug auf positive Maßnahmen widerspiegelt: Positive Maßnahmen der Arbeitgeber sind innerhalb gewisser Grenzen zulässig, jedoch freiwillig. Die Folge ist, dass es zwar Beispiele für positive Maßnahmen von Arbeitgebern gibt, diese jedoch eher die Ausnahme als die Regel sind.

Die Untersuchungen, die für dieses Projekt durchgeführt wurden, liefern ein Bild vom aktuellen Stand geschlechtsbezogener positiver Maßnahmen im Beschäftigungsbereich, das auf deprimierende Weise vertraut ist. In den Staaten der EU und des EWR wird das Konzept der „positiven Maßnahmen" nicht wirklich verstanden; was als positive Maßnahme gilt, ist von Land zu Land sehr verschieden; eine Überwachung der Wirksamkeit positiver Maßnahmen, die umgesetzt werden, findet praktisch nicht statt, ganz zu schweigen von einer Durchsetzung der entsprechenden Standards; der Einfluss der EU, wenn es darum geht, auf nationaler Ebene Verständnis für positive Maßnahmen zu schaffen und deren Entwicklung sicherzustellen, wird allgemein als gering angesehen; er wird häufig entweder falsch interpretiert oder ignoriert; es existieren erhebliche Diskrepanzen, was den Zweck positiver Maßnahmen angeht; zwischen den Ländern existiert wenig Lernaustausch darüber, was funktioniert und was nicht; die Tatsache, dass die Mitgliedstaaten unterschiedliche Terminologien verwenden, führt zu erheblicher begrifflicher Verwirrung, ist aber auch Ausdruck einer tieferliegenden, konzeptionellen Verwirrung. Wenn positive Maßnahmen stattfinden, sind sie sporadisch, zeitlich begrenzt und von zweifelhafter Wirksamkeit.

Damit soll nicht gesagt werden, dass alle Mitgliedstaaten es versäumt haben, positive Maßnahmen umzusetzen. Es gibt einige signifikante Beispiele, wobei in all diesen Fällen jedoch die Gründe für ihre Umsetzung offenbar wenig mit der Unterstützung positiver Maßnahmen seitens der EU zu tun haben. In der Regel dominieren in diesen Fällen lokale Gründe, manchmal ergänzt durch den Einfluss des Übereinkommens zur Beseitigung jeder Form von Diskriminierung der Frau (CEDAW). Selbst in den Fällen, in denen der Staat eingegriffen hat, um die Anwendung positiver Maßnahmen entweder nachdrücklich zu unterstützen oder verbindlich vorzuschreiben, wurde wenig getan, um den Grad der Umsetzung seitens der Arbeitgeber zu überwachen, und noch weniger, um herauszufinden, welche Arten von Maßnahmen wirksam sind und unter welchen Voraussetzungen.

Das ganze Ausmaß dieser regulatorischen Divergenz, sowohl zwischen den Staaten als auch innerhalb der Staaten, ist unbekannt. Es ist aber problematisch, und zwar nicht nur deshalb, weil ein potenziell

wirksames Instrument zur Förderung der Geschlechtergleichstellung nach wie vor unzureichend genutzt wird, sondern auch deshalb, weil es Staaten und Unternehmen davon abhalten kann, positive Maßnahmen systematischer anzuwenden – selbst wenn sie dies in ihrem eigenen Interesse für geboten halten –, weil die damit verbundenen Kosten vielfach nicht bekannt sind. Unsicherheit erzeugt Risikoaversion. Ein potenzielles Risiko besteht darin, dass ein Staat oder ein Unternehmen am Ende gegenüber einem anderen, weniger verantwortungsvollen Staat oder Unternehmen den Kürzeren zieht. Diese regulatorische Divergenz widerspricht dem ursprünglichen wirtschaftlichen Grundgedanken von Art. 119 EWG, der Gleichbezahlungsvorschrift.

Leider wird nichts von all dem diejenigen überraschen, die die regelmäßige Analysen der Entwicklung positiver Maßnahmen in Europa verfolgt haben, die die Europäische Kommission seit Ende der 1970er Jahre durchgeführt hat, um die Umsetzung solcher Maßnahmen seitens der Mitgliedstaaten zu beobachten, nicht zuletzt die Analyse, mit deren Erstellung unser Netzwerk beauftragt wurde. Bericht um Bericht, Bewertung um Bewertung, Studie um Studie kamen immer wieder zu sehr ähnlichen Ergebnissen: Die Fortschritte der Frauen auf dem Arbeitsmarkt sind zwar möglicherweise die tiefgreifendste Veränderung, die der europäische Arbeitsmarkt in den letzten fünfzig Jahre erlebt hat, die Notwendigkeit umfassender Maßnahmen zur Beseitigung und Korrektur weit verbreiteter Ungleichheiten zwischen Männern und Frauen auf diesem Arbeitsmarkt besteht aber unvermindert weiter. Der vorliegende Bericht legt nahe, dass – um sicherzustellen, dass positive Maßnahmen umgesetzt werden – der Moment gekommen ist, die Kombination aus Respekt vor den Mitgliedstaaten und Selbstregulierung der Unternehmen zu überdenken.

Der Bericht stellt fest, dass natürlich mehr getan werden kann, um die Vorstellung davon, was positive Maßnahmen sind, zu verdeutlichen, und empfiehlt verschiedene zusätzliche Instrumente für ein besseres Verständnis des Konzepts; unter anderem beschreibt er dafür Beispiele positiver Maßnahmen aus verschiedenen Bereichen und greift auf die einschlägige wissenschaftliche und politische Literatur zurück. Der Bericht verfolgt jedoch einen etwas ehrgeizigeren Ansatz: Er wiederholt nicht einfach die immer selben Ergebnisse und die immer selbe Forderung, der immer selben politischen Agenda der EU mehr Aufmerksamkeit zu widmen, sondern versucht vielmehr, dieses triste Narrativ zu überwinden. Mit anderen Worten: Es macht keinen Sinn, ein weiteres Mal auf die Mängel bei der Umsetzung positiver Maßnahmen auf nationaler Ebene hinzuweisen, ohne sich zu fragen, was dagegen getan werden kann.

Die falsche Strategie?

Die Gründe dafür, dass die Möglichkeit, positive Maßnahmen umzusetzen, die die EU den Mitgliedstaaten gibt, so wenig genutzt wird, sind von Land zu Land unterschiedlich: In manchen Fällen geben die Regierungen populistischem Widerstand nach; in anderen existiert eine sehr negative Vorstellung von positiven Maßnahmen; in wieder anderen weiß man zu wenig über sie. Alles in allem führt dies dazu, dass in der Praxis nur wenige positive Maßnahmen umgesetzt werden. Die Institutionen der EU haben zwar versucht, ihren Einfluss geltend zu machen, um die innenpolitischen Widerstände gegen positive Maßnahmen zu verändern, sind damit jedoch weitgehend gescheitert. Der Grund dafür, dass die oben skizzierte, unbefriedigende Bilanz sich unablässig wiederholt, ist, dass die EU nach wie vor eine Strategie verfolgt, die nicht mehr zweckmäßig ist. Und wenn nicht bald eine neue Strategie vorgelegt wird, werden künftige Berichte ebenfalls mangelnde Fortschritte konstatieren. Die Feststellung, dass die EU-Strategie der positiven Maßnahmen gescheitert ist, ist nicht neu; in den zahlreichen wissenschaftlichen und politischen Arbeiten, die ebenfalls seit den 1970ern veröffentlicht wurden, ist sie eine vertrauter Gemeinplatz. Diese große Vertrautheit sollte allerdings nicht darüber hinwegtäuschen, wie wichtig die entsprechende Schlussfolgerung ist: Es ist notwendig, die derzeitige Strategie radikal in Frage zu stellen. Wir müssen uns voll bewusst sein, dass sie nicht funktioniert, bevor wir den nächsten Schritt tun. Die Tatsache, dass wir sechzig Jahre nach Unterzeichnung der Römischen Verträge noch immer große Probleme mit der Ungleichbehandlung von Männern und Frauen auf dem europäischen Arbeitsmarkt haben, ist ein klarer Beweis dafür, dass die EU ihren Ansatz überdenken muss.

Herauszufinden, warum der bisherige Ansatz nicht funktioniert, ist schwierig, da aber ein radikaler Politikwechsel empfohlen wird, ist es notwendig, zumindest kurz einen Überblick über die entsprechenden Defizite zu geben. Es sind verschiedene Aspekte der derzeitigen Politik, die, so scheint es, zu ihrem Scheitern beigetragen haben. Die zehn problematischsten Elemente der derzeitigen Strategie werden im Folgenden beschrieben.

Erstens: Dem Antidiskriminierungsrecht der EU ist es weitgehend gelungen, sich in das europäische Recht und in das nationale Recht vieler Mitgliedstaaten zu integrieren. Infolgedessen scheint unmittelbare Diskriminierung – mit Ausnahme von Schwangerschaftsdiskriminierung – zurückgegangen zu sein. Dieser relative Erfolg ist zu begrüßen, hat jedoch einige unbeabsichtigte Folgen gehabt. Insbesondere hat er dazu geführt, dass sich die den Mitgliedstaaten von der EU auferlegten rechtlichen Verpflichtungen im Wesentlichen auf das Verbot von Diskriminierung beschränkt haben. Die Betonung von Diskriminierung stärkt ein Narrativ, das die individuelle Entscheidungsfindung in den Vordergrund rückt, Gerechtigkeit für den Einzelnen gewährleistet und individuelle Täter bestraft, anstatt Gerechtigkeit zwischen Gruppen zu gewährleisten und gegen systematische Ungleichheiten auf dem Markt vorzugehen. Im Streben nach individueller Gerechtigkeit wird gruppenbezogene Gerechtigkeit tendenziell kleingeredet und es wird übersehen, in welchem Maße das Wohl des Einzelnen häufig durch seine Zugehörigkeit zu einer Gruppe bestimmt wird.

Zweitens: Die Dominanz des Antidiskriminierungsansatzes führt dazu, dass die Anwendung positiver Maßnahmen in erheblichem Maße dadurch behindert wird, dass das Hauptaugenmerk der EU *eher auf dem Prozess als auf den Resultaten* liegt. Eine auf Antidiskriminierung basierende Strategie birgt seit jeher die Gefahr, sich allein darauf zu konzentrieren, *wie* Entscheidungen auf dem Arbeitsmarkt getroffen werden, anstatt darauf, was die *Resultate* dieser Entscheidungen sind, und diese Gefahr ist Realität geworden.

Drittens: Diese Betonung des Prozesses wurde unter anderem dadurch noch besonders verstärkt, dass die Antidiskriminierungspolitik der Bekämpfung *mittelbarer Diskriminierung*, die sich etwas mehr als unmittelbare Diskriminierung auf die Auswirkungen der betreffenden Maßnahme auf die geschützte Gruppe konzentriert, relativ wenig Bedeutung beimisst. Wäre ein effektiverer Ansatz zur Durchsetzung des unionsrechtlichen Verbots mittelbarer Diskriminierung, beispielsweise beim Entgelt oder beim Zugang zu Beschäftigung, gewählt worden, dann wäre die Wahrscheinlichkeit größer gewesen, dass Arbeitgeber positive Maßnahmen ergriffen hätten, um zu vermeiden, dass mittelbare Diskriminierung festgestellt wird; aber auch hier wurde entweder ein individualrechtlicher Ansatz gewählt oder auf freiwillige Maßnahmen gesetzt. Vielleicht hätte auch der EuGH mehr tun können, um den Zusammenhang zwischen der Vermeidung mittelbarer Diskriminierung und der Umsetzung positiver Maßnahmen stärker zu verdeutlichen; die Hauptverantwortung liegt jedoch bei den Mitgliedstaaten in ihrer Rolle als Vertragsgestalter und EU-Gesetzgeber. Der Nachdruck, den das EU-Antidiskriminierungsrecht darauf legt, jegliche (meist unmittelbare) Diskriminierung aus dem Entscheidungsprozess zu eliminieren, basiert auch auf der Annahme, dass ein derartig bereinigter Prozess zu echter Gleichstellung führt – auch wenn inzwischen eindeutig belegt ist, dass dies nicht zwangsläufig der Fall ist, und diese Annahme durch die eigene politische Haltung der EU sogar widerlegt wird.

Viertens: Selbst wenn es zuträfe, dass der Abbau von Diskriminierung an sich ausreicht, um Gleichstellung zu gewährleisten (was nicht der Fall ist), wäre dies nur dann so, wenn die entsprechenden Vorschriften wirksam durchgesetzt würden, was häufig nicht geschieht. Die Grenzen der Praxis des europäischen Antidiskriminierungsrechts sind, was die *Durchsetzung der Antidiskriminierungsvorschriften* betrifft, inzwischen klar. Wie in vielen Berichten des Netzwerks in den letzten Jahrzehnten immer wieder betont, führt ein individualrechtlicher Ansatz, der darauf vertraut, dass Individuen klagen, um ihre Rechte durchzusetzen, zu keinem signifikanten gesellschaftlichen Wandel, nicht zuletzt aufgrund der zahlreichen Hürden, die Frauen überwinden müssen, um vor Gericht zu ziehen. Generell ist die Klagerate im Bereich der Geschlechtergleichstellung daher nach wie vor niedrig. Dies wird von den EU-Institutionen zunehmend anerkannt, aber genau diese Erkenntnis hat wiederum unbeabsichtigte Folgen. Die

Gleichstellungsstrategie der EU wird nunmehr von dem Bestreben dominiert, eine größere Wirksamkeit des Antidiskriminierungsgrundsatzes zu gewährleisten, was dazu führt, dass der Schwerpunkt auf einer Reform des individualisierten Durchsetzungsmodells liegt, die im Wesentlichen darauf abzielt, opferorientierte, klagebasierte Rechtsstreite effizienter zu machen.

Fünftens: Angesichts der Dominanz des Antidiskriminierungsmodells ist es auch nicht verwunderlich, dass positive Maßnahmen von den Mitgliedstaaten überwiegend durch die „Antidiskriminierungsbrille" gesehen werden. Wir haben festgestellt, dass *positive Maßnahmen als bloße Ausnahme vom Antidiskriminierungsgrundsatz angesehen werden*. Diese Sichtweise hat ihren Ursprung in der Art, wie positive Maßnahmen in der Geschichte der Richtlinie 76/207 und der diesbezüglichen Rechtsprechung des EuGH konzeptualisiert wurden. In einigen Ländern besteht jedoch der Eindruck, das Unionsrecht selbst schränke berechtigte positive Maßnahmen in erheblichem Maße ein. Der Gerichtshof, so heißt es zuweilen, erkenne die Notwendigkeit positiver Maßnahmen nicht an – ob die Verantwortung nun aber beim Gerichtshof oder beim Rat liegt, ist fraglich. Es ließe sich in der Tat einwenden, dass der Gerichtshof das ihm von den anderen europäischen Institutionen erteilte Mandat weitestgehend gewissenhaft ausgeübt hat und dass etwaige Probleme mit dem System der positiven Maßnahmen nicht beim Gerichtshof, sondern im rechtlichen Regelwerk der Geschlechtergleichstellung liegen, in dessen Rahmen der Gerichtshof operiert.

Sechstens: Wo die EU die Notwendigkeit sieht, über den Antidiskriminierungsgrundsatz hinauszugehen, beschränkt sie sich im Wesentlichen darauf, in Bezug auf positive Maßnahmen einen sehr freiwilligen Ansatz zu verfolgen, in dem die Mitgliedstaaten die Führungsrolle haben. Die Wirkungslosigkeit dieses Ansatzes wird in dem vorliegenden Bericht immer wieder dargelegt. Es gibt drei verschiedene Probleme, von denen jedes für sich problematisch ist, die in der Summe jedoch eine äußerst mangelhafte Strategie ergeben. Diese Strategie fördert die Selbstregulierung der Wirtschaftsakteure, kurz: *Freiwilligkeit*, anstelle von staatlicher Durchsetzung. Wir haben gesehen, dass die EU die staatliche Regulierung in gewissem Maße beschränkt; dies scheint aber nicht der springende Punkt zu sein. Springender Punkt ist vielmehr, dass die EU positive Maßnahmen in ihrer Rhetorik vor allem als eine Frage der sozialen Verantwortung von Unternehmen, nicht der sozialen *Verpflichtung* von Unternehmen darstellt, anders ausgedrückt: als eine Frage der unternehmerischen Entscheidung und nicht als eine Frage der unternehmerischen Pflicht. Die EU-Akteure werden faktisch darauf reduziert, eine Form von „Regulierung" – wenn man es überhaupt so nennen kann – zu akzeptieren, die auf Überzeugungskraft setzt, um wirksamere Anreizmechanismen einzuführen. Derartige Überzeugungsversuche sind offensichtlich erfolglos, wenn der Staat der Auffassung ist, dass sein Ansatz generell der sein sollte, sich nicht einzumischen, indem er Unternehmen strenge Pflichten auferlegt, sondern Geschlechtergleichstellung sich ohne Einmischung von außen entwickeln zu lassen.

Siebtens: Abgesehen davon, dass sie in hohem Maße auf Freiwilligkeit setzt, vertritt die EU (nach den Vorgaben der Mitgliedstaaten handelnd) die Auffassung, dass positive Maßnahmen ein Thema sind, das besser den Mitgliedstaaten überlassen bleibt und der *Subsidiarität* unterliegt, was dazu führt, dass nationale politische Hemmnisse für die Anwendung positiver Maßnahmen triumphieren oder positive Maßnahmen völlig außer Acht gelassen werden. In der gegenwärtigen politischen Situation sind fortschrittliche Entwicklungen eher zu erwarten, wenn ein angemessenes Maß an Zwang, vorzugsweise aufgrund legislativer Maßnahmen auf EU-Ebene, existiert.

Achtens: Die Kombination von Subsidiarität und Freiwilligkeit wirft eine Reihe weiterer Probleme auf, insbesondere die Unklarheit, die den Begriff der positiven Maßnahmen umgibt, und das *Fehlen konkreter Leitlinien* dafür, was wirksame positive Maßnahmen sind. Es mangelt in hohem Maße an konzeptionellem Verständnis und Akzeptanz von positiven Maßnahmen als Instrument zur Herstellung von Geschlechtergleichstellung. Der EU-Rahmen für positive Maßnahmen ist ebenfalls „verschwommen", und es wäre wünschenswert, Kriterien und Definitionen dafür zu haben, was positive Maßnahmen genau ausmacht. Das geltende Unionsrecht zu positiven Maßnahmen gilt als schwer auszulegen, zumal nicht

nur die Vertragsbestimmungen, sondern auch die Richtlinien zum Thema Geschlechtergleichstellung im Beschäftigungsbereich ziemlich allgemein sind.

Neuntens: Es besteht erhebliche Unsicherheit darüber, was die obersten Ziele sind, zu deren Erreichen positive Maßnahmen beitragen sollen. Wie wir im nächsten Kapitel sehen werden, haben sowohl die Mitgliedstaaten als auch die EWR-Staaten und die Europäische Union eine breite Palette unterschiedlicher Endziele festgelegt. Die Gründe, warum sich positive Maßnahmen entwickelt haben, sind von Land zu Land sehr unterschiedlich, mit sehr unterschiedlichen Auswirkungen auf die Weiterentwicklung positiver Maßnahmen in dem jeweiligen Land. Geht es in erster Linie darum, Diskriminierung auf dem Arbeitsmarkt zu beseitigen? Wenn es um das allgemeinere Ziel geht, mehr Gleichstellung für Frauen zu erreichen, welche Art von Gleichstellung strebt die EU dann an? Ist das grundlegende Ziel, den Raum der individuellen Entscheidungsfreiheit zu erweitern, einen effizienteren Arbeitsmarkt zu schaffen, die Achtung der Menschenwürde zu gewährleisten, einen stärkeren sozialen Zusammenhalt zu erreichen, Ressourcen aus Gründen der Gerechtigkeit umzuverteilen, oder ist es alles auf einmal? Angesichts dieser Fülle möglicher Ziele ist es nicht verwunderlich, dass sich die Staaten nicht einig sind, wie das Thema in der praktischen Politikgestaltung angegangen werden soll. Eine Bewertung der Wirksamkeit wird ebenfalls erschwert (wenn nicht sogar unmöglich), wenn das Ziel nicht von vornherein klar definiert ist.

Zehntens: Die Gleichstellungspolitik der EU integriert das internationale Menschenrechtsdenken sehr selektiv, insbesondere durch den weitgehenden Ausschluss des alternativen Ansatzes zur Gleichstellung von Frauen auf der Grundlage von CEDAW. Was die Integration des internationalen Menschenrechtsdenkens in die Gleichstellungspolitik der EU betrifft, so wird ein höchst selektiver Ansatz verfolgt, was vor allem in der weitgehenden Ausgrenzung des alternativen, auf CEDAW basierenden Gleichstellungsansatzes zum Ausdruck kommt. Der CEDAW-Ansatz stellt den im Unionsrecht vorherrschenden Regulierungsmodus in Frage und plädiert stattdessen dafür, positive Maßnahmen als zentrales Element zur Bekämpfung von Ungleichheit und Diskriminierung zu sehen und nicht als Ausnahme; er sieht positive Maßnahmen vor allem asymmetrisch und legt systematisch den Akzent auf gruppenbezogene Gerechtigkeit. Dies bedeutet nicht, dass die Anwendung des CEDAW im Hinblick auf die *Rechtsdurchsetzung* eine adäquate Alternative zum Unionsrecht wäre (CEDAW wird nach wie vor viel zu wenig durchgesetzt), sondern lediglich, dass der im CEDAW angewandte Standard wesentlich breiter ist als der des geltenden Unionrechts.

Ziel: ein europäisches Modell für positive Maßnahmen zur Förderung der Geschlechtergleichstellung

Die EU hat – zu Recht – oft versucht, sich über ihre Werte zu definieren, und einer dieser Werte ist die Gleichheit von Frauen und Männern – Gleichheit nicht nur in der Theorie, nicht nur als rhetorische Ausschmückung, sondern als gelebte Realität. Die Tatsache, dass die EU diesen Werten nicht gerecht wird, fördert den Zynismus gegenüber dem europäischen Projekt. Wenn die Hälfte der europäischen Bevölkerung sich von den Vorteilen der europäischen Integration effektiv ausgeschlossen fühlt, ist dies nicht nur ungerecht, sondern auch gefährlich. Die Achtung der eigenen Werte ist nicht nur eine innenpolitische Angelegenheit, so wichtig dies auch sein mag. Sie ist auch nach außen wichtig, wenn es darum geht, welches Gesicht die EU dem Rest der Welt zeigt. Ein Thema, das in den Kommentaren zum europäischen Ansatz für positive Maßnahmen immer wieder auftaucht, ist die Tatsache, dass die EU-Mitgliedstaaten die im CEDAW enthaltenen internationalen Standards nicht erfüllen. Die Tatsache, dass der CEDAW-Ausschuss die EU-Staaten regelmäßig dafür kritisiert, dass sie die zur Verfügung stehenden positiven Maßnahmen nicht einsetzen, um effektive Veränderungen herbeizuführen, sollte heute von der EU als echter Grund zur Sorge gesehen werden, der ein konzertiertes Vorgehen der Union erforderlich macht. In einer Welt, in der die EU eine Stimme der Vernunft ist, die das auf Regeln basierende internationale System stützt, ist dieses Defizit bei einer der grundlegendsten Voraussetzungen jeder zivilisierten Gesellschaft besorgniserregend, kann aber behoben werden. Ziel dieses Berichts ist es, eine überarbeitete EU-Strategie zu entwerfen, die auf bereits laufenden Maßnahmen in den Mitgliedstaaten basiert und somit ein echtes europäisches Modell für positive Maßnahmen darstellt.

1) Klarstellung der Ziele, die mit positiven Maßnahmen erreicht werden sollen.

In der Praxis wenden die meisten Rechtssysteme eine Kombination verschiedener Begründungen an; diese können sich im Laufe der Zeit erheblich verändern, indem eine Begründung „in Mode kommt", dann aber durch eine andere ersetzt wird. Angesichts dieser Vielzahl von räumlichen und zeitlichen Zielen hat sich die EU-Politik in erster Linie darauf konzentriert, den größtmöglichen gemeinsamen Nenner für diese verschiedenen Positionen zu finden, was zu etwas vage formulierten Zielen geführt hat. Der große gemeinsame Nenner scheint zu sein, dass es Ziel der EU ist, Diskriminierung zu beseitigen, darüber hinaus aber auch eine größere Gleichstellung auf dem Arbeitsmarkt anzustreben. In der Praxis hat dies zu einer Verringerung der Geschlechtertrennung, einem Abbau der Entgeltunterschiede, einer besseren Vereinbarkeit von Beruf und Privatleben und zu einer Erhöhung des Anteils von Frauen in Führungs- und Verantwortungspositionen im öffentlichen und privaten Sektor geführt. Dies sind keine Ziele an sich, sondern Mittel, mit denen drei Hauptziele besser verwirklicht werden können: (i) Frauen bekommen Zugang zu mehr materiellen Ressourcen, was dazu beiträgt, ihre Unabhängigkeit und Autonomie und damit ihre menschliche Würde zu sichern, (ii) Frauen bekommen Zugang zu beruflichen Möglichkeiten, die Teil eines befriedigenden Lebens jedes Menschen sind und ihm daher mehr als nur materielle Vorteile verschaffen, und (iii) mehr Gleichstellung für Frauen führt zu mehr wirtschaftlichem und sonstigem Nutzen für alle, auch für Männer, insbesondere zu mehr Produktivität, Effizienz und Wachstum. Diese Vielzahl von Zielen hat erhebliche Auswirkungen auf positive Maßnahmen. Die künftige EU-Politik muss deutlich machen, wie positive Maßnahmen dazu beitragen können, all diese potenziellen legitimen Ziele voranzubringen. Im Beschäftigungsbereich sollte die Funktion geschlechtsbezogener positiver Maßnahmen künftig in erster Linie darin bestehen, gegen „Unterrepräsentation" vorzugehen, nicht als Selbstzweck, sondern als Mittel, um eine vollständige Gleichstellung in der Praxis zu erreichen. Die Maßnahmen wären formal also symmetrisch, würden sich in der Praxis jedoch vor allem auf die Unterrepräsentation von Frauen konzentrieren. Dies wäre nicht die einzige, aber die hauptsächliche Funktion positiver Maßnahmen, mit erheblichen Auswirkungen auf Fragen der Entgeltgleichheit, da ungleiche Bezahlung häufig mit beruflicher Segregation zusammenhängt. Ob ein ähnlicher Ansatz auch für positive Maßnahmen in anderen Bereichen als Geschlecht (z. B. ethnische Ungleichheit oder Behinderung) angewandt werden sollte, ist eine wichtige Frage, die im vorliegenden Bericht jedoch nicht behandelt wird.

2) Einführung positiver Pflichten.

Im Mittelpunkt dieser Alternativstrategie steht die Empfehlung, dass rechtliche Regelungen in Bezug auf positive Maßnahmen eine wichtige Rolle spielen sollte. Eine positive Pflicht zur Förderung der Gleichstellung von Männern und Frauen sollte, sofern dies noch nicht geschehen ist, sowohl für die Mitgliedstaaten als auch für die Arbeitgeber eine rechtliche Verpflichtung werden. Positive Maßnahmen wären ein Mittel, um dieser positiven Pflicht Substanz zu verleihen. Dadurch gäbe es einen Wechsel von negativen zu positiven Pflichten, eine Betonung dessen, was Unternehmen tun sollen (Gleichstellung fördern), und nicht nur dessen, was sie nicht tun sollen (Diskriminierung vermeiden). Dieser Regulierungsansatz betrachtet das Verbot von Diskriminierung als ein Element dessen, was eine kohärente Gleichstellungsstrategie ausmacht, aber eben nur als ein Element. Der bestehende *acquis* im Bereich Antidiskriminierung würde weitgehend intakt bleiben, Gleichbehandlung würde dann aber über ein rein rhetorisches Gleichheitsbekenntnis hinausgehen und eine positive Pflicht beinhalten, sich in der Praxis um mehr Gleichstellung zu bemühen.

3) Präzisierung.

Wenn eine solche positive Pflicht sowohl im privaten als auch im öffentlichen Sektor entwickelt werden soll, welcher Regulierungsansatz wäre dann der beste, um die Erfüllung dieser Pflicht zu gewährleisten? Entscheidend dafür wäre es, die geforderten Resultate viel genauer zu präzisieren, insbesondere auf der Ebene einzelner öffentlicher und privater Instanzen, einschließlich der Arbeitgeber. Neben einer positiven Pflicht sollte dann ein zweites Element eingeführt werden, nämlich die Festlegung eines klar definierten Endziels für bestimmte Unternehmen (in der Regel ein statistisches Ziel). Der Umfang dessen, was die positive Pflicht erfordert, ist damit einigermaßen detailliert abgesteckt, Ausgangspunkt ist aber häufig die Forderung nach einer Reduzierung der „Unterrepräsentation" als Mittel zur Förderung einer vollen Gleichstellung in der Praxis – wiewohl das Ziel positiver Maßnahmen gemäß Art. 157 Abs. 4 AEUV weit

mehr umfasst als die Reduzierung von Unterrepräsentation. Der prozessorientierte Ansatz der bisherigen Strategie würde einer Ergebnispflicht weichen. Parallel dazu sollte ein viel genauerer Zeitrahmen festgelegt werden, innerhalb dessen das numerische Ziel des jeweiligen Unternehmens erreicht werden muss und der berücksichtigt, was mit redlichen Bemühungen des Unternehmens erreichbar zu sein scheint.

4) Einsatz des gesamten Spektrums verfügbarer positiver Maßnahmen.
Es gibt eine Vielzahl unterschiedlicher positiver Maßnahmen, mit deren Anwendung Staaten experimentiert haben. Nur wenige Staaten, wenn überhaupt, scheinen sie jedoch alle anzuwenden, und Berichte der Länderexperten und -expertinnen deuten darauf hin, dass einige von ihnen weitgehend unbekannt sind. Es besteht die Möglichkeit, die Staaten auf diese verschiedenen Maßnahmen aufmerksam zu machen, und eine neue Strategie für positive Maßnahmen würde die gesamte Palette verfügbarer Maßnahmen, einschließlich ihrer jeweiligen Vor- und gegebenenfalls Nachteile, aufzeigen.

5) Klärung der Beziehung zwischen Leistung und Geschlechterbevorzugung.
Während der Einsatz des breiten Spektrums möglicher Maßnahmen also gefördert werden sollte, sollte von Arbeitgebern, die die gesteckten Ziele auf andere Weise nicht erreichen können, ein geringes Maß an Bevorzugung verlangt werden – allerdings unter der Voraussetzung, dass eine solche Bevorzugung symmetrisch ist (indem sie die Unterrepräsentation von Männern und Frauen berücksichtigt) und das Leistungsprinzip zumindest insofern respektiert, als eine Bevorzugung nur zwischen Bewerbern mit weitgehend vergleichbarer Qualifikation zulässig wäre.

6) Förderung der Reflexivität, indem Arbeitgebern ein gewisser Spielraum bei der Wahl des besten Wegs zur Erreichung der Ziele eingeräumt wird.
Aufgabe der Regulierung sollte es sein, Arbeitgeber und andere Wirtschaftsakteure zu zwingen, darüber nachzudenken, wie sie das vorgegebene Ziel („Reduzierung der Unterrepräsentation“) am besten erreichen können. Es ist ein Regulierungsansatz, der „Reflexivität“ als ein Schlüsselelement bei der Einführung von Änderungen betrachtet. Er gibt eine Standardnorm vor, die die Arbeitgeber erfüllen müssen, räumt ihnen aber einen gewissen Spielraum bei der Art und Weise ein, wie sie diese erfüllen. Der Vorschlag lässt Flexibilität in dem Sinne zu, dass seine Anforderungen nicht zur Anwendung kommen, wenn ein Staat eine ebenso wirksame Vorgehensweise nachweisen kann. Die Art der positiven Maßnahmen, die Arbeitgeber anwenden, würde durch diese Reflexivität bestimmt und wäre nicht durch irgendwelche willkürlichen Grenzen beschränkt. Der Vorteil dieses Ansatzes liegt darin, dass jedes Unternehmen ermutigt wird, seine eigene Problemanalyse anzustellen, sich jedoch mit anderen darüber auszutauschen, ob diese Analyse korrekt ist, und sie im Lichte dieses Austauschs eventuell zu korrigieren. Dabei bestärkt er das Unternehmen darin, sich die von ihm entwickelten Lösungen „zu eigen zu machen“; er fördert gegenseitiges Lernen, sowohl innerhalb der Unternehmen als auch zwischen diesen; er bestärkt die Unternehmen darin, über die für das jeweilige Unternehmen besten Lösungen zu beratschlagen, und erkennt daher an, dass pluralistische Lösungen wünschenswert sind; er begünstigt einen Prozess, in dem sich unterschiedliche Interessenträger in konsensfördernder Weise auf eine Definition des Problems und die beste Methode zu seiner Lösung verständigen, und fördert damit soziale Harmonie. Entscheidend ist jedoch, dass dieser Ansatz besser in der Lage wäre, die Regulierungsziele zu erreichen, als andere, konkurrierende Regulierungsansätze. Ein reflexiver Ansatz steht nicht im Widerspruch dazu – und ist damit vereinbar –, sich gegen eine übermäßige Betonung von Subsidiarität und Freiwilligkeit auszusprechen, da er so konzipiert ist, dass er anhand zentraler strukturierender Regulierungsnormen funktioniert.

7) Ausschließliche Ausrichtung auf ausgewählte Unternehmen.
Zwischen den Staaten bestehen erhebliche Unterschiede, was den Umfang der jeweiligen regulatorischen Anforderungen und vor allem die Frage betrifft, welche Unternehmen den jeweiligen Vorschriften unterliegen. Es scheint mindestens fünf Aspekte zu geben, die bei der Entscheidung, welche Unternehmen in eine Vorschrift über positive Maßnahmen einbezogen werden sollten, berücksichtigt werden müssen: Erstens die Bedeutung des Unternehmens in Bezug auf die Zahl der betroffenen Beschäftigten, denn je größer das Unternehmen nach der Zahl seiner Beschäftigten ist, desto größer ist auch die Wirkung,

wenn es seine Zusammensetzung ändert und die Unterrepräsentation von Frauen reduziert; zweitens die Fähigkeit des Unternehmens, regulatorische Anforderungen zu erfüllen, wobei es umso wahrscheinlicher ist, dass ein Unternehmen entsprechende Anforderungen tatsächlich erfüllen kann, je größer das Unternehmen in Bezug auf seinen Jahresumsatz ist (weil es beispielsweise über eine ressourcenstarke Personalabteilung verfügt); drittens das Ausmaß, in dem das Unternehmen in seinem Markt führend ist, also die Frage, inwieweit Veränderungen in dem betreffenden Unternehmen wahrscheinlich dazu führen werden, dass andere Unternehmen, die in demselben Markt tätig sind, seinem Beispiel folgen – anders ausgedrückt: Wird eine Änderung in diesem (regulierten) Unternehmen zu einer Änderung in jenem anderen (nicht regulierten) Unternehmen führen?; viertens die gerechte Verteilung der Lasten auf die Unternehmen: Spezielle Pflichten bringen spezielle Belastungen mit sich und verschaffen damit Wettbewerbern, die diesen speziellen Pflichten nicht unterliegen, einen Vorteil; je umfassender die Unternehmen erfasst werden, desto gerechter ist daher die Verteilung der Lasten; fünftens würde – ausgehend davon, dass die überwiegende Mehrheit der Arbeitnehmer in der EU bei KMUs beschäftigt ist und das Ziel darin besteht, gegen Unterrepräsentation vorzugehen – jede Politik, deren Maßnahmen sich allein auf Großunternehmen beschränken, mit sektoraler Segregation zu kämpfen haben und das Ziel der Bekämpfung von Unterrepräsentation daher möglicherweise verfehlen.

8) Einrichtung geeigneter Regulierungsinstanzen und -verfahren.

Reflexivität ist ein Schlüsselelement der vorgeschlagenen Strategie, sollte aber nicht mit herkömmlicher Selbstregulierung verwechselt werden, da sie gewisse Zwänge beinhalten würde, nämlich nicht nur die Einführung einer positiven Gleichstellungspflicht und die Festlegung einklagbarer Ziele und Zeitpläne, sondern auch die Einführung zweier weiterer Elemente. Auch wenn Flexibilität gefördert wird und die Unternehmen aufgefordert wären, selbst angemessene Ziele und die Mittel zu deren Erreichung zu bestimmen, wäre es dennoch wichtig festzulegen, in welcher Regulierungsstruktur diese Entscheidungen untergebracht werden sollen. In der Regel sollte dies in Form eines veröffentlichten Gleichstellungsplans geschehen; dieser müsste jedoch von einer unabhängigen Überwachungsstelle überprüft werden, die befugt ist, die Überarbeitung des Plans seitens des Unternehmens zu verlangen, wenn sie die von dem Unternehmen zur Bewertung der Unterrepräsentation angewandte Methodik und das Potenzial, diese im Laufe der Zeit zu korrigieren, für unzureichend hält. Darüber hinaus wäre es notwendig, nicht nur eine Ex-ante-Kontrolle, sondern auch eine Ex-post-Kontrolle einzuführen. Von den Unternehmen würde, was ihre Fortschritte bei der Erreichung der gesteckten Ziele betrifft, erhebliche Transparenz gefordert; zu diesem Zweck würden Berichtspflichten und staatliche Mechanismen eingeführt, die entsprechend ausgestattet sind, um die Fortschritte auf der Grundlage der vorgelegten Berichte zu überprüfen. Es sollte eine Reihe von Anreizen und Sanktionen geschaffen werden, um die Einhaltung der Vorschriften seitens der Arbeitgeber zu gewährleisten, sei es in Form von Auszeichnungen für Unternehmen, deren Fortschritte über das Erforderliche hinausgehen, oder in Form von Sanktionen für Unternehmen, die ihre Ziele nicht erreicht haben.

9) Überdenken der Subsidiarität.

Bislang war man im EU-Rat offensichtlich der Ansicht, dass die Gleichstellung der Frauen (neben der Beseitigung von Diskriminierung und der Festlegung sehr allgemeiner Standards) am besten auf nationaler Ebene zu schaffen sei. An die Stelle dieser Ansicht sollte die Sichtweise treten, dass die Gleichstellung der Frauen zu wichtig ist, um sie in erster Linie den Mitgliedstaaten zu überlassen, dass das entsprechende „Experiment“ eine Fülle von Informationen, aber sehr uneinheitliche Ergebnisse hervorgebracht hat und dass es höchste Zeit für die Mitgliedstaaten ist, sich auf ein koordiniertes Vorgehen auf EU-Ebene zu einigen. Die Gleichstellung der Frauen ist nicht nur unter dem Aspekt der Menschenrechte und als eine Frage der Gerechtigkeit von Bedeutung, sondern auch in wirtschaftlicher Hinsicht: Unternehmen, die keine positiven Maßnahmen ergreifen, um die Diversität ihrer Belegschaft zu steigern, laufen Gefahr, wirtschaftlich ins Hintertreffen zu geraten. Es gibt auch einen wichtigen wirtschaftlichen Grund, sich auf europäischer Ebene systematischer für eine verstärkte Anwendung positiver Maßnahmen einzusetzen: Die deutliche Kluft, die in Bezug auf Geschlechtergleichstellung und positive Maßnahmen derzeit zwischen den Mitgliedstaaten besteht, droht, sich zu einer beträchtlichen regulatorischen Divergenz auszuwachsen und

damit den Zusammenhalt des Binnenmarktes zu gefährden. Hintergrund der ursprünglichen Bestimmung über Entgeltgleichheit im Vertrag von Rom (Art. 119 EWG) war die Sorge derjenigen Mitgliedstaaten, die die Gleichbezahlung von Frauen bereits eingeführt hatten, von den Staaten, die dies nicht getan hatten, unterboten zu werden; es wurde daher vereinbart, dass die EU (bzw. die damalige EWG) darauf hinwirken sollte, einen Wettlauf nach unten zu verhindern, indem sie alle Mitgliedstaaten verpflichtete, diese Politik zu befolgen. Das volle Ausmaß der regulatorischen Divergenz in Bezug auf positive Maßnahmen, sowohl zwischen den Staaten als auch innerhalb der Staaten, ist nicht nur deshalb problematisch, weil ein potenziell wirksames Instrument zur Förderung der Geschlechtergleichstellung nach wie vor unzureichend genutzt wird. Es ist auch deshalb problematisch, weil es Staaten und Unternehmen davon abhalten kann, positive Maßnahmen systematischer einzusetzen, selbst wenn sie glauben, dass es in ihrem eigenen Interesse wäre, weil die damit verbundenen Kosten oft nicht bekannt sind. Unsicherheit erzeugt Risikoaversion – und ein potenzielles Risiko besteht darin, dass ein Land bzw. ein Unternehmen gegenüber einem anderen, weniger verantwortungsbewussten Land oder Unternehmen am Ende den Kürzeren zieht.

10) Ergreifen von Maßnahmen im Rahmen des bestehenden *acquis.*

Es liegt auf der Hand, dass auf der Ebene der Mitgliedstaaten große Vorbehalte bestehen, im sozialen Bereich ganz allgemein mehr Macht oder Befugnisse an die EU-Institutionen abzutreten (der Vorschlag zu Führungsgremien der Unternehmen und die Diskussionen über die kürzlich erzielte Einigung über die Richtlinie zur Vereinbarkeit von Beruf und Privatleben sind nach wie vor offen), und daher muss jegliche von den EU- Institutionen entwickelte Strategie diesen Widerstand berücksichtigen. Es gibt jedoch Maßnahmen, die die Kommission ergreifen kann – ohne so weit zu gehen, eine neue Richtlinie vorzuschlagen – und die rechtsverbindlich wären. Eine erläuternde *Mitteilung* könnte den bestehenden Rechtsrahmen für positive Maßnahmen im Licht der Rechtsprechung des EuGH beschreiben und konsolidieren. In einer *Empfehlung* könnte die Kommission ihre Strategie für die Gleichstellung von Frauen und Männern, unter Einbeziehung positiver Maßnahmen, detailliert darlegen. Eine solche Empfehlung wäre zwar nicht rechtsverbindlich, würde sich aber an die Mitgliedstaaten richten, um als Leitlinie für deren legislative und politische Ziele zu dienen. Es wird angeregt, dass die Kommission, falls sie beschließt, keine neue Richtlinie vorzuschlagen, eine Empfehlung in Betracht ziehen sollte, die ein detailliertes Konzept für positive Maßnahmen enthält, die auf nationaler Ebene umgesetzt werden sollten. Es würde die acht oben beschriebenen Elemente umfassen: (1) die Ziele, die mit positiven Maßnahmen erreicht werden sollen, (2) die Notwendigkeit positiver Pflichten, (3) die Rolle von numerischen Zielen und Zeitplänen, (4) das gesamte Spektrum der verfügbaren positiven Maßnahmen, (5) den Zusammenhang zwischen Leistungsprinzip und Geschlechterbevorzugung, (6) die Bedeutung der Reflexivität der Arbeitgeber in Bezug darauf, wie die Ziele erreicht werden können, (7) die geeigneten Kriterien, um zu ermitteln, welche Unternehmen nach ihrer Bedeutung unter die regulatorischen Anforderungen fallen sollten, (8) den rechtlichen Kontext dieser Anforderungen, einschließlich des Einsatzes von Gleichstellungsplänen, der Notwendigkeit der Überwachung und der Durchsetzung durch eine unabhängige nationale Behörde.

11) Förderung der Unterstützung der neuen Politik durch den EuGH.

Wir haben festgestellt, dass sowohl aus Gerechtigkeitsgründen als auch im Hinblick darauf, die politische Legitimität positiver Maßnahmen zu gewährleisten, die mit Bevorzugungen einhergehen, Grenzen dafür festgelegt werden sollten, was zulässige positive Maßnahmen sind. In diesem Zusammenhang ist es wichtig, dass die Kommission offen für die Zielkonflikte ist, die mit der Umsetzung einer Politik verbunden wären, in der Bevorzugungen eine größere Rolle spielen. Die richtige Strategie, um positiven Maßnahmen Legitimität zu verschaffen, besteht nicht darin, diese Zielkonflikte zu leugnen, sondern darin, zu zeigen, dass das Interesse an Gleichstellung schwerer wiegt als legitime Bedenken. Zu diesen Bedenken zählen die möglichen Auswirkungen auf bestimmte Gruppen von Männern (und zwar nicht unbedingt die, die derzeit am stärksten begünstigt sind) und die Beschränkung der Freiheit privater Arbeitgeber, ihre Unternehmen zu organisieren und zu führen. Positive Maßnahmen bringen ein geringes Maß an Umverteilung und Regulierung mit sich, die begründet und entsprechend beschränkt werden müssen. Solche Beschränkungen sind umso notwendiger, als positive Maßnahmen auch zum Nachteil von Frauen

eingesetzt werden können – die Erfahrung lehrt, dass positive Maßnahmen eine potenzielle Büchse der Pandora sind, die es unberechenbaren Politikern ermöglicht, unter dem Deckmantel positiver Maßnahmen Schritte zu unternehmen, die, absichtlich oder unabsichtlich, der Gleichstellung von Frauen zuwiderlaufen. Die derzeit vom EuGH angewandten Beschränkungen entsprechend weitgehend denen, die jede neue Politik anwenden sollte. Trotz aller Kritik am Gerichtshof verdient sein allgemeiner Ansatz insgesamt Unterstützung, da er sich auf eine Beurteilung stützt, die weitgehend auf Verhältnismäßigkeit basiert. Weitere Klarstellungen seitens des Gerichtshofs wären jedoch nützlich. Im Idealfall sollte er deutlich machen, dass im Rahmen des weitgehend aristotelischen Gleichheitsverständnisses der EU positive Maßnahmen eher ein Bestandteil von Gleichstellung als eine Abweichung davon sind. Der Gerichtshof könnte sinnvollerweise noch einmal darauf eingehen, was legitime Ziele sind, die positive Maßnahmen rechtmäßig verfolgen können, und klarstellen, dass es eine Vielzahl legitimer Ziele gibt. Der EuGH sollte aufgefordert werden, näher zu erläutern, wann positive Maßnahmen in Stereotype abrutschen, anstatt einfach die Realität der praktischen Erfahrungen von Frauen anzuerkennen. Es ist dringend erforderlich, genauer zu klären, was der EuGH in diesem Zusammenhang unter „Qualifikation" versteht und inwieweit Qualifikationen „gleich" sein müssen, damit positive Maßnahmen rechtmäßig sind. Ebenso könnte der Gerichtshof ersucht werden, in einem geeigneten Fall zu klären, inwieweit ein symmetrischer Ansatz für positive Maßnahmen tatsächlich der einzige ist, den der Gerichtshof zulässt, oder ob manchmal auch ein asymmetrischer Ansatz zulässig ist. Die Kommission spielt in diesem Zusammenhang eine wichtige Rolle, indem sie den Gerichtshof auf die realen Gegebenheiten vor Ort aufmerksam macht und zur Klärung auffordert. Generell wird vorgeschlagen, dass die Kommission, wenn sie in Rechtssachen interveniert, darauf achtet, Positionen zu vertreten, die eher geeignet sind, eine Strategie positiver Maßnahmen wie die oben empfohlene zu fördern. Kurz gesagt, Die Kommission sollte eine strategischere Nutzung von Rechtsstreiten in Betracht ziehen, um positive Maßnahmen auch ohne eine neue Richtlinie zu fördern.

12) Vorschlag einer neuen Richtlinie.

Um es ganz offen zu sagen, es ist sinnlos, ein weiteres Mal die Mängel bei der Umsetzung positiver Maßnahmen auf nationaler Ebene hervorzuheben, ohne sich mit der Frage zu befassen, was dagegen getan werden kann. Die Strategien, mit denen die EU versucht hat, ihren Einfluss geltend zu machen, haben es nicht geschafft, die nationalen Widerstände gegen positive Maßnahmen zu verändern. Es braucht verbindliche Rechtsnormen. Die Erfahrungen mit der Empfehlung 84/635 zeigen, dass eine unverbindliche Empfehlung ihr Ziel verfehlen kann. Eine neue Richtlinie sollte aus den in der vorgeschlagenen Empfehlung enthaltenen Elementen unionsrechtliche Verpflichtungen der Mitgliedstaaten und (einiger) Arbeitgeber machen: (1) die Ziele, die mit positiven Maßnahmen erreicht werden sollen, (2) die Notwendigkeit positiver Pflichten, (3) die Rolle von numerischen Zielen und Zeitplänen, (4) das gesamte Spektrum der verfügbaren positiven Maßnahmen, (5) den Zusammenhang zwischen Leistungsprinzip und Geschlechterbevorzugung, (6) die Bedeutung der Reflexivität der Arbeitgeber in Bezug darauf, wie die Ziele erreicht werden können, (7) die geeigneten Kriterien, um zu ermitteln, welche Unternehmen nach ihrer Bedeutung unter die regulatorischen Anforderungen fallen sollten, (8) den rechtlichen Kontext dieser Anforderungen, einschließlich des Einsatzes von Gleichstellungsplänen, der Notwendigkeit der Überwachung und der Durchsetzung durch eine unabhängige nationale Behörde. Eine neue Richtlinie sollte sich darüber hinaus mit Aspekten befassen, die vom Gerichtshof im Rahmen des bestehenden *acquis* noch geprüft werden müssen. Weiter oben wurde zum Beispiel vorgeschlagen, dass eine Bevorzugung zulässig sein könnte, wenn zwei Bewerber (ein Mann und eine Frau) „weitgehend gleich qualifiziert" sind, seitens der Mitgliedstaaten gibt es bisher jedoch kaum Orientierung, was dies in der Praxis genau bedeutet. Eine neue Richtlinie hätte die wichtige Funktion, zu klären, wie mit der Frage der gleichen Qualifikation umzugehen ist, indem sie vielleicht einen Ansatz wählt, der sich dem Konzept der „grundsätzlich" gleichen Qualifikation annähert, und die schwierigen Fragen der negativen Auswirkungen auf Dritte und der Geschlechterstereotypisierungen im Kontext positiver Maßnahmen eingehender zu beleuchten.

1 Introduction to the report

1.1 Introduction

Employment opportunities remain vital to women's wellbeing, not least because employment is closely linked to income and access to other material resources, in turn affecting how far women have the ability to live their lives as autonomous individuals. Equality in employment opportunities and pay must be central to any policy seeking to challenge gender inequality, but these are not the only issues that such policies must address. Gender inequalities arise across a range of contexts: access to health resources is often unequal; gender inequality in the household has important effects on women's and children's wellbeing and their economic activities; political disempowerment of women and their unequal representation in key positions of power mean that their wellbeing is not fully taken into account in the political process; inequality in the provision of women's education is still widespread; the position of women who are, or were, full-time carers in the family is often ignored or taken for granted; women who have a disability, or who are LGBT+, or who are from a religious or ethnic minority often suffer from double, multiple, or intersectional discrimination. All these dimensions of inequality intersect and interact. For both women and men, for example, the family setting is often key to determining whether inequalities will be perpetuated in the context of education and labour force participation. Unequal access to the full range of educational opportunities contributes to occupational segregation and associated wage differences – and so on. The vicious circle of these inequalities intensify and aggravate each other.

From the Treaty of Rome in 1957, in the famous Article 119 EEC on equal pay for men and women, and then more intensively from the 1970s in a series of directives, EU policy has identified tackling the issue of employment inequality (including in the area of pay) as one way in which to break into this vicious circle of mutually reinforcing inequalities. The focus on employment equality and equal pay cannot be viewed in isolation, however, and other measures complement and supplement these employment-focused measures: prohibiting sex discrimination more broadly, such as in the provision of goods and services; securing a more sustainable work-life balance; ensuring that men and women who choose to raise children are able to continue to participate as fully in the labour market as they would wish; and many other policies. These separate but overlapping policy agendas are pursued in various different ways.

This report does not attempt to address the broad range of gender inequalities or the full range of measures adopted at the EU and national levels to tackle all these problems. The report has a narrower focus. Since at least the 1980s, the European Union has advocated the use of 'positive action' in employment as a key mechanism to advance women's equality. It has sought to persuade Member States and employers that positive action (a term that is somewhat flexible in its meaning, as we shall see) is a necessary part of any effective gender equality strategy.

'Positive action' involves the use of measures that are taken by Government or other actors to enable or encourage members of 'protected groups' (such as women) to overcome or at least reduce current or past disadvantages (including discrimination), or to meet the needs of the protected group that differ from other groups, or to enable or encourage persons in the protected groups to participate in a particular activity where they might otherwise be under-represented.

The report has three primary aims. First, it seeks to identify the current legal and regulatory frameworks and scope of positive action in European Union law and policy, and in the states covered by the report. We were asked to focus on the use of *positive action* to address *gender* inequality in the *labour market*, and in this report, the term 'positive action' will be used, primarily, to describe measures in that context. We were also asked to include within the scope of our report the topical issue of how to ensure gender-balanced company boards. The report covers the current 28 European Union (EU) Member States (including the United Kingdom, which at the time of writing remains a full member), and the three members of the

European Economic Area (EEA, comprising Iceland, Liechtenstein, and Norway). Secondly, this report aims to lay bare where tensions and gaps may arise in the applicable legal framework between different levels of legal authority, but in particular between EU law and national approaches to positive action. Addressing this second issue will involve a reflection on whether there are possible inconsistencies or shortcomings in the current EU legal treatment of positive action (including the jurisprudence of the Court of Justice of the European Union (CJEU, previously the European Court of Justice; for the sake of simplicity, 'CJEU' refers to both in this report.). The third aim, in light of this analysis, is to make recommendations for possible European Union (in particular European Commission) action, including suggestions for actions that may be included in any forthcoming EU gender strategy. This first chapter details how the report attempts to achieve these three aims, and introduces the broad conclusions that subsequent chapters will support.

1.2 Methodology

This report is based primarily on data gathered as a result of questionnaires completed by the legal experts on gender of the European Commission's European Equality Law Network, which comprises experts from each of the states covered by this report. The questionnaire is attached as an appendix at the end of this report. I am most grateful to the members of the Network for their cooperation, without which this report could not have been written. Country reports are not published separately, but instead the national information on the implementation of positive action measures was compiled and categorised in an overall structure that makes it possible to get an overview for each Member State, indicating whether measures are taken, and if so which ones, and identifying examples of best practice. All translations into English have been provided by the national experts. The questionnaire (which is included as an appendix) sought qualitative information on the particular type of positive action measures in use, the primary justifications advanced for such measures in the jurisdiction concerned, how the preferred group is defined and what difficulties this has given rise to, and the major constraints on introducing and continuing the use of such measures, focusing particularly on the legal context, in light of the room EU law leaves for positive action. I have also drawn extensively on my previous published work on the comparative, conceptual and empirical analysis of positive action,[1] including that written with Professor (now Judge) Sacha Prechal, previously of the Gender Equality Network.[2]

1.3 Structure of the report

The report is structured in three parts, after this introductory chapter. In Part 1, two chapters set out, briefly, the approach that is adopted to positive action in EU law and policy, including by the Court of Justice of the European Union (CJEU). The approach taken to 'positive action' in EU law has evolved over the past 40 years, both in EU legislation, and in the case law of the CJEU. The approach taken by the Court of Justice of the European Free Trade Association States (the EFTA court), and (more briefly) by the European Court of Human Rights is also considered. Part 2 examines systematically the approach to positive action adopted in the Member States of the EU, and the states comprising the EEA. Part 3 assesses the impact of EU law and policy on the approaches adopted in these states, identifying where the limits of the EU's strategy have been, and then turns to consider an alternative strategy, which promises to be more successful in using positive action to secure a significant change in the position of

1 McCrudden, C. (2011) 'A Comparative Taxonomy of 'Positive Action' and 'Affirmative Action' Policies,' in Reiner Schulze (ed), *Non-Discrimination in European Private Law*, Mohr Siebeck, Tübingen, pp. 157-180; McCrudden, C. (2009) 'Equality and Non-Discrimination', in David Feldman (ed), *English Public Law* (2nd edition), OUP, p. 499; McCrudden, C. (1986) 'Rethinking Positive Action', 15 *Industrial Law Journal* p. 219 (reprinted in S. Mitra (ed.), *The Politics of Positive Discrimination,* Popular Prakashan PVT Ltd., Bombay); McCrudden, C. (2003) 'Theorising European Equality Law,' in Cathryn Costello and Eilis Barry (eds), *Equality in Diversity,* Irish Centre for European Law), p. 1; McCrudden, C. (2015) 'Affirmative Action: Comparative Policies and Controversies' in James D. Wright (editor-in-chief), *International Encyclopedia of the Social & Behavioral Sciences*, (2nd edition), vol 1, Elsevier, pp. 248-255.

2 McCrudden, C., and Prechal, S. (2009) *The Concepts of Equality and Non-Discrimination in Europe: A practical approach*, European Network of Legal Experts in the Field of Gender Equality, European Commission.

women in the labour market. The remainder of this chapter sets out the issues to be discussed in the following chapters.

1.3.1 Part 1: Positive action in EU gender equality law and policy

In Chapter 2, we shall see that these two sources (EU legislation and case law) have co-evolved, with changes in one being partly due to changes in the other. Although changes have occurred, however, the basic approach adopted in EU law and policy has remained relatively stable. EU approaches to positive action have attempted to ride two horses at the same time. On the one hand, positive action is legally an exception to the non-discrimination principle in the gender equality directives. On the other hand, in terms of EU policy on gender equality, the EU has consistently promoted positive action as a measure that Member States should adopt in order to advance the broader aim of equality between men and women, even though not legally required to do so. Along with measures to advance these other policies, positive action remains a central element in EU policy pronouncements to this day, as an important part of the EU's wider strategy of how to address gender inequality. The report identifies two key features of the approach taken to positive action in EU law and policy (subsidiarity and self-regulation). We shall see subsequently that the potential advantages of these features of EU policy have materialised, to the extent that greater experimentation has been encouraged, but that they have not resulted in the sustained use of positive action to advance women's equality, in contrast to the approach taken regarding company boards.

In Chapter 3, we consider the CJEU jurisprudence on positive action in some detail. We shall see that, following an initial foray into the topic in the controversial *Kalanke* case, which attracted significant criticism, the principal question was whether the approach initially articulated in that case would continue. The answer was not long in coming. Between the judgment of the Court in *Kalanke* and the coming into force of the Treaty of Amsterdam, the CJEU modified its approach somewhat, bringing its interpretation more into line with the spirit of the changes introduced by Article 141(4). In this chapter, we introduce the positive action jurisprudence of the CJEU, and the EFTA Court, which has considered positive action. We shall see that this jurisprudence is complex. Subsequent chapters will show that the approach taken in these decisions has been influential in several states as regards the structure and content of national legislation.

Over time, the CJEU's jurisprudence demonstrates a clear commitment to the application of a set of common principles to the complex issues presented. Positive action measures that are in tension with non-discrimination requirements will be subjected to a broadly proportionality-based assessment. This includes the requirements that the aim of the measures be transparent and legitimate, that the measures adopted should be sufficiently connected to achieving those aims, and that the aims cannot be achieved by the adoption of methods that pose a less significant challenge to the non-discrimination principle. Consistent with this approach, positive action measures should in particular address two potential problems with positive action: stereotyping and third-party costs. The problem of stereotyping is that positive action measures, in the guise of assisting women to overcome barriers, may simply reinforce existing barriers. This has led to judicial scepticism as to whether measures that appear to confirm a traditional understanding of the role of women as mothers and carers can survive scrutiny. The problem with third-party costs is that positive action may have adverse effects on those not benefitting from these measures, and the extent of those costs should not be disproportionate to the benefits. This has led to the adoption of a judicial rule of thumb that preferences cannot be accorded to those of the under-represented sex if they are not, broadly, as well-qualified as the candidate who was not awarded the position, and that the decision-making body must be open to the possibility that the circumstances of the male candidate are such that the default preference for the person of the under-represented sex should be overridden. Under no circumstances can a person from the under-represented sex be given an automatic and unconditional preference. It is reasonable to conclude that the approach taken by the EFTA Court is equivalent to that taken by the CJEU, not least because the approach taken by the CJEU

has been regarded as highly persuasive, if not binding, by the EFTA Court in the one significant case in which the EFTA Court has considered positive action. There is no indication, therefore, that the approach of the EFTA Court would be any different were the other issues on which the CJEU has given its opinion to come before the EFTA Court in the future.

1.3.2 Part 2: Positive action at the national level

The terms 'positive action' or 'positive measures' are widely used as legal terms by both the EU and EEA institutions to the virtual exclusion of other terms. The term 'positive action' is also widely used in most Member States and EEA countries. However, in Chapter 4, the report points to the widely differing terminology used in the states covered by the report to describe measures that would come within the definition of positive action set out in the previous chapters. We shall see that multiple other terms in addition to 'positive action' are used nationally, but even where states use the term 'positive action' it will have to be translated into the national language, and when we refer in this report to the use of a particular term, this is nearly always a translation of that term into English, with the limits that that brings.

There is considerable confusion among these states as to how positive action, as understood in the previous chapters, is described nationally, and some significant differences as to what the term positive action means nationally compared with the EU usage. Terms other than positive action are sometimes used to describe EU-type positive action, and the term positive action is sometimes used nationally to describe measures that would not be described as positive action at EU level. As we shall see, this terminological confusion indicates an underlying conceptual confusion. From the perspective of policy makers (whether national or in the EU institutions) this means that considerable care will be necessary in future in deciding upon the preferred term (or terms) to describe particular policies. Policy makers cannot simply assume that all states will understand the same thing when they hear the term 'positive action', as we shall see in some detail subsequently.

The report provides an inventory and categorisation of the legislative measures that have been implemented in the employment context at the national level in these 31 states. In Chapter 5, we divide Member States into three broad categories in terms of the approach they adopt to positive action in their national legislation: category 1 comprises states in which positive action by employers is permissible within limits, but voluntary, in both public and private sector employment; category 2 comprises states in which positive action by employers is permissible, within limits, in the private sector but compulsory, within limits, in the public sector; and category 3 comprises states in which positive action is compulsory in both private and public sector employment (the one Member State that does not come within any of these categories is **Latvia**, which does not appear to have any provision for positive action, even as an exception in private sector employment). We can regard EU legislation in the area of positive action as potentially setting both a floor and a ceiling. As regards the floor, given that EU law permits, rather than requires positive action, all states in categories 2 and 3 are exceeding their obligations under EU law. And since adopting the exceptions-based approach is itself at the discretion of Member States, even **Latvia** does not appear to be in breach of EU law in failing to incorporate positive action as an exception in its legislation prohibiting gender discrimination.

The results of this account of national legislation providing for positive action in employment are striking and somewhat disturbing. First, there are very wide disparities, between, say, the approach taken in **Latvia** and the approach taken a short distance away in **Sweden**, or between **Denmark** and **Norway**. These examples indicate that differences emerge not only between countries that diverge significantly in terms of legal culture, previous history, and prosperity, but also between countries that we may be tempted to think are quite similar in terms of their geographical, cultural or political background and context. Countries within each of the main blocs, the Visegrád Group (**Czech Republic**, **Hungary**, **Poland**, and **Slovakia**), the Baltics (**Estonia**, **Lithuania** and **Latvia**), Eastern Europe (**Bulgaria** and

Romania), south-eastern Europe (**Croatia** and **Slovenia**), and southern European states (**Greece**, **Italy**, **Malta**, **Portugal** and **Spain**) are as likely to diverge among themselves in the approach adopted, as they are to diverge from the approach taken by states outside the bloc. None of these groups appear to have anything like a common position internally. The Nordic countries tend to be an exception to this absence of internal similarity.

Secondly, half of EU Member States do not require either public or private employers to adopt positive action measures in employment (**Czech Republic**, **Cyprus**, **Denmark**, **Estonia**, **Ireland**, **Latvia**, **Lithuania**, **Malta**, **Netherlands**, **Poland**, **Romania**, **Slovakia** and **Slovenia**), contenting themselves with including a provision establishing an exception for positive action (except **Latvia**), but otherwise leaving it up to employers to decide whether to engage in positive action. Only a handful of states require positive action in both the public and private sectors of employment (**Finland**, **France**, **Iceland, Italy**, **Sweden** and **Norway**), and of these, two are outside the EU, (being members of the EEA), and four are Nordic states (**Finland**, **Iceland, Norway** and **Sweden**). One general conclusion that may be drawn from this pattern is that there is an interesting relationship between the introduction of positive action in the public and private sectors: there is some evidence that countries that introduce positive action measures in public sector employment may set an example for the private sector to come up with its own, voluntary, measures; and states that have introduced compulsory measures in the private sector have tended to have introduced these measures first in the public sector. Another general conclusion from this pattern is that those countries that have adopted positive action in a sustained way have tended to locate their positive action measures as part of a more comprehensive, well-considered gender equality policy and legal approach/action plans, in which other structural problems such as unequal pay are included.

Beyond these broad conclusions, several further conclusions may be reached on the basis of the detailed analysis provided in this chapter. First, there are several points of similarities, differences and complexities that become evident upon comparing the national approaches that are not captured by the compulsory-voluntary, and public-private distinctions. Three points seem particularly worth pointing to in this conclusion. First, the issue of positive action is addressed in some countries in their constitutions and in others in ordinary legislation only. A second point that emerges is that in some states, positive action is permitted in theory, but cannot come into operation until some further legal action is taken, an action plan drafted, or some further institution established (**Lithuania** is the best example, but **Germany** is another regarding the role of works councils). Thirdly, it is interesting to observe that there is a shift towards more receptive approaches towards positive action in those states where positive action was introduced as a compulsory element early in that state's consideration of how to approach positive action, but that those states which initially adopted a totally voluntarist approach have mostly doggedly stuck to this approach, and little forward movement can be detected. Chapter 5 will provide an overview of positive action in employment in the legislation of the Member States.

In the subsequent chapters in Part 1, we drill down into the detail of the approaches taken nationally. In Chapter 6, we consider the material and personal scope of measures taken at the national level in EU and EEA states. In this chapter, we point to two particularly controversial areas, where there is significant divergence as to whether positive action measures are regarded as appropriate, namely in the context of pay, and in the context of redundancy. As regards the personal scope of positive action measures, the issue of which group (or groups) is defined as the beneficiary of the positive action programme is a crucial variable. In particular, the issue arises as to whether the beneficiaries of positive action are defined in symmetrical or asymmetrical terms. Are those who are to benefit as the 'underrepresented group' to include men as well as women in some situations, or are the beneficiaries defined explicitly as women, as opposed to men? A second issue is how far the group is defined to include one or more additional characteristics in addition to gender (such as race, or disability, or religion, for example), raising the issue of how far positive action engages with intersectionality. A third issue, since it is likely that the beneficiaries are defined in binary terms as 'men' and 'women', is how membership of either group is to be determined, raising the question of how positive action measures address trans* issues.

In addressing each of the issues discussed in Chapter 6, similar to what we find in Chapter 5, the states discussed frequently adopt very different approaches, but few states are particularly well advanced in their practice, let alone in their thinking, on any of these issues. To that extent, we see not only diversity of approach, but also a degree of uncertainty as to how to proceed at the state level. There is a sense, frequently, that the innovation and experimentation that there used to be in how to approach positive action has now slowed, and that this is evident in the way in which the issues discussed in this chapter, which have mostly emerged since the 1980s and 1990s, are frequently ignored at the national level.

In Chapter 7, we provide more detailed information on the type of positive action measures that have been specified in national legislation, and/or are adopted in practice in the states surveyed in this study. The approach adopted is to classify national legislation and practice into several broad groupings, thus providing a taxonomy of positive action measures at the national level. We can think of the term 'positive action' as an umbrella concept, under which many different types of programmes shelter.

The first group of actions that some jurisdictions regard as 'positive action' are where active anti-discrimination policies are regarded as positive action. It is controversial whether these measures would be regarded as a form of positive action in other jurisdictions. These activities amount to little more than adopting measures to help avoid what is generally unlawful discrimination, for example where the employer agrees to remove symbols from the workplace that may well constitute unlawful harassment against a particular group if they remained, or where the system of 'last in, first out' as the basis for making redundancy decisions is replaced by a system with less adverse effects on newly hired minorities, or where an equality body engages in a campaign to urge employers not to discriminate, or where an employer is required to make reasonable efforts to accommodate persons with disabilities.

The next category of activities that have frequently been regarded as coming under the 'positive action' umbrella consist of measures that are conscious of the group dimensions of inequality, but do not use direct preferential treatment of members of the targeted group in making decisions as to whom to employ. Perhaps least controversial are measures such as the collection of statistics to monitor the participation of women and men in employment; in measuring inequality, such monitoring demonstrate the need for positive action measures. This category also includes indirectly inclusionary measures, such as government assistance targeted at all those returning to work, for example, result in women benefiting disproportionately because they are disproportionately represented in the targeted group. This activity involves measures being adopted that go beyond avoiding simple direct or indirect discrimination. Advertising by employers, Government bodies or others is another type of measure included in this category. This specifically targets the gender group that is considered underrepresented in a particular type of employment that is non-traditional for that group, for example advertising encouraging women to become fire fighters. Special training may also be offered by employers, Government bodies or others, which also specifically targets the gender that is considered underrepresented in a particular type of employment that is non-traditional for that group, for example providing special training to men wanting to become kindergarten teachers. To encourage the underrepresented group to remain in employment, the employment may provide facilities to lessen particular disadvantages, such as providing women with children preferential access to child-care facilities, thus encouraging them to take up employment in these firms. These measures are designed to attract or retain qualified candidates from the previously underrepresented group in two ways: first, by bringing employment opportunities to their attention and encouraging them to apply; secondly, by providing better training to equip them for competing on equal terms when they do apply; and thirdly, by attempting to reduce burdens particularly associated with that group. These types of measures are sometimes said to operate on the 'supply side' of the equation, meaning that they are intended to change the behaviour of the underrepresented group, rather than those on the 'demand side', which are measures that are intended to affect the behaviour of employers towards what counts as relevant in making decisions as to who should be appointed to a job.

The third category of activities operates more on the 'demand side', and involves the use of preferential treatment of members of the targeted group. Tie-break policies prefer an individual

from the underrepresented group, where he or she is equally well qualified, to a candidate from the overrepresented group: for example, where both men and women candidates for an engineering job are equally well qualified, and the woman candidate is chosen because men are overrepresented in engineering employment. Although controversial, such activities are among the more common types of positive action in practice. They involve the direct identification of individuals from the targeted group as beneficiaries of the policy, but they have no clear impact on traditional conceptions of 'merit' since in neither of these two types of positive action are traditional conceptions of merit changed or challenged. Within this category, the next types of positive action measure elicit the most heated debate, consisting of measures that involve preferential treatment for members of the underrepresented group, where the candidate may be less-well qualified than another candidate, but are still qualified to do the job. There are considerable differences between different types of measures that fit under this broad heading, relating to the type of preference accorded and the situation in which the preference is accorded. It is also worth distinguishing between preferences for a particular candidate from the underrepresented group and a general quota in favour of candidates from the underrepresented group.

Finally, we can identify measures where employers change traditional criteria for employment or promotion in such a way that the new criteria are more likely to favour candidates from the underrepresented group, modifying traditional 'merit' in favour of increasing participation. Redefining merit involves changing the traditional criteria for admission to university or employment, for example, in such a way that the new criteria are more likely to favour candidates from the underrepresented group: for example, requiring a proportion of candidates for a particular job providing services to be from a particular gender in order to ensure that the provision of services are more acceptable to that group, or appointing women to boards of companies because of a belief that women will bring a particular perspective to decision-making. These types of positive action are seen as posing the greatest challenges for traditional conceptions of 'merit' in the sense that, 'traditional merit' is over-ridden in favour of increasing participation, or 'merit' is redefined to include characteristics that the targeted group are more likely to have.

We will see that one of the potential advantages of the EU's current approach to positive action, which places Member States in pole position, is that experimentation can take place, and is indeed encouraged. This chapter demonstrates that, at the level of the individual states, there has indeed been extensive experimentation, not only in the range of different types of positive action in operation, but also in respect of whether preferences are permitted and what type, and how far the concept of 'merit' is being rethought. In so far as the purpose of EU policy is stimulating experimentation, it has been a success. We shall see subsequently, however, that in so far as experimentation was thought likely to lead to emulation, with states learning from each other which types of positive action constitute good practice and adopting those, leading to a significant degree of convergence among the states, this does not appear to be happening – it is hard to discern any convergence across the EU as a whole. Furthermore, on the basis of our analysis, one can draw some conclusions on some of the challenges in the effective application of positive action measures. There appear to be two principal challenges. First, there remains considerable uncertainty at the national level which types of positive action are available under national legislation, with national experts frequently uncertain whether a particular measure was, or was not permitted. We shall see subsequently that there has been litigation at the national level seeking clarity on some of these issues, but inevitably this has been sporadic, and in any event whether or not there has been litigation in a particular state on a particular issue, uncertainty often persists as regards other types of measure. Secondly, and not unconnected, there is a significant gap between what is permitted or required in any particular state and what is actually put into practice in that state – merely because a particular measure is permitted or required does not mean that it is adopted.

In Chapter 8, we examine the development at the state level of positive action policies aiming to secure more balanced gender representation on the boards of companies. The European Commission has submitted a proposal for a directive on gender balance among non-executive directors of companies listed on stock exchanges, and this proposed directive is still under consideration. The measures taken by several states pre-date this initiative, whereas the proposal appears to have stimulated other states

to address the issue for the first time. There is a clear distinction between those states that rely on voluntary action by the relevant body to secure the desired end, and those that rely on regulation to achieve that end. For those states that rely on a degree of regulation for securing changes in Government boards, there is another distinction that can be identified: between states that rely on self-regulation by bodies set up by the industry itself, and those states that rely on statutory regulation. We begin, first, by identifying those states that have no specific regulatory structure that seeks to further the aim of greater gender balance (category i); secondly, those states that rely on industry-level self-regulation without statutory obligations (category ii); and thirdly, those states that have introduced statutory obligations to further that aim (category iii).

In several respects, the pattern of activities attempting to secure more equal gender representation on company boards mirrors the pattern we see in previous chapters regarding positive action in the employment context. First, several states are still not doing anything at all to secure gender-balanced company boards. This is despite the Commission's proposal on company boards, and the enhanced action taken in other states. Secondly, the difference in regulatory approach among those states that have taken action shows extreme diversity, from encouraging voluntary non-legally-binding codes of practice, such as in Sweden and Poland, to the approach of strict regulation and sanctioning in **Norway**, followed by some other countries like **Italy** and **France**. Thirdly, the specific measures adopted to secure gender-balanced company boards reflect several of the positive action measures in employment identified in previous chapters, such as tie-break priority rules in the case of equal qualifications, and the use of numerical targets or quotas. Fourthly, some states have moved to a stricter legal approach after first having introduced measures to secure a gender balance in Government bodies and committees. So, here too, there is some evidence of the public sector leading by example, or at least providing evidence that such measures are feasible, before similar measures are introduced in the private sector.

In contrast with the picture built up in the previous chapters where the issue was positive action in employment, states appear to be more willing to impose statutory positive action obligations on private sector companies regarding the composition of their boards than in the context of the composition of their workforce. The difference in regulatory approach is striking. States appear willing to impose much more specific obligations in the company boards context, including measures that are often not required in the employment context in those same countries. This includes imposing specific quotas (**Belgium**, **Germany**, **Greece** – albeit only concerning the boards and the service councils of the public sector – **Austria**, **Iceland**, **Italy**, **Norway**) or numerical targets (**Denmark**, **Finland**, **France**, **Luxembourg**, **Netherlands**, **Slovenia**, **Spain**) to be met within a specific timeframe. There appear to be four significant factors that may help explain the differences. Positive action at the European level emerged in the 1980s and 1990s, at a time when there was considerable faith in self-regulation (although at the Member State level some states started earlier (**United Kingdom**), and some later (**Greece**). The development at the state level of regulatory approaches regarding company boards, on the other hand, often emerged after the financial crisis of 2008, when self-regulation was much less in vogue. The fact that many of the developments at the national level occurred after the Commission proposed a directive that would introduce EU legal obligations to undertake positive action at the level of company boards is hardly co-incidental. There is a long history of regulating the workplace by prohibiting certain conduct by employers, and requiring other conduct. But regulating who may sit on the board of a privately-owned (though publicly-traded) company does not have a similar history.

It has already been observed that, in several Member States and EEA countries, the national courts have given judgments that have important implications for the understanding and scope of permissible positive action under national law. A complete picture of the legal position on positive action at the national level must not, therefore ignore the role of the national courts, just as it would present a limited picture of EU or EEA law to leave out the decisions of the CJEU and the EFTA Court. In Chapter 9, we turn to national (primarily constitutional) law and its interpretation by national courts in the context of positive action. These decisions add considerably to our understanding of the limits imposed by national law on what is regarded as appropriate positive action, setting a ceiling on permitted positive action

measures. In several respects, the interpretation of EU law by the CJEU, and national constitutional law by constitutional courts, often (although not always) runs in parallel, addressing several common questions, and arriving at similar conclusions reflecting the application of common principles, such as proportionality. National courts and the CJEU may apply these principles in ways that differ from each other, for example in the terms used to describe what they are doing, and in the weight given to particular elements in the proportionality test. These differences aside, however, there is a significant consensus that can be identified in practice that enables policy makers at the national and EU levels to make decisions regarding the scope of positive action with some degree of confidence as to what both national and EU law requires, should they wish to do so.

1.3.3 Part 3: An assessment

In Chapter 10, we consider the impact of the EU's positive action strategy on the development of positive action at the national level. We begin by examining the extent to which EU law on positive action (including the judgments of the CJEU) has been influential in the development of national approaches. We consider whether, beyond encouraging experimentation and an exceptions-based understanding of positive action, EU positive action law and policy has succeeded in having structures embedded at the national level that have brought about change in the labour market that have benefitted women. We attempt to identify what elements in EU gender equality law and policy, in which positive action is situated, have contributed to these effects. We consider to what extent the anti-discrimination model of gender equality has become dominant, and the extent to which CEDAW is part of European positive action discourse. We then consider national economic and political constraints on the adoption of positive action measures, before, finally, turning to the impact of more recent EU initiatives on the development of measures aimed at the gender-balancing of company boards.

In arriving at conclusions derived from this chapter on impact, three caveats must be entered. First, there is a degree of uncertainty as to what the ultimate goals are that positive action is supposed to contribute to achieving. What positive action is supposed to achieve significantly affects how its success in achieving these goals will be measured. Secondly, we are conscious in arriving at our conclusions on the effect of EU positive action law and policy that we must be cautious for a second significant reason. This report uses one methodology; complementing it with other methodological approaches may show harder evidence that would allow for more rigorous conclusions. Thirdly, we find that, in the main, states have little or no information to offer on what change has occurred as a result of positive action measures. With these caveats, however, we offer some preliminary conclusions based on the responses of our national legal experts.

In drawing conclusions from the evidence available, it is useful to draw a distinction between legal change and change in practice (or between law-on-the-books and law-in-action, as this distinction is sometimes described). We conclude that, in the main, the EU's positive action strategy has been influential at the level of legal change, in three principal respects. First, the EU has put positive action on the national political and legal agenda of certain states, to an extent that would have been unlikely without the EU's inspiration or the incentives it has created to encourage consideration of these issues, and this has led to the concept of positive action being introduced into national legislation (although it goes by different terms in different states) where it was previously absent. Secondly, it has encouraged a conception of positive action as a legal exception to the prohibition on discrimination in the national law of many Member States. Thirdly, it has been successful in encouraging experimentation on the types of positive action that national legislation and policy has adopted, such that a taxonomy of such measures now demonstrates a wide variety of different approaches.

Beyond this, however, the effects of EU positive action law and policy appear to be more mixed. On the basis of the comparatively thin information that is available, the voluntarist model of positive action, which is dominant at the national level across the EU, does not appear to have resulted in significant

change 'on the ground'. In the main, positive action measures have not been embedded at the national level that have brought about material changes in the labour market that have benefitted women. Where change on the ground has occurred, it largely derives from developments that are specific to the country concerned. The reasons for the limited exploitation of positive action differ from state to state. In some cases, Governments pander to populist resistance. In others, positive action is conceived of in highly negative terms. In others, it is poorly understood. The overall result is little positive action in practice. EU strategies attempting to bring influence to bear have not been successful in changing the domestic pressures against positive action.

EU law and policy may not have stimulated significant change, but have they *contributed* to the problem? The answer appears to be 'yes', at least to some extent. In attempting to identify what elements in EU gender equality law and policy, in which positive action is situated, have contributed to this state of affairs, we emphasise the dominance of the anti-discrimination model of gender equality, the very success of which appears to have successfully supplanted the broader aim of gender equality. We also identify a further, unintended, consequence of the dominance of the EU approach to gender equality: the virtual exclusion of CEDAW from European positive action discourse, except in a very few states. This is important, given that CEDAW would have presented an alternative model to that of the EU, had it flourished. We will consider the shortcomings of the EU model in contrast to the CEDAW approach. In brief, with the possible exception of the recent initiative concerning gender-balancing of company boards, which has been, comparatively, rather more successful in stimulating change at the national level, we suggest that the EU strategy has largely failed to present a sufficiently robust and effective counter-balance to national economic and political constraints on the adoption of positive action measures.

In Chapter 11, the report considers possible recommendations for a revised EU strategy regarding gender-based positive action in employment. Bluntly, it would be pointless for this report only to highlight once again the deficiencies of the delivery of positive action at national level, without addressing the reasons for the lack of take-up of positive action at the national level, and what can be done about it. More can be done to further clarify the idea of positive action itself, and some additional tools for understanding the concept can be adopted, in part by providing examples of positive action measures in different fields, and drawing on the relevant scholarly and policy literature. However, this report adopts a rather more ambitious approach, not just reiterating the same pattern of findings of previous reports, and urging greater attention be given to the existing EU policy agenda, but seeking to move beyond this policy. We suggest that there are elements both in national level initiatives and in the Commission's initiative on the gender balancing of company boards, that point towards a different approach, which would appear to be somewhat more likely to result in change. We suggest that any new EU strategy should consider seriously what lessons might be learned from these recent developments that might point a way forward for EU gender equality policy more broadly.

Drawing on this experience, we suggest that the European Union is faced with three significant choices in thinking about future policy on gender-based positive action in employment. The first is about what the EU wants to achieve: what is the aim or goal of policy in the area of gender-based 'equal treatment'? The second is what an effective strategy for positive action would look like at the state level. The third is what role EU institutions should play in securing the adoption of this strategy by the Member States (and indirectly in the EEA). In Chapter 11, we recommend that, if the Commission initially does not consider proposing a directive, it should at least adopt a Recommendation that would set out systematically a detailed strategy for gender equality, incorporating positive action. It is further suggested that the Commission should specify in this a detailed approach to positive action that should be adopted at the national level. This would comprise eight elements: (1) the goals that positive action seeks to achieve; (2) the need for positive obligations; (3) the role of numerical targets and timetables; (4) the inter-relationship of the merit principle and gender preferences; (5) the importance of reflexivity by employers in terms of how to meet targets; (6) the appropriate scoping criteria for identifying which firms should be covered by regulatory requirements; (7) the regulatory context of these requirements, including the use of equality plans; and (8) the need for monitoring and enforcement by an independent national authority.

Although a non-legally binding Recommendation could be helpful, this report considers that the Commission should go beyond the approach based on subsidiarity and voluntarism, and should aim to produce a directive that would set binding obligations on each of these issues. The EU has often sought, rightly, to define itself in terms of its values. One of those values is the value of equality between men and women, that is equality not just in theory, or as a rhetorical flourish, but as a lived reality. We consider that a legally binding directive is an appropriate instrument on which to base a new strategy on positive action aiming to address gender inequality in the labour market. Such inequality should be a matter of policy priority internally in the EU, and the absence of sufficient change requires more effective leadership at the EU level. It is, for example, a matter of concern that there is now such wide regulatory divergence on the issue of positive action that the coherence of the internal market is threatened, as we discuss subsequently. Effectively addressing gender inequality in the labour market is also an appropriate concern in terms of the EU's external face to the world. It is a consistent theme in commentaries on the European approach to positive action that some of its Member States fall short of the international standards contained in CEDAW. The regular criticism of some EU states by the CEDAW Committee for their failure to use the positive action tools available to produce real change should now be seen as a real cause for concern for the EU, calling for concerted Union action. In a world where the EU is a voice of sanity in supporting the rules-based international system, this shortfall in one of the most basic requirements of a civilized society is troubling, but it can be addressed. This report attempts to set out a revised EU strategy, one which is based on actions already underway in Member States and reflects elements of the Commission's strategy on gender-balancing of corporate boards, and thus constitutes a truly European model of positive action.

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Part 1
Positive action in EU gender equality law and policy

2 EU law and policy on positive action in employment and on company boards

2.1 Introduction

The approach taken to 'positive action' in EU law has evolved over the past 40 years, both in EU legislation, and in the case law of the CJEU. These two sources (legislation and case law) have co-evolved, with changes in one being partly due to changes in the other, as the following brief description demonstrates. Although changes have occurred, however, the basic approach adopted in legislation has remained relatively stable. EU approaches to positive action have attempted to ride two horses at the same time: on the one hand, positive action is legally an exception to the non-discrimination principle in the gender equality directives, while on the other hand, in relation to EU policy on gender equality, the EU has consistently promoted positive action as a measure that Member States should adopt in order to advance the broader aim of equality between men and women, even though not legally required to do so. Along with measures to advance these other policies, positive action remains a central element in EU policy pronouncements to this day. It is to be regarded as an important part of the EU's wider strategy of how to address gender inequality.

2.2 Positive action as exception

The EU's legislative provisions addressing gender inequality, setting a legal framework for women's equality in employment and working conditions, originally comprised one Treaty Article (Article 119 EEC), to which three directives were added in the 1970s: the first on equal pay (which incorporated the concept of 'equal pay for work of equal value'),[3] a second on equal treatment in other aspects of employment (such as hiring, promotions, and dismissals),[4] and the third on equal treatment in a limited number of social security matters.[5]

Initially, only the second directive, Directive 76/207 (the Equal Treatment Directive), introduced in 1976, provided for positive action, in Article 2(4). In the first draft of Article 2, the idea of positive action had been included in the definition of equal treatment itself, which it defined as: 'The elimination of all discrimination based on sex or on marital or family status, *including the adoption of appropriate measures to provide women with equal opportunity in employment, vocational training, promotion and working conditions*' (emphasis added). During the negotiations on this draft article, the reference to 'appropriate measures' was deleted.[6] As adopted, Article 2(4) provided only that the directive 'shall be without prejudice to measures to promote equal opportunity for men and women, in particular by removing existing inequalities which affect women's opportunities' in employment, including access to employment, promotion, vocational training and working conditions.

3 Council Directive (EEC) 75/117 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women [1975] OJ L45/198, later abrogated and replaced by Directive 2006/54.

4 Council Directive (EEC) 76/207 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 [1976] (*Equal Treatment Directive*) OJ L39/40, later abrogated and replaced by Directive 2006/54.

5 Council Directive (EEC) 79/7 on the progressive implementation of the principle of equal treatment for men and women in matters of social security [1979] OJ L6/24.34.

6 A point made by Susanne Burri, in Burri, S. (2018) *EU gender equality law – update 2018*, European network of legal experts in gender equality and non-discrimination, November 2018, para 3.4.

Since 1976, positive action has been interpreted in EU *law* as an exception to the anti-discrimination principle in the gender equality directives, instead of as an integral part of the equal treatment principle. The approach adopted, of first setting out a prohibition of discrimination, and then establishing that certain types of measures aimed at advancing gender equality should not be regarded as unlawful discrimination, has come to dominate subsequent EU Treaty amendments and secondary legislation. The 1992 Maastricht Treaty adopted this approach in the February 1992 Agreement on Social Policy, which was annexed to the Protocol on Social Policy of the Maastricht Treaty. Article 6(3) of that Agreement introduced for the first time a Treaty provision on positive action, providing that Article 119 EEC on equal pay 'shall not prevent any Member State from maintaining or adopting measures providing for specific advantages in order to make it easier for women to pursue a vocational activity or to prevent or compensate for disadvantages in their professional careers.'

Article 2(4) of the Equal Treatment Directive was initially interpreted quite restrictively by the European Court of Justice (now the Court of Justice of the European Union, the CJEU). In *Kalanke v Freie Hansestadt Bremen* (Case C-450/93)[7] a man who was employed by the City of Bremen Parks Department, complained of unlawful sex discrimination. He was one of two candidates on the final shortlist for a managerial position. He was rejected in favour of the other shortlisted candidate, a woman with similar qualifications. The decision was taken in order to comply with paragraph 4 of the *Landesgleichstellungsgesetz* of 20 November 1990.[8] This provided that women who had the same qualifications as men applying for the same post were to be given priority in sectors where they are underrepresented. Women were 'underrepresented' if they did not make up at least half of the staff in the individual pay, remuneration and salary brackets in the relevant personnel group within a department. Mr Kalanke challenged this on the basis that it conflicted with various provisions of the German domestic law. The Federal Labour Court found that it did not conflict with domestic law but referred it to the CJEU asking whether it conflicted with the Equal Treatment Directive. The national court asked in particular whether the directive precluded national rules that automatically gave priority to women in sectors where they were underrepresented, in cases where candidates of different sexes shortlisted for promotion were equally qualified.

The CJEU decided that the exception in Article 2(4) of Directive 76/207 permitted national measures relating to access to employment, including promotion, which, although discriminatory in appearance, were intended to eliminate or reduce actual instances of inequality and consequently gave a specific advantage to women with a view to improving their ability to compete on the labour market and to pursue a career on an equal footing with men. However, since it also involved a derogation from an individual right laid down in the directive, namely the right not to be discriminated against, Article 2(4) had to be interpreted strictly. On that basis, the Court held that national rules which guaranteed women absolute and unconditional priority for appointment or promotion, even when the candidates were equally well qualified and where women were underrepresented, went beyond the promotion of equal opportunities and went beyond the permitted exception in Article 2(4), and therefore constituted unlawful discrimination.

The reception of the CJEU's judgment in *Kalanke* was, in the main, hostile and highly critical, both of the result, and of the reasoning that led to the result. This reaction was to have continuing effects on the view taken on the relationship between EU law and positive action, as we shall see subsequently. Despite the fact that the Court, as we shall see, has modified its views, and despite the fact that this modification has considerably reduced the extent to which EU law poses a threat to, or a constraint on, the adoption of positive action in Member States, the effect of *Kalanke* still reverberates, and as a result EU law remains in the eyes of some, as we shall see subsequently, a significant (although, sometimes perhaps, a somewhat convenient) barrier to the adoption of positive action.

7 Judgment of the Court of 17 October 1995, *Eckhard Kalanke v Freie Hansestadt Bremen*, Case C-450/93, European Court Reports 1995 ECR I-03051; ECLI:EU:C:1995:322.

8 Germany, Bremen Law on Equal Treatment for Men and Women in the Public Service (LGG), 1990, (*Bremisches Gesetzblatt*, p. 433).

As a reaction to the CJEU's *Kalanke* ruling, Article 141(4) was included by the Treaty of Amsterdam into the Treaty (coming into force in 1999) as a replacement for the (amended) Article 119 EEC, and was intended to ensure a somewhat wider scope for positive action than the one favoured by the Court in *Kalanke*. Article 141(4) TFEU provided (and the same wording was subsequently included in Article 157(4) TFEU):

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

These provisions continued to allow for positive action measures by the Member States as an exception to the prohibition on unlawful discrimination, but substituted 'full equality in practice' for 'equal opportunities'. The Court in *Kalanke* had impliedly regarded the latter as more restrictive than the former. Following the Opinion of Advocate General Tesauro, the Court had found that the measures challenged went beyond promoting equal opportunities and unacceptably substituted equality of results for equality of opportunity. Article 141(4) (and Article 157(4)) also substituted the phrase 'underrepresented sex' for the earlier reference to 'women's opportunities', thus making the provision symmetrical, although Declaration 28 stipulated at the time of the adoption of the Amsterdam Treaty that positive action measures should in the first instance aim to improve the situation of women in working life.

Further substantial changes were introduced into the legal framework of the Union from the 1990s, providing for increased Union jurisdiction in matters relating to gender equality. Under Article 2 EC, the Union was given the task, explicitly for the first time, of promoting equality between men and women. In addition, Article 3(2) EC stated that in carrying out the activities, the Union 'shall aim to eliminate inequalities, and to promote equality, between men and women'. Article 13 EC gave the Council the competence to take appropriate action to combat discrimination based, *inter alia*, on sex. Not surprisingly, the judgments of the CJEU have taken these changes into account, as we shall see.

From 2000, EC anti-discrimination legislation was significantly expanded to cover grounds of discrimination other than gender, and beyond the employment context, and this also stimulated further reform of the gender discrimination directives. Significant amendments to the 1976 Equal Treatment Directive were introduced in 2002, to be implemented by Member States by October 2005. In 2004, for the first time, gender discrimination was prohibited in the area of goods and services. This had to be implemented by Member States by the 21 December 2007. In 2006, a new directive (the Recast Directive) was adopted bringing together many of the existing provisions of several gender discrimination directives dealing with employment, and updating them to reflect the case law of the CJEU. The Recast Directive was to be implemented by Member States by 15 August 2009.

Another source of the equality principle in EC law is the EU Charter of Fundamental Rights promulgated in 2000. In part, this document sets out more systematically the fundamental rights already considered by the CJEU as arising from the general principles of EC law. The Charter goes further, however, in setting out a wider catalogue of rights that are considered to be fundamental in the Community/Union, and contains a chapter headed 'equality'.

Several of these measures explicitly allowed for positive action. Recast Directive 2006/54 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation[9] defined positive action in EU law by tying it directly to Article 157(4) TFEU. Article 3, entitled 'positive action', provided that 'Member States may maintain or adopt measures

9 Directive 2006/54 of the European Parliament and of the Council of 5 July 2006, on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (*Recast Directive*) [2006] OJ L 204/23.

within the meaning of Article 141(4) [today 157(4)] of the Treaty] with a view to ensuring full equality in practice between men and women in working life.' Article 6 of the Goods and Services Directive 2004/113 also included a positive action provision, stating that 'with a view to ensuring full equality in practice between men and women, the principle of equal treatment shall not prevent any Member State from maintaining or adopting specific measures to prevent or compensate for disadvantages linked to sex.' The Charter of Fundamental Rights of the European Union also recognises the right to gender equality in all areas, not only in employment, and the possibility of positive action for its promotion. Article 23 provides: 'Equality between women and men must be ensured in all areas, including employment, work and pay. The principle of equality shall not prevent the maintenance or adoption of measures providing for specific advantages in favour of the under-represented sex.'

2.3 Positive action: beyond the exception

Promoting positive action as a measure that Member States should adopt in order to advance equality between men and women, even though not legally required to do so probably dates from the Commission communication concerning a new Community action programme on the promotion of equal opportunities for women (1982 to 1985), which covers 'the achievement of equal treatment by strengthening individual rights' and the 'achievement of equal opportunities in practice, particularly by means of positive action programmes.' The approval of the Commission's initiative in the Council Resolution of 12 July 1982 on the promotion of equal opportunities for women, marked an important acceptance of this approach by the Member States. The Council welcomed the initiative taken by the Commission, and recommended that 'in a period of economic crisis', action undertaken at Community and national level promoting gender equality, 'should be not only continued but also intensified, in particular in order to promote the achievement of equal opportunities in practice through the implementation of inter alia positive measures.'

Council Recommendation 84/635/EEC of 13 December 1984 took this approval further, producing a detailed policy promoting positive action for women.[10] It recommended Member States in particular:

> '(1) To adopt a positive action policy 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, within the framework of national policies and practices … 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 underrepresented, particularly in the sectors of the future, and at higher levels of responsibility in order to achieve better use of all human resources … (3) To take, continue or promote positive action measures in the public and private sectors. (4) To take steps to ensure that positive action includes as far as possible actions having a bearing on the following aspects: … – adapting working conditions … (8) To make efforts also in the public sector to promote equal opportunities which might serve as an example …'

In 1988, the Commission produced an even more detailed publication, 'Positive Action – Equal Opportunities for Women in Employment',[11] which is now, apparently, out of print. So far as it is possible to ascertain, this guide has not been republished or updated, although positive action has featured as a prominent element of strategies for gender equality promoted by the EU institutions.

10 Council Recommendation 84/635/EEC of 13 December 1984, OJ L 331, p. 34.

11 European Commission (1988), 'Positive Action – Equal Opportunities for Women in Employment – A Guide', Office for Official Publications of the European Communities, CB-48-87-525-EN-C.

The Commission has continued to strongly advocate the adoption of positive action measures, most recently in discussing the implementation of the European Pillar of Social Rights, proclaimed on 17 November 2017 by the European Parliament, the Council and the Commission at the Social Summit for Fair Jobs and Growth in Gothenburg, Sweden. At the European Council of December 2017, European Heads of State or Government called for the pillar to be implemented at EU and Member State level, in line with their respective jurisdictions. According to a Commission staff working document, the pillar:

> 'emphasises the need to foster proactively equality between women and men through positive action in all areas. By extending equality to all areas, the Pillar goes beyond the existing EU provisions in this area. (...) The Pillar's provisions emphasise that specific measures may be necessary to prevent, correct and compensate for disadvantages linked to certain protected grounds. This principle encourages Member States to address the challenge faced by groups at particular risk of discrimination through positive action and incentives, for instance by supporting workforce diversity practices among employers.'[12]

The Council of Ministers has also on several occasions explicitly advocated the use of positive action. Council Recommendation 96/694/EC11 of 2 December 1996 on the balanced participation of women and men in the decision-making process recommended that Member States encourage the private sector to increase the presence of women at all levels of decision making, in particular by the adoption, or within the framework, of equality plans and positive action programmes.[13] In 2010, the Council's conclusions of 6 December on strengthening the commitment and stepping up action to close the gender pay gap, and on the review of the implementation of the Beijing Platform for Action, referred to the need to address '(d) the elimination of vertical segregation through appropriate means such as positive action or, if necessary, qualitative and quantitative objectives or dissuasive measures aiming to improve the gender balance in decision-making positions in the public and private sectors.'[14]

So, too, the European Parliament has taken a robust stand, advocating the use of positive action consistently. Parliament's resolution of 13 September 2011 pointed 'to the need to encourage initiatives to help devise and implement positive action and human resources policies at company level to promote gender equality, while also laying greater emphasis on awareness-raising and training measures serving to promote, transfer and incorporate practices that have been successful in organisations and companies.'[15] Parliament's resolution of 13 March 2012 on equality between women and men in the European Union considered that 'positive actions aimed at women have proved to be fundamental for their full incorporation in the labour market and in society in general.'[16] Parliament's resolution of 12 March 2013 on eliminating gender stereotypes in the EU, considered that 'strategies should include positive action, lifelong learning and active encouragement for girls to undertake studies in areas which are not traditionally seen as "feminine", such as information technology or mechanics, and to support work-life balance measures for both men and women'.[17]

Parliament's resolution of 9 June 2015 on the EU Strategy for equality between women and men post 2015, suggested that 'the promotion of gender equality goes beyond the prohibition of discrimination based on gender and positive action in support of women has proven to be essential to their full integration

12 Commission Staff Working Document Strasbourg, 13.3.2018 SWD(2018) 67 final, accompanying the *Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee, Monitoring the implementation of the European Pillar of Social Rights*, COM(2018) 130 final. The pillar does not go beyond the Charter, since the Charter applies to all areas.

13 OJ L 319, 10.12.1996, p. 11.

14 Council conclusions of 6 December 2010 on strengthening the commitment and stepping up action to close the gender pay gap, and on the review of the implementation of the Beijing Platform for Action, 2010/C 345/01.

15 European Parliament Resolution on women entrepreneurship in small and medium-sized enterprises (2010/2275(INI)) (2013/C 51 E/07), para 42.

16 European Parliament Resolution of 13 March 2012 on equality between women and men in the European Union – 2011 (2011/2244(INI)) (2013/C 251 E/01) Equality between women and men in the European Union – 2011 P7_TA(2012)0069.

17 European Parliament resolution of 12 March 2013 on eliminating gender stereotypes in the EU (2012/2116(INI)) (2016/C 036/03).

in the labour market, political and economic decision-making and society in general.'[18] Parliament's resolution of 8 October 2015 on the application of Directive 2006/54/EC, emphasised 'the importance of taking positive measures that foster the involvement of women in political and economic decision-making', and pointed out 'that binding quotas have proved to be one of the best ways of achieving this aim', and 'that positive measures are also needed to incentivise the less well-represented sex to enter certain professions where there is clear horizontal gender segregation.'[19] Parliament's resolution of 14 March 2017 on the application of Council Directive 2004/113/EC, called on the Member States 'to better integrate and promote provisions on positive action, which is based on a legitimate aim and strives to prevent or compensate gender-based inequalities, as outlined in the Directive.'[20]

2.4 Discrimination and inequality

An important distinction emerges from the debates over the appropriate response to the disadvantaged position of women in the labour market. This is the distinction between discrimination and inequality. Discrimination is considered to be one reason leading to inequality, but not the only reason. Discrimination and inequality are neither the same thing nor merely two sides of the same coin. Removing discrimination will assist in tackling inequality but will not in itself do so. Reducing inequality is itself regarded as a policy aim, in addition to tackling discrimination, for both moral and economic reasons.[21]

The approaches taken by EU law to both these aims differ greatly. Under the first approach, anti-discrimination policy is implemented through legally binding directives and Treaty articles, and domestic legislation is needed to implement these, in order to comply with the Member State's obligation to implement a directive 'as far as possible' to conform to the directive's obligations. This has been particularly influential in the context of gender discrimination, where this approach had a significant effect in expanding the interpretation of sex discrimination legislation not covered by EC law. In addition, where domestic anti-discrimination legislation shares the same concepts, such as the concept of discrimination itself, EU approaches to the interpretation of that concept in the gender context significantly influenced the domestic interpretation of the concept, on the basis that domestic anti-discrimination legislation should be interpreted consistently. We shall see that most states have transposed the gender equality provisions providing that positive action is an exception to the principle of non-discrimination.

2.5 Subsidiarity and self-regulation

We turn now to the second approach, using positive action to secure a reduction in gender inequalities in the labour market. The active promotion of positive action by the EU is not, however, accomplished through legally binding directives or other legislation. Although the EU advocates positive action and to that extent considers that the EU has an interest in employers and others buying into that policy, and

18 European Parliament resolution of 9 June 2015 on the EU Strategy for equality between women and men post 2015 (2014/2152(INI)) (2016/C 407/01).

19 European Parliament resolution of 8 October 2015 on the application of Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (2014/2160(INI)) (2017/C 349/11).

20 European Parliament resolution of 14 March 2017 on the application of Council Directive 2004/113/EC implementing the principle of equal treatment between men and women in the access to and supply of goods and services (2016/2012(INI)) (2018/C 263/08). See also: European Parliament resolution of 28 April 2016 on gender equality and empowering women in the digital age (2015/2007(INI)) (2018/C 066/06), at para 23.

21 This is not a new insight. Sophia Koukoulis-Spiliotopoulos has consistently maintained that gender equality is 'a Union positive and proactive constitutional principle – not a mere prohibition of discrimination – positive action being its logical corollary' (Sophia Koukoulis-Spiliotopoulos has argued that the promotion of gender equality is already a positive obligation of the Member States. She suggests that the 'positive obligation' imposed on EU institutions by Articles 3(3) TEU (former 2 TEU) and 8 TFEU (former 3(2) TEC) to 'promote gender equality' includes taking positive action and it is incumbent on the Member States as well *via* their duty of loyal cooperation. Koukoulis-Spiliotopoulos, S. (2005), 'The amended equal treatment Directive (2002/73): an expression of constitutional principles /fundamental rights' *Maastricht Journal of European and Comparative Law,* 12(*4)* p. 335; Koukoulis-Spiliotopoulos, S. (2008) 'The Lisbon Treaty and the Charter of Fundamental Rights: maintaining and developing the *acquis* in gender equality', *EGELR* 1/2008, p. 22.

although women's equality has become a task of the Union, the principal legal measure that the EU has adopted to encourage positive action is to reduce one of the possible barriers to its adoption, namely the possibility that some forms of positive action may be in breach of the prohibition of discrimination in EU law. Although this view is contested, as we shall see below, there is unlikely to be any existing, general EU legal obligation on Member States or on employers to adopt positive action. The exception makes adoption of positive action possible – it does not require its adoption. Beyond that, positive action is a matter for the Member States, and if they choose not to adopt it, that is not a matter of legal concern for the EU.

One of the potential advantages of subsidiarity in this context is that Member States and employers have the opportunity to experiment, exploring different ways in which to deliver this policy, rather than having to adopt a one-size-fits-all approach, which may stifle innovation and reduce the opportunities of learning across borders and across industry. The costs of compliance to both industry and the public purse are likely to be reduced, and compliance with a potentially controversial policy may be eased if it is not seen to be coerced by the EU.

However, whether the advantages of subsidiarity outweigh any disadvantages must always remain open to discussion. Indeed, a commitment to evidence-based policy-making requires this to be the case. When national approaches adopting self-regulation are not delivering equality in practice, alternative approaches should be considered. In other areas of gender equality policy these elements are not seen as central to the delivery of EU policy choices. Most notably, in the context of securing non-discrimination in employment on the basis of sex, subsidiarity has not been interpreted as ruling out a central role for the EU in setting common standards and enforcing them.

Whether Member States do in fact buy into the EU's policy preference for positive action, and to what extent, is in the hands of the Member States themselves. As we shall see in Part 2 of this report, most Member States have been satisfied to provide that positive action is an exception to the non-discrimination principle but have otherwise left it up to employers whether to adopt positive action; in other words, states have largely adopted a policy of self-regulation in this area. Organisations decide whether to introduce positive action measures and monitor their own adherence to the standard, rather than have an outside, independent agency such as a governmental entity require them to adopt positive action and monitor and enforce those standards.

The combination of both subsidiarity and self-regulation has resulted in a situation where both Member States and industry monitor their own adherence to positive action policy as advocated by the EU. There exists no outside, independent body at the EU level (and very few at the national level) that seeks to ensure that positive action is actually adopted, or is effective where it is adopted.

2.6 An exception: company boards

The major exception to this in the context of EU policy development is gender-balancing on company boards.[22] The European Commission submitted a proposal for a directive on gender balance among non-executive directors of companies listed on stock exchanges in November 2012.[23] The directive would be based on Article 157(3) TFEU, which ensures the application of the principle of gender equality in employment and occupation. As we have seen, Article 157(4) TFEU and Article 23 of the Charter of Fundamental Rights of the EU recognise positive action as a method of achieving gender equality.

22 The report does not consider the important developments regarding parity democracy in the composition of legislatures, and to other elected positions.

23 European Commission (2012), *Proposal for a Directive on improving the gender balance among non-executive directors of companies listed on stock exchanges and related measures*, COM(2012) 0614 final – 2012/0299(COD). Available at: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52012PC0614.

The proposal set the aim of a minimum of 40 % of non-executive members of the underrepresented sex on company boards, to be achieved by 2020 in the private sector and by 2018 in public-sector companies. Companies would have to make appointments on the basis of pre-established, clear and neutral criteria. If candidates were equally qualified, a preference would be given to a candidate of the underrepresented sex. Member States would require companies to issue annual reports on the composition of their boards and impose sanctions in the event of negative evaluations. Companies that had not reached the 40 % target would be required to continue to apply the procedural rules, as well as to explain what measures they intended to take to reach the target. For Member States that chose to apply the objective to both executive and non-executive directors, a lower target (33 %) would apply.

The European Parliament adopted its position, by a substantial majority, on 20 November 2013.[24] The Parliament strongly supported legislative action in this area and supported the key objective for listed companies in the EU to aim to reach a target of at least 40 % of non-executive directors of the underrepresented sex by 1 January 2020 at the latest (and by 2018 for public companies). The Parliament went beyond the Commission's proposal, by calling for additional measures. These included: stronger penalties, such as exclusion from public tenders, for companies that failed to introduce transparent appointment procedures; the removal of exemptions for companies employing less than 10 % of the underrepresented sex; the extension of reporting to the EU's own institutions and agencies; and an examination of whether the scope of the directive should be extended to cover non-listed public companies. The Parliament pointed out that, although the directive would not apply to SMEs or micro-enterprises, Member States should support these companies and give them incentives to improve gender balance at all levels of management and on their boards. The Parliament also stressed that, to achieve gender equality in the workplace, companies should develop a gender-balanced model of decision making at all levels, whilst taking steps to eliminate the gender pay gap and introducing flexible working conditions for all employees.

Despite broad consensus across the EU in favour of taking measures to improve the gender balance on company boards, not all Member States support EU-wide legislation and some Member States consider that binding measures at the EU level are not the best way to pursue the objective. The national parliaments of **Denmark**, **Netherlands**, **Poland**, **Sweden**, **United Kingdom**, and one of the two chambers of the Parliament of **Czech Republic** (Chamber of Deputies) submitted reasoned opinions within eight weeks of the submission of the Commission's proposal, alleging that it did not comply with the principle of subsidiarity. Some delegations continued to prefer either national measures or non-binding measures at EU level. As well as revising the proposed target dates and reporting deadlines, two recent presidencies of the Council of the European Union drafted compromise texts with a view to breaking the deadlock on the directive, but agreement has not yet emerged.

During the Luxembourg Presidency in 2015, the proposal was considered again with a view to addressing some delegations' subsidiarity concerns. As set out in the Luxembourg Presidency Report,[25] a flexibility clause 'would allow Member States to pursue the aims of the Directive by means of their own choosing and to suspend the Directive's procedural requirements, provided that they have already taken equally effective measures or attained progress coming close to the quantitative objectives set in the Directive.' With a view to 'combining flexibility with maximum legal certainty,' scenarios were identified which would be deemed legally to guarantee 'equal effectiveness'. The timetable was also altered. Importantly, the proposal was also extended to 'directors of companies', and not restricted only to non-executive directors. In the first half of 2017, during the Malta Presidency the proposed directive was revised a second time. The latest version, dating from 31 May 2017 and as amended by the Maltese Presidency, adjusted the

24 European Parliament (2013), Legislative resolution on improving the gender balance among non-executive directors of companies listed on stock exchanges, 2012/0299(COD), Brussels, 20 November 2013. http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P7-TA-2013-0488.

25 Luxembourg Presidency (2015) *Report from the Presidency to the Council*, 15 December 2015, 14343/15, http://data.consilium.europa.eu/doc/document/ST-14343-2015-INIT/en/pdf.

implementation calendar, the target dates, the reporting deadlines and the sunset clause by adding two years.[26]

The European Commission underlined in its work programme for 2016 that the directive should be adopted as a priority in 2016, although this was not achieved. At the EPSCO Council on 15 June 2017, the European Commissioner for Employment, Social Affairs, Skills and Labour Mobility, Marianne Thyssen, expressed the hope that there would be a breakthrough and noted that the proposed directive would bring important change and help to minimise gaps between the Member States. The Commission's proposal for an EU action plan to tackle the gender pay gap reaffirms that it will continue to work towards the adoption of the directive, together with other measures to address vertical segregation and improve gender-balance in decision making.[27]

As the proposal now stands[28] Member States are required 'to ensure that listed companies aim to attain, by 31 December 2022 (rather than 2020), the objective that members of the under-represented sex hold at least 40 % of non-executive director positions or the objective that members of the under-represented sex hold at least 33 % of all director positions, including both executive and non-executive directors.' The directive would not apply to small and medium-sized enterprises, i.e. companies that employ fewer than 250 persons and have an annual turnover not exceeding EUR 50 million or an annual balance sheet total not exceeding EUR 43 million.

Listed companies on whose boards members of the underrepresented sex hold less than 40 % of the non-executive positions, must make the appointments to these positions on the basis of a comparative analysis of the qualifications of each candidate, by applying pre-established, clear, neutrally-formulated and unambiguous criteria. A 'comply-or-explain duty' applies; companies not complying with the 40 % target would be required to apply the procedural rules and explain what measures they have taken in order to reach the target. In addition, Member States must ensure that, when choosing between candidates who are equally qualified in terms of suitability, competence and professional performance, the companies concerned must give priority to the candidate of the underrepresented sex, unless an objective assessment taking account of all criteria specific to the individual candidates tilts the balance in favour of the candidate of the other sex. This means that a priority rule needs to be applied in such cases. Member States must take the necessary measures to ensure that where a candidate of the underrepresented sex establishes facts from which it may be presumed that he or she was equally qualified as compared with the candidate of the other sex selected for appointment or election, it is for the listed company to prove that there has been no breach of the priority rule.

Member States would be able to suspend the directive's procedural requirements, if they can demonstrate that they have already taken equally effective measures or attained progress coming close to the quantitative objectives set in the directive. The directive defines several scenarios that would be considered legally to guarantee 'equal effectiveness', but these are not meant to be exhaustive. The directive proposal imposes a reporting duty under which Member States must require listed companies to provide information on the gender representation in their boards to the competent authorities on an annual basis. Where they fail to meet these targets, they must provide the reasons for this and describe the measures taken or to be taken in order to meet the targets. Finally, the directive proposal also requires Member States to ensure effective, dissuasive and proportionate enforcement measures for infringements of the procedural and reporting obligations.

26 Maltese Presidency (2017) *Report from the Presidency to the Council*, 31 May 2017, Interinstitutional File: 2012/0299 (COD), http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CONSIL:ST_9496_2017_INIT&from=EN.

27 European Commission (2017) *EU Action Plan 2017-2019: Tackling the gender pay gap*, COM(2017) 678 (Action 3). http://ec.europa.eu/newsroom/just/document.cfm?action=display&doc_id=48360.

28 For a more detailed account, see Senden, L. and Kruisinga, S. (2018) *Gender-balanced company boards in Europe A comparative analysis of the regulatory, policy and enforcement approaches in the EU and EEA Member States*, European Equality Law Network, January 2018. The following account is adapted from this report.

2.7 International context

EU law is located in a web of other legal systems, including international human rights law. Several treaties have addressed elements of what EU law calls positive action.[29] Of these, the most important, for the purposes of this report, is the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). It consists of a preamble and 30 articles, defining what constitutes discrimination against women, and the circumstances in which it is prohibited under the Convention. Discrimination is defined as '... any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.'

States that are parties to the Convention commit themselves to undertake a series of measures to end this discrimination against women in all its forms. This includes a duty to incorporate the principle of equality of men and women into their legal system, abolish all discriminatory laws, and adopt appropriate ones prohibiting discrimination against women. States also commit to establishing tribunals and other public institutions to ensure the effective protection of women against discrimination, and to ensure the elimination of all acts of discrimination against women by persons, organisations or enterprises.

States Parties also agree to take all appropriate measures, including temporary 'special measures', so that women can enjoy all their human rights and fundamental freedoms.

The potential importance of CEDAW in the context of positive action is that, in contrast to the approach taken in EU law, 'special measures' in CEDAW are not primarily characterised as an exception to the anti-discrimination principle, but rather as the principal method for securing gender equality, thus subtly shifting the debate on the approach that states should take to positive action measures. In this context, Article 4(1) of the Convention and the Committee's General Recommendation No. 25 (2004) on temporary special measures are particularly relevant.

Article 4 of the Convention provides: 'Adoption by States Parties of temporary special measures aimed at accelerating de facto equality between men and women shall not be considered discrimination as defined in the present Convention, but shall in no way entail as a consequence the maintenance of unequal or separate standards; these measures shall be discontinued when the objectives of equality of opportunity and treatment have been achieved.' Although this may appear to adopt a similar position to that in EU law, the CEDAW Committee's General Recommendation No. 25,[30] states that

> 'The Committee views the application of these measures not as an exception to the norm of non-discrimination, but rather as an emphasis that temporary special measures are part of a necessary strategy by States parties directed towards the achievement of de facto or substantive equality of women with men in the enjoyment of their human rights and fundamental freedoms. While the application of temporary special measures often remedies the effects of past discrimination against women, the obligation of States parties under the Convention to improve the position of women to one of de facto or substantive equality with men exists irrespective of any proof of past discrimination. The Committee considers that States parties that adopt and implement such measures under the Convention do not discriminate against men.'

29 For example, Article 14 of the European Convention on Human Rights, Protocol 12 to the same Convention, Articles 2 and 5 of the ILO Convention 111 concerning Discrimination in Respect of Employment and Occupation, as well as Recommendation No R (85) 2 from the Council of Europe.

30 UN Committee on the Elimination of Discrimination Against Women (CEDAW), (2004) General recommendation No. 25 on Article 4, paragraph 1, of the Convention on the Elimination of All Forms of Discrimination against Women, on temporary special measures, paragraph 18.

Such measures are *required*, not just permitted, where necessary to achieve the aims of the other provisions of CEDAW: '(...) the Committee considers that States parties are obliged to adopt and implement temporary special measures (...) if such measures can be shown to be necessary and appropriate in order to accelerate the achievement of the overall, or a specific goal of, women's de facto or substantive equality.'[31]

Countries that have ratified or acceded to the Convention are committed to submit national reports to the CEDAW Committee, at least every four years, on measures they have taken to comply with their treaty obligations. This originally provided the principal means of attempting to ensure compliance. Since it initially came into force, however, an Optional Protocol was adopted on the 6 October 1999. States that ratify or accede to the Optional Protocol agree to individual or group 'communications' against that State Party being made to the CEDAW Committee. In addition, states have agreed to permit the CEDAW Committee to initiate inquiries into compliance with the Convention by that state. All Member States and EEA countries have ratified CEDAW, and are bound under international law to implement it. All Member States and EEA states that have ratified CEDAW, with the exception of **Estonia** and **Latvia**, have also accepted the Optional Protocol permitting individual petitions to the CEDAW Committee. In theory, therefore, all Member States and EEA countries should be adopting the CEDAW standard regarding positive action.

2.8 Conclusion

In this chapter, the report has identified some key features of the approach taken to positive action in EU law and policy. We shall see subsequently that the potential advantages of the approach generally taken (subsidiarity and self-regulation) have in the main materialised, to the extent that greater experimentation has been encouraged, but that it has not resulted in the sustained use of positive action to advance women's equality, in contrast to the approach taken regarding company boards and under CEDAW.

31 UN Committee on the Elimination of Discrimination Against Women (CEDAW), (2004) General recommendation No. 25 on Article 4, paragraph 1, of the Convention on the Elimination of All Forms of Discrimination against Women, on temporary special measures, paragraph 24.

3 CJEU and EFTA Court and European Court of Human Rights positive action jurisprudence

3.1 Introduction

Following *Kalanke*, discussed in the previous chapter, the principal question was whether the approach initially articulated in that case would continue. The answer was not long in coming. Between the judgment of the Court in *Kalanke* and the coming into force of the Treaty of Amsterdam, the CJEU modified its approach, bringing its interpretation more into line with the spirit of the changes introduced by Article 141(4). In this chapter, we introduce the positive action jurisprudence of the CJEU, the EFTA Court, and the European Court of Human Rights, which has also considered positive action. We shall see that this jurisprudence is complex. Subsequent chapters will show that the approach taken in these decisions has been influential in several states as regards the structure and content of national legislation.

3.2 *Marschall*

In its 1997 decision in C-409/95, *Marschall v Land Nordrhein-Westfalen*,[32] the Court returned to reconsider Article 2(4) of the Equal Treatment Directive. A teacher applied for promotion to a higher-grade teaching post. The relevant law of North Rhine-Westphalia provided that where there were fewer women than men in the particular higher-grade post, women were to be given priority for promotion in the event of equal suitability, competence and professional performance, unless reasons specific to the male candidate tilted the balance in his favour. Mr Marschall was informed that, in accordance with these provisions, since fewer women than men were employed in the relevant post, an equally qualified woman would be appointed to the position. He complained and the Administrative Court of Gelsenkirchen to which he brought his complaint made a preliminary reference to the CJEU on the compatibility of the law of North Rhine-Westphalia with Directive 76/207/EEC.

The Court sought to distinguish this case from that in *Kalanke*, since the law at issue in *Marschall* did not guarantee absolute and unconditional priority for women, unlike the law at issue in the *Kalanke* case. The Court thus balanced the aim of advancing women's equality in practice, with what it considered the need to take into account the interests of the individuals involved. The Court went further than in *Kalanke* in identifying the practical difficulties that women encounter and how positive action may legitimately seek to address these, in particular the prejudicial effects on female candidates of stereotypical attitudes and behaviour on the part of employers, such as the fear that women will interrupt their careers more frequently or that owing to household and family duties they will be less flexible in their working hours. The legal effect of the decision, therefore, was that preferential treatment in favour of women in sectors where they were underrepresented could be justified under Article 2(4) if preferential treatment was capable of counteracting these prejudicial societal attitudes and behaviour and reducing actual instances of inequality. However, such a preference could not guarantee an absolute and unconditional priority for women, and must guarantee an objective assessment of all candidates, taking into account their individual circumstances. Such an assessment, which should not be based on criteria that discriminated against women, must then be open to overriding the priority accorded to women if the assessment tilted the balance in favour of the male candidate.

3.3 *Badeck*

After the rather rocky start in *Kalanke*, the Court's approach in *Marschall* has remained substantially in place, and subsequent cases have refined and polished this approach, or in the case of *Lommers*,

32 Judgment of the Court of 11 November 1997, *Hellmut Marschall v Land Nordrhein-Westfalen*, Case C-409/95, 1997 ECR I-06363, ECLI:EU:C:1997:533.

introduced subtle changes, rather than taken any dramatically different turn. In Case 158/97, *Badeck*,[33] the CJEU was called on to consider whether legislation enacted by the *Land* of Hesse (the HGIG) was compatible with Article 2(4) of the Equal Treatment Directive. The stated aim of the HGIG was equal access of women and men to posts in the public service. This was to be achieved by the adoption of advancement plans relating to conditions of access and promotion for women and their working conditions. The aim of these advancement plans, which were detailed, extensive and wide-ranging, was the reduction of the underrepresentation of women. Women were considered to be underrepresented if fewer women than men were employed in a pay, remuneration or salary bracket in a career group. Members of the Parliament of the *Land* of Hesse argued that the legislation was contrary to the Equal Treatment Directive. The CJEU, to which the issue was referred on a preliminary reference, disagreed.

The approach taken in the legislation was two-fold. First, the legislation addressed the difficult question of what should, and what should not, be taken into account in the determination of 'qualifications' for a job. The legislation required that the assessment of qualifications for all appointments and promotions should take into account capabilities and experience acquired by looking after children or persons requiring care in the family work, in so far as they are of importance for the suitability, performance and capability of applicants. Seniority, age and the date of last promotion may be taken into account only in so far as they are of importance for the suitability, performance and capability of applicants. The family status or income of the partner of the candidate may not be taken into account. Part-time work, leave and delays in completing training as a result of looking after children or dependants certified by a doctor as requiring care must not have a negative effect on assessment in service and not adversely affect progress in employment.

The Court also addressed specifically the issue of qualifications, and the approach taken in the legislation. The Court said: 'Such criteria, although formulated in terms which are neutral as regards sex and thus capable of benefiting men too, in general favour women. They are manifestly intended to lead to an equality which is substantive rather than formal, by reducing the inequalities which may occur in practice in social life.'[34] Because the legitimacy of the legislation's approach to qualifications was not challenged in the main proceedings, the Court was not called on to address its legitimacy, but there is no indication that the Court was other than entirely happy with this approach.

What was called into question was the second element in the legislative scheme. The women's advancement plans contained binding targets, for two years at a time, regarding the proportion of women in appointments and promotions needed to increase the proportion of women in sectors in which women were underrepresented. In each advancement plan, more than half of the posts to be filled in a sector in which women were underrepresented were to be designated for filling by women, unless being of a particular sex was an indispensable condition for the job, or not enough women with the necessary qualifications were available, in which case a correspondingly smaller number of posts would be designated for filling by women. In sectors in which women were underrepresented, at least as many qualified women as men, or all the qualified women applicants, must be called to interview, if interviews were carried out. If the targets of the women's advancement plan for each two years were not fulfilled, until they were fulfilled every further appointment or promotion of a man in a sector in which women were underrepresented required the approval of the body which had approved the women's advancement plan. Until a women's advancement plan had been drawn up, no appointments or promotions could be made in sectors in which women were underrepresented.

The targets were more extensive still. Certain academic posts were to be filled with at least the same proportion of women as the proportion of women among the graduates in the discipline in question. Training for occupations in which women were underrepresented was to be allocated on the basis that at least half of the training places were to be filled by women, except in circumstances where the state

33 Judgment of the Court of 28 March 2000, *Georg Badeck and Others*, Case C-158/97, ECR I-01875, ECLI:EU:C:2000:163.
34 Judgment of the Court of 28 March 2000, *Georg Badeck and Others*, Case C-158/97, ECR I-01875, ECLI:EU:C:2000:163, para 32.

exclusively provided that training. Measures were to be taken to draw women's attention to vacant training places and to encourage them to apply. If, despite such measures, there were not enough applications from women, more than half of the training places could be filled with men. In making appointments to commissions, advisory boards, boards of directors and supervisory boards and other collective bodies, at least half the members should be women.

The Court upheld all those provisions that were contested. Repeating the approach it set out in *Marschall*, it found that a measure that was intended to give priority in promotion to women in sectors of the public service where they are underrepresented was compatible with EU law if it did not automatically and unconditionally give priority to women when women and men were equally qualified, and the candidates were the subject of an objective assessment which took account of the specific personal situations of all candidates. In the case of the Hesse legislation, the rule giving priority to women was not absolute and unconditional.

3.4 *Abrahamsson*

In Case C-407/98, *Abrahamsson and Anderson v Fogelqvist*,[35] the Court returned to consider the issue of the permissible limits of positive action in an academic context, this time in Sweden. The University of Göteborg announced a vacancy for the chair of Professor of Hydrospheric Sciences. The notice indicated that the appointment to that post should contribute to the promotion of equality of the sexes in professional life and that what the law termed 'positive discrimination' might be applied, in accordance with provisions which allocated Government funding for the creation of thirty professorial posts as part of an effort to reduce the underrepresentation of women in Swedish universities.[36] The universities and higher educational institutions that were granted a funding allocation under these provisions were required to create and fill such posts initially with a qualified candidate belonging to an underrepresented sex. This replaced an earlier attempt at addressing underrepresentation that had not required such a preference to be accorded, and which had been judged to be largely unsuccessful. Under the new system, a candidate belonging to an underrepresented sex who possessed sufficient qualifications must be granted a preference over a candidate of the opposite sex who would otherwise have been chosen where it proved necessary to overcome the alleged tendency of qualifications to be inherently discriminatory against women and enable a candidate of the underrepresented sex to be appointed. This preference should, however, not be applied where the difference between the candidates' qualifications was so great 'that such application would give rise to a breach of the requirement of objectivity in the making of appointments' (the meaning of which was left unexplained).

Eight candidates applied, including Ms Abrahamsson, Ms Destouni, Ms Fogelqvist, and Mr Anderson. The appointments committee of the Faculty of Sciences voted twice, on the first occasion in relation to the candidates' scientific qualifications. In that vote Mr Anderson came first with five votes and Ms Destouni received three votes. On the second vote, Ms Destouni came first with six votes as compared with two for Mr Anderson. The selection board proposed to the Rector of the university that Ms Destouni be appointed, expressly stating that the appointment of that candidate instead of Mr Anderson did not constitute a breach of the requirement of 'objectivity', presumably meaning that his qualifications were not notably superior. The selection board placed Mr Anderson second and Ms Fogelqvist third. Ms Destouni then withdrew her application, and the Rector of the university decided to appoint Ms Fogelqvist to the professorial chair instead. In his decision, the Rector referred to the provisions under which the money was provided and to the university's plan for equality between men and women, and stated that the difference between the respective merits of Mr Anderson and Ms Fogelqvist was, again, not so considerable that a preference in favour of the latter constituted a breach of the requirement of objectivity in the making of appointments.

35 Judgment of the Court (Fifth Chamber) of 6 July 2000, *Katarina Abrahamsson and Leif Anderson v Elisabet Fogelqvist*, Case C-407/98, ECR I-05539, ECLI:EU:C:2000:367.

36 Sweden, Regulation 1995:936.

Mr Anderson and Ms Abrahamsson appealed to the Överklagandenämnden för Högskolan (Universities' Appeals Board), which considered that Mr Anderson and Ms Fogelqvist were the best qualified candidates and that it was evident from the inquiries undertaken that Mr Anderson was clearly more competent in the relevant scientific field than Ms Fogelqvist. As regards teaching skills, neither of the two candidates could, in the view of the Överklagandenämnden, be regarded as clearly better qualified than the other. Their administrative ability likewise did not appear to be a decisive factor, although it was considered that Ms Fogelqvist had a certain, albeit limited, advantage in that respect. The Överklagandenämnden also stated that particular importance attached, in the overall assessment, to scientific qualifications. In the present case, Ms Fogelqvist's slight superiority in the administrative area could not outweigh Mr Anderson's superiority from the scientific point of view. The Överklagandenämnden considered, however, that the appointment of Ms Fogelqvist did not involve a clear breach of the requirement of objectivity. Mr Anderson appealed to the Universities' Appeals Board. He contended that the appointment was contrary to decision of the CJEU in the *Kalanke* case. The Universities' Appeals Board referred the issues to the European Court of Justice for a preliminary ruling. *Abrahamsson* was the first case on positive action not to have been referred by a German court.

The CJEU interpreted the Swedish legislation as automatically granting preference to candidates belonging to the underrepresented sex, provided that they are sufficiently qualified, subject only to the proviso that the difference between the merits of the candidates of each sex was not so great as to result in a breach of the requirement of objectivity in making appointments. It did not consider that conformity with that proviso was capable of being precisely determined, with the result, in contrast to the national legislation examined by the Court in its *Kalanke, Marschall and Badeck* judgments, that the selection of a candidate from among those who were sufficiently qualified was seen as ultimately based on the mere fact of belonging to the underrepresented sex, and that this was so even if the merits of the candidate selected were inferior to those of a candidate of the opposite sex. Moreover, candidates were not subjected to an objective assessment taking account of their specific personal situations. It followed that such a method of selection was not permitted by Article 2(4) of the Directive.

In those circumstances, it was necessary to determine whether legislation, such as that at issue in the main proceedings, was justified by Article 141(4) EC, the first time the implications of this provision had been considered by the Court in a positive action case. The Court held that even though Article 141(4) EC allowed Member States to maintain or adopt measures providing for special advantages intended to prevent or compensate for disadvantages in professional careers in order to ensure full equality between men and women in professional life, it could not be inferred from this that it allowed a selection method of the kind at issue in the main proceedings which appeared, in the view of the Court, to be disproportionate to the aim pursued.

The fact that these procedures applied only to the filling of a predetermined number of posts created as part of a specific programme of a particular higher educational institution allowing the application of positive discrimination measures did not alter the judgment of unacceptability. The Court made clear, however, that EU law did not preclude a rule under which a candidate belonging to the underrepresented sex may be granted preference over a competitor of the opposite sex, where the candidates possess equivalent or substantially equivalent qualifications, and where the candidatures are subjected to an objective assessment which takes account of the specific personal situations of all the candidates.

3.5 *Schnorbus*

A similar approach was adopted in Case C-79/99, *Schnorbus v Land Hessen*,[37] decided in December 2000, although in this case Article 2(4) of Council Directive 76/207/EEC was used by the Court to uphold a preference that benefitted men. The case concerned admission to the practical legal training element

37 Judgment of the Court (Sixth Chamber) of 7 December 2000, *Schnorbus v Land Hessen,* Case C-79/99, ECR I-10997, ECLI:EU:C:2000:676.

of becoming a lawyer in Germany. Where the number of applicants exceeded the number of training places available, applicants who had completed military or substitute civilian service (which were obligatory only for men) were immediately admitted to training and did not have to satisfy any further requirements, whereas the admission of other applicants who had not undertaken military or civilian service (female and male) might be deferred for up to 12 months. The Court held that although such a measure did not constitute direct discrimination, it did constitute indirect discrimination based on sex since, under the relevant national legislation, women were not required to do military or civilian service and therefore could not benefit from the priority accorded. However, the Court went on to hold that the priority accorded was not unlawful because it was protected by Article 2(4). The provision in issue took account of the delay experienced in the progress of their education by applicants who had been required to do military or civilian service, and was therefore 'objective in nature and prompted solely by the desire to counterbalance to some extent the effects of that delay'.[38] The priority accorded was not disproportionate, since the delay those undertaking military or civilian service suffered on account of undertaking these activities was at least equal to the advantage conferred on them, since their enjoyment of priority operated to the detriment of other applicants only for a maximum of 12 months.[39]

3.6 *Griesmar*

Case C-306/99, *Griesmar*,[40] decided in November 2001, was one of a series of cases considering provisions in French legislation, in which women in the public sector were granted specific rights linked to their family responsibilities. In 1988, the European Commission had taken infringements proceedings against France to the CJEU because of special benefits offered to women in collective agreements.[41] 'Positive action was not invoked as such, the French government merely defended the existence of a compensation measure deemed admissible because, France argued, the aim of Directive 76/207/CEE was not to transform gender relations in work and family relations.'[42] The Court rejected this analysis for reasons that need not be detailed here since they did not concern positive action. France's reaction was not to abolish all special measures but to restrict the scope of regulating collective negotiation.[43] In another CJEU case of 1988 concerning France,[44] separate competitions were organised for candidates seeking entry to different sections of the civil service (primary teachers, police officers) and there were justifications to restrict them to a single sex. With regard to primary and physical education teachers, the French Government highlighted the need to give children an opportunity to be educated by men as well as women, since the profession was very female dominated and joint competitions were not enabling enough men to be recruited. The French Council of State approved this civil service measure,[45] holding that restricting women's access in this way was justified, 'taking into account the mission of civil service in relation to pre-school and primary education and the potential psychological benefit for children in this age group of having a teaching body composed of men and women'. The Commission did not share this analysis and referred France to the CJEU.[46] During the course of the proceedings, teachers had been withdrawn from the list of civil service corps with separate competitions, which left in that list the police

38 Judgment of the Court (Sixth Chamber) of 7 December 2000, *Schnorbus v Land Hessen,* Case C-79/99, ECLI:EU:C:2000:676, para 44.

39 Judgment of the Court (Sixth Chamber) of 7 December 2000, *Schnorbus v Land Hessen,* Case C-79/99, ECLI:EU:C:2000:676, para 46.

40 Judgment of the Court of 29 November 2001, *Joseph Griesmar v Ministre de l'Economie, des Finances et de l'Industrie and Ministre de la Fonction publique, de la Réforme de l'Etat et de la Décentralisation*, Case C-366/99, ECR I-09383, ECLI:EU:C:2001:648.

41 Judgment of the Court of 25 October 1988, *Commission of the European Communities v French Republic*, C-312/86, ECR 06315, ECLI:EU:C:1988:485.

42 The Court rejected this analysis, see Xenidis, R. and Masse Dessen, H. (2018) 'Positive action in practice: some dos and don'ts in the field of EU gender equality law', *European Equality Law Review*, 2/2018, 36, p. 5.

43 See Xenidis, R. and Masse Dessen, H. (2018) 'Positive action in practice: some dos and don'ts in the field of EU gender equality law', *European Equality Law Review*, 2/2018, p. 52.

44 Judgment of the Court of 30 June 1988, *Commission of the European Communities v French Republic*, C-318/86, 1988 ECR 03559, ECLI:EU:C:1988:352.

45 Conseil d'État, n° 47337, 16 April 1986.

46 Judgment of the Court of 30 June 1988, *Commission of the European Communities v French Republic*, C-318/86, ECLI:EU:C:1988:352.

corps, prison administration employees and a specific teaching corps. The Court held that, by retaining in force a system of separate recruitment according to sex for appointment to the management staff corps and the corps of technical staff and vocational training staff in the external departments of the prison service as well as to all of the five corps in the national police force, France had failed to fulfil its obligations under EU law.

In the *Griesmar* case, and also contrary to the argument put forward by the French Government, the CJEU took the view that the credit granted to civil servants who were mothers could not be authorised as being a measure designed to help women in their career since, being granted at the date of their retirement, it did not provide a remedy for the problems that they might encounter during the course of their professional career.[47] The CJEU was asked to consider a dispute between Mr Griesmar, on the one hand, and the Minister for Economic Affairs, Finance and Industry and the Minister for the Civil Service, State Reform and Decentralisation, on the other, concerning the legality of the decree awarding Mr Griesmar a retirement pension. Mr Griesmar, a French *magistrat* and father of three children, was granted a retirement pension, pursuant to the Civil and Military Retirement Pensions Code. In calculating his pension, account was taken of the years of service actually completed by Mr Griesmar. However, no account was taken of the service credit that was provided for under Article L. 12(b) of the code, to which only female civil servants were entitled in respect of each of their children. The Conseil d'État referred several questions to the CJEU for a preliminary ruling. The questions referred asked whether the pensions provided by the French retirement pension scheme for civil servants constituted pay within the meaning of Article 119 of the EEC Treaty (now Article 157 of the TFEU) (the answer was that they did), and if so whether the principle of equal pay was breached by the provisions of Article L. 12(b) of the code (again, the answer was that they did), and if so whether Article 6(3) of the agreement annexed to Protocol No 14 on Social Policy prevented it from being considered pay discrimination.

It is the last question that is relevant for the purposes of this discussion of positive action because, as stated above, Article 6(3) of that agreement provided that Article 119 EEC on equal pay 'shall not prevent any Member State from maintaining or adopting measures providing for specific advantages in order to make it easier for women to pursue a vocational activity or to prevent or compensate for disadvantages in their professional careers', echoing the provisions of Article 2(4) of the Equal Treatment Directive. The French Government sought to defend the contested provision by stressing the greater frequency of the use of parental leave by women, which affected their pension rights, and on the duration of the careers of female civil servants, which was on average two years shorter than that of male civil servants. It stated that, even though the statistics did not establish a direct link between the benefit of parental leave and length of career, it could hardly be doubted that the bringing-up of children was an important factor, perhaps the most important factor, in explaining the shorter duration of the careers of female civil servants at the date of their retirement. The credit introduced by Article L. 12(b) of the code, it argued, was thus designed to offset, for the benefit of women, the disadvantages, so far as the rate and basis of calculation of retirement pensions are concerned, ensuing from a break in career for the purpose of bringing up children.

The CJEU took the view that the credit granted to civil servants who were mothers could not be authorised as being a measure designed to help women in their career since, being granted at the date of their retirement, it did not provide a remedy for the problems that they might encounter during the course of their professional career.[48] In order to comply with Article 6(3) of the Agreement on Social Policy, the national measures must contribute to helping women conduct their professional life on an equal footing with men. On the contrary, the challenged measure was limited to granting female civil servants who were mothers a service credit at the date of their retirement, without providing a remedy for the problems that they encountered during the course of their professional career. It was significant, said

47 The Court concluded that career-related difficulties encountered by mothers could not be resolved by means of the service credit at issue in the present case; See also Zarca, Alexis (2014) *L'égalité dans la fonction publique française*, Bruylant, p. 884.

48 The Court concluded that career-related difficulties encountered by mothers could not be resolved by means of the service credit at issue in the present case.

the Court, that although the contested measure dated back to 1924, it had not been possible to resolve, by means of that provision, the problems that female civil servants may encounter in their careers. Article L. 12(b) of the code therefore infringed the principle of equal pay inasmuch as it excluded male civil servants who had assumed the task of bringing up their children, from entitlement to the credit, which it introduced for the calculation of retirement pensions of similarly situated women. Following this judgment, fathers also obtained the service credit but, given the cost of the measure, a reform was deemed necessary. This reform significantly penalised women who had built up entitlements over a long period, meaning that a simple alignment would produce serious inequalities.[49] Law No. 2004-14985 of 30 December 2004 also preserved the nature of the benefit for women, while men had to provide proof of their involvement in caring for their children.[50]

3.7 *Lommers*

In Case C-476/99, *Lommers v Minister van Landbouw, Natuurbeheer en Visserij*,[51] Mr Lommers was a civil servant employed by the Netherlands Ministry of Agriculture, Nature Management and Fisheries. His wife was employed by a different employer. In November 1993, the Minister for Agriculture adopted a policy of making available a limited number of subsidised nursery places to staff. The policy circular stated: 'In principle, nursery places are available only to female employees … save in the case of an emergency, to be determined by the Director.' There was about one place allocated for every 20 female employees. The policy was adopted in response to underrepresentation of women in the ministry. At the end of 1994, out of a total workforce of 11 251 in the ministry, 2 792 were women and women were underrepresented at senior levels. Mr Lommers asked the minister to reserve a nursery place for his as yet unborn child, but his request was rejected on the ground that children of male officials could be given places only in cases of emergency. Mr Lommers complained that this contravened the Dutch law implementing the EC Equal Treatment Directive.[52] The Dutch Commission for Equal Treatment issued an opinion that the policy was justified because it was well-known that more women than men did not embark on or abandoned a career for reasons linked to childcare. The Commission added that the policy circular should have clearly stated, however, that a male official bringing up children on his own might, as a matter of 'emergency', have access to nursery places.

Mr Lommers complained to the district court, and then on appeal to the Higher Social Security Court, which made a reference to the CJEU for a preliminary ruling. The Court of Justice held that a scheme under which an employer makes nursery places available to employees is to be regarded as a 'working condition' within the meaning of the Equal Treatment Directive, and that Article 2(4) therefore applied. Provision of a limited number of subsidised nursery places only to female staff was permissible in principle under Article 2(4) of the Directive, where the scheme had been set up by the employer to tackle extensive underrepresentation of women, in a context characterised by a proven insufficiency of suitable, affordable childcare facilities. Article 2(4) was specifically designed to authorise measures, which, although discriminatory in appearance, were intended to eliminate or reduce actual instances of inequality which may exist in the reality of social life. It authorised national measures relating to access to employment, including promotion, which give a specific advantage to women with a view to improving their ability to compete in the labour market and to pursue a career on an equal footing with men. In principle, a measure such as that in the present case, which reserved for women enjoyment of certain

49 See Masse Dessen, H. (2012) 'Retraite des femmes: existe-t-il des marges de manoeuvre du point de vue du droit communautaire sur la reconnaissance de droits particuliers?' *Revue Française des Aff. Sociales* 2012/4, p. 207.

50 See France, *Loi de finances rectificative pour 2004*, 30 dec. 2004, n° 2004-1485.

51 Judgment of the Court of 19 March 2002, *H. Lommers v Minister van Landbouw, Natuurbeheer en Visserij,* Case C-476/99, ECR I-02891, ECLI:EU:C:2002:183.

52 A few years before the decision handed down in the *Lommers* case, the Spanish Constitutional Court ruled in a similar matter (Judgment of the Constitutional Court 128/1987, of 16 July 1987). The Spanish Constitutional Court considered that a subsidy for daycare established only for women and widowers in a collective agreement was justified as a compensation measure for the greater labour difficulties of women. In this judgment, the Constitutional Court did not require, as the CJEU went on to do in the *Lommers* case, that the same benefit must also be attributed to a working father who takes care of a child alone.

working conditions designed to facilitate their pursuit of, and progression in, their career, fell into that category of permitted measures.

The CJEU did not refer to the principle that derogations to an individual right should be interpreted strictly, as it had in *Kalanke*. Instead, it held that '... in determining the scope of any derogation from an individual right ... due regard must be had to the principle of proportionality ...'. Thus, whether any particular measure of this type was acceptable was subject to the application of the proportionality principle, given that the measure constituted a derogation from the individual right of equal treatment of men and women. The principle of proportionality required that such derogations must remain within the limits of what is appropriate and necessary in order to achieve the aim in view and that the principle of equal treatment be reconciled as far as possible with the requirements of the aim pursued. The fact that the policy did not guarantee access to nursery places to employees of both sexes on an equal footing was not, in itself, contrary to the principle of proportionality. Account had to be taken of the fact that the number of nursery places was limited and there were waiting lists for female employees to obtain a place. Moreover, the scheme did not deprive male employees of all access to nursery places for their children, since such places were accessible on the market. However, a measure that excluded male officials who take care of their children by themselves from access to a subsidised nursery scheme would go beyond the exception permitted by Article 2(4). Male employees who take care of children by themselves should be allowed access to the nursery places scheme on the same conditions as female employees. Overall, the Court's approach hints at the importance of 'equality' being seen as possessing two limbs, treating likes alike, but also treating differences differently (as in this case).

3.8 *Briheche*

Case C-319/03, *Briheche v Ministre del'Interieur*,[53] concerned Serge Briheche, who was a 48-year-old widower who had not remarried. He had one dependent child. He applied to sit a competitive examination organised by the Ministry for the Interior for the recruitment of administrative assistants. His application to sit the examination was rejected, as was his appeal against that decision to the French Minister for the Interior. He was rejected because he did not fulfil the age limit of 45 years laid down in Decree No 90-713, which regulated entry to that examination, and which provided that the age limit for recruitment of civil servants by competitive examination was fixed at 45 years.

Beginning in 1975, however, that age bar had been progressively removed for certain categories of women, initially for women who were obliged to work following the death of their husband, then additionally for mothers with three or more children, widows who had not remarried, divorced women who had not remarried, legally-separated women, and unmarried women with at least one dependent child. In 2000, to this list of those exempted from the age bar, were added unmarried men with at least one dependent child who were obliged to work. None of these categories of exempted persons applied to Mr Briheche. The French Government maintained that the provision in question was adopted with a view to reducing actual instances of inequality between men and women, in particular due to the fact that women take on most of the housework, above all when there are children in the family, and with a view to facilitating the integration of women into work. Mr Briheche complained that in so far as widows who had not remarried, but not widowers who had not remarried, were included in the list of persons exempted, this constituted unlawful discrimination under the Equal Treatment Directive. He applied to the Administrative Court, which asked the CJEU for a preliminary ruling as to the compatibility of the French decree with the directive.

The CJEU held that a national provision which provides, as regards entry to competitive examinations organised for the recruitment of civil servants, that the age limit is not applicable to widows who have not remarried who are obliged to work, results in discrimination on grounds of sex, contrary to the

53 Judgment of the Court (Second Chamber) of 30 September 2004, *Serge Briheche v Ministre de l'Intérieur, Ministre de l'Éducation nationale and Ministre de la Justice*, Case C-319/03, 2004 ECR I-08807, ECLI:EU:C:2004:574.

directive, against widowers who have not remarried who are in the same situation as those widows, unless Article 2(4) of the directive applied. The Court reiterated many of the principles as to how positive action measures should be treated under EU law that it developed in previous cases: a measure which is intended to give priority in promotion to women in sectors of the public service must be regarded as compatible with Community law if it does not automatically and unconditionally give priority to women when women and men are equally qualified, and the candidates are subject to an objective assessment which takes account of their specific personal situations; in determining the scope of any derogation from an individual right such as the equal treatment of men and women laid down by the directive, due regard must be had to the principle of proportionality.

As regards the legislation in question, the European Commission stressed that whatever the motivation, the contested measure did automatically and unconditionally give priority to women when women and men were in the same situation, and that Article 2(4) did not protect it. The Court, agreeing, held that the provision in question, under which an age limit for obtaining access to public-sector employment was not applicable to certain categories of women, while it was to men in the same situation as those women, was not compatible with Article 2(4). Nor could such a provision be allowed under Article 141(4) EC, which did not allow measures that proved to be disproportionate to the aim pursued.

3.9 *Roca Alvarez*

In Case C-104/09, *Roca Alvarez*,[54] at issue was Spanish employment legislation regulating breastfeeding in the employment context.[55] The Workers' Statute provided for the granting of 'breastfeeding' leave: 'Female workers shall be entitled to take one hour off work, which they may divide into two parts, in order to breastfeed a child under the age of nine months. The woman may, if she wishes, replace this entitlement with a half-hour reduction in her working day for the same purpose. This time off work may be taken by the mother or the father without distinction, provided that they are both employed.'[56]

Mr Roca Álvarez made a request to his employer that he be granted the right to take the leave allowed for the period from 4 January 2005 to 4 October 2005. He was refused leave on the ground that the mother of Mr Roca Álvarez's child was not employed but self-employed and the mother's employment was an essential condition of entitlement to that leave. He brought an action challenging his employer's refusal.[57] The court held that the leave in question was reserved for 'female employees' and so was exclusively conferred on mothers. Moreover, the right to take this leave was only recognised for mothers whose status is that of employee and the mother of Mr Roca Álvarez's child did not fulfil that condition. Consequently, his action was dismissed.

He appealed against that decision.[58] The appeal court held that the national legislation had been correctly interpreted by the previous court. However, it held that the leave provided for by the legislation had been detached from the biological fact of breastfeeding, so that it could be considered as time purely devoted to the child. In addition, it pointed out that another mechanism to protect the female employee existed in cases of 'risk during breastfeeding'. It observed further that the legislation in question allowed either the father or the mother to make use of this leave but only provided 'they are both employed' and that therefore the father would be entitled to leave in place of the mother only if the mother is employed, and so only on that basis had a right to breastfeeding leave. The Court referred to the CJEU for a preliminary ruling the question whether the legislation was in breach of the Equal Treatment Directive.

54 Judgment of the Court (Second Chamber) of 30 September 2010, *Pedro Manuel Roca Álvarez v Sesa Start España ETT SA*, Case C-104/09, *2010 ECR I-08661*, ECLI:EU:C:2010:561.
55 Spain, Law 8/1980 on the Workers Statute (*Estatuto de los trabajadores*) of 10 March 1980, as amended by Royal Legislative Decree 1/1995 of 24 March 1995 (BOE No 75 of 29 March 1995, p. 9654).
56 Spain, Law 8/1980 on the Workers Statute, Article 37(4).
57 Before the Social Court of A Coruña.
58 To the Tribunal Superior de Justicia de Galicia (High Court of Justice of Galicia).

The CJEU interpreted the question as asking, in essence, whether the directive prohibited a provision that female employees who are mothers were entitled to take leave during the first nine months following the child's birth, whereas male employees who are fathers with that same status are not entitled to the same leave unless the child's mother is also an employed person. It pointed out that the consequence of the provision was that for men whose status was that of an employed person the fact of being a parent was not sufficient to gain the entitlement to leave, whereas it was for women with an identical status. Referring to *Griesmar* and *Lommers*, it held that the positions of a male and a female worker, father and mother of a young child, were comparable with regard to the need to reduce their daily working time in order to look after their child, and the provision was therefore discriminatory, unless one of the exceptions in the directive applied.

The Court did not consider that the measure was one concerning the protection of women, as regards pregnancy and maternity, under Article 2(3) of the directive, because little by little the leave had become detached from the biological function of breastfeeding, so that it could now be considered as time purely devoted to the child and as a measure that reconciled family life and work following maternity leave. The fact that the leave at issue in the main proceedings might be taken by the employed father or the employed mother without distinction meant that feeding and devoting time to the child could be carried out just as well by the father as by the mother. It could not, therefore, be regarded as ensuring the protection of the biological condition of the woman following pregnancy or the protection of the special relationship between a mother and her child, and was not therefore protected by Article 2(3).

Turning to whether it was protected by Article 2(4), the positive action exception, the Spanish Government had submitted in its observations that the objective pursued in reserving for mothers an entitlement to the leave at issue in the main proceedings was to compensate for the genuine disadvantages suffered by women, in comparison to men, in keeping their jobs following the birth of a child. According to the Spanish Government, it was more difficult for mothers of young children to enter the world of work or to remain in it. The Court accepted that such a measure could have the effect of putting women at an advantage by allowing mothers whose status is that of an employed person to keep their job and to devote time to their child. That effect was reinforced by the fact that if the father of the child was himself an employed person, he was entitled to take this leave in the place of the mother, who would not suffer adverse consequences for her job as a result of care and attention devoted to the child.

However, citing the *Lommers* case, the Court rejected the Spanish Government's submission on the basis that it was liable to perpetuate a traditional distribution of the roles of men and women by keeping men in a role subsidiary to that of women in relation to the exercise of their parental duties. There was also an unintended consequence of the contested measure: that the effect could be that a woman, such as the mother of Mr Roca Álvarez's child, who was self-employed, would have to limit her self-employed activity and bear the burden resulting from the birth of her child alone, without the child's father being able to ease that burden. Consequently, a measure such as that at issue in the main proceedings could not be considered to be a measure eliminating or reducing existing inequalities in society within the meaning of Article 2(4) of Directive 76/207, nor was it a measure seeking to achieve substantive as opposed to formal equality by reducing the real inequalities that can arise in society and thus, in accordance with Article 157(4) TFEU, to prevent or compensate for disadvantages in the professional careers of the relevant persons. After this ruling, Spain changed the regulation of parental leave for breastfeeding, which was the parental leave that was the subject of the preliminary ruling.

3.10 *Leone*

Case C-173/13 *Leone and Leone*,[59] required the Court to interpret the equal pay obligation in Article 141, including Article 141(4), the positive action exception. It involved a claim brought by Mr and Mrs Leone

59 Judgment of the Court (Fourth Chamber) of 17 July 2014, *Maurice Leone and Blandine Leone v Garde des Sceaux, Ministre de la Justice and Caisse nationale de retraite des agents des collectivités locales*, Case C173/13, ECLI:EU:C:2014:2090.

against the French State for compensation for the loss incurred by them due to the refusal by the national pension fund for local community civil servants (CNRACL) to grant Mr Leone early retirement with immediate payment of pension and a service credit for the purposes of calculating his pension. This refusal was based on Mr Leone's inability to meet the requirements for early retirement and service credit set out in the French Civil and Military Retirement Pensions Code (the 'Pensions Code'). The provisions regarding service credit had been introduced following the *Griesmar* case, discussed earlier, in which the Court had found the provisions to be directly discriminatory. As a response to that judgment, the Pensions Code had been revised. The Leones argued that the revision was itself indirectly discriminatory, as were the provisions regulating the ability to take up early retirement,[60] in that although the arrangements appeared to be neutral, in effect women benefitted to a significantly greater extent than men.

Having determined that this was the case, the Court considered whether these indirectly discriminatory arrangements were capable of being protected under Article 141(4). The Court's answer was 'no', for very similar reasons as it set out in *Griesmar* itself. Indeed, as regards the service credit issue, the Court restricted itself to merely repeating its finding in *Griesmar* that a measure such as the service credit is not a measure covered by Article 141(4), since it is limited to granting civil servants a service credit upon their *retirement*, without providing a remedy for the problems which they may encounter in the course of their professional career, and does not appear to be of a nature such as to offset the disadvantages to which the careers of those workers are exposed by helping them in their professional life and thereby ensure full equality in practice between men and women in working life. The Court applied the logic of this approach also to the issue of early retirement with immediate payment of pension, since that measure was no more liable to provide a remedy for the problems which civil servants may encounter in the course of their professional life by helping them in their professional life and thereby ensure full equality in practice between men and women in working life. In 2015, the French Council of State approved a French provision in relation to the past, supporting its decision with a quantitative analysis of inequalities that penalise women's careers.[61] Indeed the national court considered that the proof of the existence of a legitimate motive for this positive action had been provided and approved the law reforming the pension system, noting that it had been amended to remove the benefit for the future.[62]

3.11 EFTA jurisprudence

Thus far, this review of the jurisprudence of positive action has focused exclusively on the approach taken by the CJEU. This extensive jurisprudence is not matched by an equivalent jurisprudence from the Court of Justice of the European Free Trade Association States (the EFTA Court) in relation to EEA law. Indeed, there has been only one significant decision of the EFTA Court, in *EFTA Surveillance Authority v Kingdom of Norway*,[63] in which Norwegian legislation reserving a certain number of academic positions exclusively for women was held to breach Norway's obligations under the EEA Agreement, which at that time included applying the EU's Equal Treatment Directive 76/207 as a part of EEA law.[64]

60 Paragraph 92 of the judgment sets out the relevant provisions: 'Under those provisions, for a civil servant who is a parent of three children or of one child older than one year of age and suffering from a disability equal to or greater than 80%, to be able to take early retirement, the civil servant concerned must be able to show that, for each child, he or she has taken a career break of a continuous duration of at least two months in the form of maternity leave, paternity leave, adoption leave, parental leave, parental care leave or leave in order to be available to bring up a child of less than 8 years of age. In cases of multiple births or adoptions, the duration of the career break taken into account in respect of all of the children in question is also two months.'

61 Council of State Assembly, 27 March 2015, M. Quintanel n° 372426: 'while noting the divergence from the EU case, the Council of State sought to establish the social facts from which the conclusions were to be drawn', Xenidis, R. and Masse Dessen, H. (2018) 'Positive action in practice: some dos and don'ts in the field of EU gender equality law', *European Equality Law Review*, 2/2018, p. 55.

62 France, Law No. 2010-1330 on pension reform (*Loi portant réforme des retraites*) 9 November 2010.

63 Case E-1/02, 27 January 2003, [2003] EFTA Court Report 1.

64 Article 7 EEA provided that acts referred to or contained in the annexes to the agreement or in decisions of the EEA Joint Committee were binding upon the Contracting Parties. Article 70 EEA stipulated that the Contracting Parties should promote the principle of equal treatment for men and women by implementing the provisions specified in Annex XVIII to the EEA Agreement. The EU's Equal Treatment Directive 76/207 was listed in Annex XVIII to the EEA Agreement. It has since been replaced by Directive 2006/54.

In 1998, the Norwegian Government had allocated forty postdoctoral research grants, funded through the national budget, to universities and university colleges. Of these 40 posts, 20 were assigned to the University of Oslo. A postdoctoral scholarship was obtainable after completion of a doctoral degree and was designed to be a temporary position with a maximum duration of four years. The scholarships were intended to improve the recruitment base for high-level academic positions. According to the directions issued by the Ministry of Education, Research and Church Affairs, these positions were to be made available in fields where the recruitment of women needed to be strengthened. The University of Oslo earmarked all of these positions for women. Under the university's *Plan for Equal Treatment 2000-2004*, another 10 postdoctoral positions and 12 permanent academic positions were to be earmarked for women. According to the plan, the university would allocate the permanent positions to the faculties by way of an evaluation of, inter alia, the academic fields where women in permanent academic positions were considerably underrepresented, giving priority to fields with less 10 % female academics, and academic fields where women in permanent academic positions were underrepresented as compared to the number of female students. These preferences were challenged under the EEA Agreement.

In defending the provisions, the Norwegian Government mounted a robust defence of the challenged provisions, and invited the Court to adopt an alternative to the interpretation of the directive developed by the CJEU, under which what were described as 'affirmative action measures' were legally defined as derogations from the prohibition on discrimination. According to Norway, the Court should adopt an interpretation that views affirmative action measures aimed at gender equality in practice, not as constituting discrimination but rather as an intrinsic dimension of the very prohibition of discrimination. Norway did not dispute that in allowing certain academic positions to be earmarked for women, this constituted an automatic and unconditional preference for one gender, but Norway argued that the rule in question was not in breach of the directive. Formal equality in treatment, it argued, was not sufficient to achieve substantive equality. The modest number of women in academia stood in glaring contrast to the percentage of women in the student body, and women tended to leave academic careers before they were qualified for higher academic positions. The aim of the disputed legislation was to achieve long-term equality between men and women as groups, citing support for its view in provisions of international agreements including Article 4(1) of CEDAW.[65]

The EFTA Court rejected this invitation to depart from the approach adopted by the CJEU. In the light of the homogeneity objective underlying the EEA Agreement, the Court considered that it could not accept the invitation, as it saw it, of redefining the concept of discrimination on grounds of gender in the way that Norway suggested. The Court considered that the directive was based on a recognition of the right to equal treatment as a fundamental right of the individual. National rules and practices derogating from that right were only permissible when they allowed a balance between the need for the promotion of the underrepresented gender and the opportunity for candidates of the opposite gender to have their situation objectively assessed. There must, as a matter of principle, be a possibility that, what the Court termed the 'best-qualified candidate' obtained the post. The Court noted that it appeared from Norway's answer to a written question from the Court that the posts in question might be awarded to women applicants with, what the Court termed, 'inadequate qualifications', if there was not a sufficient number of qualified women candidates. Norway could not justify the measures in question by reference to its obligations under CEDAW. Although CEDAW was in force for EU Member States at the time when the CJEU had rendered the relevant judgments concerning the directive, the provisions of this and other international conventions dealing with affirmative action measures cited by Norway were clearly permissive rather than mandatory, and therefore could not be relied on to justify derogations from obligations under EEA law.

65 Other international provisions were: Article 14 of the European Convention on Human Rights, Protocol 12 to the same Convention, Articles 2 and 5 of the ILO Convention 111 concerning Discrimination in Respect of Employment and Occupation, as well as Recommendation No R (85) 2 from the Council of Europe.

In the alternative, Norway had contended that, in any event, the CJEU had not yet had an opportunity to rule on whether the earmarking of specific posts for women fell within the scope of Article 2(4) of the directive, and that upholding the Norwegian provisions was consistent with the CJEU's jurisprudence. Unlike in *Lommers*, where all the employer's nursery places were reserved for women, the Norwegian scheme only applied to a limited number of academic positions at the University of Oslo. The measures in *Badeck* concerning training positions were very similar to those provided for in the Norwegian legislation. The measure at issue in *Abrahamsson* was significantly more disadvantageous to the other gender than the measures at issue in the present case because it involved a judgment on academic merits, involving the adverse effect of a rejection on a researcher's reputation. The earmarked posts in Norway represented only a minor part of all new temporary and permanent appointments. The positions were, in addition, new posts constituting a real extension of the total number of available posts. Therefore, male applicants were not in a more difficult position with respect to career advancement than they would be without the earmarked posts.

The EFTA Court, in a carefully argued judgment, disagreed, embarking on a detailed examination of the jurisprudence of the CJEU, and in doing so (somewhat paradoxically) shedding considerable light on the thinking behind the CJEU's positive action decisions up until that time. One of the most interesting, and important, parts of the judgment concerns the training aspects of the contested postdoctoral positions. The Norwegian positions were limited in time, and intended to offer holders of doctoral degrees the possibility to qualify for permanent academic posts and develop the necessary competence to compete for higher academic positions. The issue was in what ways these differed from the provisions that were upheld in *Badeck*. Although the Court agreed with the European Commission that the CJEU had drawn a distinction between training for employment and actual places in employment, allowing the reservation of positions for women with a view to obtaining qualifications necessary for subsequent access to occupations requiring such training in the public service, the EFTA Court considered that even for training positions, the law required a system that was not 'totally inflexible', and that alternatives for postdoctoral positions in the private sector should be possible.

In the Court's view, the Norwegian measures went further than the Swedish legislation in *Abrahamsson*, where a selection procedure involving an assessment of all candidates was envisaged at least in principle. Since that Swedish rule had been held by the CJEU to be in violation of the principle of equal treatment of women and men, the Norwegian rule must fall foul of that principle *a fortiori*. It had been argued that the positions in question are new posts and that male applicants were not in a more difficult position with respect to career advancement than they would be without the earmarking scheme. The Court noted, however, that it was unlikely that newly created professorship posts would be allocated to specific disciplines, subjects or institutions without an evaluation of already existing posts, or without regard to future needs and expected consequential adjustments of teaching or research staff. It therefore appeared that the earmarking scheme would have an impact on the number of future vacancies open to male applicants in any field in which it was been applied. The defendant had not even alleged that in the case at hand the situation could be different.

The suggestion that the permanent professorships set up and earmarked for women were temporary in nature since they would lapse at the latest when such a professor retired could not be accepted. On the principles examined earlier, the Norwegian legislation in question must be regarded as going beyond the scope of Article 2(4) of the directive, insofar as it permitted the earmarking of certain positions for persons of the underrepresented gender. The last sentence of Article 30(3) of the University Act as applied by the University of Oslo gave absolute and unconditional priority to female candidates. There was no provision for flexibility, and the outcome was determined automatically in favour of a female candidate. The defendant had argued that the criteria of unconditional and automatic priority did not exhaust the scope of the proportionality principle. The Court noted, in this respect, that other aspects of the Norwegian policy on gender equality in academia – including target measures for new professorship posts, priority in allocation of positions to fields with less than 10 % female academics and in fields with

high proportion of female students and graduates – had not been challenged by the EFTA Surveillance Authority, except with regard to the earmarking of positions exclusively for female candidates.

The Court considered that under the present state of the law, the criteria for assessing the qualifications of candidates were essential. In such an assessment, there appeared to be scope for considering those factors that, on empirical experience, tended to place female candidates in a disadvantaged position in comparison with male candidates. Directing awareness to such factors could reduce actual instances of gender inequality. Furthermore, giving weight to the possibility that in numerous academic disciplines female life experience might be relevant to the determination of the suitability and capability for, and performance in, higher academic positions, could enhance the equality of men and women, which was the concern at the core of the directive. In coming to this conclusion, the Court relied heavily on *Abrahamsson and Anderson*.

3.12 European Court of Human Rights jurisprudence

All Member States of the EU and all EFTA states have ratified the European Convention on Human Rights. Article 14 of the ECHR prohibits discrimination by a Party to the Convention, 'on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status' in the implementation of the other rights in the Convention. The Convention is interpreted by the European Court of Human Rights (ECtHR). Unlike under EU law, there is no specific provision concerning positive action, only this general prohibition of discrimination. Two separate questions regarding positive action arise under the ECHR. The first is whether positive action is compatible with the ECHR, and if so in what circumstances. The second is whether it is ever obligatory for a state to engage in positive action.

Regarding the first question, the ECtHR has adopted the approach of interpreting the prohibition of discrimination as encompassing what (in EU law terms) would be considered direct and (more recently) indirect discrimination. However, this prohibition is subject to an override, where the Contracting Party is able to establish that there are reasons that the Court considers would justify the discrimination that has occurred; the question that the Court has to consider is whether the state has established an 'objective and reasonable justification',[66] which amounts in practice to a proportionality test. In *Abdulaziz, Cabales and Balkandali v the United Kingdom*,[67] the Court held, for example, that the exclusion of the applicants' husbands from the United Kingdom entailed sex discrimination in the securing of the applicants' right to respect for family life. The Court considered that the difference of treatment between women and men in this case lacked an objective and reasonable justification. A difference of treatment on the ground of sex could be regarded as compatible with the Convention only if 'very weighty reasons' were advanced. Since then, an equivalent approach has been adopted by the Court in numerous other cases involving allegations of sex discrimination.

Applying this approach to the question of whether positive action is permissible under the Convention, we can say that positive action will be permissible in two situations: either where the positive action does not amount to a *prima facie* case of discrimination under the Convention in the first place (e.g. any unequal treatment occurs in a field not covered by the Convention); or, secondly, where the positive action does amount to a *prima facie* case of discrimination under the Convention, but the state is able to establish that there was an 'objective and reasonable justification' for the positive action taken. This latter situation essentially amounts to the positive action in question surviving the application of a proportionality analysis. For example, in the *Lindsay* case, the European Commission on Human Rights, when it was in existence, upheld the provision of a tax advantage for married women as satisfying the

66 *Case 'Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium' v Belgium* (*Belgian Linguistics case*), [Plenary] Application Nos. 1474/62, 1677/62, 1691/62, 1769/63, 1994/63 and 2126/64, 23 July 1968.

67 *Abdulaziz, Cabales and Balkandali v the United Kingdom* [Plenary] Application no. 9214/80; 9473/81; 9474/81, 28 May 1985.

'objective and reasonable justification' of seeking to encourage married women back to work.[68] More recently, in *Kurić and Others v Slovenia*,[69] the Court observed that 'Article 14 does not prohibit Contracting Parties from treating groups differently in order to correct 'factual inequalities' between them.'[70]

For a smaller number of EU Member States and EFTA countries, an additional provision of the ECHR is of relevance. For those states that have ratified it, Protocol No. 12, provides for a general prohibition of discrimination by broadening the field of application of Article 14 of the Convention. It provides in Article 1: 'The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, (...).' The Protocol thus affords protection extending beyond the enjoyment of the rights and freedoms set forth in the Convention and includes the enjoyment of any right specifically granted to an individual under national law.

So far as the compatibility of positive action with Protocol No 12 is concerned, a very similar analysis to that under Article 14 is applicable, with the caveat that the expansion of the coverage of the non-discrimination principle in the Protocol means that positive action is (marginally) more likely to fall foul of the prohibition on discrimination. This is balanced, to some extent at least, by the inclusion of a provision supportive of positive action, but only in the preamble to the Protocol. This reaffirms 'that the principle of non-discrimination does not prevent States Parties from taking measures in order to promote full and effective equality, provided that there is an objective and reasonable justification for those measures.' It will be seen that this provision in the preamble echoes the approach adopted by the ECtHR under Article 14, and therefore adds very little to the discussion.

Turning to the second question, whether Parties to the Convention have any positive obligation to undertake positive action measures, the legal situation is evolving. Marc De Vos suggested in 2007,[71] following the *Thlimmenos* case in which the Court said that Article 14 would be violated 'when States without objective and reasonable justification fail to treat differently persons whose situations are significantly different',[72] that there was some possibility that in a subsequent case the ECtHR might develop a positive obligation to undertake positive action. However, given that at the time of his writing those cases following *Thlimmenos* appeared to have rejected such a development, at least in the context of positive obligations to take positive action in the context of other grounds, such as race, ethnic origins, and national origins, he was rightly sceptical whether, as the law then stood, such a development was likely.[73]

So too, as regards the position under Protocol No. 12, although an argument that positive obligations might emerge from the obligation to 'secure' the rights could be made, that argument has so far not been adopted by the ECtHR. The explanatory report accompanying the protocol when it was concluded stated that: 'the wording of Article 1 reflects a balanced approach to positive obligations of the Parties under this provision. (...) While such positive measures cannot be excluded altogether, the prime objective of Article 1 is to embody a negative obligation for the Parties: the obligation not to discriminate against individuals.'[74]

More recently, however, there appears to have been some further inching towards a 'positive obligations' approach in the interpretation of Article 14 and, by extension, Protocol No. 12. This has resulted, in some cases, in the ECtHR upholding claims that public bodies were in breach of their obligations under Article 14 in failing to provide 'reasonable accommodation' for students with disabilities.[75] In some other cases, the ECtHR has stressed that the state had a positive obligation to undo a history of racial

68 *Lindsay v United Kingdom* (1996) 49 DR 181 (ECommHR).
69 *Kurić and Others v Slovenia* [GC], No. 26828/06, 26 June 2012.
70 *Kurić and Others v Slovenia* [GC], No. 26828/06, 26 June 2012, para. 388.
71 De Vos, M. (2007) *Beyond Formal Equality*, European Commission, para 6.2.
72 *Thlimmenos v Greece*, [GC], No. 34369/97, 6 April 2000.
73 *Chapman v the United Kingdom*, [GC], No. 27238/95, 18 January 2001.
74 Council of Europe (2000) *Explanatory Report to Protocol No. 12*, para 24.
75 *Çam v Turkey*, No. 51500/08, 23 February 2016.

segregation in special schools.[76] In *Kurić and Others v Slovenia*,[77] the Court considered that 'in certain circumstances a failure to attempt to correct inequality through different treatment may, without an objective and reasonable justification, give rise to a breach of that Article'. There is no case, thus far, clearly rejecting or supporting a positive obligation to undertake positive action in the context of *gender inequality*, but judging from the emerging case law concerning positive action on other grounds, such a development would appear to be possible. However, given the role of the margin of appreciation, in which states are accorded a wide discretion in the context of social policy, that development is by no means certain.[78]

3.13 Conclusion

Over time, the CJEU's jurisprudence demonstrates a clear commitment to the application of a set of common principles to the complex issues presented. These can be summed up as the following: positive action measures that are in tension with non-discrimination requirements should be subjected to a broadly proportionality-based assessment.[79] This can now be seen as encapsulating the European approach to the limits of positive action. As is well known, this includes the requirements that the aim of the measures be transparent and legitimate, that the measures adopted should be sufficiently connected to achieving those aims, and that the aims cannot be achieved by the adoption of methods that pose a less significant challenge to the non-discrimination principle.

Consistent with this approach, positive action measures should in particular address two potential problems with positive action: stereotyping, and third-party costs. The problem of stereotyping is that positive action measures, in the guise of assisting women to overcome barriers, may simply reinforce existing ones. This has led to judicial scepticism as to whether measures that appear to confirm a traditional understanding of the role of women as mothers and carers can survive scrutiny. The problem with third-party costs is that positive action may have adverse effects on those not benefitting from these measures, and the extent of those costs should not be disproportionate to the benefits. This has led to the adoption of a judicial rule of thumb that preferences cannot be accorded to those of the underrepresented sex if they are not, broadly, as well qualified as the candidate who was not awarded the position, and that the decision-making body must be open to the possibility that the circumstances of the male candidate are such that the default preference for the person of the underrepresented sex should be over-ridden. Under no circumstances can a person from the underrepresented sex be given an automatic and unconditional preference.

It is reasonable to conclude that the approach taken by the EFTA Court is equivalent to that taken by the CJEU, not least because the approach taken by the CJEU has been regarded as highly persuasive, if not binding, by the EFTA Court. There is no indication, therefore, that the approach of the EFTA Court would be any different were the other issues on which the CJEU has given its opinion to come before the EFTA Court in the future.[80]

Comparing the approach taken under the ECHR and under EU law, there are several apparent contrasts. First, the combination of the margin of appreciation in the socio-economic policy area (which does not have a real parallel in EU sex equality law),[81] the somewhat less strict application of the proportionality test (evident in such cases as the *Lindsay* case considered above), and the acceptance in the preamble

76 *Horváth and Kiss v Hungary*, No. 11146/11, 29 January 2013, para 127. See also ECtHR, *Oršuš and Others v Croatia* [GC] No. 15766/03, 16 March 2010.
77 *Kurić and Others v Slovenia* [GC], No. 26828/06, 26 June 2012, para. 388.
78 *Zeman v Austria*, No. 23960/02, 29 June 2006, paras 32 and 33.
79 See also, in the context of positive action in the context of religious discrimination, CJEU, judgment of 22 January 2019 [GC], *Cresco Investigation GmbH v Markus Achatzi*, Case C-193/17.
80 Hellum, A. and Nielsen, R. (2002) 'Menneskerettighetene og EØS-retten på kollisjonskurs? Om adgangen til å øremerke professorater og post doc-stpend for kvinner ved UiO', I: *Kritisk Juss 2002* (29) pp. 113-132, discuss critically the EFTA Court's decision. The authors are sceptical of the decision.
81 *Stec v the United Kingdom* [GC], No. 57325/00, 12 April 2006.

to Protocol No. 12 that special measures may be necessary to give full effect to equality, means that the ECtHR is likely to takes a less interventionist approach in assessing whether positive action is permissible under the Convention than the CJEU takes under EU law. Secondly, there is somewhat more likelihood, as the law currently stands in the EU and under the ECHR, that a positive obligation to engage in positive action could arise under the ECHR than under EU law. However, in the absence of more definitive case law from the ECtHR on either of these issues, both these observations remain somewhat speculative.

Part 2
Positive action at the national level

4 Positive action: some terminology

4.1 Introduction

In this chapter, the report points to the widely differing terminology used in the states to describe measures that would come within the definition of positive action set out in the previous chapters. In the next chapter, the report provides an inventory and categorisation of the legislative measures that have been implemented in the employment context at the national level in 31 states. In the preparatory works of the Discrimination Act,[82] the Government of **Sweden** noted that many different terms are used to describe positive action measures, both nationally and internationally.[83] The terms 'positive action' or 'positive measures' are widely used as legal terms by both the EU and EEA institutions to the virtual exclusion of other terms,[84] and in most Member States and EEA countries. We shall see that multiple other terms are used nationally, but even where states use the term 'positive action' it will have to be translated into the national language, and when we refer in this report to the use of a particular term, this is nearly always a translation of that term into English, with the limits that brings with it.

4.2 Use of the term 'positive action'

In **Cyprus**, the term used in the law implementing Directive 2006/54/EC,[85] is *θετικές δράσεις* which can be considered to be a direct translation of 'positive action'. In the **Czech Republic**, the term 'positive measures' is also used. There is no difference between this and 'positive action'. In **Germany**, 'positive action' (*positive Maßnahmen*) is a legal term used in the General Equal Treatment Act, the main statutory regulation on equality in (private) employment. In **Austria**, however, although the Equal Treatment Act for the Private Sector has the heading 'positive measures' (*Positive Maßnahmen*),[86] and while this can be seen as being a legal term, it has never been widely used as such. In **Greece**, the Constitution[87] and the acts transposing the gender equality directives,[88] use the term 'positive measures'. Thus, 'positive action' is the widely used term, but not universally. In some Member States and EEA countries, the term 'positive action' is not used at all, or not used widely, and other terms are used instead. There is no such explicit legal term as 'positive action' in **Bulgaria**, for example. In **Poland**, there is no dedicated legal term for the notion of positive action. In **Latvia**, there is no legal term for positive action provided in the national legal system. In most Member States and EEA countries, even where 'positive action' is used widely, other terms are also used. In **Austria**, the legal and political terms most commonly used are *Gleichbehandlung* (equal treatment), *Gleichstellung*, (which designate factual and legal measures aiming to establish equality and which are the closest equivalent to the central meaning of equal opportunities and positive action respectively), and gender mainstreaming, which comprises processes of equalisation and positive action measures for all genders.

82 Sweden, Discrimination Act, 2008:567.
83 Sweden, Government Bill Prop. 2007/08:95 166.
84 However, note that in the CJEU case law different terms are to be found as well, e.g. 'positive discrimination' in relation to the national law at issue in *Abrahamsson*.
85 Cyprus, Law 205(I)/2002 on equal treatment between men and women in employment and vocational training, Article 2.
86 Austria, Equal Treatment Act for the private sector, Section 8.
87 Greece, Constitution, Article 116(2).
88 Greece, Act 3896/2010, transposing Directive 2006/54/CE, Article 19.

4.3 'Affirmative action'

In **Iceland**, the direct translation of 'positive action' (*jákvæð aðgerð*) is not used, rather *sértækar aðgerðir*, meaning 'special measures' is used instead, although the meaning from a gender perspective would be understood. The Icelandic terms are used interchangeably with 'affirmative action,' which is defined as: **'**Special temporary measures that are intended to improve the position of, or increase the opportunities of, women or men aimed at establishing gender equality in a specific field where either sex is at disadvantage. In such cases it may prove necessary to give either sex temporary priority in order to achieve balance.'[89] The term 'positive discrimination' is used when an individual who is a member of the minority gender is employed, even though there is a more qualified person of the other gender among the applicants.[90] In **Norway**, positive action is the legal term commonly used, but the term 'affirmative action' is often used instead of, or as well as, positive action. Legally there are no significant differences between the terms. Affirmative action is the term that is more common, in public debate in Norway. The term 'affirmative action' is also, for example, used in **Northern Ireland**.

4.4 *'Parité'*

Parité is the term used particularly in the context of measures taken to provide preferential treatment for women in the context of electoral representation, originating in **France**. The word *parité* describes a special form of positive action and has a specific history. It was first considered as an instrument to ensure equal representation of women and men in politics and then was extended to corporate governance in 2011. In **Belgium**, the existing legal framework relating to positive action refers exclusively to actions taken in the labour market. It concerns actions taken by the employer or by social partners. The terms 'quota' and *parité* are used in the field of decision-making and require the adoption of a law by the authorities. In electoral legislation, *parité* between the sexes must be guaranteed in all lists of candidates. In **Germany**, the term *parité* (*Parité*) is widely used these days, but is generally restricted to the area of parliamentary elections or gender equality in elected offices. In **Portugal**, the terms *parité* and 'positive discrimination' are also used. *Parité* is a term used in the context of the quota legislation for the election of members of the National Parliament, for the European Parliament and for local political representatives.[91] However, this term is not commonly used outside this context.

4.5 'Special measures'

States that use the term 'special measures' tend to identify international law as the source.[92] In **Cyprus**, terms such as 'special measures', meaning measures designed to advance substantive equality for the underrepresented sex, can also be found in policy documents.[93] These terms can be considered interchangeable. In **Croatia**, although the term 'positive action' is often used colloquially or informally, the proper legal term is 'special measures'. 'Special measures' are legally defined in the Gender Equality Act[94] and the Anti-Discrimination Act.[95] However, the differences in terminology do not result in any substantive differences between two terms. In **Denmark**, 'positive action' is not a commonly used legal term in legislation, rather the legislation uses the term 'temporary special measures'. The concepts

89 Iceland, Gender Equality Act No. 10/2008, Article 2(7).
90 https://www.jafnretti.is/is/um-jafnrettisstofu/ordabok.
91 Portugal, Law No. 3/2006, of 21 August 2006, known as the 'Parity Law' (*Lei da Paridade*).
92 Article 4(1) of CEDAW uses the term, 'temporary special measures.
93 E.g. the draft *National Action Plan for Equality between Men and Women 2018-2021* and the latest *Shadow Report to CEDAW*.
94 Croatia, *Zakon o ravnopravnosti spolova*, *Narodne novine* (NN; Official Gazette of the Republic of Croatia), Nos. 82/2008 and 60/2017.
95 Croatia, *Zakon o suzbijanju diskriminacije*, NN Nos. 85/2008 and 112/2012. Both the Gender Equality Act and Anti-Discrimination Act explicitly prohibit sex discrimination. The Gender Equality Act specifically aims to protect and promote gender equality and defines and regulates methods of protection against discrimination based on sex, while also creating equal opportunities for men and women (Article 1, Gender Equality Act). The Anti-Discrimination Act is a horizontal, 'umbrella' act in the field of prohibition of discrimination and creation of equal opportunities, and includes an exhaustive list of 21 prohibited discriminatory grounds, including sex (Article 1(1), Anti-Discrimination Act).

of 'positive action' or 'affirmative action' are not used in the statutory law of **Lithuania**. Instead, the legislator uses the notion 'special measures.' Direct translation from Lithuanian defines them as 'special measures, established by law, to accelerate the establishment of effective equality between men and women and which must be discontinued after equal rights and equal opportunities for women and men have been achieved'.[96] In **Slovenia**, the term used is not 'positive action', rather, they are called 'special measures', but no significance should be given to the difference in terminology.

4.6 'Real equality'

In **France**, **Spain** and **Sweden**, 'real and effective equality' (**Spain**), or 'real equality' (**France** and **Sweden**) are additional terms used. The Spanish Constitution requires public authorities to promote 'the conditions in order to make equality real and effective'.[97] In **France**, the use in the Law of 4 August 2014 of 'real equality' between women and men[98] seems to refer to the enforcement of substantive equality and gender mainstreaming. In **Sweden**, the term used is *positiv särbehandling*, which refers to 'positive action proper', as the Swedish expert describes it. There is no statutory definition of the term. However, in the preparatory works to the Discrimination Act,[99] the Government stated that positive action refers to specific measures which amount to a preference, advantage or preferential treatment for neglected or underrepresented groups, aiming to achieve real gender equality (*reell jämställdhet*) in practice for persons belonging to the group in question. Another term used is 'active measures', which refers to activities that the employer takes in order to promote equality at the workplace. Active measures can be distinguished from positive action proper. Sometimes, active measures may be directed specifically towards a certain group, for instance in order to promote gender equality.

4.7 Quotas and other terms

Terms that are used instead of, or in addition to, 'positive action' include, among others: positive discrimination (**Lithuania**, **Poland**, **Portugal**), reverse discrimination (**Germany**, **Hungary**), quotas (**Belgium**, **Cyprus**, **France**, **Germany** and **Sweden**), specific measures (**Malta**), preferential treatment (**Poland**, **Netherlands**), positive measures (**Romania**), temporary balancing measures (**Slovakia**), and appropriate measures (**Malta**). **Bulgaria** appears to have a particularly rich vocabulary. The terms used include: 'temporary incentive/promotional measures', 'promotional measures', 'hiring the candidate of the underrepresented sex'; 'balanced representation'; 'measures for balanced participation'; 'special measures'; 'measures aimed at initiatives exclusively or mainly promoting entrepreneurship among women'; and 'measures aimed at initiatives for preventing or compensating for disadvantages in the professional career of women'. In **Poland**, both the Labour Code[100] and the Anti-Discrimination Act[101] describe 'measures … aimed at the creation of equal opportunities for … employees that experience different treatment on one or more grounds specified … by reducing existing inequalities to the advantage of those employees',[102] or 'measures aimed at equalising the inconveniences connected with unequal treatment at the source of which lies one or more grounds for discrimination …'.[103] In the professional literature and policy documents, terms such as equalisation of opportunities, compensatory preference,

96 In Lithuanian – *įstatymų nustatytos specialios laikinosios priemonės, kurios taikomos siekiant paspartinti faktinės vyrų ir moterų lygybės įtvirtinimą ir kurios, įgyvendinus moterų ir vyrų lygias teises ir vienodas galimybes, turi būti atšauktos.*

97 Spain, Constitution, Article 9(2).

98 France, Law No. 2014-873, on real equality between women and men, 4 August 2014. (https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000029330832&categorieLien=id).

99 Sweden, Discrimination Act, 2008:567.

100 Poland, Labour Code (Act of 26 June 1974), unified text Journal of Laws (*Dziennik Ustaw*; Dz.U) 2018, Item 917, with further amendments.

101 Poland, Law of 3 December 2010 on the Implementation of (some) EU Provisions on Equal Treatment, consolidated text JoL 2016 Item 1219 (the Anti-Discrimination Act). It refers to the following Directives: 86/613/EEC, 2000/43/EC**,** 2000/78/EC, 2004/113/EC and 2006/54/EC. From 2016 it also refers to Directive 2014/54/EU on measures facilitating the exercise of rights conferred on workers in the context of freedom of movement for workers.

102 Poland, Labour Code, Article 183b(3).

103 Poland, Anti-Discrimination Act, Article 11.

preferential treatment, affirmative action and positive discrimination are used. In some countries, different terms are used to refer to similar practices depending on whether the context is one relating to gender equality, or ethnic or other types of equality. In **Finland**, the term positive action is more prominently in use in the context of gender equality than in other equality contexts. Also popular in the **Netherlands** is 'diversity (policy)'. This does not specifically relate to gender, but to all underrepresented groups.

4.8 Different understandings of 'positive action'

Even where the term 'positive action' is widely used in the gender equality context, different Member States attribute widely different meanings to it. In some Member States and EEA countries, 'positive action' refers to a wide range of practices, from taking action to root out direct discrimination, to the adoption of preferential employment in favour of women. In other Member States and EEA countries, on the other hand, 'positive action' refers only to the use of 'quotas' or other preferential hiring practices. In most Member States, the term 'positive action' has neutral or positive implications; in other countries, however, it has strongly pejorative implications and is used to indicate that the practice is in some way illegitimate. In public discourse in **Latvia**, the term 'positive discrimination' is mostly used.

Terms other than positive action may be used where the measures adopted are seen by those using the term as being illegitimate in some respects. In **Germany**, 'special measures' might be used in legal discourse now and then and carry the association of illegitimate preferential treatment. The most commonly used term concerning gender-based positive action in employment in Germany is 'quota' (*Quote*), the use going back to the 1980s and always associated with a slight (or explicit) devaluing of positive action measures. The term 'reverse discrimination' (*umgekehrte Diskriminierung*), which was very common in German legal discourse before the introduction of 'positive action' by European law was also a derogatory term. 'Positive special measures' is the term used in **Estonia**, but 'positive discrimination' is also used, with the negative connotation associated with the term 'discrimination'. In **Hungary**, legal provisions either use the term 'special measure' (*külön intézkedés*) or 'preferential treatment' (*előnyben részesítés*), but in public debates and in everyday conversations, the term used is almost always 'positive discrimination' (*pozitív diszkrimináció*). According to experts, the negative connotation of this widely used term, with its association with discrimination, contributes to the controversies around positive action in Hungary.[104] In **Romania**, experts in the field of discrimination also use the term 'affirmative measures', in order to create a distinction from 'positive discrimination', which is considered in public discourse to mean a disproportionate advantage that minorities benefit from and a form of discrimination against the majority.

4.9 Differences within states

The term that is used to describe a particular practice may also vary depending on which national institution is describing the practice: courts may use different terminology from the legislature to describe the same practice. The **Cyprus** Supreme Court used the term 'positive discrimination' to characterise a legal provision establishing that in certain public law organisations at least one third of the members of the Board of Directors should belong to either sex.[105] In constitutional legal discourse in **Germany**, the term 'women's affirmative action' (*Frauenförderung*) is widely used, and is also used in gender matters relating to the civil service. The notion of 'positive discrimination' (*pozityvioji diskriminacija*) has popped up in the early case law of the Constitutional Court of the Republic of **Lithuania**. On a few occasions the Court has pointed out that a differentiated legal regulation when it is applied to certain groups of persons with equal characteristics, does not qualify as discrimination or privileges, if 'it pursues positive, socially significant goals (so-called "positive discrimination")'.[106] However, this concept has not been used by the Court more recently – either to define positive action or to justify different treatment.

104 See e.g. Kollonay, Cs. (2006), 'Fórum: Előnyben részesítés' (Forum: Preferential treatment) *Fundamentum*, vol. X, no. 4, pp. 71-78.
105 Cyprus Supreme Court, *President of the Republic v House of Representatives*, judgment 2/2016.
106 Lithuanian Constitutional Court, ruling of 4 July 2003, conclusion of Constitutional Court of 24 January 1995.

4.10 Conclusion

There is considerable confusion among states as to how positive action, as understood in the previous chapters, is described nationally, and some significant differences as to what the term positive action means nationally compared with the EU usage. Terms other than positive action are sometimes used to describe EU-type positive action, and the term positive action is sometimes used nationally to describe measures that would not be described as positive action at EU level. As we shall see, this terminological confusion indicates an underlying conceptual confusion. From the perspective of policy makers (whether national or in the EU institutions) this means that considerable care will be necessary in future in deciding upon the preferred term (or terms) to describe particular policies. Policy makers cannot simply assume that all states will understand the same thing when they hear the term 'positive action'. What appears to be clear in one language may appear considerably less clear when it is translated into another language.

5 Positive action in employment in domestic legislation: an overview of national law

5.1 Introduction

In this chapter, we consider in detail the legislative approach adopted by the Member States. The overwhelming majority of EU Member States have implemented EU anti-discrimination law in such a way as to reflect in national law the approach to positive action adopted in the EU directives, with the overwhelming majority of states taking the opportunity provided by the EU directives to introduce an exception for certain types of positive action that would otherwise constitute unlawful discrimination. Such exceptions, in general, apply to both public and private sector employment. In other respects, some states distinguish between public and private sector employment. We can roughly divide Member States into three broad categories: category 1 – positive action by employers is permissible within limits, but voluntary, in both public and private sector employment; category 2 – positive action by employers is permissible, within limits, in the private sector but compulsory, within limits, in the public sector; and category 3 – positive action is compulsory in both private and public sector employment. The one Member State that does not come under any of these categories is **Latvia**, which does not appear to have any provision for positive action, even as an exception in private sector employment.

5.2 Positive action by employers, permissible within limits, but voluntary, in both public and private sector employment (category 1)

Cyprus is a good example of a category 1 state. The possibility to adopt positive action measures in the field of employment is found in legislation enacted to implement EU gender equality legislation,[107] which establishes *the possibility* of adopting positive action measures as a way of serving the law's purpose.[108] The purpose of the law is the application of the principle of equal treatment between men and women regarding access to vocational training and employment and conditions of work.[109] The law applies to public and private sector employers. Positive action is defined as 'measures that, with a view to ensuring full and substantive equality between men and women in working life, provide for specific advantages for the persons of the unrepresented sex, and especially for women, in employment posts or employment hierarchy posts or sectors of vocational training to facilitate these persons in exercising an employment activity, or [measures] that prevent or remedy disadvantages in these persons' employment advancement.'[110] There is no obligation to develop any measures of positive action in the field of gender equality, but only a possibility to justify such measures as exceptions to the equality principle.

Similarly, the **Czech Republic** provides in the Anti-discrimination Act that positive action will not be deemed to constitute discrimination, but does not permit a preference for a less well-qualified candidate.[111] Measures aimed at preventing or compensating for disadvantages arising from a person's belonging to a group of persons defined by one of the discriminatory grounds and ensuring equal treatment and equal opportunities will not be regarded as discrimination.[112] In matters relating to access to employment or occupation, these measures may not give rise to a preference for a person whose qualifications are not higher than those of other persons currently assessed.

107 Cyprus, Law 205(I)/2002 on equal treatment between men and women in employment and vocational training.
108 Cyprus, Law 205(I)/2002, Article 6.
109 Cyprus, Law 205(I)/2002, Article 3.
110 Cyprus, Law 205(I)/2002, Article 2.
111 Czech Republic, Anti-Discrimination Act, Law No. 198/2006 Coll., Section 7.
112 Czech Republic, Anti-Discrimination Act, Section 7(2) and (3).

In **Denmark**, the Gender Equality Act[113] and the Equal Treatment Act[114] permit public authorities and private as well as public employers to invoke temporary special measures to promote equal treatment of women and men or to reduce inequality between women and men. In public employment, the relevant minister is given the opportunity to assess whether to invoke special temporary measures to ensure de facto equality between women and men. According to Section 3 of the Gender Equality Act, all ministers may, within their area of responsibility, permit measures deviating from the equal treatment principle by promoting temporary special measures with a view to promoting gender equality and the advancement of women, particularly by remedying actual inequalities and unequal treatment on the ground of sex both on and outside the labour market. Furthermore, specific rules are laid down in the Danish Ministerial Order[115] that provides that employers, authorities and organisations may implement development initiatives for a limited period of up to two years to attract the underrepresented gender without requiring permission from the minister. It is a precondition for such initiatives that one gender is underrepresented (25 % or less). It is permitted to establish courses or training activities of up to six months for one sex, if the purpose is to promote equality between women and men and to promote women's and men's equal access to employment, education and management. There is, however, no requirement to act on gender inequalities with special measures.

In **Estonia**, the Gender Equality Act (GEA) was adopted in 2004 and several amendments were made in 2009. Positive action is explicitly allowed.[116] Application of specific temporary measures to promote gender equality and to give advantages to the less-represented sex or to reduce gender inequality is not deemed to be direct or indirect discrimination based on sex. The meaning of 'temporariness' has not been specified in law or case law. Although this is an abstract and general statement and there is no explicit requirement that these temporary measures must be compatible with the principle of proportionality, in cases of fundamental rights, the 'necessity and proportionality' test generally applies. The GEA also requires the promotion of gender equality by state and local government authorities, educational institutions and employers.[117] State and local government authorities are required to promote gender equality systematically and purposefully. Their duty is to change the conditions and circumstances that hinder the achievement of gender equality. There are, however, no legally binding requirements that positive action should be adopted. The Equal Treatment Act[118] provides that it is without prejudice to the application of specific measures to prevent or diminish inequality.[119] It also adds that the application of specific measures to prevent or diminish inequality should be in proportion to the objective being sought. The Civil Service Act (CSA)[120] requires that authorities should follow the principle of equal treatment and promote equality.[121] The CSA stipulates further that if upon redundancy the selection is to be made between at least two officials performing similar functions, an official who is raising a child under seven years of age will have a preferential right to remain in the service.[122] The constitutional basis for positive action remains a subject of continuing debate.[123]

113 Denmark, Consolidation Act No 1678/2013, Section 3.
114 Denmark, Consolidation Act No 645/2011, Section 13.
115 Denmark, Ministerial Order No 340/2107 on Measures that Promote equality without dispensation (*Bekendtgørelse om initiativer til fremme af ligestilling – Adgangen til at iværksætte ligestillingsfremmende initiativer uden dispensation*), Section 1.
116 Estonia, Gender Equality Act, 2004, Article 5(2)(5).
117 Estonia, Gender Equality Act, 2004, Articles 9-11.
118 Estonia, Equal Treatment Act, 2008, https://www.riigiteataja.ee/en/eli/503052017002/consolide.
119 Estonia, Equal Treatment Act, 2008, Article 6.
120 Estonia, Civil Service Act, 2013, Article 13.
121 Estonia, Civil Service Act, 2013, https://www.riigiteataja.ee/en/eli/525032019003/consolide.
122 Estonia, Civil Service Act, 2013, Article 90(5).
123 Albi (2012), Comment 11 to Article 12 of the Constitution of Estonia (2017), Eesti Vabariigi Põhiseadus, Kommenteeritud Väljaanne (2017), available in Estonian at: https://www.pohiseadus.ee/index.php?sid=1&ptid=17&p=12, has pointed to possible legal uncertainty and different approaches used in legal analysis. Albi notes that: 'In the commented edition of the Constitution, the commentator addressing Article 12 of the Estonian Constitution notes that a legal basis for the adoption of positive measures could in principle be derived from the respective EU directives. However, the commentator takes the view that the constitutional equality clause (Article 12) is not suitable for the justification of positive measures because this clause deals systematically with legal equality. The commentator finds that a legal base for positive action could be derived from other provisions of the Constitution, such as protection of parents and children, care for families with many children and persons with disabilities.' See: European Network of Legal Experts in Gender Equality (2011)

Several different pieces of legislation implement equality in **Lithuania**.[124] The Equal Opportunities Act of Women and Men of 1998 provides for an exception from the prohibition of direct discrimination based *inter alia* on sex.[125] Special measures, established by law, to accelerate the establishment of effective equality between men and women are not to be seen as violating the principle of equal treatment. Positive action (as it has been perceived under the EU-directives and CJEU) has never been implemented in practice in Lithuania because it requires a special law, that is, an Act of Parliament, which has not been enacted.

In **Ireland**, the Constitution provides: 'All citizens shall, as human persons, be held equal before the law. This shall not be held to mean that the State shall not in its enactments have due regard to differences of capacity, physical and moral, and of social function.'[126] The Employment Equality Act 1998[127] provides that 'the Act is without prejudice to any measures that are maintained or adopted with a view to ensuring full equality in practice between men and women in their employments, and providing for specific advantages so as to make it easier for the under-represented sex to pursue vocational activity, or to prevent or compensate for disadvantages in professional careers….'[128] In this context, positive action in employment is not legally obligatory, either in the public or private sectors of employment. In addition, Section 42 of the Irish Human Rights and Equality Commission Act 2014[129] provides that a public body[130] 'shall, in the performance of its functions, have regard to the need to eliminate discrimination, promote equality of opportunity and treatment of its staff and the persons to whom it provides services, and protect the human rights of its members, staff and the persons to who it provides services…'. Such information must be set out in its strategic plan, including an assessment of the human rights and equality issues which are relevant to its purpose and functions.

In **Italy**, the rules governing positive action measures are based on the constitutional principle of substantive equality stated in the second paragraph of Article 3 of the Constitution.[131] This general and fundamental principle of the Italian legal system has a programmatic value enforceable in all fields and provides the basis of the definition of substantial equality, which justifies positive action measures. The Code of Equal Opportunities (Decree No. 198/2006) defines positive action as measures designed to encourage female employment and to achieve substantial equality between men and women at work by removing obstacles, which in practice prevent the achievement of equal opportunities.[132] In particular, positive action will aim at eliminating disparities that affect women in education and professional training,

Positive action measures to ensure full equality in practice between men and women including on company boards, p. 74. Available at: https://www.equalitylaw.eu/downloads/3864-positive-action-measures-to-ensure-full-equality-in-practice-between-men-and-women-including-on-company-boards-pdf-2-639-kb.

124 Lithuania, Labour Code of 2017 (in force since 1 July 2017), the Equal Opportunities Act for Women and Men of 1998, and the Equal Opportunities Act of 2003. Registry of Legal Acts, 2016, No. 23709. State Gazette, 1998, No. 112-3100. An unofficial and not-updated translation into English is available on the Internet site of the Lithuanian Parliament at https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/488fe061a7c611e59010bea026bdb259?jfwid=q8i88l7y0. State Gazette, 2003, no 114-5115. An unofficial and not-updated translation into English is available on the Internet site of the Lithuanian Parliament at https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/TAIS.91428?jfwid=q8i88l7y0.

125 Lithuania, Equal Opportunities Act for Women and Men Act 1998, Article 10 (and analogously Article 2(9) No 6 of the Equal Opportunities Act 2003).

126 Ireland, Constitution, Article 40.1.

127 Ireland, Employment Equality Act 1998, as amended by Section 15 of the Equality Act 2004 transposing Article 3 of Directive 2006/54/EC. http://revisedacts.lawreform.ie/eli/1998/act/21/front/revised/en/html.

128 Ireland, Employment Equality Act 1998, Section 24.

129 http://www.irishstatutebook.ie/eli/2014/act/25/section/42/enacted/en/html#sec42.

130 A 'public body' comprises a Department of State for which a Minister of the Government is responsible (other than in relation to the Department of Defence, the Defence Forces (army, navy, air corps), a local authority, the Health Service Executive (the State health service), a university or institute of technology, any education and training board, any other person, body or organisation established by or under an enactment or charter, any scheme administered by a Minister of the Government, a company established under the companies legislation which is financed which is financed wholly by the State or where the all the shares are held by a Minister of the Government or any other body or person where the funds are provides by the Oireachtas (Parliament).

131 Italy, Constitution, Article 3, paragraph 2 states that 'It shall be the responsibility of the Republic to remove all obstacles of an economic and social nature which, by limiting the freedom and equality of citizens, impede the full development of the human person and the effective participation of all workers in the country's political, economic and social organization'.

132 Italy, Decree No. 198/2006 (Code of Equal Opportunities), Article 42.

in professional choices (both as regards labour relationships and self-employment), in working conditions and organisation, in activities, professional sectors and levels where they are underrepresented, and in the division of family and professional responsibilities between the two sexes. The measures go beyond formal equality as they can include preferential measures for workers belonging to the disadvantaged gender, consistent with the Constitution[133] and with the principle of substantive equality. Positive action is voluntary. According to the Code of Equal Opportunities, positive action may be promoted by different subjects, both public and private alike.[134] Employers, professional training centres, associations, and trade unions promoting positive actions can also apply for public funding, which is paid according to the available funds; positive action organised by employers and the most representative trade unions, and positive action geared towards professional training have preferential access to public funding.[135]

In the field of entrepreneurial activity, preferential measures meant to favour access to bank credits and public funds have been adopted.[136] Before the implementation of Directive 2010/41/EU, the Code of Equal Opportunities already provided for positive action in the field of entrepreneurial activity. In fact, the code implements the principle of substantive equality, providing for the promotion of female self-employment through preferential measures meant to favour access to bank credits and public funds, to improve professional training and qualifications for women in this field, and to promote the presence of businesses owned or managed by a high percentage of women in the most innovative parts of different production sectors.

As regards the public sector, public employers are also entitled to request financing for positive action plans and must draw up three-year positive action plans aimed at achieving a better balance between the sexes in jobs and professions where women are underrepresented (that is, they make up less than one third of the total).[137] Moreover, with this aim, in hiring procedures and in promotion when there are male and female applicants with the same level and qualifications and the male is chosen, the Civil Service has to provide an express and suitable reason for this choice. The same article states that at least one third of the members of the commission for public hiring competitions must be women, except in case of justified impossibility.

Act No. 215/2012 provides that the Equality Adviser must be informed of the appointment of each commission for hiring competitions in the public sector, so as to check that at least one third of the members are women.[138] If women's representation in the commission is lower, the Equality Adviser must compel the public administration to eliminate the infringement and if it persists she/he must take the public administration to court. Furthermore, as regards state-owned companies, a specific provision is dedicated to positive action measures in the radio and television sector. The Code of Equal Opportunities states that public and private broadcasting companies shall promote positive action measures so as to eliminate unequal opportunities conditions between the two sexes in the working organisation, recruitment and appointment to high and responsible positions.[139] No sanctions are provided in case no plans have been achieved, so the adoption of these positive action measures is not binding and data does not exist on its real implementation. Finally, the Public Administration should ensure the professional training of personnel in proportion to the percentage of representation of each sex in the specific sector and facilitate this participation through the reconciliation of work and private life.

Act No. 53/2000 provides for other kinds of positive action,[140] which are symmetrical, that is they can address both women and men, allocating part of the Fund for Family Policies to companies that enforce

133 Italy, Constitution, Article 3.
134 Italy, Code of Equal Opportunities, Article 43.
135 Italy, Code of Equal Opportunities, Articles 44 and 45.
136 Italy, Code of Equal Opportunities, Articles 52 to 55.
137 Italy, Code of Equal Opportunities, Article 48.
138 Italy, Act No. 215/2012, Article 5.
139 Italy, Code of Equal Opportunities, Article 49.
140 Italy, Act No. 53/2000, Article 9.

collective agreements on positive action aimed at: allowing parents to adopt a flexible working time schedule, through part-time, teleworking, homeworking, flexitime and other measures; reintroducing parents to the workplace after a period of leave linked to reconciliation reasons; and promoting innovative services for the reconciliation of private and professional life. Positive actions have to address parents with minor children; priority is given to parents with children under 12 (or under 15 in the case of temporary custody or adoption) and to parents with disabled children. Funds are accessible to private employers and some public bodies, such as local health units and hospitals. Moreover, the Family Fund can also support the promotion of and professional advice on the planning and monitoring of the measures to be carried out through territorial networks.

The **Netherlands** has extensive legislation on equal treatment and anti-discrimination in employment. The 1983 Dutch Constitution states that all people in the Netherlands should be treated equally in equal circumstances: discrimination on the ground of sex is prohibited.[141] There is no provision on positive action in a constitutional document. In 1975 the Equal Pay Act came into force. In 1980 this act was included in the Equal Treatment Act (ETA) for Men and Women in Employment. This provided that a derogation from the prohibition of discrimination will be permitted if the aim of the discrimination is to place women in a privileged position in order to eliminate or reduce existing inequalities and the discrimination is in reasonable proportion to that aim.[142] This was followed in 1994 by a General Equal Treatment Act (GETA), which also covers several other grounds and extends the scope to the area of goods and services. The prohibition on discrimination contained in the GETA does not apply if the aim of the discriminatory measure is to place women in a privileged position in order to eliminate or reduce existing inequalities connected with race or sex and the discrimination is in reasonable proportion to that aim.[143] The Dutch Civil Code (DCC) similarly provides that in both the public and private sectors of employment, positive action is permitted – within these limits – but not required.[144]

The **Luxembourg** Constitution provides: 'Women and men are equal in rights and duties. The State has to actively promote the elimination of any existing obstacles to equality between women and men'.[145] Legislation of the 12 February 1999 addresses positive action in the private sector.[146] Positive action measures are regarded as a way of fulfilling the non-discrimination principle, inscribed in Article 11(2) of the Constitution, in action. These articles have remained unchanged since 1999. Positive action is monitored by a special service of the Ministry for Gender Equality.[147] Positive action is voluntary in both the private and public sectors. In the private sector, companies decide voluntarily to enter into a positive action, and if they do so they commit themselves in a contract signed with the ministry that they will follow the different steps of the positive action process. These commitments do not exist in the public sector, where no contract is signed between the Administration and the ministry. There is no legal basis regarding positive action in the public sector.

In **Malta**, the Constitution allows for the adoption of temporary special measures 'shown to be reasonably justifiable in a democratic society'.[148] Specific provision is made in the relevant laws,[149] which state that measures of positive action for the purpose of achieving substantive equality for men and women do not constitute discrimination.[150] The Equal Treatment in Employment Regulations state that nothing in the regulations will render unlawful any act done in connection with maintaining or adopting measures providing for specific advantages in order to make it easier for the underrepresented sex to pursue a

141 Netherlands, Constitution, Section 1.
142 Netherlands, Equal Treatment Act for Men and Women in Employment, 1980, Section 5(1).
143 Netherlands, General Equal Treatment Act, 1994, Section 2(3).
144 Netherlands, Civil Code, Article 7:646(4).
145 Luxembourg, Constitution, Article 11(2).
146 Regarding the national action plan for employment 1998 (NAPE 1998), article XXVII. This was integrated into the Labour Code (LC), in Articles L.243-1 to L.243-5.
147 Website: http://mega.public.lu/fr/travail/programme-actions-positives/index.html.
148 Malta, Constitution, Section 45(11).
149 Malta, Equality for Men and Women Act, Article 2(4)(b), Chapter 456 of the Laws of Malta.
150 http://www.justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=8922&l=1.

vocational activity or to prevent or compensate for disadvantages in professional careers with a view to ensuring full equality in practice between men and women in working life.[151]

In **Poland**, the Labour Code states explicitly that any temporary action undertaken for the purpose of equalisation of opportunities for all or a considerable number of employees covered by the Labour Code, and aimed at diminishing factual inequalities in employment does not infringe the principle of equal treatment in employment.[152] Such preferential treatment does not constitute a violation of the principle of equal treatment. This approach was also adopted by the Anti-Discrimination Act, which applies to work exercised under a civil-law contract, self-employment, and uniformed services. Positive action may be utilised in both the public and private sectors of employment.[153] In order to benefit from the positive action exception, the employer should officially publish an affirmative policy (for all or a significant number of employees, distinguished by a specific criterion). The exemption therefore does not cover a single measure that was not provided for in advance in the adopted action plan.

In **Portugal**, positive action is indirectly allowed by the Portuguese Constitution.[154] By considering the active promotion of equality between men and women as a fundamental task of the Portuguese state, this provision allows for positive action in the context of the promotion of such a goal in all areas. Positive measures are allowed by the Labour Code,[155] which is applicable to employment relations in the private sector. However, the Labour Code provisions related to gender equality and non-discrimination and those related to reconciliation of work and family life are also directly applicable to public employees and civil servants.[156] Positive action is defined as 'a legal measure of limited duration in favour of a group, placed in a disadvantaged situation because of a discrimination ground, and aiming to grant equal conditions in the access to or in the exercise of legal rights or correcting a factual discrimination which already exists'. The Labour Code explicitly provides that these positive action measures are to be considered as non-discriminatory measures, provided that they are established on a temporary basis in order to correct a factual discrimination that already exists. Collective agreements should establish 'measures that contribute to the effective implementation of equality and the non-discrimination principle'.[157] According to this provision, equality plans and concrete measures for the promotion of equality (on several grounds, including sex) at professional or company level can be defined by collective agreements directly. These measures can include positive action and preferential treatment, if, in the specific situation, they meet the legal requirements for such action measures. However, this rule is a non-binding recommendation, since there are no sanctions attached to the absence of such measures or plans. The Labour Code also states that, when professional training regards economic activities dominated by workers of one sex, workers of the underrepresented sex have priority in access to that professional training; the same priority is generally granted to workers with low academic achievement or no specific skills, as well as to workers responsible for single-parent families, and to those who have been on leave for reasons related to maternity, paternity or adoption.[158] This provision may clearly favour women since they are more likely to be in the situations described by the rule.

In **Romania**, positive action is permitted, but not required. There are two different provisions. The Gender Equality Law defines positive action as special action that is adopted on a temporary basis in order

151 Malta, Equal Treatment in Employment Regulations, S.L. 452.95, Regulation 6(3).
152 Poland, Labour Code, Article 183b(3).
153 It is worth adding that in the literature it is stated that the circle of entities authorised for the conduct of a preferential treatment is considered to be broader, since it includes not only employers, but also trade unions, which are entitled to determine conditions for action to compensate discriminated categories of workers in collective agreements and administrative authorities' (e.g. governmental and local labour (employment) offices responsible for reduction of unemployment (*urzędy pracy*). Świątkowski. A. (2012), *Kodeks pracy*. *Komentarz* (Labour Code – Commentary), (4 ed.), C.H. Beck, Warsaw, p. 96.
154 Portugal, Constitution, Article 9(h).
155 Portugal, Labour Code, Article 27.
156 Article 4 No. 1 (c) and (d) of the Legal Statute of Public Employment – *Lei Geral do Trabalho em Funções Públicas (LGTFP)*, approved by Law No. 35/2014, of 20 June 2014.
157 Portugal, Labour Code, Article 492 No.(2)(d) regarding the content of collective agreements in the field of gender equality.
158 Portugal, Labour Code, Article 30 No. 3.

to accelerate the realisation of equal opportunities between women and men in practice.[159] The Anti-discrimination Law provides a definition of what appears to be positive action, but does not name it as such.[160] It provides: 'Measures taken by public authorities or by legal entities under private law in favour of a person, a group of persons or a community, aiming to ensure their natural development and the effective achievement of their right to equal opportunities as opposed to other persons, groups of persons or communities, as well as positive measures aiming to protect disadvantaged groups, shall not be regarded as discrimination under the ordinance herein.' The definition of positive action in the Romanian legislation covers all protected grounds. Positive action is voluntary in both public and private sector employment.

In **Slovenia**, positive action in general is regulated under the Protection Against Discrimination Act (the PADA)[161] and the Act on Equal Opportunities for Women and Men (the AEOWM).[162] In both acts, positive action by employers is voluntary and not legally obligatory. The PADA is a general act (equality law legislation) and defines the adoption and description of positive action measures, designed to ensure the actual equality of persons who are placed in a less favourable position, in particular due to their sex, nationality, racial or ethnic origin, religious or other belief, disability, age and sexual orientation. The PADA provides that positive action measures may be adopted with the purpose of preventing or eliminating the consequences of such a position or as compensation for a less favourable position.[163] They include: positive measures, which under the condition of the equal fulfilment of the prescribed criteria and conditions give priority to persons with a particular personal circumstance and are applied in cases where an obvious disproportion of the representation of persons with that particular personal circumstance exists; or incentive measures, which give special benefits or implement special incentives for persons in a less favourable position. The AEOWM is a *lex specialis* in relation to the PADA. It defines common grounds for the improvement of the status of women and the establishment of equal opportunities for women and men in various fields of social life. Under the AEOWM, positive action measures are temporary measures aimed at establishing equal opportunities for women and men, and promoting gender equality in specific fields of social life in which the non-balanced representation of women and men (when the representation of one gender is lower than 40 %) or in which unequal status of persons of one gender is ascertained.[164] The AEOWM includes the following positive action measures: positive measures that give priority to equally qualified persons of the gender that is underrepresented or which is experiencing an unequal status, until balanced or equal representation is achieved; encouraging measures that provide special benefits or introduce special incentives for the purpose of eliminating underrepresentation of women and men or unequal status on account of gender; and programme measures in the form of awareness-raising activities and action plans for the promotion and establishment of equal opportunities and gender equality.

In **Slovakia**, the Constitution[165] provides: 'The fundamental rights and basic freedoms are guaranteed in the territory of the Slovak Republic to everyone regardless of sex, race, colour of skin, language, creed and religion, political or other beliefs, national or social origin, affiliation to a nation or ethnic group, property, descent, or another status. No one must be harmed, preferred, or discriminated against on these grounds.'[166] The Anti-Discrimination Act of 2013[167] now provides that the 'adoption of temporary balancing measures by public administration bodies (state authorities and local governments) or other

159 Romania, Gender Equality Law, 2002, Articles 4(e) and 5(b).
160 Romania, Government Ordinance 137/2000 on the prevention and sanctioning of all forms of discrimination (*Ordonanta 137/2000 privind prevenirea şi sancţionarea tuturor formelor de discriminare*), Article 2(9).
161 Slovenia, Protection Against Discrimination Act, *Uradni List RS* (UL RS; Official Gazette of the Republic of Slovenia), No. 33/2016.
162 Slovenia, Act on Equal Opportunities for Women and Men, UL RS Nos 59/2002 and 61/2007.
163 Slovenia, Protection Against Discrimination Act, Article 17.
164 Slovenia, Act on Equal Opportunities for Women and Men, Article 7.
165 Slovakia, Act No. 460/1992 Coll. Constitution of the Slovak Republic *(Ústava Slovenskej republiky)* https://www.ustavnysud.sk/ustava-slovenskej-republiky available in English.
166 Slovakia, Constitution, Article 12(2).
167 Slovakia, Act No 32/2013 Coll. amending Act No. 365/2004 Coll. on Equal Treatment in Certain Areas and on Protection against Discrimination Amending and Supplementing Certain Other Laws (the Anti-Discrimination Act), effective from 1 April 2013. http://www.snslp.sk/CCMS/files/AntidiskriminacnyZakon_ENG-1.1.2015.pdf available in English.

legal entities (companies, schools, citizens' associations, etc.) that are aimed at removing disadvantages following from the ground of racial or ethnic origin, affiliation with a national minority or an ethnic group, gender or sex, age or disability, the aim of which is to guarantee equality of opportunities in practice, is not deemed to be discrimination.'[168] The Anti-Discrimination Act lists the possible temporary balancing measures in a non-exhaustive list to contain measures: a) aimed at removing social or economic disadvantage that disproportionally affects representatives of disadvantaged groups; b) consisting of supporting the interests of representatives of the disadvantaged groups in employment, education, culture, healthcare and services; c) aimed at generating equality in access to employment, education, healthcare and housing, mainly through targeted training programmes for representatives of the disadvantaged groups or through the dissemination of information about these programmes or through opportunities to apply for jobs or places in the education system.[169] The temporary balancing measures can only be adopted if there is 'provable inequality', if their aim is reducing or removing this inequality and if they are appropriate and necessary to achieve the set aim.[170] The temporary balancing measures can only be adopted in the fields falling under the material scope of the Anti-Discrimination Act (employment and occupation, social security and social advantages, healthcare, education and access to and provision of goods and services including housing).[171] They can only be in force while the inequality that has led to their adoption exists. Otherwise the bodies that have adopted such measures are obliged to stop them.[172]

In **Liechtenstein** the Gender Equality Act *(Gleichstellungsgesetz, GLG)*[173] provides that adequate measures for achieving *de facto* equality are not to be considered as discriminatory.[174] Positive action is voluntary in both public and private employment.

5.3 Positive action by employers permissible, within limits, in the private sector but compulsory, within limits, in the public sector (category 2)

Austria is a good example of a state in category 2. The Federal Constitution (*Bundes-Verfassungsgesetz, B-VG)*[175] establishes the objective of 'actual equal measures' in order to reach 'effective equality by the elimination of factual inequalities of men and women',[176] but these do not generate individual rights and are not directly enforceable in national courts. In the private sector, positive measures are generally allowed, but not compulsory. The Equal Treatment Act for the Private Sector (*Gleichbehandlungsgesetz, GlBG)*[177] allows for 'positive measures',[178] providing that measures aimed at the promotion of de-facto equality between women and men are not to be regarded as sex-related discrimination.[179] This is part of the larger set of labour legislation for the private sector. Legislation on collective bargaining and workers' participation,[180] provides for the material scope of collective agreements and labour-management agreements as well as the responsibilities of works councils. Labour-management agreements can establish positive action measures for women at company level as well as measures providing for a better work-life balance.[181] Some large companies, e.g. Erste Bank, also have labour-management agreements

168 Slovakia, Anti-Discrimination Act, Article 8a(1), first sentence.
169 Slovakia, Anti-Discrimination Act, Article 8a (1), second sentence.
170 Slovakia, Anti-Discrimination Act, Article 8a (2).
171 Slovakia, Anti-Discrimination Act, Articles 3(1), 6 and 5.
172 Slovakia, Anti-Discrimination Act, Article 8a(3), second sentence.
173 Liechtenstein, Gender Equality Act, State Gazette, LGBl. 1999 No. 96 updated in LGBl. 2016 No. 505, see full text at https://www.gesetze.li/konso/suche.
174 Liechtenstein, Gender Equality Act, Article 3, Section 4 lit a concerning the prohibition of discrimination.
175 https://www.ris.bka.gv.at/Dokumente/Bundesnormen/NOR40152496/NOR40152496.pdf.
176 Austria, Federal Constitution, Article 7(2).
177 Austria, Equal Treatment Act for the Private Sector, *Bundesgesetz über die Gleichbehandlung* (*Gleichbehandlungsgesetz*), 12.3.2019, https://www.ris.bka.gv.at/GeltendeFassung/Bundesnormen/20003395/GlBG%2c%20Fassung%20vom%2012.03.2019.pdf.
178 https://www.ris.bka.gv.at/Dokumente/Bundesnormen/NOR40100136/NOR40100136.pdf.
179 Austria, Equal Treatment Act for the Private Sector, Article 8.
180 Austria, Act on the Constitution of Labour, (*Arbeitsverfassungsgesetz*; ArbVG), 12.3.2019, http://www.ris.bka.gv.at/GeltendeFassung/Bundesnormen/10008329/ArbVG%2c%20Fassung%20vom%2012.03.2019.pdf.
181 12.3.2019, Article 97(1) n° 25.

for the advancement of female careers (*Frauenförderplan*) in place. The Act on the Constitution of Labour reserves the right to bargain for positive measures (e.g. relating to special in-house training measures for female employees or to preferential access to in-house job and advancement offers) to works councils, which companies are not required to establish.[182] Companies without a works council cannot implement measures covered by these provisions. Companies could establish independent positive action plans for career advancement, e.g. by integrating corresponding measures in women's work contracts, but almost never do so.

Civil service legislation for the public sector, on the other hand, contains hard equality and positive action measures, which are enforceable by the specialised equality bodies for the civil service and before the courts.[183] The Federal Equal Treatment Act (*Bundes-Gleichbehandlungsgesetz, B-GlBG*) is also a template for large parts of the equal treatment regulations of public service legislation in the provinces. Preferential hiring and preferential career advancement for women is obligatory in the federal civil service if female representation at the relevant department or relevant level of civil service falls below 50 %.[184] Civil service legislation obliges employers to pursue measures ensuring the preferential employment of women until a quota of at least of 50 % at all levels of federal civil service and federal civil employment is reached. All federal departments and agencies have to implement planning for female career advancement (*Frauenförderungspläne*), which is subject to reporting and revision.[185] A quota is to be applied, if a female candidate has at least the same level of qualifications as the best-qualified male candidate, as long as there are 'no prevailing reasons relating to the male applicant'.[186] A severe disability may constitute a prevailing reason for the suspension of the statutory quota rule in favour of a male competitor, but the consideration of such reasons is not permitted to lead to any less favourable treatment of the female competitor with comparable qualifications.[187]

The treatment of employers in the public and private sectors differs in **Belgium**, too. A regulatory framework for positive action was first adopted by the Act of 4 August 1978,[188] implementing the EU gender equality directives and applicable to both private and public sectors. At that time, positive action was only envisaged in favour of women. The practicalities of positive action were defined, for the private sector, in the Royal Decree (RD) of 14 July 1987,[189] which left positive action to be agreed by the social partners or to be dependent on the goodwill of employers. For the public sector, a Royal Decree was adopted on 27 February 1990.[190] These royal decrees, adopted on the legal basis of the Act of 4 August 1978, remained in force under subsequent legislation adopted in 1999.[191] The regulatory approach to positive action is now based on primary (law) and secondary gender legislation (royal decrees). The primary law is the Gender Act of 2007, fixing the general principle of positive action. Specific practicalities for implementing positive action are provided in the Ancillary Royal Decree of 11 February 2019.

Positive action in the private sector is purely voluntary in Belgium. The only obligation imposed upon every employer is to draw up a yearly report, even if no positive action is carried out. In the public sector, however, Article 11bis of the Constitution provides that the members of any public executive authority

182 Austria, ArbVG, Article 97(1) n° 25.
183 Austria, *Beamten-Dienstrechtsgesetz* – BDG; *Vertragsbedienstetengesetz des Bundes*– VBG. *Gehaltsgesetz*– GehG; *Bundes-Gleichbehandlungsgesetz* – B-GlBG .
184 Part 1 chapter 1 subchapter 2 of the Federal Equal Treatment Act is entitled 'Special Advancement Measures for Women' (Article 11, *Frauenförderungsgebot*) https://www.ris.bka.gv.at/Dokumente/Bundesnormen/NOR40134207/NOR40134207.pdf.
185 Austria, B-GlBG, Article 12 https://www.ris.bka.gv.at/Dokumente/Bundesnormen/NOR40205688/NOR40205688.pdf.
186 Austria, B-GlBG, Article 11b(1), ('*keine überwiegenden in der Person des männlichen Mitbewerbers liegenden Gründe*'), https://www.ris.bka.gv.at/Dokumente/Bundesnormen/NOR40134209/NOR40134209.pdf.
187 E.g. Administrative High Court, Ra 2015/10/0117, https://www.ris.bka.gv.at/Dokumente/Vwgh/JWR_2015100117_20161005L03/JWR_2015100117_20161005L03.pdf.
188 Belgium, Economic Reorientation Law, Title V, Equal opportunity between men and women relating to working conditions and access to work, training and professional promotion and self-employment, *M.B./B.S.,* 17.8.1978.
189 Belgium, Royal Decree on measures to promote equal opportunities between men and women in the private sector, *M.B./B.S.*, 26.8.1987.
190 Belgium, Royal Decree on measures to promote equality between men and women in the public services, *M.B./B.S.*, 8.3.1990.
191 Belgium, Act of 7 May 1999 on equal treatment of men and women on working conditions, access to labour market, promotion opportunities, access to self-employment and complementary social security schemes, *M.B./B.S.* 19 June 1999.

must not all be of the same sex. The Royal Decree of 27 of February 1990 provides that positive action must be adopted, and a civil servant must be assigned in each public service with the main task of compiling a report on the respective situations of women and men and to draw up an action plan to remedy any inequalities detected. However, not taking any measures to implement these measures does not have any adverse consequences for the body involved as there are no sanctions.

The situation became confused following the adoption of the Gender Equality Act 2007. The act provided that a royal decree should detail the modalities of positive action in all the fields covered by the act (including in the field of goods and services).[192] However, an Ancillary Royal Decree was finally adopted only on 11 February 2019 (entering into force on 11 March 2019). It is applicable to positive action adopted in the private sector concerning all groups covered by the anti-discrimination acts.[193] It confirms the voluntary approach adopted in 1978 and the role of the social partners. The new royal decree formally repeals the Royal Decree of 14 July 1978 concerning positive actions in the private sector; in contrast, the Royal Decree of 27 February 1990 referring to positive action in the public sector should be considered as still in force, although there is some doubt as to whether those in the federal administration are aware of its existence.[194]

A quota of one-third is applicable in the composition of advisory bodies that support public authorities. The same is true for the composition of the Higher Council of the Judiciary, an institution endowed with almost decisive powers in the appointment of judges.[195] Considering that quota provisions are contained within instruments with the same legal status as the equality legislation, no serious attention has been given to an eventual contradiction. Moreover, Article 16 of the Gender Equality Act provides that a difference in treatment that results from a legislative act may not be challenged on the basis of the Gender Equality Act.

Bulgaria also distinguishes between public and private sector employment. Positive action is provided for in the Law on Protection from Discrimination 2003 (LPFD)[196] and in the Law on Equality between Women and Men.[197] The LPFD provides for 'measures' that are justified and proportional initiatives of a temporary nature aiming at removing obstacles to balanced representation of women and men or to equal status of the representatives of one sex or of the sex that is in an unequal position. It provides for 'promotional measures' aimed at encouraging or promoting persons belonging to the less-represented sex or ethnic group to apply for a certain job or position and for encouraging or promoting the vocational development and participation of workers and employees belonging to the less-represented sex or ethnic group.[198] Positive action measures are allowed in the process of hiring for positions in the state and local government administration. If the candidates for positions in the state central and local administration have equivalent qualifications in relation to the requirements for the position, the candidate from the underrepresented sex will be appointed, except when there are specific circumstances for appointing the other candidate.[199] Positive action measures are allowed in the process of hiring for positions in the state and local government administration. This is also the case for determining the members of consultative,

192 Belgium, Gender Equality Act 2007, Article 16.

193 Under the triple set of Federal anti-discrimination acts of 10 May 2007 – the Gender Equality Federal Act (implementing all the EU gender directives), the Racial Equality Federal Act (implementing Directive 2000/43/EC) and the General Anti-Discrimination Federal Act (implementing Directive 2000/78/EC, but adding a series of additional criteria – e.g. health, wealth, language – to the four envisaged by this directive) – an identical provision (Article 16 in the Gender Equality Federal Act and Article 10 in the other two acts) allows for positive action.

194 When the possibility to adopt an RD in 2012 to favour the appointment of women in managing posts of the administration was discussed within the negotiation committee of the public administration (Committee B), a member mentioned the question of the compatibility of such legislation with the Royal Decree of 1990, to the big surprise of other members, who were unaware of it.

195 Belgium, Judicial Code, 295.

196 Bulgaria, *Закон за защита от дискриминация, Zakon za zashtita ot diskriminazya*, (LPFD), State Gazette No. 86/2003, in force since 1st January 2004, last amended in S.G. No.7/2018, Bulgarian text available at https://lex.bg/laws/ldoc/2135472223.

197 Bulgaria, *Закон за равнопоставеност на жените и мъжете, Zakon za ravnopostavenost na zhenite I mazhete*, State Gazette No. 33/2016, Bulgarian text available at https://www.lex.bg/bg/laws/ldoc/2136803101.

198 Bulgaria, LPFD, Article 24.

199 Bulgaria, LPFD, Article 39.

managerial and other bodies in this sphere, except when they are determined by elections or are subject to a competition or tendering process.[200]

Positive action is also provided for in the Bulgarian Law on Equality between Women and Men.[201] There are also provisions for 'balanced representation', the sharing of the positions by women and men in power and decision-making in all areas of life which represents an important condition for equality of sexes in the Law on Equality between Women and Men, and 'measures for balanced participation' in education and training of men and women, to the extent and for as long these measures are needed.[202] The Law on Equality between Women and Men provides for the application of temporary promotional measures as one of the elements of the state policy on gender equality.[203] 'Special measures' for individuals or groups of persons in a disadvantaged position are based on the same grounds as the prohibition of discrimination,[204] as long and to the extent that these measures are necessary,[205] as are 'measures aimed at initiatives exclusively or mainly promoting entrepreneurship among women' when they are the underrepresented sex, and 'measures aimed at initiatives for preventing or compensating for disadvantages in the professional career of women'.[206]

In **Germany**, too, there is a clear distinction between the legal regulation of positive action in public and private sector employment. Since 1949, Article 3(2) of the German Constitution states that men and women are equal and any preferential or disadvantageous treatment on the grounds of sex is prohibited under Article 3(3). Since the amendments to the Constitution in 1994, public entities are under an obligation to further women's equality in practice.[207] The equality acts (*Gleichstellungsgesetze*) on the federal and state level create obligations to further gender equality and among the measures to reach this aim are affirmative action and positive measures, such as gender quotas, as well as the provision of Equal Opportunity Officers and measures for the reconciliation of working and family life. The Federal Equality Act (*Bundesgleichstellungsgesetz*) contains legally binding obligations to further gender equality including gender quotas for training, recruitment and promotion. In 2015, the Federal Equality Act (*Bundesgleichstellungsgesetz*) was amended by the Act on the equal participation of women and men in leading positions of private companies and in the civil service with the aim, among others, to further gender equality in leading positions within the federal civil service.[208] Now, the act contains obligations to further gender equality at all levels in all fields, to enact plans to increase women's representation at all levels of employment, to train, hire or promote women instead of equally qualified men in case of female underrepresentation. Men can only claim the same preferential treatment when they are not only underrepresented in the relevant sector, but also structurally discriminated against. Under the amended Act on bodies under federal control (*Bundesgremienbesetzungsgesetz*), a statutory 50 % gender quota to be reached by 2018 entered into force. This is a legally binding obligation.

As part of the civil service law, every German state also has its own equality act (*Gleichstellungsgesetz*), which, mostly, contains obligations to enact plans to increase women's representation at all levels of employment, to guarantee supervision by an Equal Opportunity Commissioner, to apply some kind of gender quota for recruitment and promotion and to further the reconciliation of working and family life.[209] In addition, obligations to further gender equality, including the use of affirmative action and

200 Articles 24 and 39 of the LPFD are legally binding on the relevant employers.
201 Bulgaria, *Закон за равнопоставеност на жените и мъжете, Zakon za ravnopostavenost na zhenite I mazhete*, State Gazette No. 33/2016.
202 Bulgaria, LPFD, Article 7 paragraph 1 p. 13.
203 Bulgaria, Law on Equality between Women and Men, Article 4 paragraph 1 p. 4.
204 Bulgaria, LPFD, Article 4 para 1 p. 4.
205 Bulgaria, LPFD, Article 7 paragraph 1 p. 14.
206 Bulgaria, LPFD, Article 7 paragraph 1, p. 18.
207 Germany, Basic Law, Article 3(2)(2).
208 Germany, Act on the equal participation of women and men in leading positions of private companies and in the civil service of 24 April 2015, Official Journal 2015, p. 642, https://www.gesetze-im-internet.de/bgleig_2015/BJNR064300015.html.
209 All federal and state equality acts can be found here: http://www.vernetzungsstelle.de/index.cfm?uuid=B707C03404AD9B19F588422ECC8D51D8&and_uuid=1789C4EDCCE9E2FCFBC05C7F9E98B53F.

gender quotas, are covered by some of the states' Higher Education Acts (*Hochschulgesetze*), applying to the recruitment and promotion of academic staff.

Apart from public procurement (to be considered in the next chapter), private employers are not obliged to adopt positive action measures. The General Equal Treatment Act (*Allgemeines Gleichbehandlungsgesetz*) states that unequal treatment shall only be permissible where suitable and appropriate measures are adopted to prevent or compensate for disadvantages arising on the grounds of sex/gender in the field of employment.[210] Under the Remuneration Transparency Act (*Entgelttransparenzgesetz*), any direct or indirect discrimination on the grounds of sex in respect of all elements and conditions of remuneration shall be prohibited in case of equal or equivalent work,[211] but the act states that the provision on positive action measures under the General Equal Treatment Act[212] remains unaffected.

In **Spain** positive action is considered to be an obligation of public bodies (the 'Public Powers') but only a mere possibility for private companies. The Spanish Constitution requires public authorities to promote 'the conditions in order to make equality real and effective'.[213] In addition, it states that discrimination on different grounds, including sex, is prohibited.[214] Reading these provisions of the Constitution together leads to the conclusion that positive action for the achievement of real equality between women and men is not only allowed in Spain but constitutes an obligation for the Public Powers. Nothing is established in the Constitution in this regard in relation to private employers, and so positive action is considered only a possibility, rather than an obligation for private employers.

Ordinary legislation plays an important role in relation to gender equality. Law 3/2007, of 22 March 2007, on effective equality between women and men,[215] provides that: 'In order to enforce the constitutional right of equality, the Public Powers will adopt specific measures in favour of women to correct patent situations of inequality with respect to men. Such measures, which will be applicable as long as these situations subsist, must be reasonable and proportionate in relation to the objective pursued in each case. Private individuals and legal entities may also adopt this type of measure in the terms established in this Law.'[216] Spanish law is generally limited to repeating that the possibility for positive action measures exists, but does not establish an obligation to adopt them. For example, the Royal Legislative Decree 2/2015 of 21 October 2015,[217] which approved the Workers' Statute, establishes the possibility that quotas that favour the hiring of women can be established by means of collective agreement, whenever it is justified by the objective to assure the participation of women in all kinds of jobs and whenever the preference occurs 'under equal conditions of suitability.'[218] Likewise, Law 3/2007 establishes the following: 'In accordance with the legal provisions, through collective bargaining, positive action measures may be established to favour women's access to employment and the effective application of the principle of equal treatment and non-discrimination in working conditions between women and men.'[219] According to the same law, employers have an obligation to avoid discrimination, but they do not have an obligation to adopt measures of positive action. It provides that: 'Companies are obliged to respect equal treatment and opportunities in the workplace and, to this end, they must adopt measures aimed at avoiding any type of labour discrimination between women and men, measures that must be negotiated, and where appropriate, agreed upon, with the legal representatives of the workers in the manner determined in the

210 Germany, General Equal Treatment Act, Section 5.
211 Germany, Remuneration Transparency Act, Section 3(4).
212 Germany, General Equal Treatment Act, Section 5.
213 Spain, Constitution, Article 9(2).
214 Spain, Constitution, Article 14.
215 https://www.boe.es/buscar/doc.php?id=BOE-A-2007-6115.
216 Spain, Law 3/2007, of 22 March 2007, on effective equality between women and men, Article 11(1).
217 https://www.boe.es/buscar/act.php?id=BOE-A-2015-11430.
218 Spain, Royal Legislative Decree 2/2015 of 21 October 2015, Article 17(4).
219 Spain, Law 3/2007, Article 43.

labour legislation.'[220] Law 3/2007 establishes preferences for access to training for people who rejoin a job in the public administration after maternity, paternity or parental leave.[221]

In the United Kingdom, there are differences between Great Britain (comprising England, Scotland and Wales), on the one hand, and Northern Ireland, on the other hand. In **Great Britain**, the Equality Act 2010 applies. It provides quite broad provisions permitting the taking of any proportionate positive action in any one of three situations: where a person (including an employer) reasonably thinks that persons who share a protected characteristic (including sex) suffer a disadvantage connected to the characteristic; where a person reasonably thinks that persons who share a protected characteristic have needs that are different from the needs of persons who do not share it; or where a person reasonably thinks that participation in an activity by persons who share a protected characteristic is disproportionately low.[222] The explanatory notes to the Equality Act state that in determining 'proportionality' account should be taken of the seriousness of the disadvantage, the extent of the needs or underrepresentation, and whether there might be other ways in which the intended aims might be achieved.[223] Where employment is concerned, an additional provision allows more favourable treatment of those from a disadvantaged or underrepresented group as regards recruitment or promotion where (but only where) four conditions are satisfied: the person appointed or promoted must be as qualified as others over whom he or she is preferred; the employer 'reasonably thinks' that the protected group is at a disadvantage or is underrepresented; no policy is in place treating persons who share the protected characteristic more favourably in connection with recruitment or promotion than persons who do not share it; and the action must be proportionate.[224]

These provisions are permissive. Employers are not required by these provisions to adopt positive action. However, there is in addition a broad public sector equality duty, which states that those subject to it must, in the exercise of their functions, have due regard to, amongst other things, advancing equality of opportunity between men and women.[225] The legislation explains how this includes encouraging people from protected groups to participate in public life or in other activities where their participation is disproportionately low. In certain circumstances, it could be argued that the public sector equality duty requires public bodies to consider the use of positive action in public sector employment.[226]

In **Northern Ireland**, the legislation is different and diverges to some extent.[227] However, just as the provisions contained in Equality Act 2010 are 'permissive' rather than mandatory, the same can be said of the Sex Discrimination (Northern Ireland) Order provisions. Some limited training and encouragement measures are permitted in the employment context in relation to sex,[228] largely in the form of outreach positive action (e.g. targeted training and encouragement to apply). A precondition is that within the past 12 months there were no women (or men) working there (or within a particular occupation within the workplace), or that the numbers were 'comparatively small' when compared with the proportions working in the general labour pool from which that employer would normally recruit.

The equivalent public sector equality duty on public authorities in Northern Ireland,[229] requires public sector employers to have due regard to the need to promote equality of opportunity between men and women: this includes a duty to monitor the impacts of their employment practices and to consider taking

220 Spain, Law 3/2007, Article 45.
221 Spain, Law 3/2007, Article 60.
222 Great Britain, Equality Act 2010, Section 158.
223 Great Britain, Explanatory notes to the Equality Act 2010, para. 512.
224 Great Britain, Equality Act 2010, Section 159.
225 Great Britain, Equality Act 2010, Section 149, in force since 2011.
226 https://www.equalityhumanrights.com/en/advice-and-guidance/employers-what-positive-action-workplace.
227 The Equality Act does not apply in Northern Ireland and there is no equivalent to Section 159.
228 Northern Ireland, Sex Discrimination (NI) Order 1976, Articles 48-50.
229 UK, Northern Ireland Act 1998, Section 75.

positive action where appropriate.[230] It is also noteworthy that many employers (with 11 or more full-time employees) are required to monitor the sex (and ethno-religious background) of their workforce and job applicants and review and analyse the data every three years.[231] This review can demonstrate underrepresentation and provide a useful basis for positive (affirmative) action.

The position in **Greece** is undergoing considerable change. Article 116(2) of the Constitution states that 'Positive measures aiming at promoting equality between men and women do not constitute discrimination on grounds of sex. The State shall take measures to eliminate inequalities existing in practice, in particular those detrimental to women.' According to its letter and to well-established Council of State case law, the material scope of this provision includes all the areas covered by the gender equality directives, as well as any other area,[232] even outside the scope of EU law. Article 116(2) requires that the legislature and all other state authorities to take any positive measures that are necessary and pertinent in promoting gender equality in all areas.[233] It thus exceeds the requirements of EU law, as it explicitly makes positive action a 'must'. In accordance with the hierarchical structure of the Greek legal order, all national provisions relating to positive action must be read and applied in the light of this constitutional norm.[234]

The relevant provision of Act 3896/2010, transposing Directive 2006/54, entitled 'positive measures', reflects the stronger concept of positive action as enshrined in Article 116(2) of the Constitution.[235] It reads: 'The adoption or maintenance of specific or positive measures aimed at abolishing eventual discrimination to the detriment of the underrepresented sex or achieving substantive equality in the areas included in the scope of application of this law, does not constitute discrimination.'[236] This definition covers the scope of Article 157(4) TFEU, but its wording is more positive and stronger. It does not merely stipulate, like Article 157(4) TFEU, that the equal treatment principle 'shall not prevent' positive action and it explicitly provides that positive measures 'do not constitute discrimination'.

The recent adoption of Act 4604/2019 on the promotion of substantive gender equality etc,[237] appears to have introduced significant changes, and in doing so to have created some confusion. Article 2 of the act distinguishes between 'positive action' and 'positive measures', providing a different definition for each of these concepts. However, the only term used in Article 116(2) of the Constitution and Act 3896/2010[238] is 'positive measures'. 'Positive measures' are acts and decisions taken by the public administration, which aim to eliminate gender inequalities, according to Article 116(2) of the Constitution.[239] 'Positive action' is any initiative by the competent state or local authorities, which aims to prevent gender inequalities and to sensitise society to them.[240] Confusion and legal uncertainty are created, inter alia because it is only the term 'positive measures' that appears further in the act, while the term 'positive action' does not appear in any other provision of the act. Moreover, these definitions limit the scope of the above concepts to

230 For which the Equality Commission for NI has produced guidance: http://www.equalityni.org/ECNI/media/ECNI/Publications/Employers%20and%20Service%20Providers/PracticalGuidanceonEQIA2005.pdf.
231 Fair Employment and Treatment (NI) Order 1998, Article 55.
232 Council of State, CS 3189/2003.
233 Council of State, CS 2832-2833/2003, 192/2004.
234 The Greek legal order has a strict hierarchical structure provided by the Constitution, which is written and rigid and prevails over statutes. According to Article 28(1) of the Constitution, international treaties introduced in the Greek legal order by statute and ratified prevail over statutes. Greek courts acknowledge the primacy of EU law over the Constitution. They often apply EU law and they interpret and apply the Constitution in light of EU law, in particular in gender equality cases. All courts review the conformity of statutes with the standards of the Constitution, EU law and ratified treaties and either interpret the statutes in conformity with these standards or disapply those that they consider to be contrary thereto (Articles 93(4), 87(2) and 28, Constitution).
235 Greece, Act 3896/2010, Article 19.
236 Greece, Act 3896/2010, on the Implementation of the Principle of Equal Treatment of Men and Women in Matters of Employment and Occupation. Harmonisation of Existing Legislation with Directive 2006/54/EC of the European Parliament and the Council, OJ A 207/08.12.2010.
237 Greece, Act 4604/2019, OJ A 50/26.3.2019.
238 Greece, Act 3896/2010, Article 19.
239 Greece, Act 4604/2019, Article 2(2).
240 Greece, Act 4604/2019 Article 2(3).

the public sector only. Act 4604/2019 provides that, when 'positive measures' are adopted, 'the physical features and the situations related to sex, sexual orientation and gender identity, in favour of which the positive measures are taken, as well as their eventual concurrence with other areas of discrimination, such as, in particular, ethnic or social origin, age, family status, disability, religious, political or other belief, shall be taken into consideration'.[241] The definitions of Act 4604/2019 are narrower compared to the provisions of Act 3896/2010, in that they do not stipulate in a straightforward way that positive measures do not constitute discrimination, as the general provisions of Article 116(2) Constitution and of Act 3896/2010 do.[242]

Article 116(2) of the Constitution, proclaiming that positive measures do not constitute discrimination, requires that not only the legislator, but all state authorities take all necessary and appropriate measures in favour of women, in order to reduce the inequalities affecting them.[243] Moreover, Act 3896/2010 provides for positive measures to be taken in both the public and the private sector,[244] repeating that they do not constitute discrimination. Therefore, private employers are free to adopt positive measures, but they are not obliged to. However, it must be considered that the legislator and the Administration, in the framework of their obligation to promote substantive gender equality, must promote them in the private sector, for example by providing incentives. The definitions of 'positive measures' and 'positive action' provided by Act 4604/2019 only refer to the public sector,[245] as already mentioned. The Greek national expert considers that this provision will cause regression with respect to Act 3896/2010, as it creates the impression that the provisions on positive measures do not apply in the private sector and that positive measures are not necessary, thus discouraging private employers from taking such measures and their employees from claiming them.

In **Croatia**, the regulatory basis for special measures is contained in the Gender Equality Act and the Anti-Discrimination Act.[246] Special measures under the Gender Equality Act are specific benefits that enable the person of a certain gender equal participation in public life, eliminate existing inequalities or ensure rights they were previously denied.[247] They can be enacted in laws and other regulations that regulate specific fields of public life.[248] They are introduced on a temporary basis with a view to achieving the genuine equality of women and men and they are not deemed as discrimination.[249] The Anti-Discrimination Act introduces special measures in its provision regulating exceptions from discrimination.[250] Pursuant to this provision, unequal treatment is not deemed to be discrimination in cases of special measures, including any measure of a temporary nature, which is necessary and appropriate for achieving real equality of societal groups suffering from adverse treatment based on any discriminatory ground covered by that act, when such treatment is based on laws, bylaws, programmes, measures or decisions with a view to improving ethnic, religious, linguistic or other minorities or other groups of citizens or persons discriminated under any ground covered by that act.

The Gender Equality Act provides a specific legal basis for the introduction of special measures in legislative, executive and judicial bodies, as well as public services, when one sex is significantly underrepresented. Significant underrepresentation exists where one sex is underrepresented in political and public decision-making bodies (under 40 %).[251] Measures are aimed at increasing the share of the underrepresented sex until it reaches the level of its share in the overall population.[252] However, this is

241 Greece, Act 4604/2019, Article 3(2).
242 Greece, Act 4604/2019, Article 19.
243 CS judgment 3189/2003.
244 Greece, Act 3896/2010, Article 19.
245 Greece, Act 4604/2019, Article 2.
246 Both acts are 'organic laws', which are adopted by two-thirds majority of members of Parliament, because they elaborate fundamental rights guaranteed in the Constitution.
247 Croatia, Gender Equality Act, Article 9(1).
248 Croatia, Gender Equality Act, Article 10.
249 Croatia, Gender Equality Act, Article 9(2).
250 Croatia, Anti-Discrimination Act, Article 9(2)(2).
251 Croatia, Gender Equality Act, Article 12(3).
252 Croatia, Gender Equality Act, Article 12(1).

just one expression of the obligation to apply special measures, which falls on these specific public sector bodies. There is no similar obligation for private sector entities. Special measures may be enacted in any sphere of public life, but they are based on a decision adopted by public decision-making bodies (i.e. laws or other regulations).[253]

In **Hungary**, the Fundamental Law (the Constitution) provides that: 'Hungary promotes the realization of equal opportunity by special measures'[254] and 'Hungary protects children, women, the elderly and the disabled through special measures'.[255] Act CXXV of 2003 on equal treatment and the promotion of equal opportunity, provides that 'a measure aimed at the elimination of an expressly identified social group's objectively substantiated inequality of opportunities is not considered a breach of the principle of equal treatment…',[256] where it is 'based on an Act of Parliament, on a government decree based on an Act or on a collective contract, effective for a definite term or until a specific condition is met'.[257] It must 'not violate any basic rights, shall not provide unconditional advantage, and shall not exclude the consideration of individual circumstances'.[258] The differentiation has to be provided either by a legal provision (an Act of the Parliament, or, on the basis of authorisation by an act, in a governmental decree or collective agreement). The only hard (legally binding) piece of regulation is imposed on a defined group of employers: budgetary organs and legal entities in state majority ownership employing more than 50 employees are obliged to adopt an 'Equal Opportunity Plan'.[259] However, these plans, as a rule, do not grant rights to targeted individuals. Employers in the private sector may adopt equal opportunity plans, if they wish so, but are not compelled to. Act IV of 1991 on the promotion of employment and on assistance provided for the unemployed, states: 'While the requirement of equal treatment shall be respected in connection with the promotion of employment and the support of job seekers, this shall not exclude the possibility of offering additional rights to those who are in a disadvantaged position on the labour market';[260] the latter includes those who are living alone with at least one dependant,[261] or are working in a sector or job characterised by a significant gender imbalance, and they belong to the underrepresented gender.[262]

5.4 Positive action is compulsory in both private and public sector employment (category 3)

In **Finland**, the main prohibition of discrimination on the ground of gender is to be found in the Act on Equality between Women and Men.[263] The act also provides exceptions to the prohibition, providing that 'the following shall not be deemed to constitute discrimination based on gender (…) temporary, special actions based on a plan and which are for the purpose of promoting effective gender equality and are aimed at implementing the objectives of this Act.'[264] The act contains several positive action duties. Every employer must promote equality between women and men in working life in a purposeful and systematic manner.[265] The employer must, with due regard to the resources available and any other relevant factors, (1) act in such a way that job vacancies attract applications from both women and men; (2) promote the equitable recruitment of women and men in the various jobs and create equal opportunities for them for career advancement; (3) promote equality between women and men in the

253 Croatia, Gender Equality Act, pursuant to Article 10.
254 Hungary, Fundamental Law of Hungary (*Magyarország Alaptörvénye*), Article XV(4).
255 Hungary, Fundamental Law of Hungary, Article XV(5).
256 Hungary, Act CXXV of 2003 on Equal Treatment and the Promotion of the Equality of Opportunities (*2003.* évi *CXXV. törvény az egyenlő bánásmódról* és *az esélyegyenlőség előmozdításáról*) Article 11(1).
257 Hungary, Act CXXV of 2003, Article 11(1)(a).
258 Hungary, Act CXXV of 2003, Article 11(2).
259 Hungary, Act CXXV of 2003, Article 63(4).
260 Hungary, Act IV of 1991 on the Promotion of Employment and on Assistance Provided for the Unemployed (*1991.* évi *IV. törvény a foglalkoztatás elősegítéséről* és *a munkanélküliek ellátásáról*), Article 2(1).
261 Hungary, Act IV of 1991, Article 57/B(4)(d).
262 Hungary, Act IV of 1991, Article 57/B(4)(e).
263 Finland, Act on Equality between Women and Men, Section 7.
264 Finland, Act on Equality between Women and Men, Section 9.
265 Finland, Act on Equality between Women and Men, Section 6(1).

terms of employment, especially in pay; (4) develop working conditions to ensure that they are suitable for both women and men; (5) facilitate the reconciliation of working life and family life for women and men by paying attention especially to working arrangements; and (6) act to prevent the occurrence of discrimination based on gender.[266]

The positive duties under Section 6 concern all employers, public and private alike, but the nature of duties depends on the number of employees. The employer's resources and other relevant factors are taken into account when the extent of this duty is determined. Section 6a obliges an employer with a minimum of 30 employees to produce an equality plan concerning pay and other conditions of employment every other year. The plan is to be produced together with personnel representatives, and is to contain an assessment of the equality situation at the workplace, including information on the position and tasks of men and women, their pay and pay differentials, is to specify the measures for promoting equality and achieving equal pay, and is to contain an assessment of the results of the measures under the previous equality plan. The plan is to list positive measures concerning pay and other conditions of work, either as an independent plan or one included in personnel, educational or safety at work plans. The plan is to be made in cooperation with a representative of the employees, who is to be given appropriate resources to participate and influence the planning. The plan is to cover an analysis of the gender equality situation at the workplace and a pay audit, which covers the classification, pay and pay differentials of women and men. The plan is to list action needed for equality and equal pay, and an assessment of earlier action and its effects. Personnel are to be informed about the pay audit.

Sections 6 and 6a thus require positive action by employers. The duties are legally binding, but not very strongly monitored. Much emphasis has been placed on policies agreed upon in a tri-partite programme (social partners and government) that has run for more than a decade and given recommendations both for public and social partners' policies. The emphasis in the programme has been on reducing pay differentials rather than pay discrimination, and accordingly issues such as combining family and working life and gender segregation in the labour market have been prominent. In practice, these programmes have not been very effective.

In **France**, positive action measures have covered both private and public employment. Positive action provisions first emerged in the private sector. The Labour Code provides that temporary measures in favour of women to promote equal opportunity for men and women,[267] in particular by removing existing inequalities that affect women's opportunities, are possible.[268] This rule was not constitutionally challenged, unlike the specific parity percentage rule adopted later which required constitutional amendments in 1999 and 2008, no doubt because there were no quantitative obligations for employers to adopt specific temporary measures, just the admissibility of the option to adopt such rules. No numerical goal or benchmark was set in the laws on equality except laws on correcting wage disparities. The Labour Code first allowed manifest efforts, initiatives to achieve equal opportunity through collective bargaining (Roudy law of 1983) and the possibility to take positive action through measures laid down by decree, by an employer's unilateral plan for equality or by a duty to bargain collectively at sectoral levels (Génisson law) in 2001, without setting an obligation to conclude a specific type of agreement. There is, however, a binding duty on the employer to post all information on measures for equality between women and men in the workplace[269] and in the place where interviews are held.[270]

The Law of 9 May 2001 (Génisson law) created an obligation to negotiate on sex equality, including positive action. The general obligation of employers to negotiate on equality between women and men is mandatory at least every four years when there is a group of union representatives.[271] The frequency

266 Finland, Act on Equality between Women and Men, Section 6(2).
267 France, Labour Code, Article L. 1142-4.
268 France, Labour Code, from Article L 1141-1.
269 France, Labour Code, Articles L. 3221-1 to L. 3221-7.
270 France, Labour Code, Article R 3221-2.
271 A '*Section syndicale*', Article L2242-1 Labour Code, Executive order n°2017-1385 du 22 september 2017 – art. 7.

of this negotiation can be set at a minimum every four years by an agreement at the enterprise level. If there is no agreement on the timetable, the negotiation is held every year. The employer has the duty to negotiate with trade unions in order to define the objectives concerning equality between men and women in the enterprises and to design the measures to be implemented in order to attain these objectives. In order to facilitate the negotiation, a written report on the comparative situation between men and women in the enterprise must drawn up by the employer. The scope of the negotiation must include the gender pay gap.[272] To improve negotiations, the Law of 23 March 2006 specified that the gender pay gap must disappear before 31 December 2010. The financial penalty in the absence of negotiation on equality reflects its binding nature.[273]

A turning point was the adoption of a law in 2012 regarding public servants in the three main public services: the civil service of the state, the civil service of public hospitals and the civil service of local governments.[274] The main provision of the law was the adoption of quotas in the same way as in the private sector.[275] The law also required that women fill 40 % of high-level public service worker posts.[276] Other measures against sexual harassment and sexism were adopted in the public sector.[277] The next step was the Law of 2014-873 on real equality between women and men, which concerned both the public and the private sector.[278] It covered a series of policies in employment and outside of private employment (poverty, equal pay, sex desegregation in jobs). It provided: 'The State and the local government and its public institutions enforce a policy of equality between women and men according to an integrated approach and evaluate all their actions.'[279] The equality policy includes a broad approach, resembling a form of gender mainstreaming across the board, both through prevention mechanisms, education, parity rules and positive action for equal pay and against sex segregation in employment, soft rules on circulation of information about sex roles as well as through sanctions in terms of equal pay.[280]

Since President Macron was elected in 2017, France has viewed equality as a national cause, with further legislation promoting corrective measures in both the private and public sectors of employment. The Presidential equality plan of 2017-2020 has been the basis for legislative reforms. Under the President's plan the goal is to foster both 'equality of rights' and 'equality in practice'. The idea was to develop annual thematic priorities on a broad basis after a survey[281] was conducted to identify the best practices in all of France (and to develop data on the employment of women, desegregation of jobs, access to justice, prevention of sexism and sexual violence, which would be useful to measure inequalities). Both the Law of September 5 2018 with its reinforced obligation to correct wage disparities in the private sector,[282] and the Law of August 6 2019 on the transformation of public service employment, introduce provisions on equality as part of the legislative implementation of the Presidential plan.[283]

272 France, Labour Code, Article L2242-1.
273 France, Labour Code, Article L2242-8.
274 France, *Loi n° 2012-347, 12 mars 2012 relative à l'accès à l'emploi titulaire et à l'amélioration des conditions d'emploi des agents contractuels dans la fonction publique, à la lutte contre les discriminations et portant diverses dispositions relatives à la fonction publique*.
275 The law required that women fill 40 % of the various seats on boards of the public enterprises (Article 52 of the Law of 2012). This percentage should have been reached at the second renewal of the boards after the adoption of the law. All the consultative bodies representing public servants' representation should also have reached this percentage at their next renewal (the 'common council of civil service' and each council affected for each category of civil service: state, territorial, hospital)
276 The levels are: 20 % for the nomination in 2013 and 2014 and 30 % between 2015 and 2017. This means that in 2018, at least 40% of the nominations for high-level public services workers should have been female.
277 Art. 6 bis of the law of 1983 amended by the Law No. 2017-86 of 27 January 2017 on equality and citizenship.
278 France, *Loi n° 2014-873 du 4 août 2014 pour l'égalité réelle entre les femmes et les hommes* (https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000029330832&categorieLien=id).
279 France, Law of 2014-873, Article 1.
280 France, Law of 2014-873.
281 The 'Tour de France of Equality'.
282 France, Decree No. 2019-15 of 8 January 2019, https://www.legifrance.gouv.fr/eli/loi/2018/9/5/MTRX1808061L/jo/texte.
283 France, Law No. 2019-828 on the transformation of the civil service (*Loi n° 2019-828 du 6 août 2019 de transformation de la fonction publique*), Article 80 of which requires the adoption of an equality plan, renewed every three years with possible measures (options include efforts to correct wage disparities, equal access to jobs and work life balance measures; financial penalty in the absence of such a plan).

The new class action suit introduced in **France** after the 2016 law is a group action that provides for injunctive relief for groups before and after litigation, which could involve future positive measures as a sanction against systemic discrimination.[284] So too, in Italy, positive action may be used as a sanction against discrimination. We saw earlier that **Italy** has extensive provisions that treat positive action as voluntary. This is the one context in which positive action may be required of employers in both the public and private sectors. In conciliation procedures, equality bodies can require the implementation of positive action plans by the author of collective discrimination or this can also be ordered by a judge in cases of unlawful differential treatment in working conditions, access to jobs and so on, where a whole group of female workers is discriminated against.[285] They can start with an attempt at conciliation,[286] where the agreement on the enforcement of a plan to remove the discrimination becomes a writ of execution through a decree of the court. They can also start with ordinary proceedings, where the court in the decision ascertaining a collective discrimination, after having heard trade union representatives as well as the national or regional equality adviser, orders the employer to set up a plan to end the discrimination, and fix a time limit for drawing up the plan.[287] A criminal and an administrative sanction is provided in case of non-compliance with the court order and public contractors can be excluded from incentives and contracts with public administrations. In these cases, the 'victim' is a group of women and the attempt at conciliation or the complaint is initiated by the national or regional equality adviser.

In **Sweden**, the Instrument of Government (one of the four fundamental laws of the Swedish Constitution) addresses sex discrimination.[288] It states that a 'law or other regulation may not imply negative differential treatment on the grounds of gender.'[289] There is, however, also an exception for positive action: '... unless this differential treatment is part of efforts to promote equality between men and women or regards military or similar services'. In addition, the Discrimination Act provides that all legal entities, including private companies, may take positive action.[290] This is defined as 'measures that contribute to efforts to promote equality between women and men'.[291] The rule is voluntary in character – they allow both public and private employers to apply such measures within the scope of the law.

In addition, however, the Discrimination Act contains provisions on mandatory preventive active measures to promote equal rights and opportunities at the workplace, to function alongside the ban on discrimination.[292] All employers are obliged, *inter alia,* to continuously apply a four-step approach (investigate, analyse, take measures and monitor/evaluate) within the following five areas: working conditions; provisions and practices regarding pay and other terms of employment; recruitment and promotion; education and training, and other skills development; and possibilities to reconcile gainful employment and parenthood. In addition, they must promote gender balance in different types of work (including in management positions), and establish, follow up and evaluate guidelines and routines to prevent harassment, sexual harassment and reprisals. Employers with at least 25 employees are required to document all elements of their work on active measures. Employers with fewer than 10 employees have the same responsibility for taking active measures as larger employers, but there is no legal requirement for them to document their work in this area. The work on active measures must be carried out in collaboration with employees.[293] Of special interest for the promotion of the underrepresented gender is the provision requiring employers to promote an equal distribution of women and men in different types of work and in different employee categories and in leading positions, by means of education and training, skills development and other appropriate measures.[294]

284 See the Recommendation of the Defender of Rights on the first class action suit on union membership discrimination.
285 France, Code of Equal Opportunities, Article 37.
286 France, Code of Equal Opportunities, Article 37(1).
287 France, Code of Equal Opportunities, Article 37(3).
288 Sweden, Instrument of Government, 1974:152, Chapter 1, Section 2(5) and Chapter 2, Section 13.
289 Sweden, Instrument of Government, Chapter 2, Section 13.
290 Sweden, Discrmination Act (*Diskrimineringslagen*), 2008:567.
291 Sweden, Discrmination Act, Chapter 2 Section 2(2).
292 Sweden, Discrmination Act, Chapter 3 Sections 1-14.
293 Sweden, Discrmination Act, Chapter 3 Section 11.
294 Sweden, Discrmination Act, Chapter 3 Section 8.

In **Iceland**, Article 65(1) of the Constitution provides that: 'Everyone shall be equal before the law and enjoy human rights irrespective of sex, religion, opinion, national origin, race, colour, property, birth or other status'. Article 65(2) emphasises that: 'Men and women shall enjoy equal rights in all respects' – and implicitly permits positive measures to achieve gender equality. The explanatory report to the amendments to the Constitution[295] states that it may be justified to promote certain groups with the aid of the law to correct their lesser status and make it more equal in comparison with other social groups.[296]

The regulatory approach with regard to positive action is entrenched in the Gender Equality Act (GEA),[297] which prohibits discrimination on grounds of gender but explicitly states that 'affirmative action shall not be regarded as being contrary to this Act;'[298] the GEA defines 'affirmative action' as special temporary measures.[299] After municipal elections, local authorities must appoint gender equality committees to advise the local government, advise on matters bearing on gender equality, monitor and take the initiative on measures, including affirmative action, to ensure the equal status and equal rights of women and men within the municipality.[300] The Directorate for Gender Equality has the function, *inter alia*, to 'make proposals on affirmative actions'.[301] Employers must take special measures to ensure that women and men have equal opportunities regarding retraining, continuing education and vocational training, and to attend courses held to enhance vocational skills or to prepare for other assignment occupations.[302] Employers shall also take special measures to enable women and men to reconcile their professional obligations and family life,[303] e.g. to increase flexibility in the organisation of work and working hours and thus take into account workers' family circumstances and the needs of the labour market, including facilitating the return of employees to work following maternity, paternity or parental leave or leave from work due to pressing and unavoidable family circumstances. The GEA stipulates further that employers and directors of institutions and NGOs shall take special measures to protect employees, students and clients from gender-based violence, gender-based harassment or sexual harassment in the workplace.[304] These measures apply to all enterprises and institutions with more than 25 employees, public and private.

Both the Act on public limited companies[305] and the Gender Equality Act provide that employers take steps to avoid jobs being classified as especially women's or men's jobs and that particular emphasis must be placed on achieving equal representation of women and men in managerial and influential positions, the beneficiary being the underrepresented sex. Companies with more than 25 employees are obliged to draw up gender equality programmes and have to make sure that the gender ratio is observed when managers are appointed.[306] This does not apply to private limited companies, as they are not obliged to have a manager. Furthermore, companies with more than 25 employees on average are required to report their analysis of gender ratio statistics relating to both employees and management. Additionally, all companies that fall under the scope of the act are required to take gender ratio perspectives into consideration in the recruitment of CEO´s and report statistics relating to this to the Register of Limited Companies.

In **Norway**, positive action is not directly regulated in a constitutional document, but in equality legislation. Until the beginning of 2018, the Gender Equality Act of 1978, 9 June, No. 45 (GEA),[307] stated that positive

295 Iceland, Act No.97/1995, the so-called human rights chapter.
296 Iceland, *Greinargerð með frumvarpi til stjórnskipunarlaga* nr. 97/1995 (not available in English).
297 Iceland, Act No. 10/2008, Gender Equality Act (GEA).
298 Iceland, GEA, Article 24(2).
299 Iceland, GEA, Article 2.
300 Iceland, GEA, Article 12.
301 Iceland, GEA, Article 4.
302 Iceland, GEA, Article 20, on vacancies, vocational training, retraining and continuing education/lifelong learning).
303 Iceland, GEA, Article 21.
304 Iceland, GEA, Article 22.
305 Iceland, Gender Equality Act No. 10/2008 and the Act on public limited companies No. 2/1995 with later amendments, https://www.government.is/Publications/Legislation/Lex/?newsid=8900031c-fbd6-11e7-9423-005056bc4d74.
306 Iceland, Act on public limited companies No. 2/1995 as amended by Act No. 13/2010, Article 65(1) http://www.althingi.is/lagas/146a/1995002.html.
307 Norway, Gender Equality Act 1978, Section 7.

action in favour of one gender was not in violation of the prohibition of discrimination if the differential treatment was suitable to enhance the aim of the GEA (to enhance equality), the treatment achieved a fair balance between the aim pursued and how negatively the measures affected the individual or the group adversely affected by the measure, and the differential treatment came to an end when the objective was achieved. The ministry may issue regulations providing further details of possible affirmative action.[308] An employer, who wished to use positive action as a way to enhance equality, was able to do so within the requirements of the GEA without seeking approval in advance. For example, companies would often specifically encourage members of the underrepresented sex to apply when announcing vacancies for specific positions. Another example was a company that arranged a workshop on leadership skills only for its female employees. The Ombud found this action to be in accordance with the GEA.[309]

More recently, the Government proposed a new act relating to equality and the prohibition against discrimination, which was enacted by Parliament on 16 June 2017. The new act entered into force on 1 January 2018.[310] The General Equality and Anti-Discrimination Act (GEADA) provides that direct or indirect differential treatment based on gender amongst other grounds, is not allowed.[311] The GEADA applies to all areas of society and in employment in both the public and private sectors.[312] It also provides for 'permitted positive differential treatment' including on the basis of gender.[313] As was the case under the previous act,[314] the GEADA provides that positive action in favour of one gender is not in violation of the prohibition on discrimination if the differential treatment is suitable to enhance the aim of the act (to enhance equality), it is a fair balance between the aim pursued viewed in proportion to how negatively the measures affect the individual or the group affected by the measure, and the differential treatment comes to an end when the objective is achieved.[315] This is interpreted as only allowing for positive or affirmative action where two employees or applicants are equally well qualified or nearly-equally well qualified for a position. When it comes to employment in Government/state jobs the State Employees Act provides that employers must always choose the best qualified applicant.[316] However this does not stop the employers from using positive action as long as this corresponds with the GEADA's positive action provisions, and the measures do not go further than the GEADA allows.

The former Gender Equality Act allowed differential treatment of *men* only for recruitment for a position within education and care of children. Under this regulation positive action for men could also be applied to attract male applicants to such schools and kindergarten. The former regulation that explicitly allowed differential treatment in favour of men concerning recruitment for positions within education[317] was repealed in 2017. Positive action may now be applied by employers equally when it comes to both women and men.[318] In other words, there is no longer a special regulation when it comes to positive action for men in Norway. However, positive action measures to employ men for certain positions still have to be suitable for eliminating the disadvantages and barriers to applying for positions that are strongly dominated by women. The sole fact that an employer wants a better gender balance at a workplace will not be enough to justify differential treatment between women and men.

308 Norway, GEA, Section 7.
309 See the Ombud's case, 10/2004.
310 Norway, Act No. 51, General Equality and Anti-Discrimination Act (GEADA).
311 Norway, GEADA, Section 6, first paragraph.
312 See; https://lovdata.no/dokument/NLE/lov/2017-06-16-51.
313 Norway, GEADA, Section 11.
314 Norway, GEADA, Section 7.
315 Norway, GEADA, Section 11.
316 Norway, State Employees Act, Section 3. See https://lovdata.no/dokument/NL/lov/2017-06-16-67?q=statsansatteloven.
317 Norway, 1998-07-17-622 – *Forskrift om særbehandling av menn* – positive action in favour of men.
318 Norway, GEADA, Section 11

As the previous legislation did, the new act sets out a series of duties on public and private employers to engage in 'active equality efforts.'[319] 'Public authorities shall make active, targeted and systematic efforts to achieve the purpose of this Act.' The act also imposes a duty on all employers to promote equality:[320]

> 'All employers shall, in their operations, make active, targeted and systematic efforts to promote equality and prevent discrimination on the basis of gender, pregnancy, leave in connection with childbirth or adoption, care responsibilities, ethnicity, religion, belief, disability, sexual orientation, gender identity and gender expression. Such efforts shall encompass recruitment, pay and working conditions, promotion, development opportunities, accommodation, the opportunity to combine work with family life and preventing harassment.'

All employers are required to issue a statement on the current state of affairs with regard to gender equality in the undertaking, and equality measures implemented or planned to promote the act's purpose of equality irrespective of gender.

An additional set of obligations applies to all public undertakings, regardless of size, and private undertakings that ordinarily employ more than fifty persons. In the context of their operations, these undertakings and employers are required to: investigate whether there is a risk of discrimination or other barriers to equality; analyse the causes of identified risks; implement measures suited to counteract discrimination and promote greater equality and diversity in the undertaking; and evaluate the results of these efforts, which must be made on an on-going basis and in cooperation with employee representatives. In addition to making the general equality statement, these undertakings and employers are required to issue a statement on already implemented or planned equality measures intended to promote the act's purpose of equality irrespective of ethnicity, religion, belief, disability, sexual orientation, gender identity and gender expression. In the case of those undertakings that have a statutory duty to prepare an annual report, such undertakings shall include the statement in its annual report. The duty to issue a statement also applies to public authorities and public undertakings with no duty to prepare an annual report. Such undertakings are required to include the statement in their annual budget.

5.5 Conclusion

In this chapter, we have seen that we can roughly divide Member States into three broad categories: category 1 – positive action by employers is permissible within limits, but voluntary, in both public and private sector employment; category 2 – positive action by employers is permissible, within limits, in the private sector but compulsory, within limits, in the public sector; and category 3 – positive action is compulsory in both private and public sector employment. The one Member State that does not come under any of these categories is **Latvia**, which does not appear to have any provision for positive action, even as an exception in private sector employment.

We can regard EU legislation in the area of positive action as potentially setting both a floor and a ceiling. As regards the floor, given that EU law permits, rather than requires positive action, all states in categories 2 and 3 are exceeding their obligations under EU law. Since adopting the exceptions-based approach is itself at the discretion of Member States, Latvia, which does not even include such an exception in its national legislation, does not appear to be in breach of EU law in failing to do so either. As regards the ceiling that the EU establishes as to what is permissible rather than required, it will be preferable to make such an assessment after we have the more complete picture of national law to be provided in the subsequent chapter.

The results of this account of national legislation providing for positive action in employment are striking and somewhat disturbing. First, there are very wide disparities in existence, between, say, the approach

319 Norway, GEADA, Section 24 imposes a duty on public authorities to promote equality.
320 Norway, GEADA, Section 26.

taken in **Latvia** versus the approach taken a short distance away in **Sweden**, or between **Denmark** and **Norway**. These examples indicate that differences emerge not only between countries that diverge significantly in terms of legal culture, previous history, and prosperity, but also between countries that we may be tempted to think as being quite similar in terms of their geographical, cultural or political background and context, such as countries of the Visegrád Group (**Czech Republic**, **Hungary**, **Poland**, and **Slovakia**), the Baltics (**Estonia**, **Latvia**, **Lithuania**), Eastern Europe (**Bulgaria**, **Romania**), South Eastern Europe (Balkans: **Croatia**, **Greece**, **Slovenia**), and southern European states (**Greece**, **Italy**, **Malta**, **Portugal**, **Spain**). None of these groups appear to indicate anything like a common position.

Second, half of EU Member States do not require either public or private employers to adopt positive action measures in employment (**Cyprus**, **Czech Republic**, **Denmark**, **Estonia**, **Ireland**, **Latvia**, **Lithuania**, **Malta**, **Netherlands**, **Poland**, **Romania**, **Slovakia** and **Slovenia**), contenting themselves with including a provision establishing an exception for positive action (except **Latvia**), but otherwise leaving it up to employers themselves. Only a handful of states require positive action in both the public and private sectors of employment (**Finland**, **France**, **Iceland**, **Italy**, **Norway**, **Sweden**), and of these, two are outside the EU, being members of the EEA, and four are Nordic states (**Finland**, **Iceland**, **Norway**, **Sweden**). One general conclusion that may be drawn from this pattern is that there is an interesting relationship between the introduction of positive action in the public and private sectors: there is some evidence that states that lead by example in public sector employment may set an example for the private sector to come up with its own, voluntary approaches; and states that have introduced compulsory measures in the private sector have tended to introduce these measures first in the public sector. Another general conclusion from this pattern is that those countries that have adopted positive action in a sustained way have tended to locate their positive action measures as part of a more comprehensive, well-considered gender equality policy and legal approach/actions plans, in which other structural problems such as unequal pay are included.

Beyond these broad conclusions, several further conclusions may be reached on the basis of the detailed analysis provided in this chapter. First, there are several points of similarity, difference and complexity that become evident on comparing the national approaches that are not captured by the compulsory-voluntary, and public-private distinctions. Three seem particularly worth pointing to in this conclusion. First, the issue of positive action is addressed in some countries in their constitutions and in others in ordinary legislation only. A second point that emerges is that in some states, positive action is permitted in theory, but cannot come into operation until some further legal action is taken, an action plan drafted, or some further institution established, before positive action may actually be proceeded with (**Lithuania** is the best example, but **Germany** is another regarding the role of works councils). Thirdly, it is interesting, given that we highlight for most countries the timing of the adoption of their laws, to observe that there is a shift towards more receptive approaches towards positive action in those states where positive action was introduced as a compulsory element early in that state's consideration of how to approach positive action, but that those states which initially adopted a totally voluntarist approach have mostly doggedly stuck to this stance, and little forward movement can be detected. In the next chapter, we address more systematically the divergence in the material and personal scope of positive action within the three categories that we distinguish in this chapter.

6 Material and personal scope of positive action in employment

6.1 Introduction

In this chapter, we consider the material and personal scope of measures taken at the national level in EU and EEA states. As regards the material scope of these measures, previous chapters have shown how positive action has come to be used in a wide range of contexts, from pre-employment decisions on whom to target for recruitment through advertising, to whom to train, whom to appoint and whom to promote. In this chapter, we point to two particularly controversial areas where there is significant divergence as to whether positive action measures are regarded as appropriate, namely in the context of pay and in the context of redundancy. As regards the personal scope of positive action measures, the issue of which group (or groups) is defined as the beneficiary of the positive action programme is another crucial variable. In particular, the issue arises as to whether the beneficiaries of positive action are defined in symmetrical or asymmetrical terms. Do those who are to benefit as the 'underrepresented group' include men as well as women in some situations (for example, few teachers in kindergartens are men), or are the beneficiaries defined explicitly as women, as opposed to men? A second issue is how far the group is defined to include one or more additional characteristics in addition to gender (such as race, or disability, or religion, for example), raising the issue of how far positive action engages with intersectionality. A third issue concerning personal scope: to the extent, as is likely, that the beneficiaries are defined in terms of 'men' and 'women', a further question is how membership of either group is to be determined, raising the question of how positive action measures address trans* issues.

6.2 Material scope of positive action

6.2.1 Positive action in the context of pay determinations

In the majority of states, positive action is not envisaged in the context of pay determinations (or, if theoretically possible, is highly unlikely), perhaps because such a measure might be seen as running contrary to the principle of equal pay for equal work or work of equal value, which would have to take precedence (**Belgium**, **Bulgaria**, **Croatia**, **Cyprus**, **Czech Republic**, **Denmark**, **Greece**, **Hungary**, **Ireland**, **Latvia**, **Malta**, **Netherlands**, **Romania**, **Slovakia**, **Spain**, **Sweden** and **United Kingdom**). In **Austria**, although it is theoretically possible, the national expert suggests that because to a very large extent public sector pay is determined by law (e.g. Federal Act on payment of Civil Servant and Employees, *Gehaltsgesetz des Bundes,* and *Besoldungsordnung Wien*)[321] this leaves practically no room for gender-based preferential pay decisions.

When positive action measures are identified as taking place in relation to pay, these are confined to the type of measures that aim to eliminate direct and indirect discrimination from payment systems. In **Portugal**, positive action is encouraged in the context of pay, under the umbrella of the Labour Code and of specific legislation in the field of pay. Aside the general provisions of the Labour Code on equal pay for equal work or work of the same value,[322] Law No. 60/2018 of 21 August 2018, expressly indicates that the Labour Inspection Services (ACT), on the basis of the annual public information on wages that companies must send to employment services, may ask the employer to implement a plan to evaluate the pay differences and their causes (including job evaluation criteria), and to correct such differences, or prove that they are based on objective non-discriminatory criteria.[323]

During the first two years that the 2018 law is in force, the possibility to ask the employer to make an implementation plan applies to employers with 250 or more workers. That possibility is extended to

321 https://www.ris.bka.gv.at/GeltendeFassung/Bundesnormen/10008163/GehG%2c%20Fassung%20vom%2011.03.2019.pdf, http://www.ris.bka.gv.at/GeltendeFassung/LrW/20000007/BO%201994%2c%20Fassung%20vom%2011.03.2019.pdf.
322 Portugal, Labour Code, Articles 24(2)(c) and 31(1), (2) and (5).
323 Portugal, Law No. 60/2018, Article 5.

employers employing 50 or more workers from the third year of the law entering into force.[324] If those pay differences persist one year after the implementation of the plan and the employer cannot prove that they are objectively justified, the ACT can apply an administrative fine.[325] As a positive action, this measure is mandatory. In **Norway**, the GEADA states that women and men in the same job shall have equal pay for equal work. It is not permitted to give group allowances to women without an aim to avoid differential gender-based differences when it comes to payment, and where this leads to a situation where women and men are given unequal payment for the same work. Furthermore, it is not permitted to give unequal payment to women and men with the aim of recruiting more men to work in the health and social sector in Norway. This will not be permitted under the GEADA provisions on equal pay,[326] and it is likely that this would not be regarded as proportionate.[327] In **Iceland**, equal pay certification is based on the recent amendment to the GEA[328] by Law no. 56/2017, requiring everyone falling under the jurisdiction of the law (workplaces with 25 employees or more on an annual basis) to implement steps contained in the equal pay management system standard.[329] This is a tool to enforce the equal pay principle due to the slow process of correcting the situation where women are paid less, and obtain a certification that their salary systems meet the requirements of the standard. In **Germany**, the Remuneration Transparency Act (*Entgelttransparenzgesetz*) provides that any direct or indirect discrimination on the grounds of sex in respect of all elements and conditions of remuneration is prohibited in case of equal or equivalent work. The act states[330] that the provision on positive action measures under the General Equal Treatment Act[331] remains unaffected, but it is unclear what effect this has in practice.

6.2.2 Positive action in the context of layoffs and redundancy

In the majority of states, positive action is not envisaged in the context of lay-offs and redundancies (or, if theoretically possible, is highly unlikely) (**Belgium**, **Bulgaria**, **Croatia**, **Cyprus**, **Denmark**, **Germany**, **Great Britain**, **Greece**, **Hungary**, **Ireland**, **Malta**, **Netherlands**, **Portugal**, **Romania**, **Slovakia**, **Spain** and **Sweden**). In **Latvia**, the Labour Law identifies employees who in the case of redundancy dismissal have a priority to retain employment.[332] Only one criterion defining the protected employees is based on objective economic factors, i.e., the employees having the best work results. All the other criteria are based on social considerations involving protection from discrimination or protecting those in a less advantageous situation in the labour market, for example, persons with disabilities, persons in pre-retirement age (five years before retirement age), parents of children below the age of 14 or parents of a disabled child below the age 18, or employees having two or more dependents. In **Estonia**, the Civil Service Act stipulates that if a redundancy selection is to be made between at least two officials performing similar functions, an official who is raising a child under seven years of age shall have a preferential right to remain in the service.[333] In **France**, the order in which economic lay-offs take place can take into account family responsibilities to protect the employment of parents.[334] In **Lithuania**, the Labour Code gives priority in retaining employment to employees raising more than three children under 14 years of age and to those employees raising children under 14 years of age alone, and those caring for other family members.[335]

324 Portugal, Law No. 60/2018, Article 18.
325 Portugal, Law No. 60/2018, Article 12.
326 Norway, GEADA, Section 34.
327 Norway, GEADA, Section 11. See Equality and Anti-discrimination Ombud (2015), *Positiv særbehandling* (A report on positive action), 28 May 2015, p. 25.
328 Iceland, GEA, Article 19.
329 Standard ÍST 85:2012.
330 Germany, Remuneration Transparency Act, Section 3(4).
331 Germany, General Equal Treatment Act, Section 5.
332 Latvia, Labour Law, Article 108.
333 Estonia, Civil Service Act, Article 90(5).
334 *Charges de famille*, see France, Labour Code, Article L 1233-5.
335 Lithuania, Labour Code, Article 57 (3) No 2.

In **Northern Ireland**, Equality Commission for Northern Ireland guidance[336] recommends that employers should include a review of redundancy selection policies, which it links to protecting the results of positive action:

> '...If the positive action is successful it will eventually lead to an increase in the numbers of employees in the workforce who are from the under-represented or disadvantaged community or group. As these new employees will on average have relatively shorter lengths-of-service than others, they may suffer a further disadvantage if length-of-service is used as a redundancy selection criterion. This will be especially so if LIFO [last-in, first-out] is the sole criterion. Therefore, to protect any gains resulting from the positive action measures, it is best to abandon the use of LIFO as the sole selection criterion.'[337]

In **Italy**, the legislation goes further. Article 5(2) of Act No. 223/1991 states that employers cannot make redundant a percentage of women workers higher than that of women workers employed in the jobs involved by the redundancy procedure. However, we have no specific example of positive action measures in this respect.

6.2.3 Positive action and public procurement

Several countries outside the EU (Canada, the United States, Zimbabwe, Malaysia, Fiji, South Africa) give affirmative action preferences for those bidding for public contracts, in the form of preferences for businesses owned or controlled by members of the preferred group.[338] Given that in many countries the expenditure by the Government on contracting amounts to a significant slice of GDP, this means that the impact of such preferences on the economy may be significant. The use of public procurement in this way needs to be distinguished from another common use of public procurement, which is to use access to public procurement as a method of ensuring the adoption of affirmative action in, for example, employment practices.[339] It is the latter that is of interest in the context of this study. We can identify several examples of this approach, but little can be said about their effectiveness, given the paucity of information available.[340]

In the past, **Germany** led the way on such uses of public procurement. Every German state has its own procurement statute (*Vergabegesetz*) and the majority provide that the promotion of women by the (private) contractor may be considered as a possible social criterion when making decisions in the procurement procedure. Thus, public authorities are permitted to take positive action measures by private employers into consideration when deciding about contracting. This possibility seems to be used reluctantly, however. While the state of Berlin is still eager to further gender equality by requiring the recruitment, equal remuneration and promotion of women by the contracting party, employers' associations warn against the 'political use (abuse)' of procurement procedures and the administrative burdens.[341] In practice, the possibility of considering environmental-friendliness, sustainability and fair or minimum remuneration as criteria is much more common.[342]

Some other states do use public procurement to some extent. In **Spain**, the Law on public sector contracts,[343] provides that contracting public administrations can establish mechanisms that give preference to public

336 Equality Commission for Northern Ireland, 'Outreach Positive Action', p. 4. https://www.equalityni.org/ECNI/media/ECNI/Publications/Employers%20and%20Service%20Providers/PositiveActionEmployerGuide.pdf.
337 Equality Commission for Northern Ireland, 'Outreach Positive Action', p. 4, para 2.16.
338 McCrudden, C. (2007) *Buying Social Justice: Equality, Government Procurement, and Legal Change*, Oxford University Press.
339 McCrudden, C. (2012) 'Procurement and Fairness in the Workplace', in Linda Dickens (ed), *Making Employment Rights Effective: Issues of Enforcement and Compliance*, Hart Publishing.
340 For an earlier survey of the empirical effects of the use of public procurement in this context, see McCrudden, C. (2007) *Buying Social Justice: Equality, Government Procurement, and Legal Change*, Oxford University Press, pp. 594ff.
341 See https://www.berlin.de/sen/frauen/recht/landesgleichstellungsgesetz/frauenfoerderverordnung/.
342 See https://www.dgb.de/themen/++co++7ccfebc4-c260-11e8-a6e1-52540088cada.
343 Spain, Law 9/2017, of 8 November 2017.

contractors that have positive action measures in favour of hiring women and that favour the conciliation of responsibilities. In **Great Britain**, the general public sector equality duty under the Equality Act applies to procurement and commissioning by organisations that are delivering public functions (but only in relation to their public functions). However, this is only a duty to have 'due regard' to the need to advance equality of opportunity, and so is limited. In **Italy**, the Code of Equal Opportunities provides that a court having held that there has been collective discrimination, may exclude public contractors from contracting with the public administration.[344] In **France**, the Law on real equality between women and men of 2014 restricts public contracts to companies that have not been held liable for discrimination, and have equality plans in place or have signed collective bargaining agreements on equality with unions.[345]

6.3 Personal scope of positive action

Generally, two methods have been adopted in respect of the personal scope. One method involves 'self-identification' in which a person claims to be a member of the benefitted group and that claim is accepted by those operating the programme. Alternatively, a system may be adopted in which membership of the group is determined 'objectively', either by some authority associated with the group or by a state authority such as the judiciary (with the possibility that this leads to 'essentialisation', where designated characteristics come to be considered as fixed traits, and variation among group members is discounted or ignored).

6.3.1 Symmetric and asymmetric positive action

In the overwhelming majority of states, the approach taken is symmetrical, at least in form. In **Croatia**, legal provisions on positive action are gender neutral, since they only refer to the 'underrepresented sex'. However, policy and strategic documents seem to pay attention only to women as beneficiaries, even though there are many sectors where men are the underrepresented sex (for example, in public sector pre-school, primary and secondary education, where the overwhelming majority of teachers are women). In **Finland**, the provisions on positive action are defined in a gender-neutral manner, in terms of 'promoting gender equality' or as demands for there to be both women and men in certain bodies. In **Portugal**, the legal definition of positive action for the implementation of such action does not mention 'women' but the 'disadvantaged group'.[346] The same is true of the law on gender-balanced company boards, which always mentions the number of persons 'from each sex',[347] despite the known fact that women are the underrepresented sex in company boards. In **Spain**, the legislation is somewhat ambiguous. For example, the Workers Statute states that it is valid to establish quotas or other measures to favour the hiring of 'women' in collective agreements,[348] but the same provision establishes that the collective agreement may provide reserves and preferences in the contracting conditions so that, under equal conditions of suitability, preference will be given to hire 'persons of the less represented sex' in the professional group in question. In **Latvia**, specific measures are targeted at parents rather than mothers. In **Malta**, the beneficiaries usually are the underrepresented sex. In **Ireland**, in general, the references are to the underrepresented sex. However, when we look at the reason for the policy, it more usually relates to higher level positions where women are the underrepresented sex. In **Hungary**, theoretically, positive action measures may be symmetrical in their targeting. However, there is no known provision that targets men as the beneficiary group. In **Cyprus**, positive action measures are understood as special advantages for the least represented sex, especially women.[349] Thus, positive action measures, while not exclusively directed to women, are envisioned primarily for their benefit. In **Estonia**, the Gender Equality Act stipulates that the membership committees, councils and other collegial bodies formed by state and

344 Italy, Code of Equal Opportunities, Article 37.
345 France, *Loi n° 2014-873 du 4 août 2014 pour l'égalité réelle entre les femmes et les hommes*, Article 16; https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000029330832&categorieLien=id.
346 Portugal, Labour Code, Article 27.
347 Portugal, Law No. 62/2017 of 1 August 2017, Article 1(2).
348 Spain, Workers Statute, Article 17(4).
349 Cyprus, Law 205(I)/2002 on equal treatment between men and women in employment and vocational training.

local government authorities will, if possible, include members of both sexes.[350] In the **Czech Republic**, exemption from the non-discrimination principle[351] is symmetrical. In **Greece**, the constitutional norm of Article 116(2) requiring positive action by the state uses the wording 'measures to eliminate inequalities existing in practice, in particular those detrimental to women'; thus, it is symmetrical in its targeting to the extent that it does not restrict the beneficiaries only to women, although it prioritises measures in favour of women. As discussed previously, the only specific legal provision on positive action is on the quotas for the participation of the underrepresented sex in the service councils of the public sector. This provision is symmetrical in its targeting, whereas in practice it has been used in the favour of women, due to their limited representation in such councils. Moreover, for an equality mark to be awarded, the balanced participation of women and men in managerial positions or in professional and scientific committees within the undertaking and gender equality in professional promotion are, *inter alia,* taken into account. Therefore, this award is symmetrical in its targeting as well. In **Sweden**, the target group is defined as 'the underrepresented sex'. In **Denmark**, the target group is the underrepresented gender. Underrepresentation is defined as less than 25 % representation. In **Slovakia**, positive action is symmetrical. Temporary balancing measures are targeted to eliminate disadvantages imposed on the grounds of gender or sex.[352] In **Iceland**, the legal provisions of the GEA apply to the underrepresented group; this is most often women but where a man considers himself a victim of discrimination under the GEA, he will be the beneficiary of the positive action measure. In **Germany**, as the main requirement is underrepresentation, the respective regulations are gender-neutral and symmetrical. However, as women are mainly underrepresented in desirable occupations or working levels and as the additional requirement in the civil service is structural discrimination, in fact, the approach is asymmetrical.

In other states, the picture is more nuanced. In **Belgium**, before the adoption of the Ancillary Royal Decree of 2019, the legal framework was uncertain and at the time of adoption of the previous royal decrees, positive action measures were only meant for women. However, for the participation in boards (companies), managing positions (in the administration), the target was the underrepresented sex (which is generally women). As from 1 March 2019, when the new Royal Decree entered into force, positive actions are symmetrical: they should target underrepresented groups. In **Italy**, positive action is asymmetric, except for positive action for the reconciliation of work and family life under Act no. 53/2000, which is symmetrical and addresses both women and men.[353] It provides for an allocation from the Fund for Family Policies to undertakings that enforce collective agreements on positive action aimed at: allowing parents to adopt a flexible working time schedule, through part-time, teleworking, home work, flexitime and other measures; reintroducing parents to the workplace after a period of leave linked to reconciliation reasons; and promoting innovative services for the reconciliation of private and professional life. In **Bulgaria**, as a matter of principle, the provisions are symmetrical, except for 'measures aimed at initiatives exclusively or mainly promoting entrepreneurship among women', when they are the underrepresented sex and 'measures aimed at initiatives for preventing or compensating for disadvantages in the professional career of women'.[354] In **Norway**, positive action measures are symmetrical in targeting the beneficiary group. However, the GEADA provides that the law will especially promote the position of women and minorities.[355] Under the GEDEA, positive action now may be applied by employers to both women and men equally.[356] In other words, there is no longer (as there was before) a special regulation when it comes to positive action for men in Norway. The former regulation that explicitly allowed differential treatment in favour of men concerning recruitment for positions within education was repealed in 2017.[357]

350 Estonia, GEA, Article 9(4).
351 Czech Republic, Anti-Discrimination Act, Section 7.
352 Slovakia, Anti-Discrimination Act, Article 8a(1) first sentence. http://www.snslp.sk/CCMS/files/AntidiskriminacnyZakon_ENG-1.1.2015.pdf available in English.
353 Italy, Act no. 53/2000, Article 9.
354 Bulgaria, LPFD, Article 7(1), p. 18.
355 Norway, GEADA, Section 1(3).
356 Norway, GEADA, Section 11.
357 Norway, 1998-07-17-622 – *Forskrift om særbehandling avmenn* – positive action in favour of men.

6.3.2 Intersectionality in positive action

When positive action was first developed as an element of EU gender equality policy, the issue of intersectionality was not on the agenda. Since then, of course, it has come to greater prominence. The question we now consider is whether any special positive action measures have been developed that are targeted at particular groups of women, such as ethnic minority women, women who are disabled workers, women in lower socio-economic classes, etc.

In **Italy**, the National Equal Opportunities Committee (EONC) 2012 programme for the public financing for positive action includes numerical targets to be achieved in hiring, such as: measures addressed to young qualified or graduate women, where 50 % of the recipients are expected to be hired on an employment contract (not a fixed-term one); and measures addressed to unemployed women or women on redundancy over 45 years old, where 50 % of the recipients shall enter or re-enter the labour market.[358] In **Spain**, according to Law 43/2006, of 29 December 2006, employers who hire women who are disabled have special discounts in social security contributions that are higher for women than for men. The discounts are of different amounts depending on the age of the worker and the severity of his/her disability, but in all cases the discount for hiring women is higher than for hiring men. In **Croatia**, women entrepreneurship or employment incentive measures are aimed at women with a disability, the Roma ethnic minority, or women in rural areas. However, although strategic and policy documents often recognise the need for an intersectional approach, this approach is hardly implemented in practice. For example, when it comes to women with disability, many measures aimed at their inclusion in various fields of public life are implemented only sporadically, through various projects of different associations financed from European or national sources. In the **Netherlands**, there are some policies that are directed at specific groups. For example, a subsidy is given to a project for women with a low level of literacy and to a project for single mothers with a low income. There are also policies for the support of ethnic minority women, for women who are disabled workers, for older women (50+) and for young women (e.g. to stimulate them to choose an education in science, rather than in arts). In **Malta**, there are specific measures targeting, for example, migrant women, such as projects aiming to empower them and make them more employable.[359] In **Austria**, the Labour Market Service Agency (*Arbeitsmarktservice, AMS*) was, until recently, required to use at least 50 % of its job training budget for women, especially for job training measures for older women (over 50). In **Hungary**, the recruitment campaign of the National Police explicitly targeted young people from the Roma minority, with a special focus on girls/women,[360] (although the absence of monitoring means that the impact of this campaign cannot be assessed). Under the National Roma Inclusion Strategy, a complex training and labour market integration programme was implemented in 2012–2015, using EU Structural Funds, with the title 'Growing Opportunity!' (*Nő az esély!*), explicitly targeting Roma women who were seeking employment, while facing disadvantages in the labour market because of the lack of up-to-date marketable vocational training. In **Greece**, Article 3(2) of Act 4604/2019 provides that, when 'positive measures' are adopted, 'the physical features and the situations related to sex, sexual orientation and gender identity, in favour of which the positive measures are taken, as well as their eventual concurrence with other areas of discrimination, such as, in particular, ethnic or social origin, age, family status, disability, religious, political or other belief, shall be taken into consideration'.

6.3.3 Trans, non-binary, and gender diverse issues in positive action

Where the beneficiaries of positive action are designated as 'women' within the legal/policy provisions on positive action, who identifies the potential beneficiary as being a 'woman'? Is it the employer or the person themselves, or is some other approach adopted? To what extent, if at all, has the development

358 http://sitiarcheologici.lavoro.gov.it/AreaLavoro/Tutela/Documents/PROGRAMMAOBIETTIVO2012.pdf.
359 https://ec.europa.eu/migrant-integration/news/empowerment-circles-for-migrant-women-in-malta?lang=fr.
360 See the webpage of the campaign, 'Diversity in Law Enforcement' (*Sokszínű rendvédelem*), http://www.sokszinurendvedelem.hu/.

of greater sensitivity to the plight of 'trans*'[361] workers affected the implementation of positive action measures benefitting women? From the responses of the national experts, it is clear that few countries have addressed this issue in any depth. Generally, two methods have tended to be adopted. One method is to adopt measures in which membership of the group is determined 'objectively' by some person or body other than simply the person claiming a particular gender (or none) (**Croatia**, **France**, **Hungary**, **Ireland**, **Latvia**, **Spain**). A second method involves 'self-identification', in which a person claims to be a member of the benefitted group and that claim is accepted by those operating the programme, thus adopting a 'subjective' approach (**Malta**, **Netherlands**). For those states that adopt an 'objective' approach, there is a further division between those states where the question is to be determined on the basis of the gender attributed at birth and registered on national identity cards, passports or birth certificates (**Belgium**, **Italy**, **Norway**, **Romania**, **Spain**), and/or recognised subsequently by law or judicially after a successful transition (**Austria**, **Bulgaria**, **Norway**, **Romania**), and those states that consider that some other body (such as an employer) is the responsible person (**United Kingdom**). In other states, there does not seem to be any very clear answer, simply because there has been no debate as to who is entitled to identify themselves as a woman or a man (**Cyprus**, **Portugal**, **Sweden**). As the expert from the **Netherlands** notes, the debate on this topic has only just begun.

The situation in **Germany** neatly illustrates the various dimensions of the issue. Membership of the group is determined objectively depending upon the entry in the register of births according to the regulations on the law of civil status. Therefore, trans* persons do not raise legal questions because the register of births would legally define their sex/gender in case of conflict. However, a 2017 landmark decision of the Federal Constitutional Court raised important issues. It holds that the constitutional prohibition of sex/gender discrimination also protects persons who do not permanently identify themselves as male or female and it obliges the federal legislature to amend the law on the birth register introducing a positive third gender entry other than male or female by 31 December 2018 at the latest.[362] Some legal scholars assume that this means that gender quotas can no longer work without being amended to take the third gender option ('*divers*') into consideration. However, the Federal Constitutional Court itself clarified in the same ruling that positive action measures in the civil service or the public sector are based upon Article 3(2) of the Basic Law, while the prohibition of discrimination on the grounds of sex is covered by Article 3(3) of the Basic Law, which prohibits any 'preference or disadvantage' and therefore, positive action measures in the public sector are restricted to women (and men, maybe). Positive action measures under the General Equal Treatment Act would cover any sex/gender,[363] but this norm is hardly ever put into action.

6.4 Conclusion

In addressing each of the issues discussed in this chapter, similar to what we found in the previous chapter, the states discussed frequently adopt very different approaches, but as regards the issues considered in this chapter, unlike the previous chapter, few states are particularly well advanced in their practice, let alone their thinking, on any of these issues, which remain cutting-edge. To that extent, we see not only diversity of approach, but also a degree of uncertainty as to how to proceed at the state level. There is a sense, frequently, that any innovation and experimentation that there was on how issues concerning positive action should be approached, has now slowed. This is evident in the way in which the new issues discussed in this chapter, which have mostly emerged since the 1980s and 1990s, are frequently ignored.

361 Including non-binary and gender diverse.
362 Federal Constitutional Court, judgment of 10 October 2017, 1 BvR 2019/16.
363 Germany, General Equal Treatment Act, Section 5.

7 A taxonomy of positive action measures adopted in employment

7.1 Introduction

In this chapter, we provide more detailed information on the range of positive action measures that have been specified in legislation, and/or actually adopted in practice in the states surveyed in this study. The approach adopted is to classify national legislation and practice into several broad groupings, thus providing a taxonomy of positive action measures at the national level, with the ultimate aims of identifying measures that may not yet have come to the attention of the European Union institutions, in particular the CJEU, and providing evidence on which 'best practice' in the area of positive action measures might be identified. We can think of the term 'positive action' as an 'umbrella' concept, under which many different types of programmes shelter. The following taxonomy has been identified based on a comparison of different types of 'positive' or 'affirmative' action globally.[364] This list does not purport to constitute a definitive list of such measures, to advocate all or any of these measures, or to attempt to identify which of these might be thought to be 'best practice' (this will be considered subsequently, in Chapter 11). Identifying these measures as 'positive action' measures does not imply that any or all of them are permissible under EU or EEA law, but is simply a way of classifying the types of measures that might also be being used in the European Union or the EEA, and then considering whether any or all of these measures have been identified as having been adopted in the relevant states.

7.2 Two initial problems

We were confronted with two immediate problems in attempting the task of developing a taxonomy of measures. First, in many jurisdictions there appears to be a lack of systematically collected and publicly available evidence on which to base such a survey. The Italian national expert pointed out, for example, that in **Italy**, 'We lack a monitoring system of positive actions; we have no information on the follow up even in relation to positive action financed with public funding. In fact, leaving aside a general report on the current state of implementation of the principle of equality, the Code does not provide for any duty for institutional bodies, such as Equality Advisers and EONC (Equal Opportunities National Committee),[365] to monitor and to specifically report on the activity of promotion of positive action plans and on its effects.' We shall return to the wider implications of this lack of systematic monitoring subsequently. For the moment, we can simply note that it presents us with a problem in attempting to identify the full range of positive action measures that may be being used at the national level. For the future, more monitoring of the take-up of positive action across the Member States at least, would be an important step forward, provided it was systematic, carried out regularly, and consistent across the EU.

A second problem arose: in attempting to construct a taxonomy of positive action measures, national experts rightly pointed to the fact that whether a particular measure was considered to amount to positive action would depend on whether 'positive action' was considered to include measures initiated by an employer simply to secure the objective of effectively promoting gender equality in employment, and nothing more. It is here that the importance of the terminological diversity, and conceptual confusion discussed in Chapter 4 has clear effects. The different national approaches complicate identification and comparison. In **Austria**, the Equal Treatment Act for the Private Sector refers to '*Positive Maßnahmen*' (positive measures),[366] which it defines as 'measures in legislation, […], collective bargaining instruments, or in general mandates by employers, that aim at the furtherance of the equality of men and women', especially by 'the elimination of factual inequalities of men and women'.[367] The wording of this provision

364 There are several alternative taxonomies, see e.g. Oppenheimer, D.B. (1988) 'Distinguishing Five Models of Affirmative Action', 4 *Berkeley Women's L.J.* 42, based largely on experience in the United States.

365 Article 20 of the Code of Equal Opportunities provides that the Minister of Labour shall report to Parliament at least every two years. Under Article 15 of the Code of Equal Opportunities, the National Equality Adviser and the Local Equality Advisers shall report to the Ministry of Labour and to local governmental bodies respectively, only on their own activities.

366 Austria, Equal Treatment Act for the Private Sector, Section 8.

367 http://www.ris.bka.gv.at/GeltendeFassung/Bundesnormen/20003395/GlBG%2c%20Fassung%20vom%2011.03.2019.pdf.

seems to allow for the inclusion of a wide range of positive action measures. In **Luxembourg**, however, the Labour Code defines positive action measures 'as concrete measures conceding specific advantages in order to enable the underrepresented sex to exercise a professional activity or to prevent or compensate for disadvantages in the professional career path'.[368]

In **Sweden**, the question of whether a provision is categorised as positive action is not always easy to answer because, generally, a difference is made between 'positive action proper' and 'active measures'. As the national expert suggested was the case in **Portugal**, it is not possible to answer this question without taking into consideration the notion of positive action adopted by the Labour Code. According to the Labour Code,[369] positive action is 'a legal measure of limited duration in favour of a group, placed in a disadvantaged situation because of a discrimination ground, and aiming to grant equal conditions in the access to or in the exercise of legal rights or correcting a factual discrimination which already exists'. The expert from Portugal further observes: 'Some of the examples of positive action [to be considered below] do not fall under this strict notion, so they would not be identified as positive action. Nonetheless, some of them are indicated in the law or put in place in practice with the objective of effectively promoting gender equality in employment, so they can be viewed as positive action.'

Thus, what constitutes examples of positive action will depend on whether a more restricted idea of positive action was adopted by the national experts, such as that the measure needed to be specifically listed in the relevant legislation providing for positive action (a criterion adopted by the experts from **Cyprus** and **Denmark**), that it be of a limited duration (**Italy**), that it necessarily involved preferential treatment, and that it involved the use of numerical targets or quotas (as is often the case in **Germany**). Thus, the Italian expert pointed to the fact that in **Italy**, 'the definition of positive action, provided by legislation, includes an open typology of activities, which means that all kinds of measures can be adopted so as to pursue the objectives provided by the discriminatory legislation. This involves that positive action measures are neutral (i.e. symmetric) measures as well as preferential (i.e. asymmetric) measures and that numerical targets are relevant or not as the case may be.' An additional distinction contributes to the different responses of the national experts: positive action was considered by some as necessarily involving actions being taken that went beyond what was legally obliged, whilst others considered that voluntariness and lack of compulsion was not a requirement for the identification of positive action. Given these problems, the approach taken in this chapter is broad and open.

Types of positive action measures

Category I: Anti-discrimination activities as positive action

1. Activity preventing and remedying direct discrimination
2. Activity taken proactively to remove indirect discrimination, systemic and institutional discrimination.
3. Reasonable accommodation measures taken to enable an individual from a particular group to gain access to particular employment, or a particular service, for example.

Category II: Positive action without preferences

4. Collecting statistics and monitoring participation of the underrepresented group.
5. Indirectly inclusionary measures.
6. Advertising targeting the underrepresented group.
7. Training targeting the underrepresented group.
8. Reducing disadvantages suffered by a particular group.

368 Luxembourg, Labour Code, Article L.243-1.
369 Portugal, Labour Code, Article 27.

Category III: Preferential treatment positive action

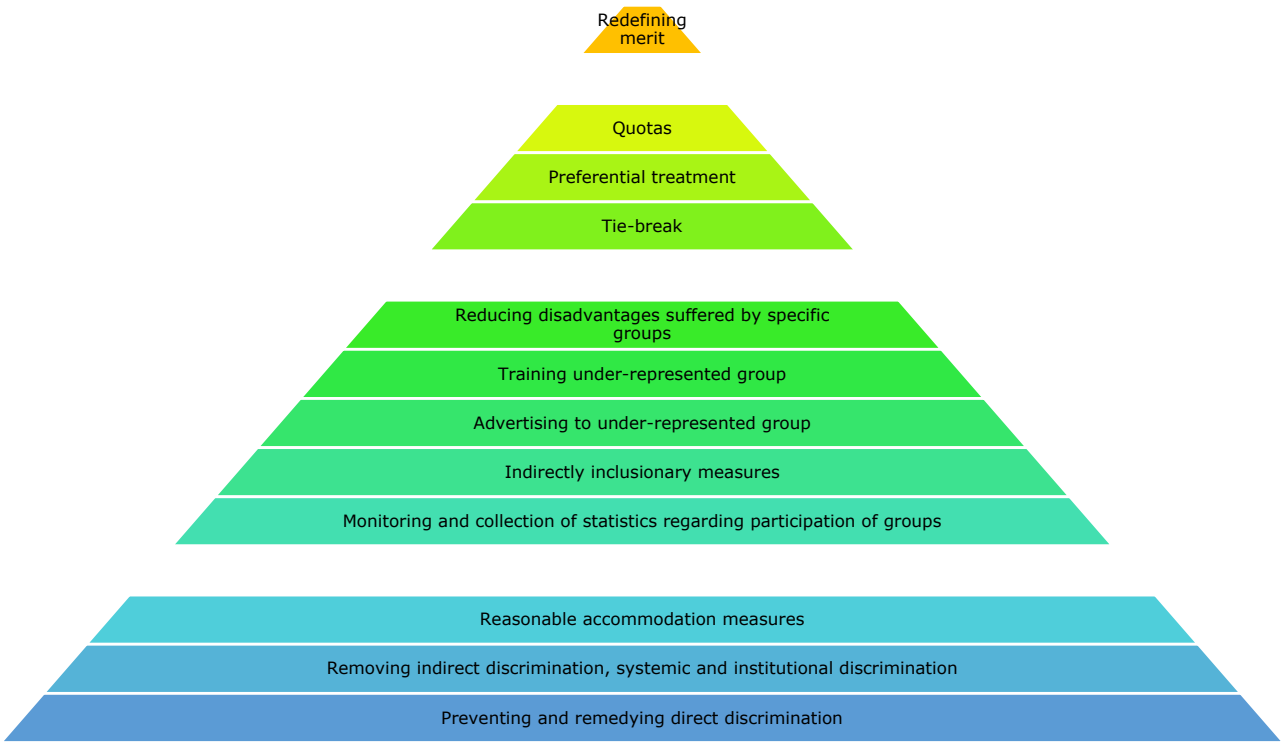
9. Tie-break policies: preferring an individual from the underrepresented group where equally well qualified.
10. Preferential treatment for less-qualified members of the targeted group.
11. Quotas.

Category IV: Redefining merit

12. Redefining merit.

We can picture these different types of positive action in the form of a pyramid, with the most common, and least controversial measures located nearer the base of the pyramid, and the least common, and (probably) most controversial located nearer the apex of the pyramid. The more controversial the measure, the more likely it is to be scrutinised intensely. In **Norway**, for example, an invitation of underrepresented groups to an interview is regarded as a mild form of positive action, and this has relevance when it comes to how strictly the principle of proportionality is applied. The principle of proportionality for positive action is applied more strictly when it comes to hiring someone for a position than simply encouraging them to apply, or inviting candidates to interviews. In the remainder of this chapter, we first sketch the different types of possible measures, and how they relate to conceptions of merit, and then consider how far these different types of positive action are present in EU and EEA states, in the context of gender equality, taking each category in turn.

Positive action pyramid



7.3 Positive action as an umbrella concept: a preliminary comparative taxonomy

The first group of actions that some jurisdictions regard as 'affirmative' or 'positive action' are those measures listed in the accompanying table as numbers 1 to 3. In this first category (category I), active anti-discrimination policies are regarded as positive action. A good example of these being designated as 'affirmative action' is to be found in the South African Employment Equity Act 1998, which specifies that the types of affirmative action contemplated include 'measures to identify and eliminate employment barriers, including unfair discrimination, which adversely affect people from designated groups', and 'making reasonable accommodation for people from designated groups.' It is controversial whether these measures would be regarded as a form of affirmative action in other jurisdictions – in the United States, for example, they would be unlikely to be classified as such, and it raises the interesting issue of the relationship between the concepts of reasonable accommodation and positive action. These three activities (1 to 3) amount to little more than adopting measures to help avoid what is generally unlawful discrimination, for example where the employer agrees to remove symbols from the workplace that may well constitute unlawful harassment against a particular group if they remained, or where the system of 'last in, first out' as the basis for making redundancy decisions is replaced by a system with less adverse effects on newly hired minorities, or where an equality body engages in a campaign to urge employers not to discriminate, or where an employer is required to make reasonable efforts to accommodate persons with disabilities.

The next category of activities that have frequently been regarded as coming under the 'positive action' umbrella (category II) consist of measures that are conscious of the group dimensions of inequality (4, 5, 6, 7, 8), but without engaging in direct preferential treatment of members of the targeted group. Perhaps least controversial are activities such as the collection of statistics by way of monitoring the participation of women and men in employment (4). These measures are adopted to enable discrimination to be more easily proven, disadvantage to be more easily identified, or the need for further positive action measures to be identified. Subsequent measures address these inequalities rather than merely identifying where they exist. Indirectly inclusionary measures, such as government assistance targeted at all those returning to work, for example, result in women benefitting disproportionately because they are disproportionately represented in the targeted group. This activity (5) involves measures being adopted that go beyond avoiding simple direct or indirect discrimination. In the United States, there was much discussion during the 1990s as to the possibility of replacing 'affirmative action' measures that explicitly took race into account, with measures such as these. The University of Texas adopted a system of guaranteeing admission to those students at the top 10 % of their class in each high school in Texas. Given the highly segregated nature of much of the school system in Texas, this had the effect of producing a significant number of black and Hispanic students eligible for admission to the university.

Advertising (6) by employers, government bodies or others, specifically targets the gender group that is considered underrepresented in a particular type of employment that is non-traditional for that group, for example advertising encouraging women to become firefighters. Special training (7) offered by employers, government bodies or others, also specifically targets the gender that is considered underrepresented in a particular type of employment that is non-traditional for that group, for example providing special training to men wanting to become teachers of children under 10 years old. Measures adopted by the employer to encourage the underrepresented group to remain in employment by providing facilities lessen particular disadvantages (8), e.g. providing women with children preferential access to child-care facilities, thus encouraging them to take up employment in these firms. These three programmes are designed to attract or retain qualified candidates from the previously underrepresented group in two ways: first, by bringing employment opportunities to their attention and encouraging them to apply; secondly, by providing better training to equip them for competing on equal terms when they do apply; and thirdly, by attempting to reduce burdens particularly associated with that group. These types of measures are sometimes said to operate on the 'supply side' of the equation, meaning that they are intended to change the behaviour of the underrepresented group, rather than on the 'demand side',

meaning measures that are intended to affect the behaviour of employers towards what counts as a qualification for the job.

The third category of activities operate on the 'demand side' (category III), and involve the use of preferential treatment of members of the targeted group. Tie-break policies (9) prefer an individual from the underrepresented group where he or she is equally well qualified as a candidate from the overrepresented group; for example, where both men and women candidates for an engineering job are equally well qualified, and the woman candidate is chosen because men are overrepresented in engineering employment. Although controversial, they are among the more common types of affirmative action in practice. They involve the direct identification of individuals from the targeted group as beneficiaries of the policy, but they have no clear impact on traditional conceptions of 'merit' since in neither of these two types of affirmative action are traditional conceptions of merit changed or challenged.

The next type of affirmative action measure is one that is probably most associated in the European public mind with American-style affirmative action, although in practice these measures have long ceased to be commonplace there, if they ever were. These are the affirmative action measures that elicit the most heated debate, consisting of measures (10) that involve preferential treatment for members of the underrepresented group, where the candidate may be less well qualified than another candidate but still sufficiently well qualified to be able to do the job in question. There are considerable differences between different types of measures that fit under this broad heading, relating to the type of preference accorded, and the situation in which the preference is accorded. It is also worth distinguishing between preferences for a particular candidate from the underrepresented group where the preferred candidate is less well qualified, from where there is a general quota in favour of candidates from the underrepresented group (11).

In category IV, employers or the state change traditional criteria for employment or promotion in such a way that the new criteria are more likely to favour candidates from the underrepresented group, modifying traditional 'merit' in favour of increasing participation (12). Redefining merit involves changing the traditional criteria for employment, for example, in such a way that the new criteria are more likely to favour candidates from the underrepresented group, for example, requiring a proportion of candidates for the police force to be from a particular ethnic group in order to ensure that policing is acceptable to that group.

7.4 Merit and positive action

The merit principle plays a significant role in the distribution of scare resources, such as employment,[370] and usually operates in the following formula: 'S merits X by virtue of M,' where S is a person, X a mode of treatment or an outcome, and M some feature possessed by S.[371] What is involved, in other words, is the selection of a person for the purposes of distribution of a benefit to that person, on the basis of some criterion. So, for example, we might say that John (S) merits the award of the job (X) by virtue of having the necessary qualifications for the job (M). Or, that Mary (S) merits appointment to the board of a company (X), by virtue of her qualities of determination, clarity of thought, and ability to work hard, which we think are likely to make her a good board member in the future (M).

Some may argue that the state should not attempt to influence, or determine, the content of what M should be, in particular perhaps in the private sector of employment, where employers should be free to determine the issue for themselves. However, in framing anti-discrimination legislation, the state has already begun to take a stand on the content of the formula. In this case, the formula would be more

370 This section draws from McCrudden, C. (1998) 'Merit Principles', *Oxford Journal of Legal Studies*, Volume 18, Issue 4, Winter 1998, 543.

371 Fallon, R. (1980) 'To Each According to His Ability, From None According to His Race: The Concept of Merit in the Law of Antidiscrimination', 60 *Boston University Law Review* 815.

accurately framed as 'S merits X by virtue of M (M being any consideration other than R; R being the disfavoured quality or feature, such as a person's race or gender). In this sense, the merit principle is satisfied if the process by which job allocations are determined is not tainted by these factors.

This 'negative approach' is probably the simplest conception of merit, where it is used to rule out cronyism, political favouritism, nepotism, or direct discrimination. As the pursuit of equality moves beyond an anti-discrimination approach, however, the more the state is required to take an increasingly complex position on what M should consist of. This more 'positive approach' to merit tends to be more controversial in its meaning and implications. We can identify at least two 'positive' understandings of merit, in addition to this first, 'negative', understanding.

A second approach requires that the quality M must be one that is regarded as societally valuable (intelligence, dexterity, etc.), job related, and validated in such a way as to demonstrate that it accurately predicts the ability to do a specific, and identifiable, feature of that job. Using the idea of tightness of fit, this second approach requires the employer to have demonstrated, for example, that a job aptitude test used by that employer actually does measure some valuable attribute that the particular candidate has, which is specifically, and demonstrably, related to a particular job the employer wants to fill. In this conception of merit, as Fallon writes, merit becomes the 'possession of precisely those qualities of excellence needed to perform a functionally defined task.' Under this second conception of merit, what the attribute achieves is doing 'the job' better. We see this approach to merit being adopted in the context of the prohibition of indirect discrimination, for example. This second conception of merit also has a sense that the job being filled is fairly well defined. The approach is based on a belief that merit can be determined, at least to some extent 'objectively', and also individualises employment decisions to a significant degree.

As regards the various types of positive action measures we have considered so far, we can say that category I measures are most closely related to the first conception of merit, and category II measures are most closely related to the second understanding of merit. The first and second conceptions of merit we can view as 'traditional merit'.

A third conception of merit does not hold to the limited conception in the second conception of merit of what it is that a person is being selected to do, or what are to be regarded as relevant attributes for selecting between candidates. Fallon encapsulates this approach by describing merit 'as the capacity to produce valued results within a specific context, regardless of whether the capacity arises from qualities generally esteemed as socially useful'. So, under this conception of merit, the attributes of persons (S), which will lead to them being able to contribute to fulfilling the goals of the organisation in which they work, or meeting wider societal goals, could also constitute 'merit'. Under the third conception, the attribute that S has is serving the organisation's or society's needs better, in ways which one would be hard put to view as part of the job narrowly conceived.

We have identified the concept of 'merit' as a significant element in distinguishing between category II and category III measures. Category III measures of affirmative action (10-11) are seen as posing the greatest challenge for traditional conceptions of 'merit' in the sense that, in 10 and 11, 'traditional merit' is either overridden in favour of increasing participation, or the attributes of S are taken into account. In category IV (12) 'merit' is redefined to include characteristics that the targeted group are more likely to have. The relationship between the positive action measures identified in category III and 'merit' is somewhat ambiguous, in that the importance attached to equality may be such as to lead to merit being overridden, or to an additional attribute being introduced into the equation that fits with the third conception of merit, such as in the requirement to take gender into account positively in tie-break situations. This third understanding of merit is, however, more clearly demonstrated by category IV measures, in which merit is explicitly re-defined.

7.5 Anti-discrimination as positive action (category I)

7.5.1 Activity preventing and remedying direct discrimination

Although employers would, of course, be permitted (indeed, in some cases, required) to take such action, a clear majority of national experts in EU and EEA states would not consider this type of measure to constitute positive action (**Belgium**, **Bulgaria**, **Croatia**, **Czech Republic**, **Denmark**, **France**, **Germany**, **Greece**, **Hungary**, **Ireland**, **Latvia**, **Lithuania**, **Netherlands**, **Norway**, **Slovenia**, **Spain**, **Sweden**), usually because such an action is merely an application of an active anti-discrimination approach. Some comments from the national experts illustrate this general reaction: 'This type of measure is not seen as positive action at this point because they are not directed only towards one sex but seen as preventing and remedying direct discrimination' (**France**); 'Given that the adoption of measures against sexual harassment is an obligation for the employer, it seems doubtful that it could be considered a positive action measure, although this issue has never been raised (**Spain**); 'In the author's view, this kind of action cannot be deemed positive action but rather compliance of the employer to the explicit prohibition of sexual harassment as a form of gender discrimination' (**Greece**); 'This will [only] qualify as fulfilment of the employer's duties under the law to prevent discriminatory actions or harassment' (**Lithuania**).

There is, however, a significant minority of experts who would regard such action as constituting positive action (**Estonia**, **Finland**, **Iceland**, **Italy**, **Luxembourg**, **Malta**, **Portugal**, **Romania**, **Slovakia** and **United Kingdom**).[372] A variety of different reasons are advanced. The expert from **Portugal** considers that this measure can be considered as a positive action, even if it does not strictly fall under the notion of positive action inscribed in the Labour Code.[373] The expert from **Romania** reports that the National Agency for Equal Opportunities Between Women and Men considers this measure as being a positive action,[374] but the national expert disagrees, considering that this measure does not fall under the legal definition of positive action.[375] The expert from **Malta** reports that more than 70 organisations in Malta have received the equality mark certification by the National Commission for the Promotion of Equality (NCPE), and that one of the requisites in order to be eligible is a sexual harassment policy, which needs to be brought to the attention of all employees.[376] In **Luxembourg**, it is part of the 'equal treatment domain' of the national plan for gender equality and therefore constitutes positive action. In **Slovakia**, the Anti-Discrimination Act states: 'Observance of the principle of equal treatment means also to adopt measures for the prevention of discrimination'.[377] According to some experts this article provided a mandate for positive action in the period in which there was no specific definition of it. In **Iceland**, positive action entails that employers with more than 25 employees are bound by the Gender Equality Act No.10/2008 to adopt a gender equality programme, which includes measures preventing bullying, sexual harassment and harassment within the workplace.[378]

7.5.2 Activity taken by an employer proactively to remove indirect discrimination, systemic and institutional discrimination

Although employers would, of course, be permitted (indeed, in some cases, required) to take such action, a clear majority of national experts in EU and EEA states would not consider this to constitute positive action (**Belgium**, **Bulgaria**, **Croatia**, **Czech Republic**, **France**, **Germany**, **Greece**, **Iceland**, **Latvia**,

372 In the case of Iceland, this is because Art. 22 of the GEA goes further than just prohibiting sexual harassment. It explicitly states that: 'Employers and the directors of institutions and non-governmental organisations shall take special measures to protect employees, students and clients from [gender-based violence, gender-based harassment or sexual harassment] in the workplace, in institutions, in their work for, or the functions of, their societies, or in schools.'

373 Portugal, Labour Code, Article 27.

374 National Agency for Equal Opportunities Between Women and Men, Response No.877/DSPPMES/SV/CGN/28.03.2019.

375 Romania, Law 202/2002 on equal opportunities and equal treatment between women and men, Article 4(e).

376 https://ncpe.gov.mt/en/Documents/The_Equality_Mark/Equality_Mark_Information_Document_2019.pdf.

377 Slovakia, Anti-Discrimination Act, Article 2(3).

378 Iceland, GEA, Article 18.

Lithuania, **Malta**, **Netherlands**, **Norway**, **Romania**, **Slovenia**, **Spain** and **Sweden**), again, because such an action is merely an application of an active anti-discrimination approach. Some comments from the national experts illustrate this general trend: 'These types of measures are, as far as I know, not seen as a form of positive action' (**Netherlands**); 'It has never been considered if a measure like this could be considered a positive action measure' (**Spain**); 'These measures are not seen as positive action at this time but removing indirect and systemic discrimination could become positive action when the first class actions on sex discrimination are introduced[379] since one of the possible remedies outside of financial remedies provided by the new law is to stop the discriminatory violation in the future'[380] (**France**); 'In Sweden, employers are required to work proactively to prevent discrimination. However, such activities are not considered positive action measures proper. Instead, they belong to the area of (preventive) active measures to promote equal rights and opportunities at the work place' (**Sweden**).

There is, however, a significant minority of experts who would regard such action as constituting positive action (**Estonia**, **Finland**, **Hungary**, **Ireland**, **Italy**, **Luxembourg**, **Portugal**, **Slovakia**, **United Kingdom**). A variety of different reasons are advanced that are similar to those under the previous discussion. Both Ireland and Hungary provide practical examples: In **Ireland**, the requirement to remove all questions in an application form for promotion which indicate that the employee had time off for caring responsibilities, would be perceived to be positive action.[381] In **Hungary**, the Academy of Sciences[382] has introduced an extension of the age limit (of 30 years as a default) set for junior research fellow positions by two years per child in case of female applicants raising young children (below the age of 10 years); male applicants may be also eligible for this extension if they have spent some time on parental leave, or if they are single fathers (a similar measure is applied in the case of a postdoctoral fellowship of the Hungarian Academy of Sciences).[383]

7.5.3 Reasonable accommodation measures taken to enable an individual from a particular group to gain access to particular employment

Although employers would, of course, be permitted (indeed, in some cases, required) to take such action, a clear majority of national experts in EU and EEA states (**Belgium**, **Bulgaria**, **Czech Republic**, **France**,[384] **Germany**, **Greece**, **Hungary**, **Ireland**, **Lithuania**, **Luxembourg**, **Netherlands**, **Norway**, **Portugal**, **Romania**, **Slovakia**, **Slovenia**, **Spain**, **Sweden**) would not consider this to constitute gender-based positive action, either but rather to constitute a separate conceptual category, that is, reasonable accommodation of disabled workers, or as a measure required in order not to unlawfully discriminate on grounds of disability (**Belgium**, **Croatia**, **Germany**, **Greece**, **Hungary**, **Ireland**, **Latvia**, **Lithuania**, **Norway**, **Poland**, **Portugal**, **Slovakia**, **Sweden**).[385]

379 The first sex discrimination class action suit in employment is due to be introduced in France in 2019.

380 France, *Loi n° 2016-1547 du 18 novembre 2016 de modernisation de la justice du XXIe siècle,* Article 62: 'when several people placed in the similar situation suffer from a harm caused by the same person, caused by a common violation, a group action can be introduced to consider the individual cases presented by the plaintiff. This action can be introduced to request the end of the violation (*cessation du manquement*) just mentioned or to prove the liability of the person who caused the harm to obtain a financial remedy for the damages, https://www.legifrance.gouv.fr/affichTexteArticle.do;jsessionid=94C5A275803E2BA89C27DAAAB770CE59.tplgfr21s_1?idArticle=JORFARTI000033418945&cidTexte=JORFTEXT000033418805&dateTexte=29990101&categorieLien=id&oldAction=.

381 Equality Tribunal, *Sheehy Skeffington v NUI Galway* DEC-E2014-078. https://www.workplacerelations.ie/en/Cases/2014/November/DEC-E2014-078.html.

382 *Magyar Tudományos Akadémia*.

383 See the latest call: https://mta.hu/aktualis-palyazati-kiirasok/mta-premium-posztdoktori-kutatoi-program-109449.

384 The French expert notes: 'There are no such reasonable accommodations outside of the efforts for the physically disabled who are women but since the *Bougnaoui* and *Achbita* case, a form of narrow reasonable accommodation such as efforts for job reassignment in jobs with no customer contact for female employees who are veiled and in contact with customers are required if the company has a neutrality rule in its internal regulations to avoid indirect discrimination liability. These measures are required.' Court of Cassation (Social Chamber) 22 November 2017 n°13-19.855; CJEU, judgment of 14 March 2017, C-188/15 *Bougnaoui*, ECLI:EU:C:2017:204 and judgment of 14 March 2017, C-157/15 *Achbita*, CLI:EU:C:2017:203.

385 The German expert notes: 'Reasonable accommodation is generally covered by special statutes on the equality of persons with disabilities which developed mainly independent from gender equality law. But interesting enough: The new statute on maternity protection has chosen a reasonable-accommodation-approach without saying so explicitly.'

7.6 Positive action without preferences at the point of hiring or promotion (category II)

7.6.1 Monitoring the participation of women and men in employment

It is important to distinguish the type of statistics that might be available, how they are used, and their connection with positive action. We can first identify states in which general employment statistics are differentiated by gender (for example, **Hungary**,[386] **Malta**[387]). Some states take this general approach further, by requiring that all employment-related statistics be gender differentiated (for example, **Croatia**,[388] **Iceland**, **Portugal**, **Sweden**[389]).

Second, we can identify states in which gender-based, firm-level statistics may be collected as part of the preparation and subsequent presentation of a case aiming to prove gender discrimination (for example, **Finland**, **Ireland**,[390] **Netherlands**, **United Kingdom**), either at the request of a potential or actual complainant (**Finland**, **Netherlands**), or equality body (**Finland**) or labour inspectorate (**Italy**), although there are states in which the collection and use of statistics in such a way is problematic (for example, **Finland**, regarding employer-level statistics relating to pay in the private sector), as information on public employees' pay is public, whereas that of private ones is not, etc. Whether any of these measures would be regarded as positive action depends very much, as we have seen on the definition of positive action adopted in the relevant state, with some states regarding some or all of these measures as positive action (for example, **Luxembourg**, **Norway**) but most not regarding them as such (for example, **Latvia**, **Netherlands**, **Portugal**, **Romania**, **Sweden**). In **Romania**, the NCCD (National Council for Combating Discrimination, the national equality body) decided that appointing an exclusively male board in a public company without making any effort to promote women amounted to sex discrimination.[391] The case concerned a local administration, which owned a public company dealing with water supply at the local level. The NCCD found that the defendant had not fulfilled the burden of proving that it aimed to promote women, but for objective reasons had failed thereby setting a standard in this regard. From this case, it appears that, when statistics about gender representation are available to the NCCD, its approach is to consider the absence of efforts towards better gender representation *per se* as amounting to sex discrimination.

The connection between the use of firm-level statistics and positive action measures is more evident where the collection of such statistics is seen as an important part of the process of determining whether to engage in other positive action measures, and if so of what type. In most states, this use of statistics is legally permitted, or even encouraged. In **Cyprus**, Law 205(I)/2002 on equal treatment between men and women in employment and vocational training contains a provision that could potentially facilitate proving discrimination: employers are encouraged to provide statistical data to employees or their representatives regarding the percentages of men and women in the different hierarchical positions and design measures for improvement.[392]

In a few states, there are elements of legal compulsion. For example, in **Iceland**, the Directorate for Gender Equality has the function of monitoring gender equality developments in society, i.e. by gathering information and initiating research.[393] Enterprises and institutions with more than 25 employees, on average over the year, are required to set themselves a gender equality programme or to mainstream

386 See: 'Equality of opportunities on the labour market' (*Munkaerő-piaci esélyegyenlőség*), 2003-2018, http://www.ksh.hu/thm/2/indi2_3_3.html.
387 https://nso.gov.mt/en/News_Releases/View_by_Unit/Unit_C2/Labour_Market_Statistics/Documents/2018/News2018_202.pdf.
388 Croatia, Gender Equality Act, Article 17(1).
389 Sweden, Ordinance amending ordinance (2000:605) on annual report and budget figures.
390 Ireland, Employment Equality Act 1998 (as amended), Part VII.
391 CNCD, Decision No. 335 of 18 June 2014, available at http://nediscriminare.ro/uploads_ro/docManager/541/hotarare_335-14_Freies_Europa_dosar_148-14_g_I_constatare_cu_avertisment.pdf.
392 Cyprus, Law 205(I)/2002, Article 19A.
393 Iceland, GEA, Article 4(g).

gender equality perspectives into their personnel policy. Enterprises and institutions with more than 25 employees must provide the Directorate for Gender Equality with a copy of their gender equality plan together with their action plan when the directorate so requests.[394] In **Belgium**, in the public sector, the RD of 27 February 1990 provides that one of the tasks of the civil servant appointed to deal with positive action is to compile a report on the respective situation of men and women in his/her public service. Such collecting of statistics is now also part of diversity policies. However, the collection of statistics as such is not considered as a positive action but as a necessary step to draw up an action plan and prove the necessity to take positive action. Collection of data is seen as a necessary preliminary step to prove the inequality and therefore justify the adoption of positive actions (see also, **Greece**).[395]

The reports of the national experts also give indications of when linking the collection of statistics with positive action may be unsuccessful. In **Estonia**, the Gender Equality Act stipulates that an employer shall collect statistical data broken down by sex concerning employment that allow, if necessary, the relevant institutions to monitor and assess whether the principle of equal treatment is complied with in employment relationships.[396] The procedure for the collection of data and a list of data must be established by the Government of the Republic by a regulation. These requirements entered into force in 2004. The Government has not yet issued the required regulation. The majority of employers do not, therefore, collect data broken down by sex for gender equality/balance analysis.

The most interesting examples are of states that provide a specific mechanism whereby the statistics become part of an explicit process by which positive action measures are likely to be negotiated on the basis of these statistics. In **Italy**, the Code of Equal Opportunities (Decree No. 198/2006) on the release of information and data at firm level is worth mentioning.[397] It provides that, every two years, public and private companies employing more than 100 employees will submit to regional equality advisers and trade unions a report concerning the situation of male and female employees in all jobs existing in a company, in relation to appointments, training, professional promotion, pay levels, mobility between categories and grades, other mobility aspects, redundancy funds, dismissals, early retirement and retirement, and the remuneration actually paid. Moreover, the regional equality adviser shall also prepare the data from the report and send them to the national equality adviser, to the Ministry of Labour and to the Department for Equal Opportunities, which is part of the Prime Minister's Office.

In **France**, in private employment, two obligations were progressively required as regards monitoring the participation of women and men in employment, with developments that show the limits of their scope. In the first phase, a report on the comparative status of men and women was required.[398] This obligation dated from the Roudy equality law of 1983[399] and was reinforced by the Law on equality of 9 May 2001 and the 2014 law on real equality.[400] Each year, companies[401] are required to inform employee representatives of the results of this numerical analysis, which shows the situation of women and men in hiring, training, promotion, qualifications, grade, working conditions and wages. This analysis is common to all companies with more than 50 employees. The second phase is the recent decree on indicators to fill the gender wage gap and monitor the promotion of women and men with specific actions.[402] The

394 Iceland, GEA, Article 19(3).
395 According to Article 13 of the recent Act 4604/2019, public services, legal persons governed by public law and legal persons governed by private law belonging to the so-called 'General Government', are obliged to collect and keep statistical data based on sex for their areas of competence.
396 Estonia, Gender Equality Act, Article 11(5).
397 Italy, Code of Equal Opportunities, Article 46.
398 *Rapport de situation compare.*
399 France, Law No. 83-635 of 13 July 1983 ('Roudy').
400 France, Law No. 2014-873 of 4 August 2014 on real equality between women and men.
401 France, Labour Code, Art. L. 2323-57 (companies of over 300 employees) and Art. L. 2323-47 (companies under 300 employees).
402 France, Decree No. 2019-15, 8 January 2019: https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000037964765&categorieLien=id.

decree was adopted to implement Law No. 2018-771 of 5 September 2018,[403] which provides that in companies with more than 50 employees, the employer must publish annual indicators relating to the pay gap between women and men and the actions implemented to eliminate them. The decree also defines the methodology used to establish the indicators, with a sliding scale of information being required depending on the size of the company.[404]

As regards companies with more than 250 employees, Article D. 1142-2 of the Labour Code requires the publication of:

a) The gender wage gap between women and men, calculated in reference to the average of wages of women compared to the average of wages of men, by age cohorts and categories of equivalent jobs. The national expert observes that, although it is useful to look at the gender wage gap according to age cohorts because it reveals when exactly in their career women benefit from similar wages to men, to avoid only comparing wages according to the comparable position men and women hold regardless of how much time it took for women, the decree gives considerable leeway to employers to determine what constitutes categories of 'equivalent jobs' (after consulting the works council/CSE, the employer can classify workers according to their level, their hierarchical grade linked to job sector classifications or another method to rate jobs).

b) The rate of disparities in individual pay raises that do not reflect promotions between women and men. The national expert observes that focusing on the 'rate' of disparities in individual raises means publishing the disparity in the number of raises given to women and men but does not reveal the amount of wage for both categories actually awarded.

c) The rate of disparities in promotions between women and men. The national expert observes that publishing the rate of disparities in promotions between women and men reveals the difference in the amount of promotions distributed and says nothing about the nature of the promotions given to men and women.

d) The percentage of employees who benefited from a raise during the year of their return from their maternity leave if there were increase in wages during their leave. The national expert observes that the percentage of employees who benefited from a raise after their maternity leave is already a requirement (Article 1225-26, Labour Code).

e) The number of workers of the underrepresented sex among the 10 employees who earn the highest wages in the firm. The national expert observes that the number of workers of the underrepresented sex among the 10 best-paid employees is more of a strong symbol, than a key provision to fight gender wage disparities across the board in companies.

For companies with between 50 and 250 employees, the same statistics are to be published except those set out in point c above: there is no obligation to publish the rate of disparities in promotion between women and men. No statistics are required for smaller companies (under 50 employees), even though they constitute the largest part of employment.

The statistical results of the company are published each year on the website of the company, or in the absence of such a website, are circulated to employees by other means.[405] The critical connection with positive action comes from the further requirement that information must be given to the works councils and negotiations on professional equality. So, collective bargaining negotiations on equality are

403 France, Law No. 2018-771 of 5 September 2018, Chapter IV, Articles 104-107. https://www.legifrance.gouv.fr/eli/loi/2018/9/5/MTRX1808061L/jo/texte.
404 France, Labour Code, L.1142-8.
405 France, Labour Code, Art. D. 1142-4.

expected to focus on developing adequate and relevant measures to correct the gender wage gap.[406] The results are presented by socio-professional categories, levels, pay hierarchical grades or other rankings according to jobs. If the statistics cannot be calculated, the employer must explain why. In the event that no agreement on measures to be taken is made with employee representatives, the employer takes its own measures after consultation with the works council. This decision is monitored by the public authorities.

7.6.2 Indirectly inclusionary measures

All of the measures identified by the national experts relate to measures attempting to secure the protection of those who take time off from work for child-rearing or other family-care reasons. In **Germany**, in its '*Perspektive Wiedereinstieg*' (perspective re-entry) action programme,[407] the Federal Ministry for Family, Senior Citizens, Women and Youth supports women and men who have taken parental or care leave for several years, or who have reduced their working hours, when returning to working life or aiming for the expansion of their previous employment. As male employees increase their working time when becoming fathers and female employees reduce working hours or stop working, this programme is mainly aimed at women. Therefore, it is important that one goal of the programme is the renegotiation of the distribution of family and home care work between men and women. The national expert observes, however, that as the re-entry of female employees is to be reached by, amongst other things, the extension of household-related services, which are severely underpaid and mostly performed by women, questions arise as to which women will benefit from the programme and whether the programme in fact consolidates the gendered division of the labour market.

In **Spain**, the Workers' Statute stipulates circumstances in which dismissal without cause is considered null and void and therefore entitles workers to return to the same job.[408] A dismissal without cause will be null and void and require reinstatement in the following cases, among others: when a person with reduced working hours in order to care for children or relatives is dismissed, when a person who is on 'birth leave' (which includes maternity and paternity leave) is dismissed, or when the person who is on parental leave is dismissed. This measure has been expressly considered positive action by the Constitutional Court.[409] There are other measures that have a special impact on women and are, thus, indirectly inclusionary measures. These measures consist of deductions in the contributions to social security.

In **Portugal**, the Labour Code provides that workers with low academic qualifications or no specific skills, as well as workers responsible for single-parent families, and those that have been on leave for reasons related to maternity, paternity or adoption, have priority in access to professional training.[410] This provision may clearly favour women since they are more likely to be in the situations described by the rule. In **Latvia**, the Law on support of the unemployed and jobseekers[411] provides for the right of specific groups to special active employment measures, i.e., vocational training etc. One of the groups listed is parents following child care leave, and applies to both fathers and mothers. In **Ireland**, there are programmes focusing on getting women returning to work, more usually women in their fifties having spent some years raising their families. The Department of Employment Affairs and Social Protection provides various programmes and benefits for those returning to work, on a gender-neutral basis, although the effect will often benefit women more than men.[412] It should be noted, however, that there is virtually full employment in Ireland, so there is presently an abundance of jobs available (albeit many not at a level that a jobseeker may wish). In **Hungary**, employers are eligible for tax relief if they employ individuals

406 France, Labour Code, Art. D. 1142-6.
407 See https://www.perspektive-wiedereinstieg.de/Navigation/DE/startseite_node.html.
408 Spain, Workers' Statute, Article 55.5.
409 Constitutional Court, judgment 173/2013, of 13 October 2013.
410 Portugal, Labour Code, Article 30(3).
411 Latvia, Law on support of the unemployed and jobseekers, (*Bezdarbnieku un darba meklētāju atbalsta likums*), Official Gazette No.80, 29 May 2002, Article 3(1)(4). Available in Latvian at: https://likumi.lv/doc.php?id=62539.
412 http://www.welfare.ie/en/Pages/jobseekers_home.aspx.

(women or men) returning from parental leave.[413] In **France**, in the private sector, there are measures ensuring equivalent conditions for returning to work after parental leave, for example, which apply mostly to women.[414] In **Finland**, some companies offer care for sick children so as to facilitate parents of small children to attend work. Such family-friendly measures are assumed to be more important for women than men, as duties towards ill family members tend to fall on women more than on men.

In **Poland,** the return of mothers to work after childbirth and care-related leave was supported by EU programmes (initially by the Human Capital Programme and since 2014 by the European Social Fund under the regional operational programmes implemented in each *voivodeship*). The range of tools that can be used may vary from region to region. For the years 2014-2020, support for mothers financed from EU funds covers professional counselling combined with the preparation of an individual action plan, psychological counselling, employment agency, training courses, traineeships and apprenticeships, subsidised employment (covering part or all of the wage costs), co-financing of costs related to moving to another place where a job was found (settlement voucher), financial support for starting up business activity, combined with advisory and training support for the unemployed. European funds also support activities aimed at increasing the accessibility of kindergartens, crèches and children's clubs. The *voivodships* also offer grants for the creation of new childcare places for children under three years of age in nurseries and children's clubs, as well as the employment of day carers or nannies. Thanks to those activities, in 2014, for example, almost 10 000 people returned to the labour market after a break that was related to birth or parental responsibilities.

7.6.3 Advertising to the underrepresented group

In this section, we identify positive action measures required, permitted or prohibited in the pre-employment stage, with efforts being placed on encouraging individuals from under-represented groups to apply to firms that they might not previously have applied to, or training individuals in groups that are thought to lack certain skills to enable them to apply successfully for employment.

In **Finland**, over the years, there have been job advertisements that stress that a job is suitable for both men and women,[415] but such advertisements have become very rare. In the **Netherlands** there have been – and still are – many campaigns to interest girls/women in choosing to study in the natural sciences and technical subjects and to go to work in these areas. Also, there are advertisements that especially encourage young men to start work in education. These measures are not seen as positive discrimination as long as they can be seen as encouragement, raising awareness, training etc. However, when an advertisement states that a certain candidate is preferred, e.g. a woman or someone from a specific cultural background, this is seen as a forbidden form of discrimination. They are also prohibited if absolute and unconditional priority is given to women or other groups. Recruitment procedures must be open to both men and women, in order to make an individual comparison possible. Reserving jobs for women or other groups is in principle not allowed. However, encouraging individuals from underrepresented groups to apply is permitted, as long as the job is open to other groups as well.

In **Austria**, the Vienna Fire Department encourages women to apply for admission, but has gender-neutral testing procedures for physical and intellectual capabilities. Similarly, the Austrian Federal Police encourage young women to apply for entry tests. In the same manner, whilst admissions to higher education colleges (*Fachhochschulen*) for pre-school education are open for all genders, young men are encouraged to apply. In **Hungary**, the recruitment campaign of the National Police (*Országos Rendőr-*

413 Hungary, Act LII of 2018 on the social contribution tax (*2018. évi LII. törvény a szociális hozzájárulási adóról*), Article 11.
414 France, Labour Code, Article L1225-55: either after the parental leave for education, or a period of part-time work or the month following a request to return to work after the death of a child or a decrease in income (Art. 1225-52), the employee returns to his/her previous job or a similar job with an equivalent income.
415 Reflecting Section 6 (2) 1 of the Act on Equality.

főkapitányság),[416] explicitly targeted young people from the Roma minority, with a special focus on girls and women.[417] In **France**, there have been industry-wide plans to promote desegregated sectors, including a plan on digital technology industries in 2017 signed by the Secretary of State in charge of equality between women and men, the Ministry of Education and the Secretary of State in charge of digital technology with 15 companies involved in this area. The military including the Marines,[418] the corps of firefighters,[419] engineering,[420] and information systems[421] have also adopted outreach campaigns to bring more women into employment in these occupations. In **Sweden**, this kind of advertisement appears from time to time (for instance the army has had such campaigns), but it is not considered positive action; rather it is a part of the employer's overall work to promote gender equality.

In **Norway**, these measures are included in the description of positive action measures, and are permitted, but not required. Encouraging groups that are underrepresented in a particular field to apply for a position is permitted.[422] The positive action measure, to encourage an application, still has to promote equality, and be considered as a temporary measure to be permitted under the GEADA. In a case before the equality body,[423] the question at stake was whether or not a municipality had violated the Gender Equality Act when it specifically encouraged men to apply for positions in the health and care sector. The tribunal unanimously found that the municipality had good cause to specifically encourage men to apply for positions, as only 4 % of the employees were men. Under the Law on universities and high schools,[424] candidates from the underrepresented gender must be encouraged to apply for positions at universities.[425]

In **Denmark**, advertisements by employers, government bodies or others, which specifically target the gender group that is considered to be underrepresented in a particular type of employment or vocational training programme are permitted. According to the Ministerial Order on measures that promote equality, without dispensation, job advertisements are permitted that encourage the underrepresented gender to apply. Underrepresentation is defined as less that 25 % representation. One example might be advertisements encouraging women to become firefighters. Measures are also taken by ministries to encourage women and men to choose non-traditional fields of education and career paths, such as science and technology for women and caregiving roles for men. The Ministry of Education launched a nationwide effort to develop and disseminate good practice on educational environments, with a focus on attracting more females to traditional male programs and vice versa.

In **Germany**, several state authorities have been trying to attract men to become kindergarten teachers[426] and supporting women and girls to take up a MINT (maths, informatics, technology and natural sciences: *Mathematik, Informatik, Technik und Naturwissenschaften*) profession or to start the corresponding

416 Implemented in cooperation with FAERLEO (Fraternity Association of European Roma Law Enforcement – Európai Roma Rendvédelmi Bajtársi Közhasznú Egyesület).

417 See the webpage of the campaign, 'Diversity in Law Enforcement' (*Sokszínű rendvédelem*), http://www.sokszinurendvedelem.hu/. As noted earlier, in the absence of any monitoring, the impact of this campaign cannot be measured.

418 Plan to desegregate Marine Corps (recruitment, promotion, mentoring of women, changes in selection processes), see: https://www.meretmarine.com/fr/content/ministere-des-armees-un-plan-en-faveur-de-ma-mixite.

419 On the challenge of a very male-dominated profession, see: Pfefferkorn, R. (2006) 'Des femmes chez les sapeurs-pompier', *Cahiers du Genre*, 2006/1 (n° 40), pp. 203-230, https://www.cairn.info/revue-cahiers-du-genre-2006-1-page-203.htm. For more local initiatives, see: https://www.pompiers.fr/actualites/cis-breteuil-sur-iton-entre-mixite-et-parite.

420 Elite engineering state schools develop desegregation plans to deal with sexism: https://www.polytechnique.edu/fr/content/lx-sengage-contre-le-sexisme.

421 Initiatives from Google and Secretary of State for digital technology: https://www.usinenouvelle.com/article/femmes-et-numerique-trois-idees-a-retenir-de-la-soiree-pour-la-mixite-dans-le-monde-economique.N654809.

422 Norway, GEADA, Section 11.

423 LKN-2002-12.

424 Norway, Law on universities and high schools (*Universitets-og høyskolelove*), 2005. Available at: https://lovdata.no/dokument/NL/lov/2005-04-01-15?q=universitets-%20og%20høyskoleloven (Norwegian text).

425 Norway, Law on universities and high schools, Section 6-3(2).

426 The most famous campaign was initiated by the state of Hamburg, praising the diversity, challenges and fulfilment of the kindergarten teacher profession and presenting a range of male role models, see http://www.vielfalt-mann.de/. The state of Thuringia decided on a more regional approach without presenting role models who might be controversial, but by showing the gap, see http://www.werde-erzieher.de/.

training.[427] Some years ago, there was also a campaign to attract female firefighters, mainly voluntary firefighters, but also attacking gender stereotypes with regard to professional firefighters, too.[428] Since December 2016, a federal initiative[429] has offered those in career guidance a framework for networking, exchange and information.[430] The aim of the initiative is gender-sensitive career guidance and counselling that is free of gender stereotypes. Girls Day for girls in grades 5 to 10 takes place every April.[431] This nationwide action day brings girls closer to occupational fields – above all in technology, natural sciences, crafts and IT – in which they are still underrepresented. On Girls' Day, girls get the chance to think outside the box and question traditional role attributions when choosing a career. Since 2011, Girls Day has been accompanied by a Boys Day, which aims to expand the range of career choices by boys to future-proof professions, such as in the social and educational sectors and the health sector.[432] The Boys Day is intended to contribute to overcoming outdated role models and to opening up new perspectives for boys who are oriented towards their individual interests and strengths.

In **Iceland**, positive action is required in the pre-employment stage; at least, public institutions should encourage the underrepresented group to apply for advertised posts. The GEA stipulates that 'vacant positions that are open for application shall be equally accessible for women and men'.[433] It is common to see advertisements for public posts (for example, for the director of the central bank, and the police) that state: 'In light of the gender proportion within [...], women are in particular encouraged to apply for this post/job.'[434] The GEA provides that it is prohibited to advertise or publish an advertisement for a vacant position indicating that an employee of one sex is preferred over the other. This provision does however not apply if the aim of the advertiser is to promote a more equal representation of women and men within an occupational sector, in which case that must be stated in the advertisement.[435]

In practice in Iceland, such use of advertising and encouragement is not without controversy. There are conflicting views on how the above principle should work in practice. In 2017, the Directorate of Fisheries wanted to advertise for women to do the job of fisheries surveillance as there were far more men doing that job within the institution than women. The aim of the advertisement was to increase the number of women in this field. Before advertising, the Directorate of Fisheries sought advice from the Directorate for Gender Equality, which confirmed that advertising for women only was in accordance with the GEA in light of the objective of increasing the number of women.[436] The Ministry of Finance that operates the job forum within the executive branch did not, however, agree with the Directorate for Gender Equality, which tried to get the Gender Equality Complaints Committee to rule on the question (but the latter declined to do so). The Directorate of Fisheries withdrew the contested advertisement and the question still remains unsolved.[437] The Directorate for Gender Equality in its letter to the Gender Complaints Committee emphasised that a home for the elderly had earlier advertised for men as assistant nurses for the elderly in order to alter prevailing gender stereotypes about the roles of men and women in a nursing home where most employees are women. The Directorate for Gender Equality pointed to **Norway**, where municipalities advertise for male assistant nurses. In other states, for example **Malta**, this would be explicitly prohibited. In **Malta** few years ago, however, billboards advertising nursing courses and promoting men for nursing were placed in prominent places prior to the publication of applications for the University of Malta.

427 See https://www.komm-mach-mint.de/.
428 See http://www.feuerwehrverband.de/frauen-am-zug-material.html.
429 'Cliché-free – National cooperation on career and study choice'.
430 See https://www.klischee-frei.de/de/klischeefrei_64211.php.
431 See http://www.girls-day.de/.
432 See https://www.boys-day.de/.
433 Iceland, GEA, Article 20.
434 https://www.logreglan.is/tvaer-stodur-almennra-logreglumanna-lausar-til-umsoknar/; http://www.vb.is/frettir/konur-hvattar-til-ad-saekja-um-stodu-sedlabankastjora/106205/?q=Karlar.
435 Iceland, GEA, Art. 26(3).
436 Iceland, GEA, Art. 26(3).
437 http://www.ruv.is/frett/taldi-fiskistofu-ekki-mega-auglysa-eftir-konum.

7.6.4 Special training offered to the underrepresented group

In **Portugal**, several provisions of the Labour Code are good examples of this example of positive action. The Labour Code states that, when professional training concerns economic activities dominated by workers of one sex, workers of the underrepresented sex have priority of access.[438] The same priority is generally granted to workers with low academic qualifications or no specific skills, as well as to workers responsible for single-parent families, and to those who have been on leave for reasons related to maternity, paternity or adoption. This provision may clearly favour women since they are more likely to be in the situations described by the rule. In the **Netherlands**, there are various training programmes that are especially directed at women, e.g. training in leadership and/or career guidance or programmes for women with a low level of literacy. In **Spain**, Law 3/2007 establishes preferences for access to training for people who rejoin a job in the Public Administration after maternity, paternity or parental leave.[439] Law 3/2007 states as follows: 'In order to improve the training of public employees, preference will be given, for one year, in the allocation of places to participate in training courses to those who have joined the active service from maternity leave or paternity, or have re-entered from the situation of leave for reasons of legal guardianship and care for dependent elderly or people with disabilities.'[440] In the Public Administration, Law 3/2007 further provides: 'In order to facilitate the professional promotion of women and their access to management positions in the General State Administration and in public bodies linked or dependent on it, in the calls for the corresponding training courses, at least 40% of the places will be awarded to them as long as they meet the established requirements'.[441] In **Germany**, women's or gender quotas covered by the federal and state equality statutes are applied not only in case of recruitment and promotion but also in deciding on the allocation of traineeships. Public employers are required to give preferential treatment to women in the allocation of traineeships within the civil service. Many universities have developed special mentoring programmes for young female researchers and some offer at least a small range of women-only professional training.[442] Moreover, there are university mentoring programmes for women that not only support young researchers, but also graduating students with different career aspirations at the time of transition from university to profession.[443] Mentoring programmes for female employees striving for a leading position are known in some of the bigger private companies[444] and in the cultural sector.[445]

In **Romania**, a few years ago, the employment authorities used to organise job fairs dedicated to women. Several projects have been implemented to help women become entrepreneurs. In **Ireland**, there are special grants for employers who employ women as craft apprentices. In **Belgium**, organising assertiveness training for women to support their progression in the hierarchy is provided as an example in the recent Royal Decree of 2019. As mentioned, until recently, such positive action was only permitted for women. The Ancillary RD of 11 February 2019 provides examples of possible positive actions and specifically mentions training positions earmarked for the underrepresented sex, followed by employment if the trainee is evaluated positively. In **Italy**, professional training is nowadays less common in positive action plans than it was a few years ago. In particular, the national expert was unable to identify specific examples on training offered by employers, government bodies or others, which specifically target the gender group that is considered underrepresented in a particular type of employment non-traditional for that group. In **Norway**, 'special training' programmes (trainee positions) are temporary positions that are earmarked for certain groups that are underrepresented in that field. The aim of the trainee positions is to make it easier for people from underrepresented groups to take positions in a particular certain field,

438 Portugal, Labour Code, Article 30(3).
439 Spain, Law 3/2007, Article 60.
440 Spain, Law 3/2007, Article 60(1).
441 Spain, Law 3/2007, Article 60(2).
442 E.g. (randomly chosen) see https://www.uni-hamburg.de/career-center/infos-aktuelles/l-20-veranstaltungen.html.
443 Some examples are available under https://www.businessladys.de/mentoring-programme-fuer-frauen/.
444 E.g. Bosch, see https://initiative-chefsache.de/vernetzung-foerderung/bosch-mentoring-programme/.
445 See https://www.kulturrat.de/thema/frauen-in-kultur-medien/mentoring-programm/.

for example to recruit more men to work in kindergartens. When it comes to gender, an employer can use positive action measures equally to recruit men in groups where men are underrepresented.

In **Great Britain**, there are several examples relating to women and gender-segregated apprenticeships.[446] Jaguar Landrover has run a number of female-specific schemes to seek to recruit higher numbers of women into apprenticeships. For example, the 'Young Women in the Know' initiative targets female applicants and gives them a week of experience in the business prior to the assessment centre process. The number of female apprentices in Jaguar Landrover has increased each year, rising from 19 % in 2015 to 22 % in 2016.[447] BAE Systems tracks diversity and inclusion statistics throughout the recruitment process and has implemented a range of initiatives aimed at increasing gender representation. In particular, BAE Systems ensures that there is an equal gender split in the A-level scholarships it provides and also in work experience placements. In addition, it provides female-only placements for groups of young women.[448] Balfour Beatty runs work experience and pre-apprenticeship programmes for young women and seeks to recruit directly from these programmes onto its apprenticeship scheme. Equally, it provides specific scholarships to young female students and has set targets for the recruitment of women onto its apprenticeship and graduate schemes. In particular, in 2016 it was aiming to have a 20 % female intake of apprentices by 2017, 30 % by 2020 and gender parity by 2025.[449]

Again, some of these types of measures are controversial, even among the national legal experts. The expert from **Iceland** considers that even though, say, men are underrepresented as teachers of children under 10, it would seem awkward to assume that they would need special training other than that required for being a teacher at an elementary school, just as it would seem strange to offer women entering a field dominated by men 'special' training other than the required qualifications for the job. In several states such measures would appear to be prohibited. In **Latvia**, such measures would be considered as direct discrimination on the grounds of sex. In **France**, gendered training does not seem to be permitted. The special training in the public sector focuses on equality for women and men to promote employment for both genders in civil service.

7.6.5 Measures to encourage the employment of the underrepresented group by providing facilities that lessen particular disadvantages

Consideration of these types of measures divides states into two groups: those in which measures which are gender-neutral and non-preferential between individuals who are members of an underrepresented group are adopted by governmental organisations and employers (and which overlap significantly with what have previously been called 'indirectly inclusive measures'); and those states in which such measures are targeting members of the underrepresented group as such.

The bulk of states are in the former category. In **Italy**, many examples of positive action by public employers are geared to lessen the disadvantages of working parents, particularly women, but do not appear to prefer women. The 2017-2019 three-year positive action plan of the Court of Audit (Corte dei Conti) provides for positive action on reconciliation (between home and work life), such as teleworking, smart-working and special working time arrangements.[450] The 2019-2021 three-year positive action plan of the Udine Municipality also provides for positive actions on reconciliation through teleworking, smart-working, part time and other special working time arrangements.[451] In **Belgium**, in the public

446 Cited in Davies, C. (2019) *Exploring positive action as a tool to address underrepresentation in apprenticeships*, Equality and Human Rights Commission Research Report 123. Available at: https://www.equalityhumanrights.com/sites/default/files/research-report-123-positive-action-apprenticeships.pdf.

447 WISE, undated.

448 Young Women's Trust, 2017.

449 Young Women's Trust, 2017.

450 http://www.corteconti.it/export/sites/portalecdc/_documenti/amministrazione_trasparente/performance/piano_azioni_positive_2017_2019.pdf.

451 http://www.comune.udine.gov.it/files/comune/pari-opportunita/piano-azioni-positive/181217-pap2019_2021.pdf.

sector, the creation (in some federal institutions) of daycare schemes for the children of staff members (male and female) were adopted as positive action. In **Iceland**, access to childcare facilities would probably not be offered to women as a particular group even though they are underrepresented in the workplace, because reconciliation of work and family life is directed towards enabling women and men to reconcile their professional obligations[452] and doing otherwise would be taken as an indication that women are more responsible for taking care of their children. The Government Employees Act provides that: 'Employees shall have a right to flexible working hours. The head of an agency must agree to the wishes of employees in this respect as far as possible, (...) provided it does not interfere with the service of the agency to the public'.[453] There is no available information on how many state institutions have offered their employees flexible working time or the proportion of each gender taking advantage of such offers should they be available.[454]

The approach of several other states, or municipal governments comes under the second group. In **Italy**, the three-year positive action plan of the Bologna Municipality provides for the development of working patterns compatible with parenthood and for diversity management actions in favour of fathers geared to facilitate their family role.[455] In the past, in **Spain**, there were discounts on employers' social security contributions when women were hired in the professions where they were underrepresented, although these discounts disappeared, probably because they had no relevant effect in diminishing labour gender segregation.[456] In **France**, too, there used to be a rule in the public sector to postpone age limits in hiring for workers who had had three children or single parents with a disabled child. These age limits have been for the most part eliminated as age discrimination.[457] In **Malta**, a current example is the reduction of income tax for women over 40 years of age who have started employment after being inactive for more than five years.[458] In **Italy**, in 2015, a project of positive action on the return to work of women over 35 years of age was admitted to public funding.[459, 460] Moreover, the triennial 2017-2019 plan for positive actions of the Prime Minister Offices provides for actions geared to favour women's return to work after long absence.[461] In **Hungary**, employers are eligible for a tax reward if they employ women with three or more children.[462] In **Ireland**, the Bar of Ireland has been concerned about the numbers of young women barristers leaving private practice. A mentoring system has been put in place for first year barristers where in addition to the usual first year pupil/master arrangement with a junior counsel, the pupil also has a mentoring arrangement with a senior counsel, including mentoring arrangements for female barristers with female senior counsel. In **Germany**, in 2011, the State Labour Court of Rhineland-Palatinate decided upon the preferential treatment of female employees in the distribution of parking spaces close to the workplace.[463] The defendant hospital justified the preferential treatment of women when allocating parking spaces close to the clinic with the argument that women are more frequently victims of violent (sexual) assaults. The court accepted this justification and mentioned that this was similar to positive action.

452 Iceland, GEA, Article 21.
453 Iceland, Act No. 70/1996, Article 13.
454 https://www.stjornarradid.is/media/velferdarraduneyti-media/media/rit-og-skyrslur-2015/Stada_karla_og_kvenna_29052015.pdf.
455 http://www.comune.bologna.it/media/files/pap_20192021.pdf.
456 Spain, Law 22/1992, of 30 July 1992.
457 https://www.senat.fr/questions/base/2002/qSEQ021002969.html. Today these exceptions concern postponing the age of retirement because of child rearing: https://www.cnracl.retraites.fr/actif/ma-future-retraite/quand-puis-je-partir-la-retraite/recul-de-limite-dage-prolongation-et-maintien-activite.
458 https://www.timesofmalta.com/articles/view/20150807/business-features/Female-participation-in-the-workforce.579681.
459 http://sitiarcheologici.lavoro.gov.it/AreaLavoro/ParitaPariOpportunita/comitatoNazionaleParita-SPOSTATO-/Documents/D.P. C.M.%209%20settembre%202015%20-%20P. O.%202013.pdf.
460 Italy, Code of Equal Opportunities, Article 44 et seq.
461 http://presidenza.governo.it/AmministrazioneTrasparente/AltriContenuti/DatiUlteriori/DSG/PIANO_AZIONI_POSITIVE_PCM_def.pdf.
462 Hungary, Act LII of 2018 on the social contribution tax (*2018. évi LII. törvény a szociális hozzájárulási adóról*), Article 12.
463 State Labour Court of Rhineland-Palatinate, judgment of 29 September 2011, 10 Sa 314/11.

7.7 Preferential treatment positive action (category III)

7.7.1 Tie-break policies

In a significant majority of states, tie-break policies are legally permitted, although there is a significant minority of states in which it appears not to be permitted (**Cyprus**, **Denmark**, **Latvia**, **Lithuania**, **Malta** and **Slovenia**). In the case of **Lithuania**, it could be permitted but only if there is a special law doing so, which there has not been. In most states, however, the permissibility of such measures is based on an interpretation of national legislation (**Austria**, **Croatia**, **Finland**, **Greece**, **Portugal**, **Romania**, **Slovakia**), sometimes by national courts (**Norway**), and sometimes by other national bodies, such as equality bodies (**Netherlands**).

In some states, there are specific legislative provisions permitting this type of measure (**Belgium**, **Czech Republic**, **Estonia**, **Great Britain**, **Italy**, **Spain**, **Sweden**), sometimes with quite elaborate provisions specifying when it would be lawful. In **Belgium**, for example, such measures are explicitly permitted as positive action under certain conditions: that the measure should be a response to situations of *manifest inequality;* the removal of such situations should be identified as a target worth pursuing; the 'corrective measures' must be of a temporary nature; and these corrective measures should not restrain the rights of others unduly.[464] Such a measure could be applied in an enterprise, if the company has beforehand adopted a positive action plan featuring such a measure and if the vacancy announcement indicates that such a measure exists. In **Finland**, it is clear that a policy to prefer an individual from the underrepresented group may legally be chosen when the candidates are equally well qualified. Legislation allows it, but only where such policy is based on an existing equality plan (in a workplace, educational institution or authority). There have been policies to this effect in equality plans over the years. In **Ireland**, the Minister for Public Expenditure and Reform stated in January 2017 that there is a target of 50:50 gender balance in appointments at senior levels in the civil service. The merit-based approach of 'best person for the job' will continue to apply. In cases where candidates who compete for Top Level Appointment Committee (TALC) appointments are of equal merit, the priority would be given to the female candidates where they are underrepresented on the management board of the department/office in question.[465]

In most states in which such a measure is lawful, it is voluntary. In a few states, however, it is compulsory. In **Bulgaria**, if the candidates for positions in the state central and local administration have equivalent qualifications in relation to the requirements for the position, the candidate from the underrepresented sex will be appointed, except when there are specific circumstances for appointing the other candidate.[466] Such a positive action measure is required, provided no specific circumstances are present in favour of the other candidate inked to his or her social, health, family status, age and similar circumstances. In **Iceland**, the GEA stipulates that employers must take necessary measures to ensure that women and men have equal opportunities regarding vacant positions;[467] hence, if men are in a majority where two applicants apply, and a woman and a man who are equally qualified apply, then the woman should be hired. In **Germany**, the federal level and the federal states have enacted laws to further equality between the sexes, most of which oblige public institutions to enact plans to increase women's representation at all levels of employment, and to hire or promote women instead of equally qualified men, unless there are exceptional reasons to decide in favour of the male candidate. The preferential treatment of equally qualified women with regard to training, recruitment and promotion is conditional on women being underrepresented in the respective field or section of the civil service. In **Italy**, the Code of Equal Opportunities provides that in public employment, when there are male and female applicants with the

464 Conditions defined by the Constitutional Court (*Cour d'Arbitrage/ Grondwettelijk Hof*), 27 January 1994, Case no. 9/94.
465 https://www.per.gov.ie/ga/top-level-appointments-committee-tlac/.
466 Bulgaria, LPFD, Article 39.
467 Iceland, GEA, Art. 20.

same level and qualifications and the male is chosen, the Civil Service has to provide an express and suitable reason for this choice.[468]

Among the national legal experts, the legal expert from **Germany** was most critical of the operation of a tie-break measure, not in principle, but in practice. Two reasons for possible concerns were identified. First, if a tie-break principle is permitted, and it is applied symmetrically, then (she suggests) there should be significantly greater limits where it applies to men, otherwise it may be abused. In **Germany**, the Federal Equality Act provides that a tie-break principle may apply to favour men, but under the additional requirement that they are not only underrepresented but 'structurally discriminated against'.[469] The State Constitutional Court of Mecklenburg-Western Pomerania explained the idea of structural discrimination and the suitable means to tackle this kind of discrimination in a 2017 landmark decision.[470] The court held that Article 3(2) of the German Basic Law explicitly allows for disadvantages generally suffered by women, especially in working life, to be compensated. The lack of the reconciliation of working and family life, the problem of sexual harassment at the workplace and the small number of women in leading positions were all cited as indications of the structural discrimination of women. As long as this structural discrimination was not effectively tackled, the legislator is authorised by the Constitution to use any means that are appropriate and necessary to end this discrimination. Only weeks later, the State Labour Court of Schleswig-Holstein agreed.[471] However, not every state equality statute contains the requirement that the preferential treatment of men requires (in addition to their underrepresentation) structural discrimination against them. In 2018, the absence of such a condition in the Hamburg equality act resulted in the publicly announced decision to give preferential treatment to *male* candidates applying for a post in the state prosecutor's office. The German Women Lawyers' Association has criticised the recruitment practice of the general state attorney's office of Hamburg as unconstitutional and declared that under the German Constitution, the preferential treatment of equally qualified persons in recruitment and promotion is only justified where they suffer structural discrimination, and that, within the judiciary, it is women and not men who are in that position.[472]

Secondly, the German expert draws on **German** experience to suggest that the requirement that the two candidates should be equally well qualified causes considerable difficulty in practice. There are several court decisions stating that the female candidate or employee is just that little bit less qualified than the male candidate or employee and that, as a result, the tie-break measure cannot apply. This difficulty is likely to be even greater where the qualifications are stated in a very broad way. In **Finland**, in the public sector, the nominating authority is understood to have a certain margin of appreciation in determining how qualifications are to be assessed. The qualifications for public office listed in the Constitution (skill, ability and proven civic merit) derive from a Swedish 18th century constitutional document, and there is plenty of interpretation as how these qualifications may be interpreted.[473] The focus of the tie-break principle on equal qualifications leads to considerable dispute over whether the candidates are actually equally well qualified, and what that means. In **Great Britain**, a recent Employment Tribunal case, found that the claimant had been directly discriminated against on the grounds of sexual orientation, sex and race.[474] The respondents were unsuccessful in arguing that they applied the 'tie-break' provisions of Section 159 of the Equality Act 2010 in favour of LGBT, women and ethnic minorities in its recruitment. The respondents could not show that those chosen having applied the tie-break principle were in fact 'as qualified as' those not selected, as required by Section 159. The case reflects the limits of this positive action provision.

468 Italy, Code of Equal Opportunities, Article 48.
469 Germany, Federal Equality Act, Section 8(1)(5).
470 State Constitutional Court of Mecklenburg-Western Pomerania, judgment of 10 October 2017, LVerfG 7/16, available under www.landesverfassungsgericht-mv.de.
471 State Labour Court of Schleswig-Holstein, judgment of 2 November 2017, 2 Sa 262 d/17.
472 German Women Lawyers' Association, Press Release of 28 June 2018, https://www.djb.de/verein/Kom-u-AS/K5/pm18-27/.
473 Finland, Constitution, Section 125.
474 Employment Tribunal, *Furlong v The Chief Constable of Cheshire Police* [2019], https://assets.publishing.service.gov.uk/media/5c66abfd40f0b61a1e93a27a/Mr_M_Furlong_v_The_Chief_Constable_of_Cheshire_Police_2405577.18_judgment_and_reasons.pdf.

In **Norway** there has been extensive litigation concerning the appropriate circumstances in which such a measure is appropriate, focusing on when candidates are equally well qualified. A case in the Norwegian Supreme Court,[475] illustrates the type of issues that may arise. The Minister of Defence nominated applicant C, who was female, for the position as head of the Norwegian Defence University College.[476] The ministry stated that even though C lacked the operational experience that A (a male candidate) had, C received very good recommendations as the current leader of the school in question. In addition, the ministry openly argued that appointing a woman would be very important in light of the clear political aim of increasing the number of women in leading positions in the military. C was nominated number one for the position by the ministry and the Government appointed C to the position as *kontreadmiral* and head of the military school.[477]

Applicant A filed a complaint to the Gender Equality and Discrimination Ombud in August 2008. In August 2009, the Ombud found that the conditions in the Gender Equality Act[478] had been fulfilled and that thus no discrimination had taken place. Applicant A appealed to the Equality Tribunal and the case came before the Tribunal in November 2009. The Tribunal was divided 3-2. The majority found that Applicant A had been the victim of discrimination, as they found that A was better qualified than C. The minority found that the Ministry of Defence had rightly argued that the applicants were near-equally qualified. The minority also pointed to the ministry's duty to actively promote gender equality and that the appointment of a woman in this high-ranking position was of great importance for the work of equality.

In its decision,[479] the majority of the judges in the Supreme Court considered that the appointment of C had a legitimate aim, and that the application was done in a proper way. After an overall assessment of the applicants' qualifications, the majority found that the two applicants were of equal qualification and that therefore the State had not discriminated against A when it appointed the member of the underrepresented sex, C. The majority found that gender was not the main reason C was appointed for the position. The minority, dissenting, found that the appointment of C was a breach of the Gender Equality Act because there was too much emphasis on C's gender and the fact that she was a woman. The majority in the Supreme Court found that the fact that C was a woman was merely an additional argument, which had not been decisive for the appointment of her for the position.

Another case before Oslo Municipal Court in 2010 concerned the appointment of a judge as head of a municipal court (court of first instance).[480] Three applicants were nominated for the job and ranked one to three, with three being the lowest. The Government appointed applicant number three, a woman. Applicant number one claimed to have been the victim of direct discrimination because of his gender. Applicant number one claimed that his qualifications as a leader were better. After an overall assessment of the applicants' qualifications, the Court found that the two applicants were of equal qualification and that therefore the Government had not discriminated against the applicant when it appointed the member of the underrepresented sex.

7.7.2 Preferential treatment for members of the underrepresented group where the preferred candidate is less well qualified, but sufficiently well qualified to do the job

In the majority of states, these measures would not be lawful. However, in **Germany** and **Sweden**, the picture is more nuanced. As a consequence of the fact that even the most sophisticated systems of qualification assessment for the civil service lead to the result that there are nearly never two persons with equal qualifications, the legislator of the state of North Rhine-Westphalia decided upon amendments of the respective civil service law. The 2016 Act on the modernisation of the civil service act of North

475 Norwegian Supreme Court, HR-2014-00831-A (sak nr. 2013/1275).
476 NDUC – *ForsvaretsSkolesenter* (FSS).
477 Norway, Royal Decree of 1 February 2008.
478 Norway, Gender Equality Act, Section 3a.
479 Norwegian Supreme Court, decision of 29 April 2014.
480 Oslo Municipal Court, 8 July 2010, TOSLO-2010-7432.

Rhine-Westphalia determined that female civil servants were to be given preference in promotion under the provision of a *substantially* equal qualification, aptitude and professional performance based upon an equivalent overall evaluation in the applicant's latest assessment report, unless a male applicant experiences specific hardships, and under the further condition that there was a lower proportion of female civil servants in the higher position applied for than in the corresponding lower positions and that women had not yet reached 50 %. In **Sweden**, preferential treatment is permitted when the two candidates are equally or *almost equally* qualified. In cases where there is a substantial difference between the qualifications of the two candidates, preferential treatment is not permitted.[481]

In the academic field, various programmes to increase the number of female researchers and professors exist at the university, state and federal level in **Germany**. One of the most important programmes during recent years is the female professors programme operated by the Federal Ministry of Education and Research in cooperation with the states.[482] Universities qualify for participation in the programme through gender equality concepts that are externally assessed. Universities that submit a convincing gender equality concept can apply for start-up funding for up to three positions for professorships filled by women for a period of five years. The programme is now in its third round, has been funded to a total of EUR 500 million and has led to the appointment of more than 500 female professors and the strengthening of gender equality structures at universities. The third funding phase focuses on the promotion of young researchers. The legitimacy of the programme had been debated, but the third phase shows that it was accepted, mainly because it is working with financial incentives. In **Ireland**, it has been announced that there are to be 45 professorial grade posts in third level education that will be open to women only.[483]

The national legal expert from **Romania** provides a warning that if preferences are not carefully structured and confined, they may become disadvantageous for those they ostensibly are established to benefit. In Romania, there are no clear conditions set in a body of regulations governing the use of preferences. Their existence or non-existence only results from the jurisprudence of the NCCD, and the national equality body appears not to have applied any conditions. In a case from 2016, where the CNCD qualified as 'positive action' the decision of a private employer specialising in selling electronics, especially photo-video equipment, to hire only women for the position of events and community assistant, the employer argued that the reason for wanting to hire women only was to counterbalance the company's image as being an exclusively male company because they were selling electronics.[484]

7.7.3 Preferential treatment for members of the underrepresented group, where there is a general quota in favour of candidates from that group

We shall see in a later chapter that there is extensive experience of the use of quotas in the context of attempts to increase the proportion of women on company boards. In this chapter, however, we consider the use of quotas only in the employment context, outside the context of company boards. In the employment context, most states prohibit general quotas in favour of candidates from the underrepresented group. In **Belgium**, there is a quota regarding the appointment of members of the higher judiciary, which has attracted the attention of international human rights bodies. The case concerned a man who was not appointed as a member of the Higher Council of the Judiciary (where there was a quota of one third of members of each sex). He complained to the UN Committee of Human Rights, relying on provisions of the International Covenant on Civil and Political Rights. He claimed he did not get the job because there was a gender quota. The committee found that the Belgian quota system was a reasonable means to pursue a respectable aim, and dismissed the claim on 17 August 2004.[485] In

481 Sweden, Government Bill Prop. 2007/08:95 p. 167.
482 See https://www.bmbf.de/de/das-professorinnenprogramm-236.html.
483 https://www.education.ie/en/Press-Events/Press-Releases/2018-press-releases/PR18-11-12.html. https://www.education.ie/en/Press-Events/Press-Releases/2018-press-releases/PR181112.html.
484 CNCD, Decision No. 522 of 27.07.2016.
485 G. Jacobs vs Belgium, C.C.P. R./C/81/D/943/2000.

Italy, Act No. 120 of 12 July 2011 introduced a quota system in favour of the underrepresented sex for the appointment of auditors of listed companies and state subsidiary companies (as well as directors, as we shall see later). In **France**, the law of 12 March 2012 provides that for appointments in the top management positions of the public sector, 40 % of each sex must be represented[486] and this provision is reinforced by the new law on the transformation of civil service of 2019.[487]

In **Germany**, the Law on the equal participation of women and men in leading positions of private companies and in the civil service of 6 March 2015 introduced several obligations to increase the number of women in leading positions within the federal civil service including gender quotas for bodies within federal control as well as a statutory 30 % gender quota for supervisory boards of the 100 most important private companies in Germany. Within the civil service, the quota requirements can only be fulfilled by applying the regulations on the preferential recruitment or promotion of equally qualified women. But the law is silent on the question how private companies will reach the 30 % gender quota on advisory boards.

There have, also, been debates in several states as to whether and how such quotas might be introduced in the academic employment sector. There were debates in the **Netherlands**, in particular on policies that were followed by the University of Groningen, the (technical) University of Delft, and the University of Eindhoven in order to increase the number of female professors. The University of Groningen appointed 17 female senior lecturers for a future appointment as a professor. The equality body ruled that this policy conflicted with the CJEU case law, as only female senior lecturers were asked to submit their file with a view to an appointment as a professor, whereas men could not do so.[488] However, a year later, in a comparable case relating to the University of Delft, the equality body accepted the need for the preferential policy. In this case the university had reserved 10 tenure tracks for female academics. The equality body found that this was allowed in this particular case because the disadvantageous position of women at the university was persistent and structural and the University Board had already taken many measures to change the situation, but without any significant effect.[489] A subsidy of EUR 5 million by the Ministry of Education and Culture in 2017 for the appointment of 100 female full professors by universities was considered acceptable as it did not exclude men. The subsidy allowed universities to apply for a budget of EUR 50 000 to cover extra salary costs for the promotion of female associate professors to full professors or for the increase of the research budget for these women. The budget could be granted if the women involved would be given a permanent appointment as a professor. In addition, men could still be appointed as a full professor, so in that sense there was no discrimination. The University of Eindhoven announced in June 2019 that, starting from 1 July 2019, it will open up applications to academic jobs for six months only to women. If after that period no suitable candidate has been found, men will also get the opportunity to apply, but for each such job there must be both a male and a female candidate.

7.8 Redefining merit (category IV)

This last set of measures are those where employers or the state explicitly change traditional criteria for employment or promotion in such a way that the new criteria are more likely to favour candidates from the underrepresented group, modifying traditional 'merit' in favour of increasing participation.

There appears to be very little significant experience of the explicit reinterpretation of the idea of what constitutes 'merit' in the context of positive action, despite the fact that we have seen that the idea of what constitutes the 'qualifications' for a position might be highly contested. In **Croatia**, the criteria

486 France, Law No. 83-634 13 July 1983 on rights and obligations of civil servants, Article 6.
487 France, Bill presented to the Council of Ministers on 23 March 2019, Article 30. https://www.vie-publique.fr/actualite/panorama/texte-discussion/projet-loi-transformation-fonction-publique.html; https://www.fonction-publique.gouv.fr/files/files/Espace_Presse/dussopt/20190213-dp-pjl.pdf.
488 Opinion 2011-198, www.mensenrechten.nl. See also *JAR* 2012/78 with a comment by E. Cremers-Hartman.
489 Opinion 2012-195, www.mensenrechten.nl. See also *JAR* 2013/41 with a comment by E. Cremers-Hartman.

for employment or promotion are formulated in a very formal manner, it is reported, focusing on paper qualifications, such as possession of a university degree or diploma, years of service, and (in the public service) the results of job evaluations. In **Finland**, the discussion on 'merit' is said to take it for granted that the employer knows what the merits for a job are. However, as the expert from **Ireland** rightly observes, one cannot state that this has been done on a transparent basis, where the qualifications for the position have been drafted in such a way as to match a particular candidate, or a particular gender, but where this is not immediately apparent. In a few states, the national legal expert considers that this measure might be permitted legally (**Italy**, **Estonia** and **Slovakia**), but did not identify any example of it in practice in the employment context.

It is only from **Germany** that clear examples have been reported. We have seen that equality acts on the federal and state level contain obligations to give preferential treatment to women in training, recruitment and promotion when they are underrepresented in the relevant field, on the condition that they are equally qualified with men. To determine the same qualification, Section 9 of the Federal Equal Opportunities Act stipulates that specific experiences and skills acquired through family or care tasks must be taken into account insofar as they are relevant to the exercise of the respective activity, while interruptions in professional activity caused by the performance of family or care tasks or shorter working hours or time burdens must not be taken into account. Generally, the state equality acts contain the same provisions. As far as can be seen, however, private employers do not publicly accept care work experience as professional qualification or merit. As is the case with regard to several other positive action measures, there are some reservations concerning this measure. The German expert considers that the recognition of care work experience as professional qualification (especially with the requirement that these skills have to be relevant to the exercise of the respective professional activity), risks consolidating gender roles and the gender segregation of the labour market, since it is not unlikely that care work experiences are only accepted as qualification for professional care work, which is an area where women are highly overrepresented.

How best to regard such measures can be debated. On the one hand, they may be thought to be even stronger than quotas, in that they question more thoroughly the idea of merit in the service of gender equality, thus constituting a stronger form of preferential treatment. On the other hand, we might think of redefining merit as structurally different to the types of preferential treatment we have encountered so far, in the sense that it questions existing underrepresentation at a more basic level, but paradoxically may be potentially more acceptable than quotas and traditional preferences that keep existing ideas of merit substantially unchallenged.

7.9 Conclusion

One of the potential advantages of the EU's existing approach to positive action, which places Member States in pole position, is that experimentation can take place, and is indeed encouraged. This chapter demonstrates that, at the level of the states, there has indeed been extensive experimentation, not only in the range of different types of positive action in operation, but also whether preferences are permitted and of what type, and how far the concept of 'merit' is being rethought. In so far as stimulating experimentation is the purpose of EU policy, it has been a success. We shall see subsequently, however, that in so far as experimentation was thought likely to lead to emulation, with states learning from each other which types of positive action constituted good practice and adopting those measures, leading to a significant degree of convergence, it is less successful, given that it is hard to discern any convergence across the EU as a whole.

Furthermore, on the basis of this analysis one can draw some conclusions on the challenges in the effective application of positive action measures. There appear to be two principal challenges. First, there remains considerable uncertainty at the national level which types of positive action are available under national legislation, with national experts frequently uncertain whether a particular measure was, or

was not permitted. We shall see subsequently that there has been litigation at the national level seeking clarity, but inevitably that has been sporadic and – whether or not there has been litigation in a particular state – uncertainty often exists. Secondly, and not unconnected, there is clearly a gap between what is permitted in any particular state and what is actually put into practice in that state. This chapter has identified how, even when a particular measure is permitted in a state, examples of it being applied are often few and far between.

8 Gender balance in company boards

8.1 Introduction

We saw in Chapter 2 that the European Commission first submitted a proposal for a directive on gender balance among non-executive directors of companies listed on stock exchanges in November 2012,[490] and that this proposed directive is still under consideration. In this chapter, we examine the development at the state level of positive action policies aiming to secure more balanced gender representation on the boards of companies. There is a clear distinction between those states that rely on voluntary action by the relevant body to secure the desired end, and those that rely on regulation to achieve that end. For those states that rely on regulation for securing changes in company boards, there is another second clear distinction that can be identified: between states that rely on self-regulation by bodies set up by the industry itself, and those states that rely on statutory regulation. We begin, first, to identify those states that have no specific regulatory structure that seeks to further the aim of greater gender balance (category i); then, secondly, those states that rely on industry-level self-regulation without statutory obligations (category ii); and thirdly, those states that have introduced statutory obligations to further that aim (category iii).[491]

8.2 No specific regulatory structure seeking to further gender balance in company boards (category i)

The following states (just under half of EU Member States) essentially rely on voluntarism, even where there is Government approval of the aim of bringing about greater gender balance in corporate boards (**Bulgaria**, **Croatia**, **Cyprus**, **Czech Republic**, **Estonia**, **Hungary**, **Ireland**, **Latvia**, **Liechtenstein**, **Lithuania**, **Malta**, **Romania**, **Slovakia** and **United Kingdom**). Some of these states have measures that indirectly may enable or encourage such voluntary action.

In **Bulgaria**, minimum standards regarding the inclusion of information on gender balance in the annual activity reports of large public companies were introduced by the Accountancy Act[492] and with the amendment of the Law on public offering of securities.[493] The provisions are not explicitly on gender representation and gender balance on the company boards or on setting priority measures but are aimed at harmonisation with Directive 2013/36 on credit institutions[494] and Directive 2014/95 on the disclosure of non-financial information.[495] The provisions effectively set out a required framework by which a company that voluntarily adopts gender balance at the board level should report this initiative.

The Accountancy Act provides that the non-financial statement, which must be issued by large companies, contains the description of policies followed by the enterprise in relation to: the environment; social issues; personnel issues; human rights; the fight against corruption; and diversity and gender equality in management bodies of the enterprise (including, the number of women and men, age, geographical diversity, education, professional qualities, religion).[496] Large enterprises are those which for the period of financial reporting meet at least two of the following indicators: their balance value of assets is at least

490 European Commission (2012), *Proposal for a Directive on improving the gender balance among non-executive directors of companies listed on stock exchanges and related measures*, COM(2012) 0614 final – 2012/0299(COD).

491 For a more extensive assessment, see Senden, L. and Kruisinga, S. (2018) *Gender-balanced company boards in Europe. An analysis of regulatory, policy and enforcement approaches in the EU and EEA Member States*, European Equality Law Network.

492 Bulgaria, Accountancy Act, (Закон за счетоводството*, Zakon za schetovodstvoto*), available in Bulgarian at www.lex.bg/bg/laws/ldoc/2136697598.

493 Bulgaria, Law on public offering of securities, (Закон за публичното предлагане на ценни книжа*, Zakon za publichnoto predlagane na zenni knizha*), available in Bulgarian at www.lex.bg/laws/ldoc/2134697472.

494 Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, OJ L 176, p. 338.

495 Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups, OJ L 330, p. 1.

496 Bulgaria, Accountancy Act, Article 48.

BGN 38 million; their net income from sales is at least BGN 76 million; the average number of staff is at least 250. The statement encompasses the description of the business model of the enterprise and the description of the policies on environmental and social issues, the respective activities and results during the reporting period.[497]

For public interest companies (credit institutions and insurance companies) and other publicly listed companies, in addition to the obligations under the Accountancy Act, there is an obligation to issue and make available publicly a declaration or statement on corporate governance. The statement may be issued as a separate report, published together with the activity report and also as a document publicly available on the website of the enterprise. According to the Law on public offering of securities, the statement on corporate governance must contain the following information: information on whether the listed company complies, where appropriate and relevant, with the code on corporate governance as adopted by the vice-chair of the Commission on Financial Supervision or with another publicly accessible corporate governance code; information about corporate governance practices applied by the company in addition to the compliance with the mentioned codes; an explanation by the company of which provisions of the corporate governance code of the types mentioned above are not applied and the reasons for non-compliance; the composition and functioning of the administrative, executive and supervisory bodies and their committees; and a description of the diversity policy applied to the administrative, executive and supervisory bodies in relation to age, sex and education, and professional experience, the objectives of the diversity policy, the method of application and the results during the reviewed period. If such a policy is not applied, the statement must contain an explanation on the reasons for that. The description of the diversity policy is obligatory only for large companies. Where the enterprise does not comply with one or more of the issues subject to the non-financial statement, the statement must contain a clear and articulated justification explaining the reasons for non-compliance with the adopted policies. The principle of 'comply or explain' applies.

In **Croatia**, state administration bodies and legal entities that are majority-owned by the state are required to implement special measures and adopt action plans every four years, aimed at the promotion and establishment of gender equality.[498] Plans are based on the analysis of the position of men and women, and they establish the reasons for the introduction of special measures, the aims that should be accomplished, and the methods of implementation and supervision.[499] The Government's Office for Gender Equality pre-approves each plan.[500] Failure to submit the plan to the Office for Gender Equality for approval is punishable as misdemeanour by a fine.[501] There is no available information on whether there have been any such cases and whether any sanctions have been imposed. A similar example of positive action in the field of gender equality can be found in Article 12(4) and (5) of the Gender Equality Act, which prescribes that when making appointments in state, regional and local bodies, as well as legal entities with public authorities, or when making appointments to diplomatic offices and committees representing Croatia at international level, due account has to be taken of gender balanced representation.

So, too, in **Romania**, the National Agency for Equal Opportunities between Women and Men (Agenția Națională pentru Egalitate de Şanse între Femei şi Bărbați – ANES) considers that in Romania there are no self-regulatory or legislative measures providing for positive action to increase the proportion of women on company boards, only a set of general provisions on balanced participation of women and men in leadership and decision making.[502] The Gender Equality Law[503] adopted in 2002, well before any

497 The obligation for a detailed non-financial statement as part of the yearly report was introduced from 1 January 2017.
498 Croatia, Gender Equality Act, Article 11(1) and (2).
499 Croatia, Gender Equality Act, Article 11(3).
500 Croatia, Gender Equality Act, Article 11(4).
501 Croatia, Gender Equality Act, Article 34.
502 National Agency for Equal Opportunities between Women and Men (Agenţia Naţională pentru Egalitate de Şanse între Femei şi Bărbaţi), Response No. 1797/A.C./D.M./SSPPMES/2017.05.22.
503 Romania, Law 202 of 19 April 2002 on equal opportunities and treatment between women and men (*Lege nr. 202 din 19 aprilie 2002 privind egalitatea de şanse şi de tratament între femei şi bărbaţi*) (Gender Equality Law).

discussions on the Commission's company boards proposed directive, stipulates the legal obligation for all entities that operate based on their own statutes of regulations 'to promote and support balanced participation of women and men in leadership and decision' and 'to adopt the necessary measures' for ensuing this goal.[504] This obligation applies also to processes of nominating members or participants to any council, group of experts and structures of paid management and/or consultancy.[505]

This legal obligation is very generally worded. In principle, it applies to all types of enterprises: 'National and local public authorities and institutions, in the civil and military area, economic or social entities, as well as political parties, employers' organisations and trade unions or other not-for-profit organisations that operate based on their own statutes of regulations…'[506] It also applies to all types of boards: 'the nomination of members and/or participants in any council, group of experts and other lucrative [sic] structures of management and/or consultancy'.[507] The legal provision uses the expression: 'balanced participation of women and men'. Therefore, it is implied that the beneficiary is the underrepresented sex. Although there is no specific target set, it is, nevertheless, a legally binding legal provision that can be sanctioned with an administrative fine.[508] However, the legal provisions are worded so generally that their binding nature is watered down.[509] These legal provisions are not applied in practice, and were they to be applied, they risk being challenged on the basis that the principle of legal certainty is breached because these legal provisions are not clear and precise.[510]

The **United Kingdom** has adopted an approach favouring self-regulation. The UK Government, in 2010, invited Lord Davies to conduct a review to identify key issues that were preventing more women from becoming board members and to make recommendations to help improve gender balance. A key recommendation of the original Davies report[511] was the setting of a target for the FTSE 100 to achieve a minimum of 25 % representation of women on boards by 2015. This target was extended to FTSE 250 in 2013.[512] In 2015, the target was increased to 33 % and extended to the FTSE 350 by 2020.[513] In Scotland, the Scottish Government set up 'Partnership for Change' in 2015 to encourage organisations (public, private and third sector) to commit to achieving parity (50/50) between men and women on boards by 2020.[514] This was also voluntary. In March 2018, however, the Scottish Parliament passed the Gender Representation on Public Boards (Scotland) Act, which sets a gender representation objective for the non-executive member component of public boards in Scotland. The objective is that 50% of non-executive members are women by the end of December 2022.

504 Romania, Gender Equality Law, Article 21(1).
505 Romania, Gender Equality Law, Article 21(2).
506 Romania, Gender Equality Law, Article 21(1).
507 Romania, Gender Equality Law, Article 21(2).
508 Fines would range between RON 3 000 and 100 000 (EUR 681 and 22 727), Article 39(3) read with Article 21 of the Gender Equality Law.
509 Romania, Gender Equality Law, Article 21(1) and (2).
510 National Council for Combating Discrimination (*Consiliul Naţional pentru Combaterea Discriminării* (CNCD)), Decision No.335 of 18.06.2014. A decision of the CNCD, the national equality body in charge of investigating and sanctioning discrimination, is illustrative of how the provisions mentioned above are overlooked when talking about women on boards. In 2014, the CNCD found discriminatory the lack of initiative of a local administration to promote women to the board of the main public company in the county (they assigned four men out of a total of seven nominations, which were all men). The CNCD issued only a written warning and a recommendation to consider taking positive action to promote women on boards in the future. However, that was not based on Article 21 of the Gender Equality Law. The CNCD does not mention this article in the decision, only the general provisions regarding positive action in the Anti-Discrimination Law (Government Emergency Ordinance No.137/2000 regarding the prevention and sanctioning of all forms of discrimination (*Ordonanţa nr.137/2000 privind prevenirea şi sancţionarea tuturor formelor de discriminare*), Art.2(9)).
511 Davies report: Lord Davies of Abersoch (2011) *Women on Boards*, available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/31480/11-745-women-on-boards.pdf.
512 Department of Business, Innovation and Skills (2013) *Women on Boards,* available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/182602/bis-13-p135-women-on-boards-2013.pdf.
513 Department of Business, Innovation and Skills (2015) *Women on Boards,* available at https://www.gov.uk/government/publications/women-on-boards-2015-fourth-annual-review.
514 See http://onescotland.org/equality-themes/5050-by-2020/.

The 2011 Davies report also recommended that companies should provide annual reports indicating the number of women on their boards, senior management teams and across their organisation, and advertise non-executive positions and develop the executive pipeline by developing senior members of staff. It also recommended that executive search firms, used by many companies to recruit board directors, develop a voluntary code of conduct. More recently, in 2016, the Hampton-Alexander review was set up to continue the work started by the Davies review.[515] This focused on improving the representation of women in the executive roles of FTSE 350 companies and made several recommendations – including some that focus on the underrepresentation of women in the layer immediately below that of executive committees, reporting requirements and disclosure of gender balance at senior levels (and clarification of the meaning of 'senior managers').

Self-regulation is encouraged, following the Davies report, on the basis of the UK Financial Reporting Council's (FRC) corporate governance code,[516] which sets out recommendations regarding the appointment process: 'Appointments to the board should be subject to a formal, rigorous and transparent procedure and an effective succession plan should be maintained for board and senior management. Both appointments and succession plans should be based on merit and objective criteria and, within this context, should promote diversity of gender, social and ethnic backgrounds, cognitive and personal strengths.' It further recommends that the annual report should describe the work of the nomination committee, including 'the policy on diversity and inclusion, its objectives and linkage to company strategy, how it has been implemented and progress on achieving the objectives.'

In **Ireland**, appointments to state boards are managed by the Public Appointments Service.[517] Such boards are in the main statutory bodies, e.g. the Residential Tenancies Board, which has a regulatory remit, and a quasi-judicial role in relation to tenancies or the Road Safety Authority. A few such bodies (e.g. commercial semi-state companies) are incorporated as companies.[518] However, they are not listed companies. In the case of state/semi-state companies set up by statute, the relevant minister appoints the directors (or the Government of Ireland, as provided in the relevant statute). Various pieces of legislation setting up state boards and committees in recent years have contained provisions requiring appointments to have either a set minimum number of male and female members or to have, as far as reasonably practicable, an equitable balance between women and men.[519] The Programme for Partnership Government of May 2016 provided that there should be at least 40 % female representation on state boards.[520]

By contrast, company law adopts 'a relatively hands-off approach in relation to the procedures for appointing directors' of non-state bodies.[521] The reason is that historically the appointment of directors was seen as an internal company matter and, secondly, company law provides for rules in the form of model articles (the constitution of the company), which can be adapted or departed from by companies at their discretion. The reason for such a lack of procedures is because of the different types of company, for example, as to whether the company is owner-managed, the types of persons who can be appointed and so on. Therefore, shareholders have considerable flexibility in choosing appointment procedures. The appointment of directors is an accepted function of the shareholders in general meeting and the members have the power to appoint directors.

515 https://www.gov.uk/government/news/rallying-call-for-female-boost-in-business-and-the-boardroom.
516 Financial Reporting Council (2016) *The UK Corporate Governance Code*, available at https://www.frc.org.uk/Our-Work/Publications/Corporate-Governance/UK-Corporate-Governance-Code-April-2016.pdf.
517 See http://www.stateboards.ie/stateboards.
518 For example. Dublin Bus, Irish Rail and Bus Éireann (all designated activity companies). The holding body, Córas Iompair Éireann, is a statutory corporation. The Government of Ireland is the sole shareholder. There has been a policy of appointing both men and women to the boards of these companies and bodies. Such companies are not listed on the stock exchange.
519 Such legislation includes for example s. 12 of the Inland Fisheries Act 2010; s. 98 of the Adoption Act 2010; Schedule 1 Art.4 of the Charities Act 2009; s. 8 of the Broadcasting Act 2009; s. 19 of the National Asset Management Agency Act 2009.
520 http://www.taoiseach.gov.ie/eng/Work_Of_The_Department/Programme_for_Government/A_Programme_for_a_Partnership_Government.pdf (see Sections 11.11 and 11.13), 'Programme_for_a_Partnership_Government' available at http://www.taoiseach.gov.ie/eng/Work_Of_The_Department/Programme_for_Government/.
521 Ahern, D. (2009), *Directors' Duties – Law and Practice*, Round Hall, Dublin, at paragraph 1-49.

More recently, two changes have been introduced. First, the European Union (Disclosure of Non-Financial and Diversity Information by Certain Large Undertakings and Groups) Regulations 2017 came into operation on 21 August 2017.[522] Directors of large traded companies are required to include a description of the company's diversity policy in relation to its board of directors, with regard to aspects such as age, gender or educational and professional backgrounds, the objective of the diversity policy, how the policy has been implemented and the results of the diversity policy in the financial year. In the absence of such a policy the directors must provide an explanation as to why there is no such policy.

Secondly, the self-regulatory requirements of the Irish Stock Exchange, in the form of a code of conduct, are also now relevant to the improvement of the gender balance on company boards. The Irish Corporate Governance Annex states[523] that the Irish Stock Exchange applies the UK Corporate Governance Code. Where a company has not complied with the code, it is required to set out the nature and the extent of as well as the reasons for non-compliance. For listed companies, there is no precise quota and if there is a target, it is a 'soft target'. For example, some companies, mainly the Bank of Ireland[524] and Allied Irish Bank,[525] have published their diversity policies. The Bank of Ireland sets a target of 15 % female representation and has two female members among the 12 directors (presently 17 %).[526] Allied Irish Bank has also published a diversity policy.[527] Its aim is to have a 25 % gender target and it currently has three women directors out of a total of 12 directors. The highest proportion of female board membership is one-third, namely four out of 12 on the board of Cement Roadstone Holdings plc.[528]

8.3 Self-regulatory industry codes establishing gender balance obligations on company boards (category ii)

Two states rely on industry-level self-regulation, through the use of industry codes that set obligations on their members (unlike in United Kingdom and Ireland), but without setting statutory obligations. In **Sweden**, the self-regulatory initiative of importance is the Corporate Governance Code, adopted in 2005.[529] Since its introduction on 1 July 2005, the Swedish Corporate Governance Code is included in the listing requirements of the Stockholm Stock Exchange. The Swedish Corporate Governance Code applies to all companies whose shares or depositary receipts are admitted to trading on a Swedish regulated market. At present, these markets are Nasdaq Stockholm and NGM Equity. The code may also be applied voluntarily by other companies, both listed and non-listed. The supervision of individual companies regarding the application of the Swedish Corporate Governance Code is carried out by the stock exchanges on which the companies' shares are listed, in accordance with the listing agreement of the stock exchange in question.

The original code was presented by the Code Group, a body initiated by the Government Commission on Business Confidence (*Förtroendekommissionen*), set up by three representatives from the commission, and six business representatives representing a number of private corporate sector organisations. The chair of the Code Group, who was also chair of the Commission on Business Confidence, had previously

522 European Union (Disclosure of Non-Financial and Diversity Information by Certain Large Undertakings and Groups) Regulations 2017 S.I. No. 360 of 2017 implementing Directive 2014/495/EU. https://www.djei.ie/en/Legislation/SI-No-360-of-2017.html.

523 http://www.ise.ie/search/?q=governance. In addition, the Corporate Code of Conduct applies to companies listed on the main securities market of the Irish Stock Exchange. Companies listed on the premium list of the London Stock Exchange and the main securities market of the Irish Stock Exchange must adhere to the UK Corporate Governance Code.

524 This is not the Central Bank of Ireland but a commercial bank trading on the Irish Stock Exchange.

525 This state-owned bank has been taken over by the Irish Government since the financial crash.

526 See the Annual Report – Bank of Ireland 2016 and in particular the report of the Group Nomination and Governance Committee of the Court of Directors refers to inter alia gender diversity as being beneficial to the Court (Board) (see p. 152), https://investorrelations.bankofireland.com/2016-results-announcement/.

527 Allied Irish Banks, p. l.c, 'Board Diversity Policy' available at https://aib.ie/content/dam/aib/investorrelations/docs/about-aib/corporate-governance/board-diversity-policy.pdf.

528 Cement Roadstone Holdings, https://www.crh.com/investors/annual-reports/#2016.

529 Swedish Corporate Governance Code, available in English at http://www.corporategovernanceboard.se/UserFiles/Archive/496/The_Swedish_Corporate_Governance_Code_1_December_2016.pdf.

been Minister for Finance. In parallel with the introduction of the Swedish Corporate Governance Code, a body was set up with the general aim of promoting good corporate governance in Swedish stock exchange listed companies: the Swedish Corporate Governance Board. The main task of the board is to manage and improve – but not supervise – the code. Since 2005, the board has made many modifications to the code, though the issuing of instructions, as well as through proper revisions, of which the most recent was that carried out in 2016.

On a number of occasions, the Swedish Corporate Governance Board has acted to promote the development of gender-balanced company boards. In the spring of 2014, the board urged company owners to speed up the process, and declared as its goal that the gender division in company boards should be at least a 40/60 on a general level (that is, not in each individual company) by 2020 at the latest.[530] The board also announced an intermediate target that by 2017 the gender balance in company boards should be on average 35/65 in larger companies and on average 30/70 in smaller companies. To emphasise the importance of the matter, the board also contacted a number of large companies, including nomination committee chairs, to discuss its aim of increasing gender equality in company boards.

Along with the establishment of this target, the Swedish Corporate Governance Code was modified to impose a stronger requirement on nomination committees for company boards to explain to the shareholders how they had worked to strive for gender balance in the nomination process. Companies must 'strive for gender balance on the board'.[531] To meet this requirement, the nomination committee for candidates of the board must give the aim of gender-balance particular consideration.[532] Moreover, the nomination committee must provide a specific explanation of its proposals as to how it meets the requirement to strive for gender balance. This explanation must be provided both in the notice of the shareholders' meeting before the elections of board members are to be held, and on the company's website.[533] The nomination committee must also provide a specific explanation of its proposals with respect to the requirement to strive for gender balance at the shareholders' meeting where the election of board members is to be held.[534]

In **Poland**, in June 2010, the Warsaw Stock Exchange (GPW) issued a document entitled: 'Good Practices of Stock Exchange Companies', which included a provision that public companies and their stakeholders were recommended to contribute to a balanced participation of women and men in their bodies. After successive modifications of the corporate governance code, the provisions have become weaker than they were initially. In 2016, a new document was issued which instead of a requirement for balanced representation merely recommends the preservation of diversity with regard to sex (as well as age, education and professional expertise).[535, 536] The code of good practice applies to public companies and their stakeholders, which are listed on the stock market. The recommendation applies to all their bodies, in particular the management board and the supervisory board. The code of good practice constitutes 'soft law'. This means that companies should apply it (it is assumed that by entering the stock market they accept and will exercise this duty). At the same time there are no sanctions provided for, if the companies fail to apply the good practice entirely or in part. In accordance with the principle of comply or explain, if any of the rules are not applied, the company has the obligation to inform the market of that fact and explain why.

530 This goal corresponds to the Commission's 2013 proposed directive.
531 Swedish Corporate Governance Code, Ch. 4, Sec. 1.
532 Swedish Corporate Governance Code. Ch. 2, Sec. 1.
533 Swedish Corporate Governance Code, Ch. 2 Sec. 6.
534 Swedish Corporate Governance Code, Ch. 2 Sec. 7.
535 The good practices form an annex to the Resolution of the GPW Supervisory Board No 26/1413/2015 of 13 October 2015. This document, which substituted the previous one is in force since 1 January 2016, available at: https://www.gpw.pl/pub/GPW/STATIC/files/PDF/RG/Uch_RG_DB2016.pdf.
536 Recommendation II.R.2.

On 7 March 2013, the Minister of the Treasury issued a document called 'Good practices with regard to ensuring balanced participation of women and men in bodies of companies with State Treasury participation,' where he recommended, as a soft target, an average participation of the underrepresented sex of at least 30 % of all members of supervisory councils chosen and nominated by the Minister of State for the Treasury. This applies only to non-executive (supervisory councils) in public companies only. It was not supposed to be applied to privately owned companies. It was estimated that in public companies this target should be reached by the end of 2015.[537]

With respect to brokerage houses and 'significant banks,' however, the Minister of Finance issued two ordinances,[538] *requiring* such institutions to establish special nomination committees (*komitety do spraw nominacji*). According to the Law on trading in financial instruments, analogous nomination committees, generally equipped with the same competences, are to be established in Polish companies running stock exchanges.[539] Among the tasks of these bodies is the determination of 'a target value for representation of the under-represented sex on the board of directors' and development of 'a diversity policy for the composition of the board of directors … to achieve this target'. Additionally (with the exception of companies running stock exchanges) the committees perform periodical examinations (at least once every year) of the performance of the board of directors in this respect and recommend changes to the supervisory boards. All the above committees also have the competence to review the policy of the boards of directors with regard to the selection and appointment of bank managers and present recommendations. They do not, however, have the competence to establish a target value for representation of the underrepresented sex or a diversity policy.

8.4 Statutory obligations regarding gender balance on company boards (category iii)

8.4.1 Linkage between gender balance on Government committees and company boards

There appears to be a clear correlation between those states that employ statutory regulation regarding the composition of Government committees, and those that regulate to require greater gender balance on company boards, with a similar pattern of sequencing of the two sets of regulation: regulating Government committees generally precedes regulating company boards.

In **Belgium**, the federal Act of 28 July 2011, which aims to ensure the presence of women on boards of directors, amended the Company and Association Code for private sector companies, comprising listed companies (stock freely traded on the stock exchange). This is a legally binding instrument with a hard target of a minimum of 33 % of members of the same sex (one third, rounded up to the nearest whole number). The act deals exclusively with 'boards of directors', not making any distinction between executive and non-executive directors and not mentioning any eventual management committee. If the target is not achieved, a person of the underrepresented sex must be appointed to the next vacant position otherwise the appointment is null and void. The same sanction applies when an appointment results in the target not being maintained. The Company and Association Code, as amended by the Act of 28 July 2011, provides that efforts made to achieve the quota target will be reported on in the yearly management report submitted by the board of directors to the company's annual general meeting.[540]

537 The same goal was also included in the National Programme of Actions towards Equal Treatment for the years 2013-2016 prepared by the Government Plenipotentiary for Equal Treatment of the day, p. 58. The Report of the Plenipotentiary for Equal Treatment on the realisation of this programme in 2014 includes the information that this declaration has been fulfilled already in 2014 (See *Raport z realizacji krajowego programu działań na rzecz równego traktowania za* 2014 r. (Report on the realisation of the national action plan for equal treatments for 2014), June 2015, p. 33 Currently the position of the Minister of Treasury does not exist and its functions are delegated to the Minister of Finance.

538 Poland, Ordinance of the Minister of Finance of 7 May 2018 on the detailed scope of tasks of the committee for nominations in brokerage houses, *Journal of Laws* 2018 Item. 878; Ordinance of the Minister of Finance of 7 May 2018 on the detailed scope of tasks of the committee for nominations in significant banks, *Journal of Laws* 2018 Item 883.

539 Poland, Law of 29 July 2005 on financial instruments (*Ustawa o obrocie instrumentami finansowymi*), *Journal of Laws* 2005 No 183, Item 1538, Article 25a(11)(3).

540 Belgium, Company and Association Code, Article 96(2).

Earlier, the Act of 21 March 1991 concerning the federal economic public bodies,[541] and the Act of 19 April 2002 concerning the National Lottery, had the same objective for the public sector. A quota of one third is also applicable in the composition of advisory bodies that support public authorities. As we have seen earlier, the same is true for the composition of the Higher Council of the Judiciary.

In **Germany**, the Law on the equal participation of women and men in leading positions of private companies and in the civil service of 6 March 2015 amended the Appointments to Federal Bodies Act (*Bundesgremienbesetzungsgesetz*). Under the Appointments to Federal Bodies Act, undertakings with at least three seats of the non-executive board within the purview of the federal Government or to be elected by the federal Government are subject to a 30 % and then 50 % gender quota with regard to these seats. The statutory quota entered into force in 2016. The bodies have to strive for full compliance with the 30 % gender quota from 2016 and for full compliance with the 50 % gender quota from 2018. As long as the federal level is holding shares that account for the decision over, or the election of, at least three members of the non-executive boards, the gender quota applies to these members in undertakings such as *Deutsche Bahn AG*, DB Netz AG, Airport Köln/Bonn Limited Liability Company, *Gesellschaft für Anlagen-und Reaktiorsicherheit*, and the German Society for International Co-operation.[542]

Regarding public undertakings or state-owned companies with at least three seats of the non-executive boards within the purview of the federal Government or to be elected by the federal Government, the relevant federal ministry is obliged to report immediately to the Federal Ministry for Family, Senior Citizens, Women and Youth when the 30 % (or, from 2018, 50 %) gender quota cannot be reached. The federal Government is obliged to submit a report to the federal Parliament assessing board appointments and elections under federal control every four years. Concerning public undertakings, the gender gap between shareholders and employee representatives is less pronounced than in the private sector. More than half of the board members are recruited from public administration and from politics and while 38 % of the representatives appointed from public administration are female, only 27.8 % of the representatives from politics are women.[543]

Concerning other 'relevant' decision-making bodies, a balanced representation of men and women is aimed at, but no statutory quota was set. 'Relevant' bodies are specified by federal institutions that are not covered by the law, such as the federal Government, federal ministries, federal commissioners, and federal legal persons under public law without the right of self-administration.

Turning now to the private sector, after many years of pinning their hopes on self-regulatory approaches without any effect, the 2015 law also introduced statutory obligations for private sector companies. To understand the new system, the German system of co-determination needs to be appreciated. In companies that are subject to co-determination, the board members are appointed or elected by the shareholders, the employees and in some, by the trade unions as well. Gender balance is more evident among employee and trade union representatives than among the shareholder representatives.

The 2015 law introduced a statutory 30 % gender quota for supervisory boards of the 100 most important private companies in Germany. These are private companies that are listed *and* subject to full parity co-determination (mostly stock corporations), as well as every listed *Societas Europaea* with a parity co-determined board. The statutory quota is a strict obligation. The quota can be fulfilled with regard to all supervisory board members or, upon request of the shareholders or the employees or

541 B-Post (postal services), Proximus (telephone company), Belgocontrol (air traffic control), Infrabel (railway infrastructure), and SNCB-NMBS (railway operator).

542 The amended Appointments to Federal Bodies Act requires all federal bodies to publish a list annually, including the number of board members to be appointed or elected by the federation. For the 2016 list see the official documents of the Federal Parliament 18/11500, Annex 1, https://www.bmfsfj.de/blob/115648/916d83985cd40e23540818f4fec2c1c0/bundestagsdrucksache-quotenbericht-data.pdf, pp. 32ff.

543 See Fidar (Frauen in die Aufsichtsräte) (2016), *Public Women-on-Board-Index mit 412 öffentlichen Unternehmen*, https://www.fidar.de/webmedia/documents/public-wob-index/160101_Studie_Public_WoB-Index_III_end.pdf.

both, with regard to the shareholder representatives and the employee representatives separately. From 1 January 2016, these private companies have to act to reach full compliance with the 30 % gender quota whenever a new member is to be appointed or elected. The 30 % gender quota is to be reached at the earliest possible date. The law is silent as to how private companies are required to reach the 30 % gender quota.[544] In the event of non-compliance, the election is void and the seat designated for a member of the underrepresented gender remains vacant.

The law also introduces obligations for the next most important group of private companies. Originally estimated to amount to between 2 500 to 3 500 companies (although in practice amounting to 1 747 companies),[545] these are private companies that are listed *or* subject to co-determination, such as stock corporations, limited liability corporations, *Societas Europaea* and cooperative societies. These companies are required to set themselves individual quantitative objectives (target gender quotas) with regard to the executive and supervisory board members as well as to the first and second management level below the board level. As long as the members of the underrepresented sex hold less than 30 % of the executive or supervisory director positions or the respective leading management positions, the target quota must not fall below the status quo in the respective positions of the company. This self-defined quorum is legally binding but actually a rather soft measure. Private companies that are listed or subject to co-determination must have published their first target quota by 30 September 2015, and have reached their self-imposed goals by 30 June 2017 for the first time. The subsequent time periods for realising self-imposed target quotas must not exceed five years.

The amended Federal Equality Act covers federal public undertakings with the exception of corporations, institutions and foundations under public law as well as subsidiaries of public undertakings being transferred into companies under private law. As the regulations of the Federal Equality Act are to be 'applied accordingly', it is not precisely clear whether public undertakings or their boards are indeed subject to binding gender quota when not falling within the scope of application of the amended company laws and the amended Appointments to Federal Bodies Act.[546]

All companies covered by the Law on the equal participation of women and men in leading positions of private companies and in the civil service are obliged to report on the compliance with the statutory gender quota or their individual target gender quotas and their compliance with these target quotas. Private companies that are listed or subject to co-determination are obliged to publish their individual target gender quotas and to report on their progress or to explain their failures in trying to reach their targets. For most private companies concerned, the report on the compliance with statutory or individual gender quota is part of their general reporting obligations under German company law. The implementation of the directives on the disclosure of non-financial information[547] amended the Commercial Code by adding that the information about measures to reach gender equality, social measures and human rights is a possible (but voluntary) content of the declaration on non-financial matters.

The reporting obligations on the compliance with the statutory gender quota or the target gender quota were amended for stock corporations by the additional requirement to publish a detailed diversity

544 Two legal essays claim that the statutory 30 % gender quota for advisory boards of the 100 most important companies in Germany is incompatible with European law, referring, *inter alia*, to the decisions in *Abrahamsson* and *Lommers*. See Olbrich H. & Krois, C. 'Das Verhältnis von "Frauenquote" und AGG', in *Neue Zeitschrift für Arbeitsrecht* 2015, S. 1288 (1291); Schleusener, A. 'Diskriminierungsfreie Einstellung zwischen AGG und Frauenförderungsgesetz', in *Neue Zeitschrift für Arbeitsrecht* – Beilage 2016, S. 50 (54). As far as can be seen, this opinion has not been confirmed by any court.

545 Regarding different methods of counting, see Weckes, Marion (2015) '30% Quote im Aufsichtsrat: Eine Eröffnungsbilanz... unterteilt nach Anteilseigner- und Arbeitnehmervertretern. Überarbeitete Auflage', *Mitbestimmungsreport* 12, Hans-Böckler-Stiftung, Düsseldorf.

546 The circular of the Federal Ministry for Family, Senior Citizens, Women and Youth from January 2017 is very vague on this point, see https://www.bmfsfj.de/blob/84064/f20880c3ed42ce87094898f6c214ef88/bgleig-rundschreiben-6-data.pdf.

547 Act on the improvement of the disclosure of non-financial information in management reports (CRD-Directive-Implementation Law) of 11 April 2017, https://www.bgbl.de/xaver/bgbl/text.xav?SID=&tf=xaver.component.Text_0&tocf=&qmf=&hlf=xaver.component.Hitlist_0&bk=bgbl&start=%2F%2F*%5B%40node_id%3D%27262569%27%5D&skin=pdf&tlevel=-2&nohist=1.

strategy regarding executive and non-executive board positions covering age, gender, educational and employment background and the respective successes achieved. Before the election of non-executive board members, nominations of candidates are published. Under the Stock Corporation Act, the executive board is obliged to add information to these nominations before publishing, namely on how many women or how many men have to be elected to reach compliance with the statutory gender quota and whether the gender quota has to be reached regarding the non-executive board members as a whole or the shareholder and the employee representatives separately.

The reports of private companies are received through the electronic *Federal Gazette* and monitored by the respective committee of the Federal Office of Economy and Export Control or the Federal Office of Justice. From 2017, the federal Government undertook to publish an annual report on the participation of women and men in leading positions and on boards of private companies and in the civil service,[548] but, at the time of writing, the report for 2018 has still not been published.

In respect of gender balance in boards in state-owned companies there have been legislative provisions in **Denmark** since 1990. The Gender Equality Act provides that boards of state-owned companies should strive for an equal gender balance.[549] Boards and other management bodies of institutions and companies within the governmental administration are required to achieve a balanced composition of women and men. The management must set targets for the proportion of the underrepresented gender, develop a policy to increase the number of the underrepresented gender on their executive levels and report the status of the achievement of the set targets to the Gender Equality Minister. For appointments not covered by this provision, the responsible minister must ensure that members appointed by the minister are balanced in terms of gender, according to Section 12 of the Gender Equality Act. If other authorities or organisations propose board members, they must suggest both a woman and a man.[550]

Legislation which requires the largest companies to set a target figure and establish a policy for the gender composition of management came into force on 1 January 2013. Danish companies are obligated to set targets for the quota of the underrepresented gender in the highest governing body/boards.[551] Also, the companies must report on the status of the achievement of the set targets, including why the company may not have achieved the desired objective. Large companies are obliged to draw up a policy to increase the proportion of the underrepresented sex at other management levels, and must explain the policy.

The obligation covers: companies, businesses, foundations etc., who have debt instruments or other types of securities listed for trade on a regulated market in an EU/EEA country; large public and private limited companies and limited partnership companies; large partnerships and limited partnerships, in which all partners and general partners, respectively, are public or private limited companies, limited partnership companies or a similar type of company; large foundations; and state-owned public limited companies. A comply-or-explain reporting obligation is part of the overall duty. The Danish Business Authority has issued guidelines on target figures, policies and reporting on the gender composition of management in 2016.[552]

In **Spain**, the Law 3/2007 on effective equality sets as an objective for certain companies that they should try to include in their non-executive company boards a number of women that would allow them to reach a balanced presence of women and men over a period of eight years from the date of entry into

548 The first report of 9 March 2017 is available at https://www.bmfsfj.de/blob/115648/916d83985cd40e23540818f4fec2c1c0/bundestagsdrucksache-quotenbericht-data.pdf.
549 Denmark, Gender Equality Act, Section 11.
550 Denmark, Gender Equality Act, Section 12.
551 Under the Danish Companies Act, the Danish Financial Statements Act and the Danish Act on Gender Equality.
552 The guidelines can be accessed here: https://danishbusinessauthority.dk/sites/default/files/media/guidance_on_target_figures_policies_and_reporting_on_the_gender_composition_of_management.pdf.

force of the law.[553] The obligation applies to companies that are obliged to submit a non-abbreviated profit and loss account; this includes only very large companies, since the only companies that can submit abbreviated profit and loss accounts are those with more than 250 workers that have a turnover exceeding EUR 22 million a year. The concept of a balanced presence of women and men is contained in Additional Provision 1 of the Law on effective equality. According to this provision, the presence of women and men is well balanced when the number of people of one sex does not exceed 60 % in the set to which it relates, which means that the figure to be reached is 40 %. It is a soft target since the companies only have the obligation of 'trying' to reach it. The timeline was eight years from the date of entry into force of the Law. That moment arrived in 2015 and the goal was not met.

The Unified Code of Good Governance of the National Commission of the Stock Market (Comisión Nacional del Mercado de Valores) recommends that listed companies have a selection procedure for non-executive board members that is concrete and verifiable and that ensures that the proposals for appointment or re-election are based on an analysis of the needs of the board (Recommendation 14). The National Commission is the body responsible for overseeing and inspecting the Spanish Stock Market and the activities of those companies involved in it, and is appointed by the Government. The unified code establishes that the selection system should promote diversity of knowledge, experiences and gender in the board. The objective is that by the year 2020 the number of female members represents at least 30 % of the total number of members of the non-executive boards of all listed companies.[554] However, these are only recommendations and there are no established sanctions if the objective is not met.

Royal Legislative Decree 1/2010 of 2 July 2010 states that listed companies must mention in their annual reports the procedures they are applying so that their Company boards have a balanced composition of women and men.[555] According to this article if a policy of this type is not applied, a clear and reasoned explanation should be given. It is only an obligation of information, that does not force any results and no sanction mechanism has been established.

The objective of a balanced presence of women is established for company boards (described above) but it is also established in other matters. Law 3/2007 recommends a balanced presence of women and men (at least 40 % women) in the following fields: political candidate lists and decision-making bodies;[556] members of the governing bodies of the General Administration of the State and of the public entities linked to or dependent on it;[557] and tribunals and bodies for the selection of the staff of the General Administration of the State and public entities linked to or dependent on it.[558] In addition, the Law on effective equality stipulates that at least 40 % of the training places for promotion in the public administration must be reserved for women.[559]

In **Finland**, Section 4 of the Act on equality between women and men contains the positive duty of the authorities to promote gender equality. The authorities are to promote the equality of women and men in all their activities, and adopt administrative methods of functioning that guarantee promotion of gender equality in preparatory work and decision-making. Section 4a(1) contains a quota provision which requires that the proportion of both women and men in Government committees, advisory boards and other corresponding bodies, and in municipal bodies and bodies established for the purpose of inter-municipal cooperation, but excluding municipal councils, must be at least 40 %, unless there are special reasons for the contrary. These public-body gender quotas do not affect elected bodies, only bodies nominated by elected bodies. Not meeting the target may lead to the nominating decision being

553 Spain, Law 3/2007, (Law on effective equality) Article 75.
554 https://www.cnmv.es/docportal/publicaciones/codigogov/codigo_buen_gobierno.pdf.
555 Spain, Law of Corporations (as modified by Law 11/2018), of 28 December 2018, Article 540(4)(c).
556 Spain, Law on effective equality, Article 14.
557 Spain, Law on effective equality, Article 52.
558 Spain, Law on effective equality, Article 53.
559 Spain, Law on effective equality, Article 60.

overturned by an administrative court. The provision is an effective tool for gender balance in public-nominated bodies.

Section 4a(2) of the act contains a provision on gender quotas in public majority companies: if 'a body, agency or institution exercising public authority, or a company in which the Government or a municipality is the majority shareholder has an administrative board, board of directors or some other executive or administrative body consisting of elected representatives, this must comprise an equitable proportion of both women and men, unless there are special reasons to the contrary.' The provision also applies to companies owned or co-owned by municipalities. The legal obligation covers only companies with majority public ownership of all sizes. There is no timeline for the provision, however.

Section 4a(3) of the act stipulates that authorities and other bodies that are entitled to nominate a representative in the board of directors are, 'whenever possible', to propose one woman and one man for each position. This is not a hard quota, in the sense that no specific percentage is mentioned. It is much easier to nominate a balanced board of directors, when each nominating body offers two candidates, a woman and a man. Because these administrative nominations take place subject to the requirements of administrative legislation, if they have been made unlawfully because the provisions in the Act on equality between women and men have not been followed, they may be overturned by the administrative courts. As to the public majority companies, the Equality Ombudsman has the right to monitor how Section 4a is applied.

There has been pressure from the Government to encourage listed companies to increase the number of women in their boards, and the Chambers of Commerce have responded by introducing a duty on gender-balanced representation by way of self-regulation. The companies are to have both women and men in their boards of directors, and in reporting on the code of conduct requirements, the companies follow the comply-or-explain rule. In 2018, the percentage of women in large-cap companies reached 34 %, in mid-cap companies 29 % and in small-cap companies 26 %. Since 2003, the national code of conduct for listed companies has required that both sexes must be represented on the boards, but no quota is set in the self-regulatory code.[560] Those companies under self-regulatory rule only are to publish a report on how the code of conduct has been applied. The Chambers of Commerce also follow the reporting. There is a definite wish by the representatives of the companies to avoid hard law in these issues, and an attempt to show that self-regulation is the way forward.

In **France**, since 2002, one third of the members of juries and commissions in recruitment or promotion of civil servants must be qualified persons of each sex.[561] The aim of this quota was to allow a balanced participation of both sexes in these juries. In 2007, the Council of State stated that the decision of a commission that did not respect this quota could not be void, as the law only defines an objective of a balanced representation, and that the criterion of gender cannot prevail against competence and skills.[562] A recent law in 2019 on the transformation of the French public service[563] reaffirms these obligations in juries and recruitment commissions and attempts to facilitate its implementation according to the public sector concerned.[564]

560 *Naiset pörssiyhtiöiden hallituksissa* -18 (Women in the boards of directors of the listed companies -18), *Keskuskauppakamari* (Finnish Chambers of Commerce), https://kauppakamari.fi/wp-content/uploads/2018/05/naiset-porssiyhtioiden-hallituksissa-2018.pdf.

561 France, Law of 13 July 1983 on public service modified, by the Génisson Law of 9 May 2001 then by the Law of 12 March 2012, Article 6 bis. See Bui-Xuan, O. (2015) 'La "représentation équilibrée entre hommes et femmes", une catégorie juridique équivoque', *RDP*, pp. 431-450; Bui-Xuan, O. (2018) '"Représentation équilibrée" et "représentation proportionnée" des femmes et des hommes: convergence ou concurrence?', *AJFP*, pp. 319-323.

562 Conseil d'Etat, 22 June 2007, n°288206.

563 France, Law of 6 August 2019 on the transformation of the public service (*Loi de transformation de la Fonction publique*). https://www.legifrance.gouv.fr/affichLoiPreparation.do?idDocument=JORFDOLE000038274919&type=general&typeLoi=proj&legislature=15.

564 Article 83 of the new law, modifying the law of 1983 on public service is to clarify the principle of balanced representation in selection committees grouping different provisions of the public service regulations to improve its application. It also facilitates its implementation in different administrations (provisions on rotating presidency between the sexes of

In the private sector, a law was adopted on 27 January 2011[565] in order to improve the representation of women on company boards. Firms had to ensure that each sex had at least 20 % of board seats within three years and 40 % in six years. The law only applies to large companies that are listed, employing at least 500 workers and with revenues of over EUR 50 million. Non-complying companies would see their board elections nullified, but not the decisions adopted by the board. New elections had to be held in order to fulfil the obligation of gender representation. The principle was extended in 2012 to state-owned companies, institutions with both private and public support in which the personnel have private contracts. The Law on listed companies required a report by the president of the board on the balanced representation of women in conformity with the law, with no official built-in monitoring outside of the effect of illegal appointment of men (the decisions become null and void).

In **Greece**, at least one-third of the (executive and non-executive) members of the boards of legal persons of the public sector who are appointed by the state, legal persons governed by public law or local authorities must belong to each sex.[566] The legal form of the legal persons concerned is irrelevant; they may be governed by public law or by private law; they may or may not be companies, and, if they are companies, they may not necessarily be companies listed on the stock exchange. It is not required that their whole capital belong to the state, a legal person governed by public law or a local authority. These may own part of the capital (not even the larger part) and still be empowered by the provisions governing the particular legal person to appoint members of its board. The one-third quota applies in all the cases. The requirement also applies to 'service councils', which are administrative authorities whose task is laid down by the Constitution.[567] Civil servants may not be transferred without an opinion, or lowered in rank or dismissed without a decision, of a service council consisting of at least two thirds of permanent civil servants.

The quota does not concern the whole service council or other body but only the members appointed by the minister or other competent public authority concerned. The state, the legal persons governed by public law or the local authorities appoint only a certain number of the board members, as provided by the provisions governing each particular legal person; the quota applies only to these members, and not those elected by employees, for example.[568] The quota has to be applied concerning the regular members of the council; it is not enough that it is applied to the deputy members.[569] The quota applies provided that there is an adequate number of employees of each sex in the service concerned who have the necessary qualifications for appointment to the particular service council.

Act 4604/2019[570] added a new provision to Act 2839/2000,[571] which stipulates that, if the composition of the service council does not fulfil the above requirements, it is unlawful. An exception to this rule is provided in the case of service councils, the members of which are partially or totally designated *ex officio* or through a ballot or are designated by the Ministry of National Defence and the legal persons supervised by it due to a proven lack of a sufficient number of persons of the other sex. The amendment will come into force after the end of the current term of the above service councils. This amendment is in conformity with the standard jurisprudence of the administrative courts and of the Council of State according to which (i) if the act by which the state, a local authority or a legal person governed by public law appoints board members does not observe the quota, it is subject to annulment and (ii) the decisions

selection committees over a period of 4 sessions of competitions to adjust to the culture of certain public professions and levels instead of every session which compromised its application).

565 France, Law No. 2011-103 of 27 January 2011 *relative à la représentation équilibrée des femmes et des hommes au sein des conseils d'administration et de surveillance et à l'égalité professionnelle publiée*, Official Journal, 28 January 2011.

566 Greece, Act 2839/2000 (OJ A 196/12.09.2000), Article 6(1).

567 Greece, Constitution, Article 103(4).

568 Athens Administrative Court of Appeal 90/2010.

569 CS judgment 1414/2018.

570 Greece, Act 4604/2019, Article 16.

571 Greece, Act 2839/2000, Article 6(1).

of boards that are not composed in accordance with the provision on the quota are also subject to annulment.[572]

This new provision in Act 2839/2000 has been incorporated into the Code for Employees of Local Authorities (CELA).[573, 574] The same measure has been included in the Civil Servants Code (CSC, which also covers the legal persons governed by public law),[575] in a more extended version.[576] Consequently, the CSC, as it now stands,[577] requires the one-third quota for the service councils as well as for other bodies that are entrusted with the assessment and selection of the heads of the services of the state and legal persons governed by public law.[578] Moreover, according to Act 3653/2008,[579] the number of scientists participating in any council or committee dealing with research, including those assessing candidacies for research projects, must be determined 'on the basis of scientific excellence' and according to a quota of at least one-third from each sex, in accordance with Article 116(2) of the Constitution, provided that they possess the necessary qualifications for the particular post.

Finally, the Hellenic Corporate Governance Council (HCGC) (Elliniko Symvoulio Eterikis Diakyvernisis) established in 2012 as a non-profit company on the joint initiative of Athens Stock Exchange and the Hellenic Federation of Enterprises (SEV), plays a role. It functions as a specialised body for disseminating the principles of corporate governance and seeks to develop a culture of good governance in the Greek economy and society. The Corporate Governance Deontology Code of HCGC for listed companies provides[580] that the nomination committee of the board should ensure that there is an effective and transparent procedure for the nomination of board members and that the responsibilities of the nomination committee include, among others, proposing a diversity policy, including gender balance, to the board.[581] This is a general soft-law provision applying only to the boards of listed companies. No quantitative objectives, timelines, defined procedures or reporting duty is provided.

In **Iceland**, quota rules were adopted in the Gender Equality Act,[582] regarding participation in Government and municipal committees, councils and boards where care must be taken to ensure that men and women have as close to equal representation as possible, and in any event neither gender should fall below 40 % representation This provision also applies to the boards of publicly owned limited companies and enterprises in which the state or a municipality is the majority owner.

The Government presented a bill in October 2009, in which it proposed amendments to the legislation on a wider range of companies. The bill stated that care should be taken to ensure gender balance on the boards of all companies, but included no direct obligations for them to promote women.[583] The bill was amended by the Parliament during its process, and new legislation approved in March 2010,[584]

572 CS judgment 2977/2014: the composition of the service council was lawful, although it contained no women, because there were no women in the service concerned who possessed the required qualifications; therefore, its decisions were valid. Athens Administrative Court of Appeal 811/2012, 90/2010, 216/2007, 602/2007, 890/2007 annulled decisions of service councils that were not composed in accordance with the above provision.
573 Greece, Act 2839/2000, Article 7(5).
574 CELA: Act 3584/2007, OJ A 143/28.06.2007.
575 Greece, Act 3528/2007, OJ A 26/09.02.2007, (Civil Servants Code) Article 161, as amended by Act 3839/2010 OJ A 51/29.03.2010 and re-amended by Act 4275/2016 OJ A 149/15.07.2014.
576 Greece, Act 4275/2014, OJ A 149/15.07.2014, Article 2.
577 Greece, Civil Servants Code, Article 161.
578 Greece, Civil Servants Code Articles 157-160.
579 Greece, Act 3653/2008, OJ A 49/21.03.2008, Article 57.
580 Article 5.4
581 The Corporate Governance Deontology Code of the Hellenic Corporate Governance Council (HCGC) for listed companies is available at: http://www.helex.gr/documents/10180/2227810/HCGC_EN_OCT_2013_form.pdf/e53731a3-a972-4e21-bbf8-2644f6709e26.
582 Iceland, GEA, Article 15.
583 Iceland, *Þingskjal* 71, 2009-2010.
584 Iceland, Act No. 13/2010.

legalising gender quotas on boards of private companies in Iceland for the first time.[585] It amended the Public Limited Companies Act No. 2/1995 as well as the Private Limited Companies Act No. 138/1994, implementing gender quotas on company boards, to take effect on 1 September 2013. Company law[586] provides that the board of directors of a public limited company must consist of a minimum of three persons. On boards of directors of official public limited companies and public limited companies with more than 50 employees each sex shall be represented on the board when the board consists of three persons and when there are more than three members in the board of directors, the sex ratio must not be lower than 40 %. The same applies to sex ratios among reserve directors in such companies, but ratios on the board and the reserve board must in total be as equal as possible. Additionally, all companies falling under the scope of the act must take gender ratio perspectives into consideration in the recruitment of CEOs, and all public limited companies with more than 25 employees must report the relevant statistics to the register of limited companies.

In 2011 the boards of pension funds were also subject to gender quotas by amendments to the 1997 pension fund legislation,[587] also to take effect 1 September 2013. As regards private limited companies, similar requirements apply to those with more than 50 employees on an annual basis (comprising only 1 % of private limited companies in Iceland).[588] If the board of directors of a private limited company with more than 50 employees comprises two or three board members, each gender shall have a representative. If the board members are three or more the 40 % gender-ratio rule applies. Taken together, then, the amended law imposes an obligation on state-owned public companies, corporations, public limited companies and private limited companies as well as pension funds with more than 50 employees to have a balanced representation of women and men (40 % of either gender at least).

In **Norway**, Section 28 of the GEADA (previously the Gender Equality Act of 9 June 1978 No. 45, Section 21 and GEA Section 13) provides for the representation of both men and women on all public boards and in committees. If a board has two or three members, members of both sexes must be represented. If a board has four or five members, each sex must be represented by a minimum of two persons. If a board has between six and eight members, each sex must be represented by a minimum of three persons. If a board has nine members, each sex must be represented by a minimum of four members. If a board has more than nine members, each sex must be represented by a minimum of 40 % of all board members. The rules accordingly apply to the appointment or election of substitutes. Exceptions to the rules may only be made as far as special circumstances make it obviously unreasonable to fulfil the requirements.

In December 2003, the Norwegian Parliament adopted legislation on gender representation to be imposed on all publicly owned enterprises (that is, state-owned limited-liability and public limited companies, state-owned enterprises, companies initiated by special legislation and inter-municipal companies) and all public limited companies in the private sector. The rules regarding gender representation also apply to limited liability companies that are wholly-owned subsidiaries of state-owned limited liability companies, state-owned public limited companies or state-owned enterprises. Public limited companies normally have a broader spread of shares and less personal involvement in the management.[589]

The Public Limited Liability Companies Act of 13 June 1997[590] states that on the board of public limited-liability companies both genders must be represented in the following manner: on boards consisting of two or three members, both men and women shall be represented; on boards consisting of four or

585 For further information: https://skemman.is/bitstream/1946/13354/1/ElinBlondal_JytteBendixen_Women%20in%20boards%20and%20management.pdf.
586 Iceland, Public Limited Companies Act No. 2/1995, as amended, Article 63.
587 Iceland, Act No. 129/1997.
588 https://www.atvinnuvegaraduneyti.is/media/Acrobat/felog.stofnun.thyding.22.1.2013.pdf.
589 See European Network of Legal Experts in Gender Equality (2011) *Positive action measures to ensure full equality in practice between men and women including on company boards*, national report from Norway by Helga Aune p. 163ff. Available at: https://www.equalitylaw.eu/downloads/3864-positive-action-measures-to-ensure-full-equality-in-practice-between-men-and-women-including-on-company-boards-pdf-2-639-kb.
590 Norway, Public Limited Liability Companies Act No. 45 of 13 June 1997, Section 6-11a366.

five members, both genders shall be represented by at least two; on boards consisting of six to eight members, both genders shall be represented by at least three; on boards consisting of nine members, both genders shall be represented by at least four. The rules as stated above equally apply to the election of deputy members. If the board consists of more than nine members each gender shall be represented by at least 40 %. These rules do not apply to board members elected by and amongst the employee representatives, or in some cases where one gender accounts for less than 20 % of the total number of employees in the enterprise at the time of the election. The Public Limited Liability Companies Act provisions are the model for all equivalent quotas in other acts.[591]

Company legislation provides general provisions for the enforcement of the rules regarding the composition of the board. The rules regarding gender representation have a natural place in these general provisions regarding companies – on equal footing with other requirements such as for book-keeping, accounting etc. Thus, no special rules have been adopted for enforcement of gender representation and this requirement will be enforced through the normal control routines followed by the Register of Business Enterprises. Under these rules, the Register of Business Enterprises will refuse to register a company board if its composition does not meet the statutory requirements, just as it refuses registration if the chief executive officer or auditor does not fulfil the legal conditions. A company that does not have a board that fulfils the statutory requirements may be dissolved by order of the Court of Probate and Bankruptcy.

8.4.2 Concentration on gender balance in companies with existing close government involvement

For those states that rely on regulation for securing changes in government boards, there is a relatively small number of states that primarily aim to regulate only those companies that have a significant degree of government involvement already in the composition of company boards. In addition to those states we have already described (**Finland**, **Greece**), the following states are in this sub-category.

In **Austria**, companies with a close economic or organisational relationship with the Austrian Republic *('staatsnahe Betriebe')* are obliged by a Federal Government Council resolution (*Ministerratsbeschluss*) to guarantee a quota of 25 % female members on supervisory and on company boards (*Aufsichtsräte).*[592] For these boards the actual rate of female representation is at almost 47% in 2017 (up from 40 % in 2016).[593] Non-binding rules are established for diversity measures relating to a balanced representation in respect of age and gender of supervisory board members together with corresponding reporting commitments.[594] The term 'balanced representation' is not defined by law. The Corporate Governance Code contains a 'comply or explain' provision for a balanced gender representation on supervisory company boards, which demands at least 30 % female representatives on supervisory boards and reporting on promotion measures for women to management and board functions.[595]

New legislation concerning gender equality on company boards was introduced in October 2017 and came into effect on 1 January 2018.[596] Elections of and postings to supervisory boards of listed stock

591 Norway, Limited Liability Companies Act of 13 June 1997 No. 44 (*Lovomaksjeselskaper (aksjeloven)*), Section 20-6.368 366; the Local Government Act (*Kommuneloven*) Section 80 a.369; the Mutual Societies Act of 29 June 2007 No. 81 (*Lovomsamvirkeforetak (samvirkelova*)), Section 69; the Foundations Act of 15 June 2001 no. 59 (*Lovomstiftelser (stiftelsesloven)),* Section 27a.The Local Government Act (*Kommuneloven*) Section 80a was amended by addition to the Act on 19 June 2009 No. 91 and entered into force on 1 January 2010.

592 Reporting for 2018 not yet available, reporting for 2017 http://www.imag-gmb.at/cms/imag/projektdetails3.htm?channel=CH0602&doc=CMS1456127938138.

593 No report for 2018 so far, for 2018 see https://derstandard.at/2000075573648/Bundes-Frauenquote-in-staatsnahen-Aufsichtsraeten-steigt.

594 Austria, Incorporated Stock Companies Act (*Aktiengesetz, AktG*) and the Code of Company Regulations (*Unternehmensgesetzbuch, UGB*).

595 Austrian Corporate Governance Code, https://www.corporate-governance.at/uploads/u/corpgov/files/code/corporate-governance-code-012018.pdf, especially clauses 52 and 60.

596 Austria, *Gleichstellungsgesetz von Frauen und Männern im Aufsichtsrat, GFMA-G*, https://www.ris.bka.gv.at/Dokumente/BgblAuth/BGBLA_2017_I_104/BGBLA_2017_I_104.pdfsig.

companies and of companies with more than 1 000 employees and consisting of at least six seats will have to have at least a 30 % quota of the underrepresented sex. Only 'single gender' companies (defined as companies that have a workforce consisting of less than 20 % employees of one sex) are exempt from these regulations. The 30 % quota is sanctioned by an 'empty seat' policy. Elections and postings that fail to meet the required quota minimum are void and board members holding such seats in contravention of this law are barred from voting. The new regulations are applicable to all new board elections, however current seats will not be affected. The quota is only required for boards with six or more seats, which means that there may still be all male boards (with five or less members) under the new legislation.

In **Luxembourg**, there are quantitative objectives regarding a gender-balanced representation of both sexes to be reached on the boards of companies partially funded by the state, for example the University of Luxembourg or public research institutes. The Law of 3 December 2014 on public research institutes states that 'the proportion of the members of the board of both sexes cannot be less than 40'.[597] Members of the boards of public research institutes are appointed by the Government.

Slovenia adopted measures that aim to improve the gender balance on company boards with the Regulation on criteria for respecting the principle of gender-balanced representation (the RCRPGBR) in 2004.[598] According to the RCRPGBR, the principle of gender-balanced representation must be applied in nominating or appointing Government representatives to management and supervisory boards of state-owned enterprises (executives and non-executives) and other entities of public law. The principle is considered to have been met when the representation of one sex is at least 40 %. No sanctions apply if the principle is not respected. This is considered as a soft target. There is no timeline within which this figure is to be reached. The regulations do not talk either about women or about the underrepresented sex. The law just says that the representation of one sex must be at least 40 %. There is no specific selection procedure specified for the selection of candidates, their recruitment or any election procedure.

8.4.3 States that aim to regulate a broad swathe of public and private companies

There is a group of states that do not primarily aim to regulate only those companies that have a significant degree of Government involvement already in the composition of company boards, but seek to regulate a much broader swathe of companies. In addition to those states we have already described (**Belgium**, **Denmark**, **France**, **Germany**, **Iceland**, **Norway**, **Spain**), the following states are in this sub-category:

In **Italy**, a quota system was introduced by Act No. 120 of 12 July 2011 for the appointment of managing directors and auditors of listed companies and state subsidiary companies quoted on the regular stock market. It provides that company statutes must include criteria regarding the election of directors and auditors, with the aim of ensuring gender balance. In particular, directors and auditors of one sex cannot be elected in a proportion greater than two-thirds compared to directors and auditors of the opposite sex. This rule is to be enforced for three periods of tenure of directors and auditors. The sanctions procedure in the case of violation of the rule is gradual. Act No. 120/2011 provides for a warning by the *Consob* (National Securities and Exchange Commission) to apply the quota system within four months and, in the event of non-compliance, for a fine of EUR 100 000 up to EUR 1 million (EUR 20 000 up to EUR 200 000 for auditors), together with a second warning for the quota to be achieved within three months, failure to do so resulting in dissolution of the company board. The statute must also include provisions regarding the substitution of members of a company board during their terms of office so as to ensure the balanced participation of the two sexes as specified by law. The *Consob* is authorised to monitor the enforcement of this rule.

597 Luxembourg, Law on public research institutes of 3 December 2014, Article 7(4).

598 Slovenia, Regulation on criteria for respecting the principle of gender-balanced representation, Official Gazette, No. 103/04, available at http://www.pisrs.si/Pis.web/pregledPredpisa?id=SKLE4452.

Decree No. 251 of 30 November 2012 also applies a hard quota rule to state subsidiary companies not quoted on the regulated market. To achieve this aim, for three periods of tenure, the less-represented gender shall obtain at least one third of the posts compared to the other sex. Moreover, in the event of infringement of the regulations, a sanction procedure to be applied by the monitoring authority following the regulations specifically issued at this purpose. Under the decree, the Prime Minister's Office or the Department for Equal Opportunities are responsible for this task and are due to report to Parliament every three years on the implementation of the law. The Prime Minister's Office and the Department for Equal Opportunities must be informed of the composition of company boards or boards of auditors within 15 days from the relevant appointment or from possible changes in their composition. The board of managers or of auditors must also report to them on possible gaps in gender balance occurring during their mandate. Moreover, the same notice can be given by any interested party. If the quota is not respected, the Prime Minister will first give the company a 60-day warning and where the unbalance persists a second warning must be given with the same term. If this latter instruction is not complied with, the company board must be dissolved. The possible substitution of a member of the company board during the mandate must be regulated by the statute in order to respect the quota provided. As regards boards of auditors, the quota must also be applied to substitute auditors. The order of possible substitutions for incumbent auditors must ensure respect for the quota. The decree also provides that if its application does not result in a round number for the members of the less-represented gender, the latter is to be rounded up.

Preferential measures meant to favour access to bank credits and public funds have also been introduced.[599] The subjects entitled to these benefits are partnerships or cooperatives made up by 60 % of women at least, limited and unlimited companies owned for at least two-thirds by women and whose board of management is made up for at least two-thirds by women, individual female undertakings and finally undertakings, their pools (*consorzi*) and associations, bodies, undertakings for the promotion of entrepreneurial activity which promote professional training on self-employment or services for professional advice and assistance on management techniques reserved to a quota of at least 70 % women.

In the **Netherlands**, provisions have been inserted into the Dutch Civil Code stipulating that at least 30 % of the members of the board of directors and the supervisory board of a joint-stock company and/or a private company must be female.[600] If the 30 % requirement is not reached, the company is required to explain in their annual report why this is the case, what measures it has taken to attain a 30 % representation of women on the board, and what measures it will take in the future to reach this target. No other sanctions are provided for. The law covers both executive and supervisory boards. It only covers large corporations, i.e. corporations with on average 250 or more employees, a net turnover of EUR 40 million or more, and with assets worth EUR 20 million or more. Companies are free to decide themselves how to achieve the target, within the limits of the applicable legislation. There are bodies that may monitor the progress, but only with the consent of the companies concerned. Companies are not required to allow their regulations and policies to be checked by an outside body.

In **Portugal**, several acts concerning gender-balanced company boards have been approved in recent years. In 2012, the Government approved a resolution designed to promote the increased participation of women in the boards of public and private companies, and following this resolution other legislative measures have been established. Later on, these measures have gone further, first as regards public administration and state-owned companies and more recently as regards private companies. Binding legislation was first applicable to public companies,[601] and only at a later stage was extended to private

599 Italy, Code of Equal Opportunities, Articles 52 to 55.

600 Netherlands, Civil Code, Art. 2:166, 2:276 and 2:391(7).

601 Portugal, Decree-Law No. 133/2013, of 3 October 2013 (on general features of public companies – *Estatuto das Empresas Públicas*), and Law No. 67/2013, of 28 August 2013 (on general features of administrative independent agencies for the monitoring of economic activity in the private and in the public sector – *Lei-Quadro das Entidades Reguladoras*).

listed companies.[602] As regards public companies, Decree-Law No. 133/2013, of 3 October 2013,[603] establishes that the governance boards of public companies (administration and oversight boards) must aim to have both men and women as members, and establishes the obligation of public companies to put in place equality plans. Similarly, Law No. 67/2013 of 28 August 2013[604] establishes that the board of these agencies must include at least 33 % of the members of each sex, and that the presidency of this board must be occupied by persons from both sexes alternatively.

The most recent provision is Law No. 62/2017 of 1 August 2017, which, for the first time, imposes a quota for women on boards for private listed companies (which includes about 20 companies). A minimum quota of 33.3 % for women in decision-making boards is set on a mandatory basis for all public companies and for private listed companies.[605] The timetable for the adjustment of the companies to the minimum quota of 33.3 % is relatively short (2018 for public companies and 2020 for private listed companies),[606] so the measure will be in place in the next few years. The notion of 'board' for the purposes of this law is wide, in the sense that it includes the executive board, the administration board and oversight board, and the minimum quota of women is imposed in each one of these boards,[607] so the influence of women at all levels of decision-making in the companies will be effective. This legislation also requires that employers must establish equality plans that are intended to facilitate the access of the employees from the underrepresented sex to top managing positions.[608]

8.5 Conclusion

In several respects, the pattern of activities attempting to secure more equal gender representation on company boards mirrors the pattern we have seen in previous chapters regarding positive action in the employment context. First, several states are still not doing anything at all to secure gender-balanced company boards. This is despite the Commission's proposal on company boards, and despite the enhanced action taken in other states. Secondly, the difference in regulatory approach among those states that have taken action shows extreme diversity, from encouraging voluntary non-binding codes of practice, to the approach of strict regulation and sanctioning in **Norway**, followed by some other countries like **Italy** and **France**. Thirdly, the specific measures adopted to secure gender-balanced company boards reflect several of the positive action measures in employment identified in previous chapters, especially those in Categories III and IV, such as tie-break priority rules in the case of equal qualifications, and the use of numerical targets or quotas. Fourthly, as we have seen in the context of positive action in employment, some states have moved to a stricter legal approach after first having introduced measures to secure gender-balanced Government bodies and committees. So, here too, there is some evidence of the public sector leading by example, or at least making clear that such measures are feasible, before similar measures are introduced in the private sector.

However, in contrast with the picture built up in the previous chapters where the issue was positive action in employment, states appear to be more willing to impose statutory positive action obligations on private-sector companies regarding the composition of their boards than in the context of the composition of their workforce. The difference in regulatory approach is striking. States appear willing to impose much more specific obligations in the context of company boards, often imposing specific quotas (**Belgium**, **Germany**, **Greece** (albeit only concerning the boards and the service councils of the public sector), **Austria**, **Iceland**, **Italy**, **Norway**) or numerical targets (**Denmark**, **France**, **Finland**, **Luxembourg**, **Netherlands**, **Slovenia**, **Spain**) to be met within a specific time-frame, measures that are often not

602 Portugal, Law No. 62/2017, of 1 August 2017.
603 Portugal, Law on general features of public companies.
604 Portugal, Law on general features of administrative independent agencies for the monitoring of economic activity in the private and in the public sector.
605 Portugal, Law No. 62/2017 of 1 August 2017, Article 1.
606 Portugal, Law No. 62/2017 of 1 August 2017, Articles 4 and 5.
607 Portugal, Law No. 62/2017 of 1 August 2017, Articles 1(1), 3, and 4.
608 Portugal, Law No. 62/2017 of 1 August 2017, Article 7.

required in the employment context in those same countries. There appear to be three significant factors that may help explain the differences. First, positive action in Europe emerged in the 1980s and 1990s, during a time when there was considerable faith in self-regulation. Secondly, the development at the state level of regulatory approaches regarding company boards, on the other hand, often emerged after the financial crisis of 2008, when self-regulation was much less in vogue. Thirdly, the fact that many of the developments at the national level occurred after the Commission introduced its proposed directive, which would introduce EU legal obligations to undertake positive action at the level of company boards is hardly coincidental.

9 Positive action in national litigation

9.1 Introduction

In several Member States and EEA countries, the national courts have given judgments that have important implications for the understanding and scope of permissible positive action under national law. In this chapter, we turn to national (primarily constitutional) law and its interpretation by national courts. A complete picture of the legal position on positive action at the national level must not neglect the role of the national courts, just as it would present a limited picture of EU or EEA law to leave out the decisions of the CJEU and the EFTA Court.

9.2 Bulgaria

In **Bulgaria**, the Constitutional Court[609] accepted that granting some privileges to some vulnerable social groups was legitimate, when such privileges were socially necessary and justified, provided that the principle of equality had priority. This interpretation can be seen as justifying the adoption of affirmative action more generally. A potential problem, however, is that this ruling focuses only on socially vulnerable groups and the need for affirmative action for achieving gender equality is not necessarily related to the kind of vulnerability envisaged in this decision. In another decision,[610] concerning gender quotas in university, the Court has held that affirming by law the principle of tolerance which is at the basis of recognising equal opportunities for realisation in society, presupposes, under certain conditions, that the opportunities of the more represented sex may be limited, when this is justified by the objective of the law.

9.3 Cyprus

In **Cyprus**, the Supreme Court considered a legal provision establishing that in certain public law organisations at least one-third of the members of the board of directors should belong to either sex.[611] In essence, that provision sought to ensure that women would make up at least one-third of the board of directors in certain organisations governed by public law. The provision was introduced in 2016 in a legislative amendment to Law 149/1988, which regulates the appointment of boards of directors in certain public law organisations. The House of Representatives in its plea used compliance with EU law and with CEDAW to buttress the argument that the specific measure was in fact compatible with the constitutionally protected equality principle. The Supreme Court struck down the amendment as being against the Constitution and specifically Article 28 on the equality principle. The Court said that while the equality principle does not rule out 'reasonable discrimination', this must be justified. For the Court, the numerical underrepresentation of one sex is not an acceptable justification but 'an arbitrary, from a constitutional point of view, discrimination which disregards meritocratic and other objective criteria set by the law'. In its reasoning the Supreme Court did not consider CEDAW and held that EU law was not applicable; the Court found that Article 157(4) TFEU did not apply in this case. In its reasoning, the Court distinguished between measures that set specific advantages in favour of the least represented sex with the purpose of advancing gender equality in employment and professional career,[612] and positive discrimination in the sense of preference in favour of candidates of the underrepresented sex on the boards of certain public law organisations – which is not allowed. The Court does not really explain what the difference between 'specific advantages' and 'positive discrimination' might be.[613]

609 Bulgarian Consitutional Court, ruling No. 14 on case No. 19.
610 Sofia District Court, decision of 6 August 2007, civil case file 1756/2005.
611 Cypriot Supreme Court, judgment 2/2016 *President of the Republic v House of Representatives.*
612 Which would be allowed under Article 147(4).
613 The argument that Article 23 of the EU Charter of Fundamental Rights could be triggered was rejected by the Court on the reasoning that the measure in question was not applying EU law.

9.4 Germany

In **Germany**, the constitutionality of positive action under the German Basic Law has also come before the courts. In its famous decision on the prohibition of night work of women in 1992, the Federal Constitutional Court established that the principle of gender equality also aims at social reality and at the future.[614] Thus, the Court started to accept the concept of indirect discrimination and, with regard to the future, the general necessity and legitimacy of positive action measures. Unfortunately, the Court has never decided upon gender quotas.

Since then, the principal cases have arisen in the *Länder*.[615] In 2010, the State Administrative Court of North Rhine-Westphalia confirmed that the 'constitutional mandate' of the state to ensure the effective implementation of equal rights for women and men can justify the 'preferential unequal treatment of women'.[616] Further, the court explained that as 'a result of the decades of discussion about compensatory legal regulations', which use the 'generally inadmissible criterion of gender' aiming at the equality of women and men, national law as well as European legal requirements would lead to the conclusion that such positive measures are accepted. The 2016 Act on the modernisation of the Civil Service Act of North Rhine-Westphalia provided that where there was a lower proportion of female civil servants in a higher position than in the next lower positions, and where women had not yet reached 50 % of those positions, then female civil servants were to be preferred in promotion where they were *substantially* equal in qualifications, aptitude and professional performance based upon an equivalent overall evaluation, unless a male applicant experienced specific hardships. Shortly after its enactment, the State Administrative Court of North Rhine-Westphalia decided that this provision was incompatible with the Basic Law.[617] The court accepted the provision that female civil servants were to be given preference in promotion where they were *substantially* equal in qualifications, aptitude and professional performance, unless a male applicant experiences specific hardships, but the court rejected the idea that a substantially equal qualification could be established by an equivalent overall evaluation.

Another example of preferential treatment of women to come before the courts in Germany was the restriction to female employees or female civil servants of the right to vote and to stand for election as the equal opportunity commissioner under the federal and state equality acts. The State Constitutional Court of Mecklenburg-Western Pomerania explained the idea of structural discrimination and the suitable means to tackle this kind of discrimination in a 2017 landmark decision.[618] The Court held that Article 3(2) of the German Basic Law explicitly allows for disadvantages generally suffered by women, especially in working life, to be compensated. The lack of the reconciliation of working and family life, the problem of sexual harassment at the workplace, the small number of women in leading positions were all cited as indications of the structural discrimination of women in the opinion of the Court. As long as this structural discrimination was not effectively tackled, the legislator was authorised by the Basic Law to use any means that are appropriate and necessary to end this discrimination. Only weeks later, the State Labour Court of Schleswig-Holstein agreed.[619] Both courts held that to attain the goal of gender equality, the state cannot use formal gender equality (formal equal treatment of the sexes) as the only method; very often the state authorities have to use affirmative action or special measures as an essential tool to achieve substantial equality.

614 German Federal Constitutional Court, BVerfG vom 28.01.1992, Az. 1 BvR 1025/82, 1 BvL 16/83, 1 BvL 10/91, BVerfGE 85, 191-214.

615 See further: State Administrative Court of Hesse, judgment of 11 April 2014, 1 B 1604/15; Labour Court of Berlin, judgment of 5 June 2014, 42 Ca 1530/14, press release; State Labour Court of Berlin and Brandenburg, judgment of 14 January 2011, 9 Sa 1771/10; State Labour Court of Düsseldorf, judgment of 12 November 2008, 12 Sa 1102/08. https://www.berlin.de/gerichte/arbeitsgericht/presse/archiv/20140605.0930.397734.html; State Labour Court of Berlin and Brandenburg, judgment of 14 January 2011, 9 Sa 1771/10; State Labour Court of Rhineland-Palatinate, judgment of 29 September 2011, 10 Sa 314/11.

616 State Administrative Court of North Rhine-Westphalia, judgment of 26 August 2010, 6 B 540/10.

617 State Administrative Court of North Rhine-Westphalia, judgment of 21 February 2017, 6 B 1109/16.

618 State Constitutional Court of Mecklenburg-Western Pomerania, judgment of 10 October 2017, LVerfG 7/16, available under www.landesverfassungsgericht-mv.de.

619 State Labour Court of Schleswig-Holstein, judgment of 2 November 2017, 2 Sa 262 d/17.

We saw above that the State Administrative Court of North Rhine-Westphalia rejected the possibility of a substantially equal qualification being established by an equivalent overall evaluation. The court's decision took place shortly before the state's parliamentary elections. Repeatedly, the ruling was incorrectly reported as a decision upon the general incompatibility of positive action measures with the Constitution, not only by the media but by political parties as well. Conservative parties as well as right-wing populists furthered resentments against the 'unjustified preferential treatment of unqualified women' as a very successful topic in the state election campaign. The immediate withdrawal of the new quota regulation became one of the most important electoral promises. On 19 September 2017, the first day of the session of the newly elected parliament, the Parliament of North Rhine-Westphalia withdrew the innovative gender quota regulation thereby pre-empting (and thus excluding) a decision by the State Constitutional Court on the topic.[620] In contrast to the former misinterpretation of the court's decision, the Parliament did not abolish any quota regulation but fell back on the well-known and fairly ineffective former regulation. With this, the civil service of North Rhine-Westphalia is not only back to the underrepresentation of women in leading positions and will stay there, but political positions against gender equality within the civil service (and in many other places) have been proven to work well in state election campaigns.

Similar discussions can be seen in a more northern state in 2018: when the state prime minister of Mecklenburg-Western Pomerania announced that she wanted to develop a strategic plan for more women in leading positions in the judiciary of the state because only 3 out of 24 top positions were occupied by women, there was uproar.[621] Preferential treatment for members of a group defined by sex/gender has been and still is under general suspicion of incompatibility with the Constitution or at least illegitimacy in German legal and political discourse since the 1980s.

9.5 France

In **France**, as we have seen, positive action measures were not really welcomed in the French system, because they were often viewed as contrary to the French concept of equality.[622] Positive action measures were also presented as a danger to the Republican idea of equality because they could lead to or favour communitarianism. That is why, in 1982, the Constitutional Council[623] declared unconstitutional a law whose purpose was to introduce quotas for the election of municipal officers. The Constitutional Council rejected as unconstitutional a proposal to set a limit of 75 % on the proportion from either sex for the lists of candidates at municipal elections. The Constitutional Council considered that quotas were contrary to the constitutional principle of equality and universality that prohibited any division in the categories of the electors and of the people to be elected. A law on equal pay voted in 2006 also intended to create mandatory quotas in different areas. However, on 16 March 2006, the Constitutional Council invalidated many provisions of this law, too.[624] The mandatory provisions relating to the access of women to deliberative and jurisdictional boards were cancelled. The Council specified that the Constitution did not permit constraining rules grounded on sex, and, for that reason, refused provisions that imposed predetermined proportions of men and women in boards. In short, all incentive provisions were saved especially those regarding equal representation of men and women in courses of initial and continuous vocational training, but the Constitutional Council censured all constraining provisions. A revision of the Constitution was thus needed to allow the legislature to adopt gender quotas. With the amendment of Article 1 of the Constitution in 2008, the position of the Council changed and the legislature is now allowed to adopt laws that promote 'equal access by women and men to elective offices and posts as well as to positions of professional and social responsibility', but the debate continues. There have also been debates on the divergence between what is viewed as a French conception of equality and the

620 Act on amendments to the Civil Service Act of North Rhine-Westphalia of 19 September 2017, https://www.landtag.nrw.de/portal/WWW/dokumentenarchiv/Dokument?Id=XMMGVB1729|764|765.
621 See German Women Lawyers' Association, Press Release of 24 August 2018, https://www.djb.de/verein/Kom-u-AS/K5/pm18-31/.
622 France, Declaration of Human and Citizens' Rights of 1789 (*Déclaration des droits de l'homme et du citoyen*, Articles 1 and 6.
623 Constitutional Council, Decision 82-146 DC of 18 November 1982.
624 Constitutional Council, Decision 2006-533 DC of 16 March 2006.

European conception of discrimination, where the former is seen as characterised by an emphasis on individualism and universalism, and the latter is characterised as communitarian and particularist. Even with the modifications of the Constitution, the Constitutional Council has not always interpreted in an extensive way the possibility left to the legislature to adopt positive action measures (such as in the 2010 decision of the Constitutional Council).[625]

9.6 Croatia

In **Croatia**, two Constitutional Court decisions indirectly touch on the issue of special measures in the field of gender equality.[626] In the first,[627] the applicant contested the decision and procedure for the appointment of judges. The argument was that the principle of gender equality was violated in that procedure because out of 11 members of the State Judicial Council, a body responsible for appointment of judges, 10 were men. According to the Constitutional Court, that fact did not violate the principle of equality. The role of the State Judicial Council is to ensure the rule of law, and this value takes precedence over gender equality. Similar arguments were used in the second decision[628] in a procedure for the review of constitutionality of certain provisions of the Act on elections. The Constitutional Court annulled the provision in the legislation on elections, which provided for automatic invalidity of gender imbalanced election lists (i.e. those where one sex is represented with less than 40 %). When weighing between two equally important constitutional values, such as gender equality and the multi-party democratic system, the latter takes precedence. Both of them seem to confirm that any special measure aimed to ensure equal representation of both sexes can be weighed against other equally important values of the Croatian constitutional order, such as the rule of law or respect for the multi-party democratic system, and that those values can outweigh gender equality under certain circumstances.

9.7 Ireland

In **Ireland**, the constitutionality of positive action is only now emerging as an issue, and the Supreme Court has yet to rule on it. The 1937 Constitution of Ireland provides in Article 40.1 that 'All citizens shall, as human persons, be held equal before the law. This shall not be held to mean that the State shall not in its enactments have due regard to differences of capacity, physical and moral, and of social function.' Article 40.1 is considered to be addressed to the state[629] and thereby there is a public duty in respect of equality.[630] Respected academic commentators have noted that jurisprudence on the concept of equality under Article 40.1 is 'remarkably' underdeveloped compared to comparative and international jurisprudence.[631] Article 40.1 may be considered within the context of 'positive action' and 'quotas' in a constitutional challenge to the validity of provisions seeking to increase the proportion of women candidates standing for election to the national Parliament.[632] The legislation provides for state funding of political parties in accordance with a statutory formula. The challenged aspect of the legislation is the use of the existence of that funding and the possibility of its removal to achieve a more gender-balanced field of candidates in elections, and consequently to increase the chances of a more gender-balanced legislature. For the first seven years of the operation of the requirement, payment due to a

625 Constitutional Council, Decision 2010-618 DC of 9 December 2010.
626 Croatian Constitutional Court, Decision U-III-248/2018 of 22 May 2018, para. 25 and Decision U-I-1397/2015 of 24 September 2015, paras. 123-124.
627 Croatian Constitutional Court, Decision U-III-248/2018.
628 Croatian Constitutional Court, Decision U-I-1397/2015.
629 See generally Hogan and Whyte, (2018) *Kelly: The Irish Constitution*, Bloomsbury Professional, para. 7.2.28. Also note Directive Principles of Social Policy, Article 45.2 'The State in shall, in particular, direct its policy towards securing- That the citizens (all of whom, men and women equally, have the right to an adequate means of livelihood) may through their occupations find the means of making reasonable provision for their domestic needs'.
630 Ireland, Human Rights and Equality Commission Act 2014, Section 42.
631 See generally Hogan and Whyte, (2018) *Kelly: The Irish Constitution*, para. 7.2.05.
632 *Mohan v Ireland and the Attorney General,* Supreme Court judgment, 21 March 2019. High Court – http://www.courts.ie/Judgments.nsf/0/C9788FB8B228680580257F4F0037B507; Court of Appeal – http://www.courts.ie/Judgments.nsf/0/E4C2EBB60C0246F280258234003D0129 and Supreme Court http://www.courts.ie/Judgments.nsf/bce24a8184816f1580256ef30048ca50/43c7b853bba05851802583c400561cbb?OpenDocument.

registered political party will be reduced by 50 % if the candidates presented for election by the party at the next following general election were not at least 30 % male and 30 % female. Thereafter, the 50 % reduction in funding will apply if the candidates presented at all subsequent elections are not at least 40 % male and 40 % female. The objective of the amendment to the Electoral Act was to address the historic underrepresentation of female candidates in the Dáil, and, consequently, increase the number of female elected representatives. The High Court and Court of Appeal considered that those challenging the provision had no locus standi to challenge the constitutionality of the quotas. The Supreme Court reversed that decision and has remitted the substantive issue to the High Court.

9.8 Poland

In **Poland**, the Constitutional Court considers that the starting point for the scrutiny of affirmative action should be the constitutional imperative to assure equality between women and men.[633] Only in this context is it appropriate to consider the question of whether the legal differentiation of the situation of women in contrast to men would constitute discrimination against men contrary to the meaning of the general principle of equality. Such actions may be supported by social arguments, in particular attempting to ensure that women achieve de facto equality in employment. Such a differentiation may be justified by such constitutional values as the general principle of social justice and the special principle of equality between women and men. The Court distinguishes the provisions of the Constitution which set out the general principle of equality,[634] and that concern equality between women and men.[635] Preferential treatment constitutes an expression of the materially understood principle of equality, as well as an exception to the principle of equality, in the formal sense, which essentially implies a question of the substantive relationship of Article 33 (on gender equality) with Article 2 of the Constitution (which besides protecting the rule of law also states that the Republic of Poland seeks to realise the principles of social justice).[636] The Constitutional Court has continued to affirm the constitutionality of positive action, such as in the judgment of 15 July 2010,[637] among others, where it clearly stated that: '... both the case-law of the Court and the provisions of EU law and international law show that, in certain cases, it is permissible to make specific arrangements to compensate for the actual inequalities between men and women, that is the introduction of the so-called compensatory privilege (preferential treatment). Specific regulations establishing such a variation in the situation of women and men cannot be regarded as inadmissible in the light of the principle of equality, provided they fulfil the above-mentioned requirements' (that is the conditions of relevance, proportionality and preserving the relation to other norms, principles and constitutional values). The Court has also recognised, therefore, that in certain circumstances a supposed privilege for women may become a real restriction of their rights depriving them of equal opportunities.

9.9 Slovakia

In **Slovakia**, the discussion relating to positive action measures started intensively with the adoption of the Anti-Discrimination Act in 2004,[638] soon after Slovakia entered the EU. Temporary balancing measures on the grounds of race and ethnicity were introduced into the Anti-Discrimination Act[639] as a result of the implementation of the Racial Equality Directive. This section was not included in the Government's initial draft of the act, but was added to the draft by deputies during the discussion of the act in Parliament. This provision resulted in perhaps the most serious controversies in relation to the conception of equality

633 Polish Constitutional Court, K15/99.
634 Poland, Constitution, Article 32(1).
635 Poland, Constitution, Article 33.
636 See further Ziółkowski M. (2016) 'Zasada równości kobiet i mężczyzn' (The principle of equality of women and men), *Państwo i Prawo* No 2 s. 105 in.
637 Polish Constitutional Court, K 63/07.
638 Slovakia, Act No. 365/2004 on Equal Treatment in Certain Areas and on Protection against Discrimination Amending and Supplementing Certain Other Laws (the Anti-Discrimination Act).
639 Slovakia, Anti-Discrimination Act, Article 8(8) headed 'Permissible differential treatment': 'With the purpose of achieving equal opportunities in practice and following the equal treatment principle, temporary balancing measures aiming to prevent disadvantages linked with racial or ethnic ground might be adopted'.

in Slovakia and occasioned turbulent political discussion. In October 2004, immediately after its adoption, the Ministry of Justice initiated proceedings before the Constitutional Court to establish whether this provision was in conformity with the Constitution. The submission of this petition to the Court created a rather peculiar situation, since only a few months earlier the same Government had adopted a set of affirmative measures aimed at achieving equality and integration among the Roma minority.[640] In its petition, the Government objected that: the purpose of the challenged temporary balancing measures was not clear; the conditions under which these measures may be adopted were not clearly defined; the addressees authorised to adopt such measures were not clearly defined; their scope and content were not clear; finally, the provision suffered from its overall ambiguity and incomprehensibility.

The Constitutional Court granted the Government's petition and in its judgment of 18 October 2005[641] held the challenged provision to be unconstitutional. The Court stated that the material approach to equality alone complied with the principle of the rule of law and resulted from 'general values of the human dignity, autonomy and equal value of each individual.' According to the material understanding of equality, 'in different cases individuals should be given treatment that will reflect their different position.' Besides equality of results, the Court also considered that equality of opportunities was also one of the material approaches to equality. In cases of a derogation from the general prohibition of discrimination, the means must be necessary and proportional to the achievement of the intended purpose.

The judgment is based on a further distinction between positive discrimination and temporary balancing measures. On the one hand, the Court distinguished balancing measures or positive measures from the prohibited positive or reverse discrimination. The Court pointed out that the purpose of balancing measures is to ensure equality of opportunities in practice. These measures are temporary, because they countervail and compensate certain disadvantages and do not breach the general principle of equality. But if such measures were not declared to be temporary, a situation might occur where they would unreasonably privilege certain groups of persons, which would lead to prohibited positive discrimination. The failure of the legislative provision to reflect the criterion of the temporary nature of such measures might lead to reverse discrimination against persons and hence to a breach of the general principle of equality. Finally, the Court stated that the provision on the 'adoption of positive measures, that are also balancing measures, leads to positive discrimination based on racial or ethnic origin.'

From the reasoning in the decision it follows that the weakness of this provision on temporary balancing measures was its generality and ambiguity and that the Constitution allows preferential treatment only towards women, minors and disabled persons. Several reasons were given by the Court (which cited two cases of the CJEU,[642] but did not mention the CJEU's case law on positive action discussed above): the adoption of special positive action, including temporary balancing measures, constituted more favourable treatment (positive discrimination) for persons on the ground of race or ethnic origin; the provision itself failed to address the subject and content of the measures permitted, as well as the criteria for adopting such measures, and therefore it violated the principle of legal certainty; the provision failed to specify that special balancing measures should be merely temporary and thus could serve as a basis for prohibited positive discrimination against others, without a legally justifiable basis.

640 Slovakia, Decree of the Government of the Slovak Republic No. 278/2003 of 23rd of April 2003 ('The Main Thesis of the Policy of the Slovak Republic in the Integration of the Roma Community'). The document was based on the policy of positive action or compensatory measures in the areas of education, employment, social security, housing and healthcare and it is aimed at members of the Roma community with the aim being to attain equality of opportunities.

641 Constitutional Court of the Slovak Republic, PL.ÚS 8/04-202, published in the Collection of Laws of the Slovak Republic under No. 539/2005 http://merit.slv.cz/PL.US8/04, http://www.google.sk/url?url=http://miris.eurac.edu/mugs2/do/blob.doc%3Ftype%3Ddoc%26serial%3D1148459524821&rct=j&frm=1&q=&esrc=s&sa=U&ved=0ahUKEwi-oKaN_b3LAhWEqnIKHRhQAkAQFggTMAA&sig2=7VCpSpdcjvkLDoayKh2MCw&usg=AFQjCNGzjt3tC2x3T7u6HffyJmF9wFlJdg available in English.

642 Case C-222/84, *Johnston v Chief Constable of the RUC,* 1986 ECR 01651, ECLI:EU:C:1986:206, and Case C-285/98, *Kreil v Bundesrepublik Deutschland,* 2000 ECR I-00069, ECLI:EU:C2000:2.

This controversial decision was adopted by a majority of eight judges, five judges voted against, with several arguing in favour of the special measures.[643] These should, in the opinion of some judges, ensure equal opportunities at the beginning for those who cannot get, for certain reasons, the same starting position as most people of the population. By the special measures the state should get over the existing disadvantages of a certain group so that they can fully and equally exercise the rights belonging to all. In the context of preferential treatment, the judges also stated in another opinion that more favourable treatment is enshrined in a definition of direct discrimination, but it only applies to the cases of comparable situation. According to their opinion, it is difficult to talk about a comparable situation when it is necessary to use a special measure just for the person to get into a comparable situation with another person.

Following this decision, repeated attempts have been made to incorporate temporary balancing measures into the Anti-Discrimination Act. The amendment of the Anti-Discrimination Act,[644] with effect from 1 April 2008, reintroduced the regulation of temporary balancing measures.[645] Although the amendment had also transposed Directives 76/207/EEC and 2004/113/EC, in the final version the possibility of adopting temporary balancing measures on the ground of sex was completely omitted. In contrast with the initial draft,[646] during the discussion of the act in Parliament the grounds of race and sex were replaced by the grounds of membership of a national or ethnic minority and social and economic disadvantages. The amendment to the Anti-Discrimination Act adopted in 2013,[647] with effect from 1 April 2013, extended the grounds on which the temporary balancing measures may be adopted: not only on the ground of age and disability, but also on the ground of racial or ethnic origin, membership of an ethnic minority, gender and sex.

9.10 Spain

In **Spain**, the legality of positive action measures has been considered in numerous judgments. In its judgment 128/1987 of 16 July 1987, the Spanish Constitutional Court considered that a subsidy for day care established only for women and widowers in a collective agreement was justified as a compensation measure for the greater labour difficulties of women.[648] In its judgment 173/2013, of 13 October 2013, the Constitutional Court considered that the positive action measure consisting in qualifying the dismissal of the pregnant worker as null and void regardless of the employer's knowledge of the pregnancy does not extend to cases that are not expressly provided for in the Workers´ Statute.[649] The same had been stated previously by the Supreme Court in its judgment of 1 April 2011. In that case, the contract of the worker had been terminated during the trial period while pregnant. In accordance with Spanish legislation,[650] as a general rule, the company is not obliged to refer to the cause of the termination of

643 See Debrecéniová J. (2005), 'Pozitívny postup ako novodobá súčasť politík smerujúcich k zabezpečeniu rovnosti a jeho zakotvenie v medzinárodnom, európskom a slovenskom práve' (Positive action as a modern part of policies aimed at ensuring equality and its anchoring in international, European and Slovak Law) in: *Ústav štátu a práva Slovenskej akadémie vied, Informačná kancelária Rady Európy: (Ne)rovnosť a rovnoprávnosť. Zborník z medzinárodnej konferencie konanej v dňoch* 13-15 October 2005; Tatranskej Štrbe; Magurová, Z. (2012), 'Pozitívne opatrenia zamerané na rodovú rovnosť v rozhodnutiach Európskeho súdneho Dvora' (Positive measures aiming at gender equality in judgements of the European Court of Justice) in *Právny obzor: teoretický časopis pre otázky štátu a práva*, Vol. 95, No. 6, pp. 584-600; Magurová, Z. (2012), 'Pozitívne opatrenia zameané na rodovú rovnosť v kontexte európskeho práva' (Positive measures aiming at gender equality in the context of European law) in *Právny obzor: teoretický časopis pre otázky štátu a práva*, Vol. 95, No. 3, pp. 237-252.

644 Slovakia, Act No. 85/2008 amending Act No. 365/2004 (the Anti-Discrimination Act).

645 Slovakia, Anti-Discrimination Act, Article 8a.

646 The original proposition contained the following wording: 'The adoption of temporary balancing measures by state administrative bodies targeted to eliminate disadvantages arising due to racial or ethnic origin, nationality or ethnic group, sex, age or disability, with the aim being to ensure equality of opportunities in practice, is not considered discrimination.'

647 Slovakia, Act No 32/2013 amending Act No. 365/2004, effective from 1 April 2013. http://www.snslp.sk/CCMS/files/AntidiskriminacnyZakon_ENG-1.1.2015.pdf available in English.

648 In this ruling, the Constitutional Court did not establish that men who were caring for children should also have access to this benefit, but this judgment was issued before the judgment of the CJEU in the *Lommers* case.

649 Spain, Workers' Statute, Article 55.5.

650 Spain, Workers' Statute, Article 14.

the contract if it occurs during the trial period, for which reason the employer did not claim any cause when he terminated the contract of the pregnant worker. The employer alleged that he was unaware of the pregnancy status. Ignorance of the pregnancy is not relevant in the case of the dismissal of the pregnant woman if she is not in probation period, as established in the Workers' Statute,[651] but the specific situation of nullification of dismissal during the trial period was not expressly referred to in this context. Therefore, both the Constitutional Court and the Supreme Court established that the employer's lack of knowledge of the pregnancy prevented the termination of contract being qualified as null and void. The qualification of null dismissal when it has no cause is a measure of positive action that applies to the cases set out in Article 55.5 of the Workers' Statute and according to these judgments does not extend to other different cases (such as the contractual termination during the trial period).[652]

9.11 Sweden

In **Sweden**, the operation of positive action in the context of higher education was the context for a Swedish decision. In a judgment issued on 21 December 2006, the Swedish Supreme Court held that the rules of admission to university studies in law at one of Sweden's universities constituted discrimination on the ground of ethnic origin. The rules of admission at issue – which had been adopted by the university on a trial basis in order to increase ethnic and social diversity among its law students – reserved 10 % of the available student places for students with both parents born outside Sweden. Two applicants who had not been admitted to study law at the university, but who would have been admitted if the rules had not provided for more favourable treatment of persons with a non-Swedish background, brought an action for damages against the Swedish state and asserted that they had been the victims of discrimination on the basis of ethnic origin. The Swedish state contested the claim and asserted, *inter alia*, that the less favourable treatment accorded to the two unsuccessful applicants was justified by the interest sought to be achieved by the relevant rules and thus fell under an explicit exception in the applicable act.[653] In its judgment,[654] the Supreme Court stated that the assessment of whether the type of positive action involved fell within the ambit of the relevant exception should take as its point of departure that any significant exception from such an important principle should be clearly set out in the relevant act and be restrictively construed. In the Supreme Court's view, the relevant provision in the Equal Treatment of Students at Universities Act could only be given the construction asserted by the state if it was called for by the act's connection with other parts of the non-discrimination legislation, or if it gained clear support from the act's *travaux préparatoires*. As no such support existed, the Supreme Court held that the relevant exception did not permit more favourable treatment on the ground of ethnic origin in situations where applicants had different qualifications. The Supreme Court accordingly concluded that the two claimants had been subjected to discrimination based on ethnic origin and awarded them damages in the amount of SEK 75 000 (approximately EUR 8 000) each.

9.12 Conclusion

We have seen that in several respects the interpretation of EU law by the CJEU, and national constitutional law by constitutional courts, often (although not always) run in parallel, addressing several common questions. The CJEU and national courts have been faced with a series of similar issues. What forms of derogation from the principle of equal treatment should be permitted in favour of women? Are targets or quotas permitted? Should there be positive action in appointments simply because women are underrepresented? If so what about a male candidate who may face other forms of disadvantage such as being a single parent or being disabled? In arriving at their conclusions, the CJEU and national courts often arrive at similar conclusions reflecting the application of common principles. These can be

651 Spain, Workers' Statute,Article 55.

652 Recently, Royal Decree 6/2018, of 1 March 2019, has altered the law and has established that the consequence of nullity also applies to the termination of the contract during the trial period and therefore operates from the beginning of the pregnancy, regardless of the knowledge of pregnancy that the employer has.

653 Sweden, Equal Treatment of Students at Universities Act, Section 7(2).

654 Swedish Supreme Court, 21 December 2006, Case no. T 400-06.

summed up as the following: the requirement that positive action measures which are in tension with non-discrimination requirements should be subjected to a broadly proportionality-based assessment. This can now be seen as encapsulating the European approach to the limits of positive action. As is well known, this includes the requirements that the aim of the measures be transparent and legitimate, that the measures adopted should be sufficiently connected to achieving those aims, and that the aims cannot be achieved by the adoption of methods that pose a less significant challenge to the non-discrimination principle. Consistent with this approach, positive action measures should in particular address two potential problems with positive action: stereotyping, and third-party costs. The problem of stereotyping is that positive action measures, in the guise of assisting women to overcome barriers, may simply reinforce existing ones. The problem with third-party costs is that positive action may have adverse effects on those not benefitting from these measures, and the extent of those costs should not be disproportionate to the benefits. National courts and the CJEU may apply these principles in ways that differ from each other, for example, in the terms used to describe what they are doing, and in the weight given to particular elements in the proportionality test. These differences aside, however, there is a significant overlapping consensus that can be identified in practice that enables policy makers at the national and EU levels to make decisions regarding the scope of positive action with some degree of confidence as to what both national and EU law requires, should they wish to do so.

Part 3
An assessment

10 The wrong strategy?

10.1 Introduction

In this chapter, we consider the impact of the EU's positive action strategy, as outlined in Chapters 1 and 2, on the development of positive action at the national level, as outlined in Chapters 3 to 7. We begin, in Section 1, by examining the extent to which EU law on positive action (including the judgments of the CJEU) has been influential in the development of national approaches. In Section 2, we consider whether, beyond encouraging experimentation and an exceptions-based understanding of positive action, EU positive action law and policy has succeeded in having structures embedded at the national level that have brought about change in the labour market that has benefitted women. In Section 3, we attempt to identify what elements in EU gender equality law and policy, in which positive action is situated, have contributed to these effects, and we emphasise the dominance of the anti-discrimination model of gender equality. In Section 4, we examine the extent to which CEDAW is part of European positive action discourse, given that CEDAW presents an alternative model to that of the EU. In Section 5, we consider national economic and political constraints on the adoption of positive action measures. Finally, in Section 6, we turn to the impact of more recent EU initiatives on the development of measures aiming at the gender balancing of company boards.

10.2 Effect of EU law and policy on national developments

All Member States and EEA countries have at least minimal provisions in their national legislation or national constitutions protecting certain types of positive action from being considered to be unlawful discrimination. In some states, little apparent effect can be identified. In **Estonia**, **Liechtenstein**, **Luxembourg**, and **Romania**, the EU framework for positive action has neither been of assistance, nor been a constraint, in developing positive action measures, but these are exceptional. Where, as is the case in the vast majority of states, national provisions on positive action post-date the introduction of a positive action exception into EU law in the Treaties, and in the gender equality directives, in most cases these EU provisions were highly influential in the development of national anti-discrimination law because of the EU law obligation to implement the directives (including the provision regarding positive action) in national legislation. In the context of the drafting of legislation, EU law has, therefore, been highly influential.

In **Croatia**, the EU framework for positive action has had a positive influence in developing the legislative framework and approach to positive action. In **Portugal**, in the national expert's view, the EU framework for positive action has been of assistance to the development of positive action, because it has contributed to rebutting the traditional argument that consider such measures useless, since 'women already have equal opportunities in access to employment and at the workplace', so it is up to them 'to grab those opportunities' and 'they are free to choose between a more active role at work or in the family'. In **Latvia** and **Lithuania**, the EU framework has been relevant in providing at least a minimum starting point for further discussion regarding necessity of such measures. In **Austria**, in the opinion of the national legal expert, the initial impulse for political debates about, and legal implementation of, equality and positive action measures by the *acquis communautaire* before the accession treaty in 1995 was extremely important and fruitful. Since then, legislation and case law have been prompt in transferring CJEU case law and implementing EU legislation at the national level. In **Great Britain**, the EU framework assisted in developing positive action measures under the Equality Act 2010. In **Italy**, EU legislation had a considerable impact on the development of positive action. Council Recommendation 84/635/EEC of 13 December 1984 on the promotion of positive action for women was important as

regards the typology of actions provided. In **Cyprus**, the EU gender equality framework has certainly been of assistance in the sense of introducing the notion of positive action in this area. In the **Czech Republic**, the EU framework helped the adoption of at least a minimal approach. In **Bulgaria**, and **Slovenia**, the national experts consider that it has been of assistance. In **Iceland**, the EU framework has provided a strong basis for requests for positive action along with domestic initiatives – bringing attention to gender equality issues. In **Poland**, the EU legal framework for positive action was helpful for promoting the very idea of preferential treatment in employment. In **Malta**, EU law spurred actions that would perhaps not have taken place had the legislation not been implemented following Malta's membership of the European Union.

In **Iceland**, the GEA takes its inspiration from the EU Recast Directive and other relevant EU directives. In **Slovenia**, EU law was the basis for the adoption of laws regarding positive action. In **Bulgaria**, EU law has impacted the adoption of the provisions on positive action in the LPFD, mainly through the EU directives related to equal treatment of men and women, including Directive 2006/54. In **Malta**, EU law has indirectly influenced and instigated discussion on positive action. In **Ireland**, EU law has impacted generally on the development of positive action.[655] Hungarian anti-discrimination legislation, which allows for positive action, is based on the relevant EU standards, hence the role of the EU law may be seen as a promoter of positive action in **Hungary**. In **Belgium**, the adoption of a positive action legal framework derived from the implementation of EU law, which is still relevant.

In a smaller group of states, the EU has had a much more significant effect on the development of national legislative approaches. In **Greece**, Articles 2 and 3(2) TEC and Declaration No 28 annexed to this Treaty have been a source of inspiration for the introduction of the constitutional provision of Article 116(2) on positive action. More specifically, Article 116(2) of the Constitution in its present wording, requiring positive action, was adopted almost unanimously by the Greek Parliament in the context of the constitutional amendments of 2001, replacing the former provision of the same article, which allowed derogations from the gender equality principle.[656] This development was inspired by European Community law,[657] international human rights treaties,[658] the constitutions of other Members States (**Austria**, **Germany**, **Portugal**), the jurisprudence of the Greek courts, and the influential proposals of the NGO Greek League for Women's Rights.[659] In **Great Britain**, the drafting of the Equality Act 2010 was a key moment in relation to positive action laws: it was recognised that the existing legislation was more limited than was permitted under EU law. The explanatory notes to the act make it clear that the provisions were then drafted in a way that reflected EU law.

It is, perhaps, in **Italy**, where EU legislation has had the most considerable impact on the development of positive action. Council Recommendation 84/635/EEC of 13 December 1984 on the promotion of positive action for women was important as regards the typology of actions provided by Italian legislation. Thanks to the EU legislation and to the Court of Justice jurisprudence, Italian scholars and the legislature included in the concept of equal opportunities both equality of opportunities and equality of results; equality of results leads to the legitimacy of reserved quotas for women in any sector where they are underrepresented. Moreover, it is due to the EU influence that positive action is no longer perceived as

655 The Irish Equality Act 2004 amended Section 24 of the Employment Equality Act to reflect the case law of the ECJ and the then Article 141. The amended version provides: 'Section 24 of the Employment Equality Act 1998 provides that 'the Act is without prejudice to any measures- (a) maintained or adopted with a view to ensuring full equality in practice between men and women in their employments, and (b) providing for specific advantages so as (i) to make it easier for the under-represented sex to pursue vocational activity, or (ii) to prevent or compensate for disadvantages in professional careers….'. This wording does not provide for quotas yet the use of the words 'any measures' gives wide permission for the policy of granting promotion or hiring to persons of the underrepresented sex.'

656 Greece, Constitution (1976) Article 116(2) provided that: 'Derogations from the provision of Article 4(2) are allowed only for sufficiently justified reasons, in cases specifically provided by statute.'

657 Treaty Establishing the European Community, Articles 2 and 3(2) and Declaration No 28 annexed to the Treaty.

658 In particular, CEDAW, Article 4(1).

659 See Koukoulis-Spiliotopoulos, S. (2003) 'Greece: From Formal to Substantive Gender Equality -The leading role of the jurisprudence and the contribution of women's NGOs', in Manganas, A. (ed.), *Essays in Honour of Alice Yotopoulos-Marangopoulos*, Volume A, Athens, Nomiki Bibliothiki – Bruylant, pp. 659-670

an exception to the principle of equality: positive actions are rather thought of as going beyond formal equality, as they can include preferential measures for workers belonging to the disadvantaged gender, consistent with Article 3 of the Constitution and with the principle of substantive equality. Therefore, even if no direct and express link can be underlined between the development of positive action in the Italian system and EU developments, nevertheless, they still were surely influenced and encouraged by the steps towards the legitimacy of these measures taken at EU level.

In many states, particularly those that had previously rejected any form of positive action, the EU framework has had the effect of opening up at least the possibility of positive action. Thus, prior to the accession of **Cyprus** to the EU, positive action measures were not allowed as they were considered to contravene the constitutionally enshrined principle of equality.[660] On EU accession, the introduction of the principle of EU law supremacy[661] allowed the adoption of Law 205(I)/2002 on equal treatment between men and women in employment and vocational training, which provides for positive action.

In this sense, EU law can be seen as a catalyst for the idea that positive action can be compatible with and further advance gender equality – and this may have beneficial consequences. In **Sweden**, EU law may have contributed to the legitimisation of the provisions on positive action by its critics. This is partly because of the very fact that positive action is accepted in EU law, and partly because of the apparent ambition in EU law to balance the interest of the persons belonging to the underrepresented sex with the interest of the person belonging to the overrepresented sex. Beyond that, EU policy has encouraged the use of positive action at the national level, whilst making it clear that (within the relatively broad parameters provided by EU law) it is up to national authorities to decide what is appropriate for their circumstances, and without providing particularly explicit guidance as to what is permissible, or recommended by the EU.

Beyond the drafting of legislation, the influence of the EU's approach to positive action has been highly variable, depending on national circumstances. In terms of the substantive effect of EU law at the national level, it has (with few exceptions, such as **Italy**, apparently) strengthened the approach that sees positive action as an exception to anti-discrimination law, rather than as a (necessary) method of securing greater gender equality. EU law has encouraged a somewhat minimalist approach to positive action, in effect becoming the ceiling rather than the floor. In **Austria**, there is considerable political hesitation in going beyond what is specifically required by EU legislation. In **Ireland**, the difficulty with all the directives is that they are essentially standalone and therefore, a Member State will transpose the minimum requirement. This appears to be the case in part because EU policy encouraging positive action beyond minimal adherence is not binding on states, and because much of EU policy on positive action remains at the level of commitment rather than detailed guidance. The expert from **Poland** considers that the very general and ambiguous way of defining these measures and the absence of an even explanatory indication of their nature and types often leads to confusion and misinterpretation. Moreover, the encouragement to use positive action resulting from EU law is very weak and is not sufficiently directive in character.

In some states, EU law has moderated the types of positive action that are permissible, reducing the possibilities of introducing hard quotas, in the sense of policies that prefer women over men, with no exceptions, or less well qualified women over more qualified men, and requiring such policies to satisfy a proportionality assessment. In the **Netherlands**, EU law is considered to be a constraint. In the opinion of the expert from **Spain**, the CJEU's doctrine on quotas has made it difficult to apply quotas for the hiring of women in collective bargaining. Quotas for the hiring of women have never been common in collective agreements, but the CJEU's case law on positive action has been seen as having further reduced any interest in incorporating them into collective bargaining. Radical positive action of underrepresented

660 Cyprus, Constitution, Article 28.
661 Cyprus, Constitution, Article 1A.

groups when it comes to gender is not allowed when it comes to employment in **Norway**,[662] based on the EFTA Court's case law, but ultimately as a result of the EU case law.

Turning now to the impact of the jurisprudence of the CJEU, we find that in the bulk of states, national courts have not referred to any of the relevant judgments of the CJEU. In **Finland**, the judgments of the CJEU have not had real impact, for two reasons. Positive measures were adopted before the said judgments, and positive action duties under Finnish law have not been formulated so as to include 'hard' quota. The only provision that involves a 'hard' gender quota is Section 4a of the Act on equality between women and men, which stipulates a minimum 40 % quota of women and men in all state committees and like bodies, as well as in municipal non-elected bodies. In public authorities and companies with public majority that have a board of directors, the latter is to have an equal representation of women and men. The rule on publicly owned companies does not use a strict quota. These provisions involve areas of law that are not within the scope of the EU case or other law. In the **Czech Republic**, none of the cases mentioned earlier has been quoted by national courts. The reason might be the general backlash of the Czech jurisdiction against applying CJEU case law, unless it is absolutely unavoidable. The only time when the CJEU case law on positive action was taken in consideration (cases *Abrahamsson* and *Lommers*) was in 2013, when the Public Defender of Rights (equality body) issued its opinion in a case on public grants, which were not allocated if the applicant was on parental leave.[663] However, the Public Defender of Rights is a non-judicial body.

In a few states, CJEU jurisprudence has had a significant effect, but in several of these cases, this has largely been because one or other of these cases has been a reference from a court in the country concerned. In **Spain**, for example, the *Roca Alvarez* case[664] had a great impact. In **Sweden**, the *Abrahamsson* case[665] led to a change.[666]

Perhaps the greatest impact of the CJEU's positive action jurisprudence has been in **Germany**. From the 1980s there were discussions in (Western) German legal discourse about the legitimacy of quotas for women, generally rejecting the idea that these may be constitutional. However, the structural discrimination against women in the labour market was so obvious that federal and state legislation and policies decided upon affirmative action in the civil service (because the overwhelming majority opinion in legal and political discourse argued that private employers and companies could not be obliged to act against discrimination). Many legal scholars explained why such gender quotas in the favour of women would violate the prohibition of sex discrimination enshrined in the Constitution. As the Federal Constitutional Court had the luck to be spared having to make decisions on this topic, the decisions of the CJEU became the guiding star for questions of positive action within the civil service while, later on, the implementation of the respective European directives would decide upon the legitimacy and legality of positive action in private employment. The judgments of the CJEU have been seen to have encouraged the use of positive action by stating that such measures could be legitimate whilst placing limits on their use by requiring equal qualification.

Initially, as the first three CJEU decisions were based on German cases, they had a special impact on German legal discourse. The decision of *Kalanke* seemed to put an end to all the new positive action measures and affirmative action measures and quotas for women within the civil service. The majority of legal opinion had prevailed. Legislators and public authorities considered withdrawing any newly introduced quotas for women. The decisions of *Marschall* and *Badeck* adjusted the first decision and stated that it was legitimate to hire or promote women instead of equally qualified men, unless there were exceptional reasons to decide in favour of the male candidate. This has been the concept of gender quotas within the civil service until this very day. As many female candidates mysteriously

662 See Equality and Anti-discrimination Ombud (2015), *Positiv særbehandling* (A report on positive action), 28 May 2015, p. 25.
663 Opinion No. VOP 81/2012/DIS/ZO from 23.1.2013, sec. C.3. – CJEU case law.
664 Judgment of 30 September 2010, *Roca Alvarez,* C-104/09, [2010] ECR I-08661, ECLI:EU:C:2010:561.
665 Judgment of 6 July 2000, *Abrahamsson* Case C-407/98, ECLI:EU:C:2000:367.
666 Chapter 2, Section 2(2) of the Swedish Discrimination Act (2008:567) is now interpreted in line with the case law of the CJEU.

lacked equal qualification, the debate shifted to the question how equal qualification should be defined. There, the decision of *Abrahamsson* played an important role. Even acknowledging the fact that gender-biased assessment procedures and persistent gender stereotypes lead to the devaluation of female qualifications, the CJEU held that the qualification must be equal.

A select few states appear to have been significantly affected by the CJEU jurisprudence that arose in other Member States. **Spain** is one prominent example of where that was the case. The wording of the Workers' Statute[667] is highly influenced by the doctrine of the CJEU established in the cases *Kalanke, Marschall, Badeck* and *Abrahamsson*. The expression used in the relevant article to define the situation in which the preference to women can be awarded is 'in equal conditions of suitability', so the doctrine of the CJEU is respected. In **Austria**, the Federal Equal Treatment Act originally had a hard quota regulation of 40 % for women at all levels of civil service without 'Öffnungsklausel' (opening clause). Following the CJEU case law in *Kalanke*,[668] and *Marschall*,[669] the Supreme Court established in case law that this did not comply with EC law.[670] In 2004, the Federal Equal Treatment Act was amended accordingly.[671] The Constitutional Court rejected an application by a female claimant, who argued that the reduction of unemployment benefits for long-term unemployment in social exigency according to the amount of the net income of a spouse should be considered as disproportionate according to CJEU case law (*Lommers)*.[672] The Constitutional Court rejected this claim with the reasoning that disproportionality could only be considered as a legal basis for the rejection of this provision, if the social and economic goal of restricting the benefit to cases of social exigency could be reached by not considering spouses' incomes.[673]

Due to a large influx of German-speaking students to medical university studies and a limited number of university places, applicants for Austrian medical schools have to pass a qualifying examination in order to gain one of the available university places. Evaluations of the test results showed a considerable imbalance of positive results in favour of male students. As a balanced presence of male and female students was considered to be in the public interest, entry tests for med schools are currently subject to a gender-specific evaluation with a certain number of university places reserved for female applicants. A male applicant from Germany whose application to the Vienna medical school was rejected because of the procedure for gender-specific test evaluation applied to the Constitutional Court. He asserted (among other arguments), that the test and evaluation procedure did not comply with EU law and case law, specifically because the relevant ordinance does not contain a clause that ensures the consideration of specific personal reasons and objective qualifications of male competitors (Öffnungsklausel), citing the *Kalanke, Marschall*, and *Badeck* CJEU case law. The Constitutional Court rejected this claim and stated that the measure in question constitutes a 'flexible gender quota with the character of a positive action measure' according to CJEU case law (*Badeck*).[674] In **Belgium**, European case law on positive action (*Kalanke, Marschall* and *Badeck*) can be found only once: in the preparatory documents to the Royal Decree of 2 June 2012 introducing a quota of two thirds maximum of persons of the same sex in managing positions and higher grades (A3, A4 and A5) of the federal public administration. The reference to such case law is only used to support the lawfulness of the introduction of progressive (and non-automatic) quotas.

667 Spain, Workers' Statute, Article 17.4.
668 Judgment of 17 October 1995, *Kalanke*, Case C-450/93, ECLI:EU:C:1995:322.
669 Judgment of 11 November 1997, *Marschall*, Case C-409/95, ECLI:EU:C:1997:533.
670 Austrian Supreme Court, OGH, 1 Ob 80/00x, RS00114711, https://www.ris.bka.gv.at/Dokumente/Justiz/JJR_20010130_OGH0002_0010OB00080_00X0000_002/JJR_20010130_OGH0002_0010OB00080_00X0000_002.pdf.
671 Austria, BGBL I 65/2004, https://www.ris.bka.gv.at/Dokumente/BgblAuth/BGBLA_2004_I_65/BGBLA_2004_I_65.pdfsig, https://www.ris.bka.gv.at/Dokumente/BgblPdf/1999_132_1/1999_132_1.pdf.
672 Judgment of of 19 March 2002, *Lommers*, C-497-99, ECLI:EU:C:2002:183.
673 Austrian Consitutional Court, VfGH A 5/04, https://www.ris.bka.gv.at/Dokumente/Vwgh/JWT_2010120065_20140430X00/JWT_2010120065_20140430X00.pdf; https://www.ris.bka.gv.at/Dokumente/Vfgh/JFT_09958987_04A00005_00/JFT_09958987_04A00005_00.pdf.
674 Autrian Constitutional Court, VfGH B 533/2013, https://www.ris.bka.gv.at/Dokumente/Vfgh/JFR_20150305_13B00533_01/JFR_20150305_13B00533_01.pdf.

In **France**, a recent case of the French Court of Cassation of 2017 takes into account positive action and EU law in order to justify a difference of treatment between men and women founded on inequalities in practice between women and men.[675] The Court of Cassation, applying the French Labour Code[676] in the 'light of Article 157 § 4 of the TFEU', decided that a collective agreement may provide for half day's leave only for women if this measure seeks to address equal opportunities in remedying de facto inequalities that generally affect women. What is striking is that the Court's commentary on this case, posted on its website, directly refers to *Kalanke*, *Marshall* and *Badeck* and explains that CJEU case law had evolved concerning positive action, which would at this point, not constitute an exception to equal treatment but rather a form of it, 'positive discrimination', according to Article 157 TFEU and the enforcement of Directive 2006/54/CE.[677]

In some states, CJEU judgments are regarded as significant constraints on national action. In the **Netherlands**, EU case law is considered as something that constrains the use of positive action. In this respect reference is made to the judgments in *Kalanke, Marschall, Badeck* and *Abrahamsson*. The reasoning used is that the CJEU ruled that absolute and unconditional priority for women is not allowed and that recruitment procedures must be open to both men and women, in order to make an individual comparison possible. The idea in the Netherlands is that EU law only permits positive discrimination in so far as men have an equal opportunity as women to apply for a specific job. Reserving positions for women is in principle not allowed. Therefore, there is no 'hard' law allowed in this respect, only rather soft policies. It would not be correct to assume that this is the only constraint on such preferences being introduced. This is probably also in line with the general feeling in the Netherlands, that people should not be given preference because of their gender or ethnic background. In particular, where measures are considered to give preference to people from minority ethnic backgrounds, rumours tend to arise in Dutch society, especially those from a right-wing populist perspective. For instance, this was the case when the police posted a vacancy for a team-leader in Amsterdam and mentioned that a candidate would be selected with a different cultural background.[678] These types of measures have not been contested in court, but they have been contested before the equality body on the basis that they were inconsistent with EU law, as was discussed above concerning the University of Groningen and the University of Delft.[679] This second opinion has been criticised however on the ground that the equality body gave too extensive an interpretation of EU law.[680] The result of these cases and the comments in literature is that the Dutch Government and companies are rather reluctant to implement preferential policies. This is in line with the ideas of most people in society, that people should be selected on the basis of 'merit' and not on the basis of gender, ethnic background and so on.

In **Sweden**, positive action involving preferences for women had been a possibility for Swedish employers since 1980, when the Act on Equality Between Men and Women[681] came into force.[682] For a long time, the existence and application of the rules on positive action were considered relatively uncomplicated in the Swedish setting, although the ability to apply these rules was not widely used by employers.[683] Originally, preferential treatment was also permitted in cases where the applicant of the underrepresented sex

675 Court of Cassation (Social Chamber) 12 July 2017, n°15-26262. See Laulom, S. (2017) 'A court decision on positive action', Flash report, European Equality Law Network, 14 December 2017. https://www.equalitylaw.eu/downloads/4518-france-a-court-decision-on-positive-action-pdf-135-kb.

676 France, Labour Code, Articles L 1142-4, L. 1143-1 and L. 1143-4.

677 Directive 2006/54/CE, Articles 2 and 3. See further: Laulom, S. (2017) 'A court decision on positive action', Flash report, European Equality Law Network, 14 December 2017, Court of Cassation commentary: https://www.courdecassation.fr/jurisprudence_2/communiques_presse_8004/droits_femmes_8310/explicative_journee_37333.html.

678 https://www.ad.nl/nieuws/politie-slaat-door-met-positieve-discriminatie~a0ef5edc/.

679 Opinion 2011-198, www.mensenrechten.nl. See also *JAR* 2012/78 with a comment by E. Cremers-Hartman; Opinion 2012-195, www.mensenrechten.nl. See also *JAR* 2013/41 with a comment by E. Cremers-Hartman.

680 See Veldman, A.G. (2013) 'Voorkeursbeleid en Unierechtelijke beperkingen: over het College, het konijn en de hoge hoed' (Preferences and restrictions by EU law: about the Equality Body, the rabbit and the high hat), in Holtmaat, R. et al. (eds.), *Gelijke behandeling 2012*, Nijmegen, pp. 278-295.

681 Sweden, Act 1979:1118.

682 Sweden, Government Bill Prop. 1978/79:175.

683 Numhauser-Henning, A. (2001), 'On Equal treatment, Positive Action and the Significance of a Person's Sex', in Numhauser-henning, Ann (ed.) *Legal Perspectives on Equal treatment and Non-Discrimination*, Kluwer, p. 219.

was less qualified then the applicant who was rejected. Today, the scope for preferential treatment is more limited, and, according to some commentators, this is the result of a restrictive interpretation of EU law.[684]

In **Norway**, the *Marschall* case[685] and the principles stated by the CJEU have had effect when it comes to positive action. Further, under the GEADA,[686] it is important that those applying for a position are considered under a concrete and objective standard. Selection criteria that favour women, but that are not linked to gender directly are accepted because they also in theory can be in favour of men.[687] The main point is that positions cannot be 'earmarked' for women, and also that there is a certain flexibility when it comes to whether the positive action measure in employment is permitted.[688] In Norway, case law, especially from the Ombud and Tribunal has stated the need for positive action, and highlighted that equal qualifications do not automatically mean that women and men have the same opportunities to gain a position.

One example from Norwegian case law that in many ways interacts with the principles in *Marschall* is Case 1/2014, where the Tribunal concluded that it was in accordance with the former Equality and Anti-Discrimination Act (GEA),[689] to hire a woman for the position of chief of police in a police district. The council in the district considered the male and female applicants equally qualified for the job, and the woman got the job. The Tribunal did not consider it to be a breach of the GEA that the police district wanted more women in leading positions in the police district, and that it was correct to use positive action. There were few women in these positions.[690] The principles stated in *Abrahamsson*[691] have been important, and the principles stated in this judgment may to some extent have constrained the use of positive action because under Norwegian law it is also not permitted for an employer to employ a person from an underrepresented group if the person is not equally as well qualified as the other applicants. In other words, 'radical positive action' is not permitted, but moderate positive action is. The Ombud has concluded that, under the former Equality and Anti-Discrimination Act (GEA), when it comes to gender, radical positive action in favour of underrepresented groups is not allowed in relation to employment.[692] Based on this we might say that EU case law in some ways has constrained the use of positive action in Norway but, in other respects, the judgments from the European court have also contributed positively to case law in Norway.

An important variable on the effect of CJEU positive action jurisprudence has to do with the extent of court litigation. Where there is little or no litigation concerning positive action at the national level, then CJEU jurisprudence has little role to play in influencing the approach taken by national judges. The absence of domestic litigation also means that the opportunity for national courts to refer cases to the CJEU on preliminary references is also reduced. Significant numbers of Member States report little or no effect of CJEU case law directly on national approaches to positive action, in the sense that few states have, for example, legislated specifically to address issues arising from the Court's jurisprudence, although to the extent that states have taken EU legislation into account, they will have done so indirectly.

Where there is significant litigation at the national level over issue of positive action, the degree and type of influence of CJEU jurisprudence is dependent on five factors: (i) the willingness of national judges to cite such jurisprudence (in some cases courts appear to be resistant to cite CJEU jurisprudence); (ii) the interpretation by the national court of the general direction of travel of the CJEU's jurisprudence,

684 Fransson, S. and Stüber, E. (2015), *Diskrimineringslagen. En kommentar* (2nd ed.) Norstedts.
685 Judgment of 11 November 1997, *Marschall*, Case C-409/95, ECLI:EU:C:1997:533.
686 Norway, GEADA, Section 11.
687 Compare the GEADA, Section 3.2.1.3 with the *Badeck* case.
688 Compare the GEADA, Section 3.2.1.1-3.2.1.3 with the *Kalanke, Badeck* and *Marschall* cases.
689 Norway, GEA Section 4(2), cf Section 3.
690 See also Case from Oslo Municipal Court of 8 July 2010 (TOSLO-2010-7432) where the court found that it was not a breach of GEA to appoint a person from the underrepresentd group, a female judge when the applicants had equal qualifications.
691 Judgment of 6 July 2000, *Abrahamsson* Case C-407/98, ECLI:EU:C:2000:367.
692 See Equality and Anti-discrimination Ombud (2015), *Positiv særbehandling* (A report on positive action), 28 May 2015, p. 25.

in particular whether it is perceived to be generally favourably disposed to positive action, or generally disposed to limit the scope of positive action; (iii) the extent to which issues concerning positive action in that state were specifically referred to the CJEU for a preliminary reference – in France and Germany, where most of the preliminary references on positive action came from, the influence of EU law on the judicial and legislative approaches on positive action has been of considerably more importance than in other states; (iv) when the dominant developments concerning positive action at the national level occurred; given the shifting approaches adopted by the CJEU, if the dominant national debate occurred immediately after *Kalanke* and *Marschall*, EU law will be likely viewed differently than if it is influenced by the subsequent jurisprudence of the CJEU; and (v) whether domestic controversies over positive action occurred in contexts that were within the scope of EU law – in several instances, national debates were uninfluenced by EU law because the positive action was in areas of activity that were not covered by EU law, such as national elections, in which case the external influences, if any, were more likely to be from the ECHR and/or CEDAW.

10.3 Assessments of results of national positive action strategies in employment

In this section, we assess the results of national positive action strategies (initially, other than those concerning the composition of company boards). We consider what take-up there has been of positive action, and what its effects have been. We consider whether there is any requirement regarding the monitoring of positive action by, or the reporting of positive action to, any national authorities, and, if so, what compliance there is with monitoring/reporting obligations, and if any enforcement measures have been taken and/or sanctions imposed, possibly by courts. From previous chapters, we have seen that in the Member States of the EU and the EEA, the concept of 'positive action' is not well understood. Even interpreted at its most generous as encompassing active measures by the state or employers, the conclusion is that while there are examples of what might be called positive action being adopted by employers, this is the exception rather than the rule.

Where positive action has been adopted, there are substantial gaps in the monitoring of the effectiveness of positive action measures that have been adopted. Other than reporting to the CEDAW committee, there is no monitoring in **Bulgaria**, **Cyprus**, **Czech Republic**, **Denmark**, **Estonia**, **Great Britain**, **Hungary**, **Latvia**, **Lithuania**, **Malta**, **Netherlands**, **Poland**, **Romania** or **Spain**. When positive action does occur and there is information on its operation in practice, it is sporadic, time-limited, and of uncertain effectiveness; the results of positive action have been disappointingly sparse, except significantly in the context of recent initiatives concerning the gender balance of company boards and Government committees.

In **Croatia**, state administration bodies and legal entities majority-owned by the state are required to implement special measures and adopt action plans every four years, which are aimed at promotion and establishment of gender equality.[693] Plans are based on the analysis of the position of men and women and they establish the reasons for introduction of special measures, aims that should be accomplished, and methods of implementation and supervision.[694] The Government's Office for Gender Equality pre-approves each plan.[695] Failure to submit the plan to the Office for Gender Equality for approval is punishable as misdemeanour by a fine.[696] In practice, however, positive action amounts to measures aimed at providing incentives for women entrepreneurship and employment through active labour market policy measures (ALMPs), and the evidence concerning the effect of ALMP measures aimed at the employment of women is mixed.[697] For example, in 2018 there were 54.3 % of beneficiaries of

693 Croatia, Gender Equality Act, Article 11(1) and (2).
694 Croatia, Gender Equality Act, Article 11(3).
695 Croatia, Gender Equality Act, Article 11(4).
696 Croatia, Gender Equality Act, Article 34.
697 The information provided is based on the analysis of the Ombudsperson for Gender Equality for 2018. See Ombudsperson for Gender Equality (2019), *Annual Report 2018*, pp. 80-83, available at: https://www.prs.hr/attachments/article/2645/Izvješće%20o%20radu%20Pravobraniteljice%20za%20ravnopravnost%20spolova%20za%202018.%20godinu_~.pdf.

ALMP measures implemented by the Croatian Employment Service were female. When it comes to the measures in the field of development of SMEs and crafts, which are implemented by the Ministry of Economy, Entrepreneurship and Crafts, evidence shows that women are less likely to apply for financial incentives (the share of women applicants is 40.9 %), although the share of women who received incentives was on the rise (46.7 %). However, when the total amount of incentives is analysed, only 33.9 % of funds were granted in favour of women. This evidence show that women are still hesitant when it comes to applying for certain grants, and that they apply for lower amounts of grants than men.

In **Finland**, the Equality Ombud and the Discrimination and Equality Board monitor the implementation of the Act on equality of women and men.[698] The Ombud has the right to receive documents from authorities and private persons for the purposes of monitoring.[699] The Ombud may also inspect working places, educational institutions, labour and employers' unions and the premises of a service provider, if there are grounds for suspecting violation of the act, or disregard of the duties under the act.[700] In practice, the Equality Ombud has monitored working places by asking for information on the equality plans of employers where there have been complaints. The Equality Ombud assesses whether the plan fulfils the requirements under the act, and if not, advises the employer. The Equality Ombud has also monitored several employers in a certain field, by assessing their equality plans. In 2017-2018, for example, the monitoring focused on the IT, logistics and banking sectors. However, the resources of the Ombud's office are not sufficient for monitoring all equality plans in all fields. A study was made by the Ombud on municipal equality planning. While the social partners have no duty to monitor equality planning, in 2017 they carried out a survey on the effectiveness of equality planning and pay audits in workplaces. The social partners' study showed that the employees were not sufficiently informed about equality plans.[701]

In the **Netherlands**, the Ministry of Education and Culture has provided a subsidy of EUR 5 million in 2017 for the appointment of 100 female full professors by universities,[702] under the condition that the universities applying would offer the woman concerned a permanent position as a full professor.[703] Through this programme the percentage of female full professors increased from 19.3 % in 2017 to 20.9 % by December 2018. This is still only one in five professors. The number of women in employment is increasing, but this has many causes. Positive action is not a relevant cause, since it is almost never applied in the Netherlands.

In **Portugal**, in the field of employment, a breach of equality provisions (and positive action in this area is included here) can give rise to the application of administrative fines by the Labour Inspection Service (ACT).[704] Monitoring of these situations is the responsibility of the Public Agency on Gender Equality in Employment (CITE),[705] which works closely with the employers and the trade unions in these areas and also with the Labour Inspection Service. Both the Labour Inspection Service and (indirectly) the CITE can bring these situations to court if they are not solved on a voluntary basis by the parties. In **Portugal**, as reported by the national expert, since the more interventionist approach to this subject is quite recent, the effects of positive action are not yet visible. In particular, she found no statistical data on the increase in the proportion of women in employment that can be attributed to positive action, since the measures in this area are mere recommendations.

698 Finland, Act on equality of men and women, Section 16.
699 Finland, Act on equality of men and women, Section 17.
700 Finland, Act on equality of men and women, Section 18.
701 Equality Ombudsman (2019) *Tasa-arvovaltuutetun kertomus eduskunnalle 2018* (Report to the Parliament, 2018), pp. 50-51.
702 Under the '*Westerdijk* Talent Impulse'.
703 https://www.nwo.nl/financiering/onze-financieringsinstrumenten/nwo/westerdijk-talentimpuls/westerdijk-talentimpuls.html.
704 ACT – Autoridade para as Condições de Trabalho.
705 CITE – Comissão para a Igualdade no Trabalho e no Emprego.

In **Spain**, according to the 2018 global gender gap report[706] produced by the World Economic Forum, the employment situation of women did not substantially improve between 2007 and 2018. The year 2007 is a comparative benchmark because that was in the year in which Law 3/2007 was approved in Spain. Spain's ranking in the sub-index 'Economic participation and opportunity' was 80 in 2018 and 84 in 2007. The best position was obtained in 2015, when Spain was ranked 67. The worst position in the rankings occurred in 2009, when Spain was ranked 90. From the year 2007 to the present there have been advances and setbacks, although in general there is a slight improvement in the labour situation of women in Spain. However, the rate of female activity has increased substantially from 2007 to the present. According to data from the National Institute of Statistics,[707] the activity rate of women in 2007 was 49.51 % and in 2018 it was 53.06 %. The two figures reflect very low activity rates for women in Spain, although there has been a substantial improvement since 2007, the cause of which it is difficult to determine; it could be the result of the implementation of positive action measures, but it could also be because of the increase of women's training or social evolution in relation to stereotypes.

In **Malta**, the employment rate of women has increased quite substantially in the past few years but it is difficult to attribute it to positive action. An article published by the Central Bank of Malta in its 2015 annual report[708] estimating the impact of structural reforms on the female participation rate, refers to a number of reforms implemented by the Government in order to address the objectives of the Europe 2020 Strategy, including those targeted to raise the female participation rate in the labour market. Between 2008 and 2014, the female participation rate in Malta increased by 11.7 %. The increase in female employment was facilitated by a number of Government initiatives undertaken to raise the participation rate of women in the labour market. Measures include back-to-work fiscal incentives, new income tax computations, an increase in maternity and adoption leave, tax credits for the self-employed and exemptions from means testing for income earned by women working part-time. Self-employed women working on a part-time basis, as in the case of employed persons, were given the opportunity to choose to pay a 15 % tax rate on their income. Childcare facilities were made more available and affordable. After-school care services were also introduced in several schools to bridge the gap between day school and the regular working hours of parents in employment. Other initiatives were undertaken to provide care for children before schools' official opening hours, to allow additional flexibility to working parents. In conjunction with the above initiatives, a number of measures were taken to further improve basic skill attainment and reduce the number of early school leavers to strengthen the employability prospects of people joining the labour market. The study states that out of the 11.7 % increase in the female participation rate since 2008, around one-fourth could not be explained by the decline in the working-age population and the natural increases in the labour supply of females. Hence, it could potentially be attributable to labour market reforms.

In **Austria**, the federal Government is legally required to send a bi-annual report on the implementation of the equality principle and on the development of gender equality in the public service and in the private sector to Parliament (*Gleichbehandlungsbericht des Bundes, Teil 1 und 2*).[709] The amendment to the Equal Treatment Act of 2011, which introduces transparency in salaries, includes the requirement that the Austrian Federal Civil Service and companies should produce staff income reports every two years. However, this obligation only applies to companies with more than 150 employees, whereas most firms are smaller. Overall, the presence of positive action measures in legislation and corresponding case law have contributed to a broad awareness of the importance and feasibility of active measures towards more gender equality. Recent reporting by a prominent management magazine on career aspects for women at large companies showed that there is reluctance to adopt positive action measures at

706 http://www3.weforum.org/docs/WEF_GGGR_2018.pdf.
707 https://www.ine.es/jaxiT3/Tabla.htm?t=4734&L=0.
708 https://www.centralbankmalta.org/annual-reports.
709 2018 Report: https://www.parlament.gv.at/PAKT/VHG/XXVI/III/III_00193/index.shtml.

management levels, possibly in some respect due to a lack of information but certainly also because of lack of interest within company boards.[710]

In **Ireland**, the Public Appointments Service reports the numbers of appointments to state boards broken down into male and female. Such reporting is voluntary.[711] There are figures available in relation to access to promotion and higher posts in the civil service. The *Top Level Appointment Committee's Report 2017*[712] published on 9 September 2018 noted that the number of women applying for such senior positions is increasing. In addition, such numbers are increasing at preliminary interview stage and that this may be evidence of the impact of policies and the focus on tackling gender diversity in leadership positions. In 2017, the competitions comprised of five secretary-general posts, two deputy secretary posts, 23 assistant secretary posts and nine specialist roles at assistant secretary level. Secretary-general is the highest civil service grade in a Government department, then deputy secretary and so on. Out of the successful candidates, 57 % were male and 43 % were female candidates. There are few women applying for craft apprenticeships notwithstanding that there is a subsidy for employers who take on women.[713] Only 2 % of women are in craft apprenticeships.

In **Hungary**, the only relevant data is about the impact of the tax reward for employers (who employ individuals returning from parental leave). According to a report by the IMF from 2016, the impact of the tax cuts on the employment of women coming back to work from maternity has been limited. While the unemployment rate of women in the age group of 25-45 years declined, and their labour market participation has increased since the introduction of the measure, 'these improvements were subpar or similar to those of the untargeted group'.[714]

In **Belgium**, as explained above, the regulatory approach adopted is not identical for the public and the private sector: in the latter it is purely voluntary and left to the goodwill of collective bargaining bodies or employers, while in the public sector such positive actions must be adopted (according to the wording of the royal decree). Reporting and monitoring of positive action adopted in the public sector were provided by the Royal Decree of 27 February 1990. However, reporting and monitoring were not systematic and no sanction or enforcement measures have been taken to-date. To the knowledge of the expert, positive actions are no longer monitored in the public sector. Moreover, in the public sector, the current approach is to adopt diversity plans, marginalising positive action for gender equality. According to the new Ancillary Royal Decree of 11 February 2019, applicable from 11 March 2019 to companies in the private sector, a positive action plan may be adopted either through a collective agreement or through an employer's 'deed of accession', in that case in the format required by the annex to the RD. Positive action plans should be approved by the competent minister.[715] So, from 11 March 2019, positive action plans in the private sector are reported to the Federal minister/ministry in charge of employment and monitoring of these reports will be possible. Also, the Ancillary RD provides that the Federal ministry in charge of employment will write a report every two years in cooperation with the National Labour Council.[716] However, this evaluation will only be realised at a meta level, to get an idea of the types of measures implemented and their efficiency. If the collective agreement or the 'deed of accession' is not validated by the minister in charge of employment, it will not be legally valid. However, the employer can then choose the alternative way and inform the Federal ministry in charge of employment of their positive action plans. No enforcement measures nor sanctions are provided. The adoption of such agreements/plans are purely voluntary and no individual/specific monitoring of each agreement/plan is set. The effect

710 Trend 03.032019, 'Women into Top-Management: The Ball is in the Companies Half', https://www.trend.at/branchen/karrieren/frauen-top-management-es-unternehmen-10676136.
711 http://www.stateboards.ie/stateboards/.
712 https://assets.gov.ie/5728/170119155115-624da66a3b9043e28efea61b7f267c9a.pdf.
713 http://www.solas.ie/SolasPdfLibrary/PathwaysApprenticeshipReviewNov18.pdf.
714 International Monetary Fund (April 2016), 'Hungary 2016. Article IV Consultation – Press Release, Staff Report; and Statement by the Executive Director for Hungary', *IMF Country Report No. 16/107*, p. 52, https://www.imf.org/en/Publications/CR/Issues/2016/12/31/Hungary-2016-Article-IV-Consultation-Press-Release-Staff-Report-and-Statement-by-the-43878.
715 Collective Relations Directorate of the Department of Employment.
716 *Conseil national du travail* (Social partners).

of positive action measures has not been analysed or researched. It remains to be seen whether this latest RD will reinvigorate the approach to positive action for women and/or the underrepresented sex. The few positive action measures adopted in the past concerned soft issues that cannot really have a big impact on female employment. In practice, not taking any measures does not have any consequences.

In **Italy**, the three-year EONC programme on positive action measures includes criteria to recognise the total or partial reimbursement of costs of positive action projects; the latest programme also provided a scheme for the evaluation of the projects where votes must be cast on the specific objectives to be achieved and on the possibility to measure the level of achievement of the plan. Some of the measures sustained by these programmes also include numerical targets to be achieved, such as the measures addressed to young qualified or graduate women and measures addressed to older unemployed women or women on redundancy. According to the Code of Equal Opportunities,[717] the EONC must evaluate the correct achievement of its programme through a method that ensures a scientific and technical system of evaluation of positive actions plans publicly financed on the basis of the programme: this could pave the way for a real impact assessment of positive actions. However, the latest EONC programme published dates from 2012.[718] Apart from the EONC's oversight (which cannot be evaluated as it is not public), to this day the state's scrutiny is just on financed positive actions and only regards the effectiveness of operating costs and the respect of accounting rules. In the field of entrepreneurial activity, preferential measures meant to favour access to bank credits and public funds have been adopted.[719] A study by the Union of Chambers of Commerce has highlighted that positive action plans implemented during the last few years have had a positive effect on the existence of start-up enterprises, while improvements in the enterprises' performance were not homogeneous and their real success seemed to be quite random. In any case, the expectations for these projects are rather high as the applications definitively exceed the amount of funds allocated. Another monitoring instrument could be the general report on the current state of implementation of the principle of equality by the National and Local Equality Advisers to the Ministry of Labour and to the local governmental bodies, respectively,[720] which is however a general report on their activities (included the promotion of positive actions), but it is not specifically focused on positive action. There is no information available on the effects of positive action that is adopted, even in relation to positive action financed with public funding. Moreover, this provision has not brought about the impact assessment of positive action that was hoped at the time of its enactment.[721] Another instrument to monitor positive actions could be the committee for granting equal opportunities and workers wellbeing in public employment,[722] as in the compulsory three years plans of positive actions of public employers, the CUG (Committee to guarantee equal opportunities, enhancing the well-being of those who work, and against discrimination) is sometimes called to monitor the positive actions provided in these plans. However, there are no available documents on the monitoring that has been carried out.

In **France**, there are at least three authorities that can monitor positive action. The High Council on Equality in Employment[723] created in 2013 is in charge of ensuring interaction with civil society about the major directions of public policy for women's rights and equality and it evaluates these public policies. The High Council also can advise on any question of the Prime Minister about these issues. Its work covers more than employment and includes: parity, stereotypes, health and reproductive rights, international commitments and gendered violence. Since 2017, the High Council writes an annual report on sexism every year.[724] There is also the Superior Council on Equality (CSEP), created by the Roudy law on equality in 1983, which monitors policies, makes recommendations (annual report) and can suggest new policies for equal opportunity in employment since 2013.[725] Finally, the Defender of Rights monitors

717 Italy, Code of Equal Opportunities, Article 10.
718 http://sitiarcheologici.lavoro.gov.it/AreaLavoro/Tutela/Documents/PROGRAMMAOBIETTIVO2012.pdf.
719 Italy, Code of Equal Opportunities, Articles 52 to 55.
720 Italy, Code of Equal Opportunities, Article 15.
721 The code was amended in this respect by Decree No. 5/2010, which implemented the Recast Directive.
722 The Comitato Unico di Garanzia-CUG (see Decree No. 165/2001, Article 57).
723 HCEP (*Haut Conseil à l'égalité entre femmes et hommes*).
724 http://www.haut-conseil-egalite.gouv.fr/hce/presentation-et-missions/.
725 https://www.egalite-femmes-hommes.gouv.fr/le-secretariat-d-etat/instances/csep/.

positive action, investigates all forms of differences of treatment (legitimate or otherwise),[726] and serves as the contact person and protector of whistleblowers.[727] Outside of these specific authorities, the labour inspector and his/her supervisors are in charge of monitoring the equal pay gap and the actions necessary to fill it under the Law of 5 September 2018.[728] For example, in companies of at least 50 employees, if the result of points linked to indicators is under 75 points, the company is given of 3 years to comply and limit the wage disparities. If the company achieves the result of 75 points before the 3 years then a new time limit of three years is awarded to correct the disparities which starts the year the 75 points result is published.[729] The law has just been adopted so strict compliance cannot be checked yet. A study has been carried out, however, testing the effects of collective bargaining agreements on equality in private employment, considering work-life balance, desegregation of certain jobs, and promotion to high level management. The measures are often symbolic and not committed to investing financially in equality and until the Law of 5 September 2018 introducing indicators on the gender gap, small budgets were allocated to correct wage disparities.[730]

In **Greece**, within its competences, the General Secretariat for Equality has designed an electronic application, where the public administration should submit the data on the composition of the service councils so that their compliance with Act 2839/2000 can be monitored.[731] According to a relevant report[732] in the period January 2017 to October 2017, out of 97 public entities, 8 did not comply, which corresponded to 12 service councils, i.e. 11.43 %. However, not all the public entities use this application given that there is no legal obligation to do so and consequently no sanction. Thus, data are not reliable. According to the recent Act 4604/2019,[733] public services, legal persons governed by public law and legal persons governed by private law, which belong to the general Government, are for the first time obliged to collect and keep statistical data based on sex for their areas of competence. These data are to be submitted annually (at least once per year) to the Equality Observatory of the General Secretariat for Equality, where a relevant file is kept and is used for the aims of the Observatory. It remains to be seen whether this provision will result in the collection of more accurate and reliable data in the near future.

In **Sweden**, there is no requirement to report. The Equality Ombudsman is the supervisory authority for the Discrimination Act,[734] including for measures on positive action. As regards active measures, the Equality Ombudsman may scrutinise an employer's work to promote equal treatment. A natural or legal person who does not fulfil his or her obligations concerning active measures under Chapter 3 of the Discrimination Act may be ordered to fulfil them subject to a financial penalty. Such orders are issued by the Board against Discrimination on application from the Equality Ombudsman. As regards positive action in the sense of an exception from the ban on direct discrimination, the impact is probably very little if any. As regards positive action in the sense of the total set of active measures, the impact is probably important, but it is not possible to give any detailed information on this matter. Although active measures to promote gender equality have been in place since 1979, to the knowledge of the national expert, there is no comprehensive follow-up on the effects of these measures.

726 https://www.defenseurdesdroits.fr/fr/saisir-le-defenseur-des-droits.
727 https://www.defenseurdesdroits.fr/fr/lanceurs-dalerte.
728 France, Law No. 2018-771 of September 5 2018: The Decree No. 2019-15 of 8 January 2019, which implements it describes the procedure to sanction the company if the 3-year time limit is not respected: an agent from the labour inspector corps sends a report to the regional director (Art. D. 1142-9.). The director informs the company it is considering the financial sanction within the next two months after the report and the director can take into account justifications for the non-compliance and correction of the wage disparity (economic hardship, company restructuring or merger, bankruptcy (Art. D. 1142-11). The director has two choices: impose a sanction of the equivalent of 1 % of the earnings and company profits from the past calendar year based on revenues from activities (social security contribution base Art. D. 1142-13) or award extra time to comply within a year maximum. Public authorities enforce the rules which avoids the constraints of judicial adjudication.
729 For financial Sanctions see the Labour Code, Articles L. 1142-10 and Art. D. 1142-8.
730 https://dares.travail-emploi.gouv.fr/IMG/pdf/rapport-de-recherche-daresmars2018-egalite-professionnelle.pdf.
731 Greece, Act 2839/2000, Article 6(1)(b).
732 12th Information Bulletin of the Equality Observatory of the General Secretariat for Equality entitled 'Women in managerial posts', available at: http://www.isotita.gr/.
733 Greece, Act 4604/2019, Article 13.
734 Sweden, Discrimination Act 2008:567.

In **Slovakia**, bodies that adopt temporary balancing measures are obliged to monitor and evaluate them continuously and to publish information about them with a view to reappraising their further duration, and must provide the relevant information to the Slovak National Centre for Human Rights (the equality body).[735] According to the Centre, so far no body has provided information about taking such measures, although in the research published by the Centre in 2016, 8.93 % of the bodies that are entitled to adopt these measures that were questioned (the sample was 1 198), informed the Centre that they are adopting or have adopted temporary balancing measures in the past. Out of those questioned, as many as 55.18 % reported that they do not know the term 'temporary balancing measures' at all.[736] Similarly, as in the previous years, the Centre did not receive any reports of temporary balancing measures being adopted in 2017 from bodies entitled to adopt such measures, on their own initiative. These bodies (mainly public bodies) gave information about projects that they consider temporary balancing measures, only in response to the Centre's requests.[737] No enforcement measures or sanctions are regulated by the Anti-Discrimination Act or other laws.

In **Iceland**, the Centre for Gender Equality monitors the application of the GEA,[738] and makes proposals on 'affirmative action',[739] and monitors gender equality developments in society, i.e. by gathering information and initiating research.[740] Institutions, enterprises and NGOs are obliged to provide the Centre with any type of information necessary for its operations.[741] The GEA provides that after municipal elections, local authorities must appoint gender equality committees to advise the local government authorities, advise on matters with a bearing on gender equality, monitor and take initiative on measures, including affirmative action, to ensure the equal status and equal rights of women and men within the municipality.[742] There is an obligation on all employers with more than 25 employees to prepare an action plan,[743] including a gender equality plan and personnel policy, together with a duty to provide the Centre for Gender Equality with a copy of this when the Centre for Gender Equality requests it.[744] The Centre for Gender Equality may impose per diem fines on enterprises and institutions if they do not comply with instructions to set themselves a gender equality programmes.[745] The same applies when an enterprise or institution neglects to comply to provide the Centre for Gender Equality with a copy of its gender equality programme and its plan of action,[746] when the Centre for Gender Equality so requests.[747] The Centre for Gender Equality has not resorted to using per diem fines so far.

In **Germany**, there are several approaches, concerning different fields of legislation and policy and working with different measures and concepts. Within these different fields, some measures are legally binding but share the problem of lacking consequences and thus, effectiveness, and some measures are soft law or voluntary policies, especially concerning private employers. The statutes are legally binding, but their effectiveness can be debated. In particular, the Federal Equality Act does not work so well concerning leading positions within the federal administration, especially the administration of the federal Government. Under the amended Appointments to Federal Bodies Act (*Bundesgremienbesetzungsgesetz*), a statutory 50 % gender quota to be reached by 2018 entered into force. This is a legally binding

735 Slovakia, Act No. 365/2004 (the Anti-Discrimination Act), Article 8a (4), http://www.snslp.sk/CCMS/files/Antidiskriminacny Zakon_ENG-1.1.2015.pdf, available in English.

736 See Slovak National Centre for Human Rights (2016), *Monitorovanie a vyhodnocovanie* účinnosti *dočasných vyrovnávacích opatrení v podmienkach Slovenskej republiky* (Monitoring and Evaluation of the effectiveness of temporary equalizing measures in Slovakia 2016), available in Slovak at: http://www.snslp.sk/CCMS/files/DVO_Vyskum_FINAL.pdf.

737 See Slovak National Centre for Human Rights (2018) *Report on the Observance of Human Rights Including the Principle of Equal Treatment in the Slovak Republic for the Year 2017*, Bratislava, ISBN: 978 – 80 – 89016 – 97 – 6, http://www.snslp.sk/CCMS/files/sprava_2017_eng.pdf.

738 Iceland, GEA, Article 4.

739 Iceland, GEA, Article 4(e).

740 Iceland, GEA, Article 4(g).

741 Iceland, GEA, Article 4(2).

742 Iceland, GEA, Article 12.

743 Iceland, GEA, Article 18(2).

744 Iceland, GEA, Article 18(3).

745 Iceland, GEA, cf. Article 18(5) and Article 18(2).

746 Iceland, GEA, Article 18(2).

747 Iceland, GEA, Article 19(5).

obligation. Although the federal Government has not yet published its latest annual report, it is already obvious that this task has failed. In the academic field, various programmes to increase the number of female researchers and professors exist on university, state and federal level. One of the most important programmes during recent years was (and still is) the female professors programme of the Federal Ministry of Education and Research in cooperation with the states.[748] Universities qualify for participation in the programme through gender equality strategies that are externally assessed. Universities that submit a convincing gender equality strategy can apply for start-up funding for up to three positions for professorships filled by women for a period of five years. The programme, which is now in its third round, has been funded to a total of EUR 500 million and has led to the appointment of more than 500 female professors and the strengthening of gender equality structures at universities.

In **Great Britain**, the available research appears to point in somewhat conflicting directions. A small study of 26 employers found that whilst most did not envisage using positive action in recruitment, a significant majority were supportive of a more interventionist approach to tackle persistent inequalities. However, a study found that most directors of human resources in universities were against the use of positive action in recruitment.[749] Another recent academic study casts doubt on the effectiveness of self-regulation-based positive action initiatives. It concludes that despite a general increase in female employment and widespread voluntary adoption of the UK universities' positive action programme (Athena SWAN) among UK medical schools, there is no evidence yet to suggest that either the introduction of the Athena SWAN charter or the announcement by the UK National Institute for Health Research only to shortlist medical schools with a 'silver' Athena SWAN award for certain research grants, has led to any measurable improvement in the careers of women employed in UK medical schools.[750]

Even though the need for extensive measures to address and rectify widespread inequality between men and women in the labour market remains, there is a depressingly familiar picture of the state of positive action that emerges from the research conducted for this project. None of this will come as any surprise to those who have followed the regular analysis of positive action trends in the EU since the late 1970s, when the European Commission began to monitor its uptake by Member States, not least the analysis that this Network has been commissioned to produce. Report after report, assessment after assessment, and study after study have concluded something very similar, time after time.[751]

10.4 The current EU strategy for positive action: core problems

The reason why the unsettling picture sketched out above recurs consistently over time is because, in retrospect, we can see that the EU's strategy is no longer fit for purpose, and as a consequence of this it has contributed to the development of national strategies that fall short of producing the desired results; and if a different strategy is not forthcoming, subsequent reports will make similar findings of lack of progress. The suggestion that the EU's positive action strategy has significant limitations is nothing new – it is a familiar trope in the extensive academic and policy literature that has also emerged since the 1970s.[752] But its very familiarity should not disguise the importance of the conclusion reached: it is important to put into question the current strategy. We have to fully realise that it does not work before taking the next step. The fact that 60 years after the Rome Treaty we still have important problems

748 See https://www.bmbf.de/de/das-professorinnenprogramm-236.html.

749 Davies, C. and Robison, M. (2016), 'Bridging the gap: an exploration of the use and impact of positive action in the United Kingdom' *International Journal of Discrimination and the Law* Vol. 16(2-3) pp. 83-101 and Manfredi, S., Vickers, L and Cousens, E (2017) *Increasing the Diversity of Senior Leaders in Higher Education: The Role of Executive Search Firms*, London.

750 Gregory-Smith, I. (2018) 'Positive Action Towards Gender Equality: Evidence from the Athena SWAN Charter in UK Medical Schools', *British Journal of Industrial Relations*, Vol. 56 Issue 3, p 463.

751 All the publications of the European network of legal experts in gender equality and non-discrimination, available at: https://www.equalitylaw.eu/.

752 See, for example, Rees, T. (1998) *Mainstreaming Equality in the European Union: Education, Training and Labour Market Policies*, Routledge; Beveridge, F. and Velluti, S. (eds), (2008) *Gender and the Open Method of Coordination: Perspectives on Law, Governance and Equality in the EU*, Routledge; Kantola, J. (2010) *Gender and the European Union*, Palgrave Macmillan; Jacquot, S. (2015) *Transformations in EU Gender Equality: From emergence to dismantling*, Springer.

of gender inequality in the European labour market is clear evidence that the EU needs to rethink its approach. Identifying why it does not work is more problematic, but since a significant shift in EU policies is recommended, it is necessary to provide – at least briefly – an overview of these deficiencies. There are several dimensions to the current policy that appear to have contributed to its limited success.

First, although there are continuing disputes over its future scope, EU *anti-discrimination* law has been largely successful in embedding itself in European law, and as a result in national law in many Member States direct discrimination appears to have been reduced. Whilst its relative success in this regard is something to be welcomed, it has had certain unintended effects. In particular, it has had the effect of substantially confining EU legal obligations on the Member States to the prohibition of discrimination. The emphasis on discrimination feeds a narrative that emphasises individual decision making, securing justice for the individual, and penalising the individual perpetrator, rather than securing justice between groups, and tackling systematic inequality in the market. Group justice tends to be downplayed, in pursuit of individual justice, and the extent to which the individual's welfare is often determined by that person's membership in the group is ignored. The strong reliance on an individual rights-based approach to secure compliance with EU law rules and rights, which is central to the whole area of internal market regulation, spills over into EU anti-discrimination law, and reinforces this approach. Anti-discrimination law in the area of gender also tends as a result towards the adoption of a symmetrical approach (viewing the problem as one applying to both men and women, rather than an asymmetric approach, which emphasises the problem as one of *women's* inequality).

Secondly, flowing from the dominance of the anti-discrimination approach, a significant barrier to the adoption of positive action is the primary emphasis of the EU on *process* rather than *results*. As the **United Kingdom** expert put it, EU law is problematic in focusing on equality of opportunity as opposed to outcome. An anti-discrimination-based strategy was always in danger of becoming focused only on *how* decisions are taken in the labour market rather than on what the *results* of those decisions are, and this danger has become a reality. Barnard rightly observes that the gender, race and framework directives 'do not focus on the achievement of equality in the broader, more results-oriented, redistributive sense'.[753]

Thirdly, this emphasis on process has become particularly accentuated partly because of the relative lack of emphasis in anti-discrimination policy on tackling *indirect discrimination*, which focuses somewhat more than direct discrimination on the effects of the contested measure on the protected group. Had a more effective approach been taken to enforcing EU law's prohibition of indirect discrimination in pay and in access to employment, for example, then there would have been more likelihood of employers adopting positive action in order to avoid a finding of indirect discrimination, but here too, either an individual rights approach was adopted, or voluntary measures were relied on. Perhaps the CJEU could also have done more to make more explicit the link between avoiding indirect discrimination and taking positive action, but the Member States bear the principal responsibility in their role as treaty drafters and EU legislators. An emphasis on results is more likely to encourage positive action being considered. So, for example, in the context of what constitutes an effective remedy, positive action might have been viewed as part of what an effective remedying of indirect discrimination would require. EU anti-discrimination law's emphasis on cleansing the process of decision making from (mostly direct) discrimination has also been based on a presumption that if the process is cleansed, then real equality will follow, even though there is now overwhelming evidence that this is not necessarily the case and, indeed, is contradicted by the EU's own policy stance.

Fourthly, even if it were correct that reducing discrimination would be enough in itself to ensure equality (which it is not), that would be the case only if these norms were effectively enforced, and often they are not. The limits of European anti-discrimination law practice are now clear as regards the *enforcement of anti-discrimination norms*. As highlighted repeatedly in many reports of the Network over the past decades an individual rights-based approach which relies on individuals going to court to enforce their

753 Barnard, C. (2001) 'The Changing Scope of the Fundamental Principle of Equality?' 46 *McGill Law Journal* 955.

rights does not lead to significant societal change, not least because of the numerous hurdles that women face in taking cases to court.[754] So, the rate of litigation on gender equality remains generally low. This is becoming increasingly recognised by the EU institutions, but that very realisation also creates unintended consequences. EU gender equality strategy becomes dominated by attempting to ensure the increased effectiveness of the anti-discrimination principle, leading to an emphasis on reform of the individualised enforcement model, which is based substantially on making victim-driven complaint-based litigation more effective. This is welcome but it should not be seen as being an effective substitute for a strategy that recognises that addressing structural inequalities effectively through stimulating change at the level of public and private bodies is as important as reform of the anti-discrimination model, if not more so. The limited political capital that the EU is able to deploy in the area of gender equality might now be better deployed in attempting to bring about significant changes in the labour market, and reformed anti-discrimination law is unable to achieve this, however good it is.

Fifthly, given the dominance of the anti-discrimination model, it is also not surprising that positive action is seen largely through this anti-discrimination lens. We have seen that positive action comes to be viewed simply as *an exception* to the anti-discrimination principle. This approach derives from the conceptualisation of positive action in the history of Directive 76/207 and the case law of the CJEU on positive action.[755] There is a perception in some states, however, that EU law significantly limits positive action measures. The evidence for this is the restrictive nature of the CJEU's jurisprudence on the adoption of preferences, as we shall see. However, there is a potentially broader impact, where that jurisprudence casts a shadow over a wide range of positive action measures that fall well-short of preferential treatment. Target setting and other positive action measures may tend to be caught up in the uncertainty generated by the CJEU's complex case law, even where no preferences are involved.[756]

Capturing this indirect effect is difficult empirically, however, and most complaints concern the effect of this case law on preferential measures. The expert from the **Netherlands** reports that EU law is seen as problematic because EU law unduly inhibits reserving positions for women (or other underrepresented groups). In the opinion of the expert from **Spain**, the CJEU's doctrine on quotas has made it difficult to apply quotas for the hiring of women in collective bargaining. The expert from **France** considers that a wider range of corrective measures should be permitted. But beyond allowing a wider scope for what is permitted, some experts, such as the expert from the **Czech Republic**, consider that a switch to a strategy based more on positive obligations would be preferable, a view apparently echoed by the expert from **Bulgaria**. The expert from **Germany** is particularly critical of the CJEU's requirement that for preferences to be acceptable, the women must be equally well qualified. A 2014 study has shown that gender quotas fail in practice because it is nearly impossible for women to be (or at least to be acknowledged to be) equally qualified within the civil service.[757] Even important legal commentaries state that women's qualifications are often judged unfavourably and that actual or anticipated burdens of family tasks can also have a negative effect but, in the next paragraph, insist upon the requirement that the qualification must always be equal to apply any gender quota[758] without answering the inevitable question that arises: how can equal qualification be established when the assessment procedures are deeply gender-biased?

These criticisms are supported by some influential legal commentary emanating from the states. From the **Netherlands**, Eva Cremers has written two critical comments on the EU-approach as well as an

754 All the publications of the European network of legal experts in gender equality and non-discrimination, available at: https://www.equalitylaw.eu/.

755 Perhaps *Lommers* might have provided a different approach, but it was not taken up.

756 For some discussion of this, see Barmes, L. (2010) 'Navigating Multi-Layered Uncertainty: EU, Member State and Organizational Perspectives on Positive Action' in G. Healy, G. Kirton & M. Noon (eds) *Equality, Inequalities and Diversity – From Global to Local*. I am grateful to Colm O'Cinneide for pointing this out.

757 Papier, H.-J. and Heidebach, M. (2014) *Rechtsgutachten zur Frage der Zulässigkeit von Zielquoten für Frauen in Führungspositionen im öffentlichen Dienst sowie zur Verankerung von Sanktionen bei Nichteinhaltung*, 2014: https://www.mhkbg.nrw/mediapool/pdf/presse/pressemitteilun%20gen/Gutachten_Zielquoten.pdf.

758 E.g. Langenfeld, C. (2015) in Maunz/Dürig, *Article 3, Basic Law. Commentary*, para 95f.

article together with Petra Oden.[759] In short, her criticism is the same as mentioned here: that EU law takes a too binary approach, that is, it focuses too much on formal equality between men and women, but not on substantive equality. This is not so much caused by the EU law in itself, but especially by the case law of the CJEU. This approach does not leave sufficient room for positive action that really helps women and other under-represented groups to improve their position. Following the early CJEU jurisprudence on positive action, the scholarly assessment in **Spain** was quite critical of the jurisprudence of the CJEU on quotas for the hiring of women. Some of them considered that the CJEU should have been more generous in its interpretation of valid quotas,[760] given that the limitation of the valid quota to equality of merits is not sensitive to the greater difficulty that women have in accessing these merits. Similar criticisms from **Norway** were levelled at the decision of the EFTA court by Anne Hellum and Ruth Nielsen,[761] who were sceptical of the decision for similar reasons. These scholarly essays are now somewhat dated, but such academic views have not gone away. Two legal essays in **Germany** claim that the statutory 30 % gender quota for advisory boards of the 100 most important companies in Germany are incompatible with European law, referring, *inter alia*, to the decisions in *Abrahamsson* and *Lommers*.[762] This is sometimes viewed as a failure by the Court to recognise the necessity of positive action measures, but whether the responsibility is the Court's or the EU legislator's is a moot point. It can be argued that the Court has mostly faithfully executed the mandate it has been given by the other European institutions, and that any problems with the positive action regime lie not in the Court, but in the legal regime of gender equality within which the Court operates.

Sixthly, where the EU does see the need to go beyond the anti-discrimination principle, it is substantially restricted to the adoption of a highly voluntarist approach to positive action, led by the Member States. It is an approach whose ineffectiveness is consistently demonstrated in these pages. The **United Kingdom** expert considers that the EU framework has not really developed and is not fit for purpose; that it is not working and needs reassessing. There are three separate issues, each of which is individually problematic, but taken together amount to a significantly flawed strategy. It encourages self-regulation by economic actors, *voluntarism*, rather than state enforcement. The EU constrains some state regulation, as we have seen, but that does not appear to be the most significant factor; rather it is that much of EU rhetoric on positive action emphasises positive action as a matter of corporate social responsibility, rather than as one of corporate social *obligation* – a matter of corporate choice rather than one of corporate duty. EU actors are effectively reduced to accepting a mode of 'regulation', if indeed it can be called that, which relies on persuasion to introduce more effective mechanisms of incentives. Such attempts at persuasion are apparently unsuccessful where the state (**Denmark** is an example, apparently) considers that the general approach should be not to interfere by putting strict obligations on companies, but rather to let gender equality evolve without interference.

Seventhly, as well as relying substantially on voluntarism, the EU (acting under the constraints of the Member States), considers that positive action is an issue which is better left to the Member States, and has become a matter of *subsidiarity*. In the opinion of the expert from **Austria**, in the current political situation, progressive developments are only likely to occur if there is an appropriate degree of compulsion, preferably resulting from legislative measures at the EU level. In the view of the expert from **Italy**, a specific directive on positive actions could be very useful in triggering the financing, knowledge and implementation of positive actions in Italy. The legal expert from **Cyprus** considers that an enabling framework is not sufficient.

759 Comment by E. Cremers-Hartman on opinion 2011-198 of the Equality Body in *JAR* 2012/78, and a comment on opinion 2012-195 of the Equality Body in *JAR* 2013/41. See also Cremers, E. and Oden, P. (2015) 'Voorkeursbeleid voor topvrouwen' (*Preferential policies for top women*), *NJB* 2015(3), pp. 170-178.

760 For instance, Unzueta, B. (1997) *Discriminación, derecho antidiscriminatorio y acción positiva (*Discrimination, antidiscrimination law and positive action*),* Ed. Civitas, Madrid.

761 Hellum, A. and Nielsen, R. (2002) 'Menneskerettighetene og EØS-retten på kollisjonskurs? Om adgangen til å øremerke professorater og post doc-stpend for kvinner ved UiO'. I: *Kritisk Juss* 2002 (29) pp. 113-132.

762 Olbrich H. & Krois, C. (2015) 'Das Verhältnis von 'Frauenquote' und AGG', in *Neue Zeitschrift für Arbeitsrecht* 2015, p. 1288 (1291); Schleusener, A. (2016) 'Diskriminierungsfreie Einstellung zwischen AGG und Frauenförderungsgesetz', in *Neue Zeitschrift für Arbeitsrecht* – Beilage 2016, p. 50 (54).

Eighthly, when subsidiarity and voluntarism are combined, various additional problems arise, in particular the vagueness that surrounds the idea of positive action, and the absence of *specific guidance* as to what effective positive action measures would consist of. The main problem identified by the expert from **Croatia** lies in the lack of conceptual understanding and acceptance of positive action as a tool for establishing gender equality. The expert from **Latvia** considers that the EU framework on positive action is 'blurred', and that it would be desirable to have more precise criteria for and definition of what positive action means. The case law of the CJEU and actions taken by different EU Member States, she says, only increase such uncertainty about the concept and its limits. The expert from **Poland** considers that current EU law on positive action is difficult to interpret, in particular since not only the treaty provisions but also the directives dealing with gender equality in employment are very general. It would be helpful to be able to name the obligatory characteristics of affirmative action, determining its admissibility.[763]

Ninthly, there is a significant degree of uncertainty as to what the ultimate goals are that positive action is supposed to contribute to achieving. As we shall see in the next chapter, the Member States, EEA states and the European Union have identified a considerable array of different end goals. Different countries have very different stories of why positive action has developed, with very different implications for the subsequent development of positive action in that jurisdiction. Is it primarily to remove discrimination from the labour market? If the aim is the broader aim of securing greater equality for women, what type of equality is the EU pursuing? Is the basic aim to increase the area of individual freedom of choice, to achieve a more efficient labour market, to secure human dignity, to bring about increased social cohesion, to engage in the redistribution of resources for reasons of fairness, or is it all of these? It is not surprising that with this plethora of potential goals, states are so significantly at odds with each other as to how to approach it as a matter of practical policy making. Any assessment of effectiveness is also made more difficult (if not impossible) if the goal is not clear to begin with.

10.5 Role of CEDAW

In addition to these features of EU positive action strategy, we may add a tenth problem. There is a highly selective approach taken to the integration of international human rights thinking into EU gender equality policy, in particular the substantial side-lining of the alternative approach to women's equality based on CEDAW. It is striking, for example, that in the amended work-life balance proposal, the UN Convention on Persons with Disabilities is mentioned,[764] and that a reference to the UN Convention on the Rights of the Child was added during the negotiations, but that there is no mention of CEDAW. The CEDAW approach challenges the dominant mode of regulation adopted in EU law, emphasising instead an approach that sees positive action as central to tackling inequality and discrimination rather than an exception, views positive action predominantly asymmetrically, and consistently emphasises group justice.[765] The legal expert from **Germany** criticises the decision in *Abrahamsson*, for example, on the basis that the CJEU ignored the different (and higher) state obligations set by CEDAW even though European law must not interfere with the standards set by international human rights treaties ratified by all EU Member States.

763 For instance, in the Polish legal literature the following characteristics of positive action have been identified: that it is conditional on the existence of factual inequalities between men and women; involving ex-post differentiation; that it has established objectives; that it has transitional nature (enduring until attainment of the objective); that it is limited to granting of entitlement to a privileged party, instead of ordering or prohibiting; that it complies with the requirement of adequacy (that is not leading to an inadequate effect for the privileged and not imposing excessive burdens on the non-privileged party); that it is subjected to inspections in accordance with the general test for relevance, proportionality and compliance with the constitutional values. See Ziółkowski M. (2016) 'Uprzywilejowanie wyrównawcze w orzecznictwie Trybunału Konstytucyjnego' *(*Compensatory Preference in the case-law of the Constitutional Tribunal)*, Państwo i Prawo* No 4 and Ziółkowski M. (2016) *'Zasada równość kobiet i mężczyzn'* (The Principle of equality between men and women) *Państwo i Prawo* No 2 https://www.academia.edu/34294372/Uprzywilejowanie_wyr%C3%B3wnawcze.

764 Preamble 4.

765 For an insightful examination of the contrasting approaches under CEDAW, EEA, and EU law, see Tobler, C. (2007) 'Going Global in Sex Equality Law: The Case of Gender Representation Rules for Company Boards', in Mario Monti, et al (eds), *Economic law and justice in times of globalisation: Festschrift for Carl Baudenbacher*, Baden-Baden, p. 891.

The major effect of CEDAW in several states appears to have been on the terminology used to describe positive action, with those states using the terminology of 'special measures' and 'temporary special measures' in their legislative drafting being most likely to be those influenced by CEDAW, but that does not appear to have affected CEDAW's influence on national debates either. In the main, therefore, where there is an external influence on a national debate over positive action, the EU approach dominates, and the fact that the EU has not explicitly adopted the CEDAW approach is likely to relegate CEDAW to the legal and political margins. The major exceptions to this trend are **Iceland**, **Greece**, **Norway**, and possibly **Croatia**.

In these few states, CEDAW appears to have affected the national legislative approach, or public debate. In **Iceland**, CEDAW is referred to as the highest international source of law regarding positive action in the area of gender equality. It is a 'household' name in that respect. In **Croatia**, the influence of CEDAW can be detected in the formulation of legislative provisions concerning special measures. The wording of the existing provisions in the Gender Equality Act and the Anti-Discrimination Act is inspired by Article 4 of CEDAW, in that they prescribe that special measures are not deemed as discrimination, and emphasise that they shall apply only temporarily, until full equality in practice is achieved. In **Greece**, Article 4(1) of CEDAW has been a source of inspiration for the introduction and wording of the constitutional provision of Article 116(2) on positive action. More specifically, Article 116(2) of the Constitution in its present wording, requiring positive action, was adopted almost unanimously by the Greek Parliament in the context of the amendment of 2001, replacing the former constitutional provision of the same article, which allowed derogations from the gender equality principle.[766] In **Norway**, CEDAW has to some extent featured in discussions and debates concerning positive action, especially when it comes to the debate whether Norwegian authorities have an obligation to use positive action as a measure to prohibit structural discrimination based on gender.

Few states under consideration, other than these, explicitly or consistently adopt the CEDAW approach, even those whose legislative terminology shows CEDAW influence. This appears to be the case for several reasons. Only in a few Member States or EEA countries, is CEDAW regarded as a part of national law from the time of ratification (**Latvia**, **Luxembourg**, **Poland**, **Portugal**, **Spain**); in other states, it is not part of national law, unless the legislature has incorporated it into national law, which few have done (exceptions are: **Croatia**, **Finland**, **Italy**, **Norway**, **Sweden**).

Even when CEDAW has become part of national law, there is a wide divergence as to whether it may be used directly in the national courts (yes, in theory: **Belgium**, **Croatia**, **Denmark**, **Estonia**, **Hungary**, **Latvia**, **Portugal**, **Romania**; no, in **Austria**, **United Kingdom**), with some courts accepting the use of CEDAW only where specific provisions of CEDAW are regarded as 'self-executing', that is, capable of having 'direct effect' (such as in **Austria**, **Italy**, **Lithuania**, **Luxembourg**, **Netherlands**). For example, in 2006, the **French** Supreme Court (1st Civil Chamber) recognised implicitly the direct application of CEDAW,[767] even though the Court rejected the claim of sex discrimination.[768] There is no case referring to CEDAW in employment. In the few cases in which it has been cited, CEDAW has been primarily used in domestic courts as an influence on the interpretation of domestic legislation or constitutional provisions. For example, **Greek** courts apply the Constitution in the light of or in parallel with international human rights treaties, including CEDAW.[769] In **Norway**, CEDAW can be used in courts, but mainly to interpret the GEADA. However, this does not happen often. In **Iceland**, existing laws must be interpreted in accordance with international law, both customary law and international agreements.[770]

766 Greece, Constitution (1976), Art 116(2) provides that: 'Derogations from the provision of Article 4(2) are allowed only for sufficiently justified reasons, in cases specifically provided by the statute.'

767 In a case where a female authorised liquidator felt she had not been given sufficient bankruptcy files in the commercial court based on the Decree No. 84-193 of 12 March 1984 certifying the publication of the CEDAW Convention.

768 Court of Cassation (1st Civil Chamber) 14 February 2006, No. 04-15595, Bull. civ. 2006, I, n° 72 p. 69.

769 See e.g. CS judgments 3189/2003 and 1414/2018 (application of Article 116(2) Constitution in parallel and in the light of CEDAW).

770 https://www.stjornarradid.is/media/innanrikisraduneyti-media/media/frettir-2016/upr-lokautgafa-4.8.16.pdf.

The main exception to this relatively minimal influence of CEDAW at the national level appears to arise when the CEDAW Committee has criticised a state for its non-implementation of positive action, and this criticism has been taken up by civil society and used as basis for political campaigning. As regards **Italy**, the latest 2017 CEDAW recommendations stated, among others, that the State Party adopted measures, including temporary special measures, in line with Article 4(1) of the Convention and the Committee's general recommendation No. 25 (2004) on temporary special measures, aimed at achieving substantive equality of women and men in the labour market, including for young women with higher education living in the southern regions, and establish special training programmes and counselling for different groups of unemployed women, including by promoting women's entrepreneurship. These recommendations had some impact on women's associations websites and on the press.[771] In **Cyprus**, in 2018, the CEDAW Committee issued its *Concluding Observations on Cyprus' 8th periodic review*. The Committee's observations feature prominently in the public dialogue for the adoption of the new national action plan on equality between men and women 2018-2021, as well as in the communications of civil society organisations. In their shadow report to CEDAW, civil society organisations refer specifically to the need to adopt positive action measures to increase women's participation in company boards as a matter or compliance with CEDAW. In **Bulgaria**, Article 4 of the Convention and the concluding observations and recommendations of the CEDAW Committee to the Bulgarian Government specifically on adopting and applying temporary special measures for achieving substantial equality, have contributed to the debate on the issue. The issue is being discussed mainly between the state and the experts from non-governmental organisations. The recommendations of the CEDAW Committee from July 2012 added to the process of adoption of the Law on Equality between Women and Men (adopted in 2016), which encompasses the possibility for taking temporary special measures for achieving equality of women and men as part of the state policy.

In **Slovakia**, some women's NGOs are dealing with the issue of positive action from a CEDAW perspective.[772] In July 2008, the CEDAW Committee in its *Concluding Observations*[773] addressed to Slovakia criticised the unwillingness of the Government to adopt any temporary special measures on the ground of sex and called upon the Government to take efficient legislative measures. The Committee recommended that the State Party use temporary special measures, in accordance with Article 4(1) of the Convention and its General Recommendation 25, as part of a necessary strategy towards the accelerated achievement of substantive equality for women, in all fields where it may be deemed necessary, especially at the highest levels of decision making (paragraph 13). In November 2015, the CEDAW Committee in its *Concluding Observations*[774] concerned that the affirmative action taken under the Anti-Discrimination Act reflects a limited understanding and application of the concept of temporary special measures in Slovakia. The Committee recommends that the State Party adopt temporary special measures, in line with Article 4(1)

771 http://www.pangeaonlus.org/r/Pangea/Documenti/Pdf/advocacy/cedaw/Traduzione%20informale%20Raccomandazioni%20CEDAW%20all%27Italia_2017_Piattaforma%20CEDAW.pdf and http://lenove.org/newsite/wp-content/uploads/2017/07/Italia-CEDAW-Rapporto-Ombra.pdf.

772 Lajčáková, J. (2012), *Dočasné osobitné opatrenia podľa Medzinárodného dohovoru na odstránenie všetkých foriem diskriminácie žien a možnosti ich prijímania na Slovensku* (Temporary Balancing Measures according CEDAW and Possibility of their Adopting in Slovakia), Možnosť voľby, Bratislava. http://moznostvolby.sk/wp-content/uploads/2012/09/pravna-analyza-k-cedawu.pdf; Lajčáková, J. (2013), *Dočasné osobitné opatrenia v oblasti politickej participácie žien podľa Medzinárodného dohovoru na odstránenie všetkých foriem diskriminácie žien* (Temporary Balancing Measures in Political Participation of Women according CEDAW), Možnosť voľby, Bratislava, http://moznostvolby.sk/wp-content/uploads/2012/03/docasne-osobitne-opatrenia.pdf; Lajčáková, J., Mesochoritisová, A., Burajová, Bb. (2013): *Metodika k prijímaniu dočasných vyrovnávajúcich opatrení smerujúcich k odstráneniu znevýhodnení na základe rodu alebo pohlavia podľa § 8a zákona č. 365/2004 Z.z. o rovnakom zaobchádzaní (Antidiskrimionačný zákon)* (Methodology of Adopting Temporary Balancing Measures to Eliminate the Gender and Sex Disadvantages according § 8a of Antidiscrimination Act), Možnosť voľby, Bratislava, http://moznostvolby.sk/wp-content/uploads/2014/11/Metodika-k-prijimaniu-docasnych-vyrovnavajucich-opatreni-_final.pdf; Lajčáková, J. (2015), *Prijímanie dočasných vyrovnávacích opatrení na základe ethnicity,národnosti, pohlavia alebo rodu na Slovensku, Príručka*, (Adopting Temporary Balancing Measures with Regard to Ethnicity, Nationality, Sex or Gender in Slovakia), Centrum pre výskum etnicity a kultúry, ISBN 978-80-970711-7-2 http://cvek.sk/wp-content/uploads/2015/11/Prirucka_DVO_web.pdf.

773 CEDAW/C/SVK/CO/4 https://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CEDAW%2FC%2FSVK%2FCO%2F4&Lang=en.

774 CEDAW/C/SVK/5-6 https://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CEDAW/C/SVK/CO/5-6&Lang=En.

of the Convention and the Committee's general recommendation No. 25 (2004) on temporary special measures, for all areas of the Convention in which women are underrepresented or disadvantaged.[775]

Perhaps the most important role of CEDAW in a national debate on positive action has been in **Germany**. For many years, CEDAW did not play any role in discussions about positive action measures because these discussions started in the 1980s in ignorance of human rights law and with an overwhelming majority opinion in legal discourse that quotas for women were incompatible with the Constitution. German legal discourse focused on national constitutional law on the one hand and European law, directives and case law, and its implementation on the other. However, the CEDAW committee tried to encourage the German Government to live up to its duties: 'With reference to general recommendation No. 25 (2004) on temporary special measures, the Committee recommends that the State Party continue to adopt and implement measures, either as temporary special measures or as permanent measures, aimed at achieving substantive equality of women and men, and ensure the allocation of resources, the creation of incentives, targeted recruitment and the setting of time-bound goals and quotas in all areas covered by the Convention where women are underrepresented or disadvantaged in both the public and the private sectors.'[776] Moreover, the Committee gave a very precise overview of the gender inequalities in the German labour market, which inspired civil society stakeholders to demand positive action measures to achieve fundamental change. Even within the legal discourse, CEDAW is quoted now and then concerning demands for *parité*, meaning equality in parliamentary elections and electoral office.[777]

Even when the CEDAW Committee has intervened, that is no guarantee of success at the national level. The CEDAW Committee has in its observations on **Finland's** report noted that the tripartite equal pay programme has not been effective. The Committee has even commented on the weak position of immigrant and Roma women, lone mothers, older women and disabled women in the labour market. The Committee recommended effective measures for de facto equality.[778] The tripartite equal pay programme has paid little attention to the positive employer duties to promote equality under the Act on equality between women and men. CEDAW places rather vigorous duties on the States Parties to use all appropriate measures, including positive action, to promote equality in working life. The convention has influenced Finnish legislation, but the positive action measures have not been very effective.

Apart from these formal national and international legal sources of influence, CEDAW's influence seems to be confined to its being cited by academic commentary and official bodies occasionally drawing on CEDAW (for example in **Netherlands**, **Portugal**,[779] **United Kingdom**[780]). In France, a Government report on real equality between women and men mentions CEDAW as a fundamental text[781] to justify *gender mainstreaming* and 'a systematic recognition of inequalities between women and men in order to take, if necessary, actions to correct them'.[782]

775 Para. 17.

776 UN-Committee on the Elimination of Discrimination Against Women (2017), *Concluding observations on the combined 7th and 8th reports of Germany*, 9 March 2017, para 20.

777 UN-Committee on the Elimination of Discrimination Against Women (2017), *Concluding observations on the combined 7th and 8th reports of Germany*, 9 March 2017, para 32: 'The Committee reiterates its previous recommendations that the State party strengthen its efforts to increase the number of women in elected decision-making bodies at the federal and state levels and in appointed positions at the municipal level, with a view to achieving the equal representation of women and men in political and public life.'

778 https://um.fi/documents/35732/48132/committee_s_concluding_observations_on_the_7th_periodic_report_of_finland_/f65571c2-2a4c-d970-1082-d459c49afde9?t=1525646895041.

779 Despite the fact that the CEDAW is well known and disseminated in Portugal, especially by the public Agency for Citizenship and Equality (Comissão para a Cidadania e Igualdade de Género – CIG), very little direct influence can be detected.

780 https://www.parliament.uk/business/committees/committees-a-z/commons-select/women-and-equalities-committee/inquiries/parliament-2017/cedaw-inquiry-17-19/.

781 Secrétariat d'Etat chargé de l'égalité entre les femmes et les hommes, (2017) *Vers l'égalité réelle entre les femmes et les hommes : Chiffres clés*, p. 4.

782 Secrétariat d'Etat chargé de l'égalité entre les femmes et les hommes, (2017) *Vers l'égalité réelle entre les femmes et les hommes : Chiffres clés*, p. 4.

10.6 Constraints on the adoption of positive action measures at national level

There are several major constraints on introducing or continuing positive action. Two major sets of constraints can be distinguished: economic and political. Economic objections may come from the belief – which may or may not be correct – that positive action simply does not 'work' in the sense that participation rates of the previously underrepresented group do not change, or that positive action focuses superficially on numbers and ignores the underlying structure of decision making in the institutions targeted leaving the organisation to manage its key operations much as before, or that there will be changes in productivity, both positive and negative, or that economic productivity will be adversely affected by positive action measures, or that positive action simply gives rise to rent seeking, or corruption.[783] The second constraint is political. Political opposition often tends to be framed in one of three ways: in terms of positive action challenging a shared sense of fairness, particularly where merit and individualised fairness is seen to be challenged; in terms of the adverse effect that positive action is seen to have to the stability and cohesion of the country, since positive action is often seen as deriving from an identity politics that is seen as destabilising; or in terms of the belief that positive action measures may be counterproductive for the preferred group itself, in terms of increasing intra-group equality, and damaging the perception that the larger society has of the members of the preferred group.[784]

Three case studies illustrate the complex interplay between these various elements. In each case, they are drawn from the reports of the legal experts from these states. In **Croatia**, major constraints include not just economic considerations, but also the fact that there is no political will to deal with this issue. There is not much public debate on positive action in Croatia. It is not a debated or controversial issue, simply because public awareness of the effect and importance of these measures is low. Although achieving true gender equality in practice is often proclaimed as having the highest value, given the relatively modest economic, employment and social indicators, this proclamation is hardly transformed to practical reality. In other words, all Governments are happy when employment is on the rise, even more when employment of women as the underrepresented sex in the labour market rises. However, no Croatian Government so far has had the strength and will to even scratch the surface concerning the removal of existing inequalities, for example in public sector employment, by introducing tie-break or similar policies aimed at overcoming the burdens the underrepresented sex is facing.

In **Finland**, employers (including state and municipalities) oppose positive action measures for various reasons. For example, more rigorous pay audits are opposed because of the cost, but employers also refer to individual rights to privacy and data protection of their employees when opposing access to individual pay information. This is a paradox, as the trade unions who represent employee interests do not refer to these rights. Employers also defend their traditionally rather strong right to direct work when opposing measures that give the employees' representatives more access to information and decision making. Politically, the attitude to positive action was more positive in the heyday of the welfare state than it is today. Positive action measures are considered legitimate even today, however. Positive action as such has not been commonly opposed, and the Act on equality between women and men stipulates many types of positive action duties. The problems are related to the relatively weak monitoring of these duties.

In **Poland**, most of the actual decision makers appear to be of the opinion that there is no need to promote women's employment or their participation in decision–making processes, because it would be more favourable for the society and family if women were to stay at home. Some from the older generation are against positive action because they see it as a relic of the socialist system, which applied preferential policies in order to facilitate access to higher education and public service for people

783 E.g. Sowell, T. (2004) *Affirmative Action Around the World: An Empirical Study*, Yale University Press.

784 E.g. Fullinwider, R. 'Affirmative Action', *Stanford Encyclopedia of Philosophy*, https://plato.stanford.edu/entries/affirmative-action/.

originating from the working or farmers class, as well as communist party members. The constraints may derive from lack of knowledge or misunderstanding of the principle of equality and non-discrimination. Due to these factors many people deny the very existence of structural sex discrimination in employment and as a result do not see the need for preferential treatment of women. Also, economic factors may play a certain role: many men are against positive measures in favour of women because they are afraid of losing work or their decision-making privileges in employment. There exist, in addition, psychological barriers: some women do not accept preferential treatment, because they believe that it is detrimental for their self-esteem, and the social perception of their competence since it may be perceived by others as the appearance of unfair competition on the labour market. There are many political objections. First, there are those related to electoral calculation: since there is a considerable opposition to affirmative action in the society (which to a certain extent is due to lack of appropriate information on its nature), candidates for election who are willing to promote parity risk losing votes. Another political objection is connected with the fear of Poles that they will lose sovereignty to the EU in decision making. This may be evidenced by the adoption by the Sejm in 2013 of the resolution declaring the proposal for a directive of the European Parliament and of the Council on gender balance on company boards to be incompatible with the principle of subsidiarity.

These controversies tend to be fought out, at least in part, in forums where the results are encapsulated in some legal form, whether that form is a constitutional document, a piece of primary or secondary legislation, or a judgment from a court. The national expert's discussion of recent experience in **Germany** on the requirement that the two candidates should be equally well qualified illustrates the use of litigation as another way of carrying on a political dispute. We saw earlier that the 2016 Act on the modernisation of the Civil Service Act of North Rhine-Westphalia determined that female civil servants were to be given preference in promotion under the provision of a *substantially* equal qualification, aptitude and professional performance based upon an equivalent overall evaluation in the applicant's latest assessment report, unless a male applicant experiences specific hardships, and under the further conditions of a lower proportion of female civil servants in the higher position applied for than in the corresponding lower positions and not yet having reached 50 %. This provision was repealed by Parliament, as we have discussed earlier in this report.

10.7 Effect of positive action on gender balancing of corporate boards

In general, however, the impact of EU policies seeking to require the gender balancing on company boards has been considerably more effective. In **Finland**, in terms of the effects of positive action, the provision with the greatest impact has been Section 4a, which requires balanced participation in nominated (not elected) public bodies. The provision has, according to many studies, considerably increased the percentage of women in decision-making bodies. It has even had spillover effects in situations where the provision does not legally apply. For example, associations often aim at gender balance in their governing bodies. In the **Netherlands**, the regulation in the Dutch Civil Code on the target of 30 % of women on boards has had some effect, but far less than was aimed for. This regulation was introduced on 1 January 2016. In the following three years, the number of women on boards of directors increased from 7.4 % to 9.6 % and the number of women on supervisory boards from 9.8 % to 11.2 %.[785] This is of course far from the target of 30 %. In **Portugal**, even without statistical data it is quite evident that the number of women on company boards is growing fast, since the time-limits to implement the legislation on quotas in that field are quite strict and the penalties are high. In **Belgium**, the adoption of quota systems for decision making (on company boards) has had an important impact. Regarding board members, the Gender Equality Institute observes, in its third report dedicated to the implementation of the law, that

785 *Commissie monitoring talent naar de top* (2015), '*Topvrouwen in de wachtkamer*', *Bedrijvenmonitor 2012-2015*, Zeist 2015. Available at: https://www.researchgate.net/publication/284413976_Topvrouwen_in_de_wachtkamer_Bedrijvenmonitor_2012-2015.

between 2008 and 2017 the number of women on company boards has tripled. However, a third of the companies analysed (22 out of 71 large companies) did not yet meet the target specified by the law.[786]

In **France**, the effect of Law 2011-103 of 27 January 2011,[787] which aimed to improve the representation of women on company boards, and impose a quota on each sex, appear to be positive. Firms had to ensure that each sex has at least 20 % of board seats within three years and 40 % in 6 years. Reports carried out by researchers[788] and the High Council on Equality have delivered reports on the implementation of parity rules in the private and public sectors.[789] Studies on the profile of these women in executive boards[790] show that they have equivalent degrees as the men but different backgrounds and ages. Latest studies seem to reveal that the mandatory quota has worked. France is the only country with 43 % of women in executive boards.[791] In **Denmark**, for companies covered by the legislation, the provisions on gender balance in boards have raised awareness of the positive effect of a gender balanced composition of boards and company management. The Government closely monitors the implementation of the legislation. The proportion of women on company boards in the largest publicly listed companies has increased since the introduction of the legislation in 2012 from 20.8 % to 30.7 % in 2018. For all publicly listed companies, the proportion of women on boards has increased from 9.6 % in 2012 to 15.9 % in 2017. The proportion of women on company boards in general has increased from 9.6 % in 2008 to 15.2 % in 2017.[792]

That is not to say that such measures have been universally effective, but that lack of progress is relative. In **Iceland**, the gender quota requirements have not rendered the desired results. The law on gender quotas took effect in September 2013. In 2014 the results reached the maximum so far in companies with 50 or more employees, where the gender ratio became 33 %. In 2016, women constituted 32.3 % of the boards and 32.7 % in 2015.[793] In **Germany**, as we have seen, federal legislation has also been introduced providing for a statutory 30 % gender quota for supervisory boards of the 100 most important private companies in Germany as well as the obligation for 2 500 to 3 500 private companies to set themselves target gender quotas for boards and the highest management level. The binding statutory 30 % gender quota for advisory boards covers no more than 108 companies in Germany. On average, these 108 companies today fulfil their legal obligations of 30 % female supervisory board members. A different story emerges when an assessment is made of the more voluntarist approach taken regarding other companies. While the obligation to set themselves target gender quotas covers 1 747 private companies, there are unfortunately no effective sanctions in the case of setting zero quotas or none at all. Due to the absence of sanctions in particular, this approach appears not to have succeeded. Critics have pointed out the narrow scope of application and doubted the effectiveness of the sanctions, demanding statutory gender quotas on executive boards and at higher management levels as well and preferring effective sanctions, such as the invalidity of the resolutions of the respective board or corporate tax disadvantages.[794] By the end of 2017, only 24.6 % of the supervisory board members and 8.1 % of the executive board members of the 200 largest companies in Germany were female.[795] While the percentage of female supervisory board member has slightly increased, there has been no

786 Gender Equality Institute, (2018) *Third report on the implementation of the Law of 28 July 2011 concerning gender quotas in boards of direction*. Report accessible in French at https://igvm-iefh.belgium.be/sites/default/files/troisieme_bilan_26.11.2018.pdf and Dutch at https://igvm-iefh.belgium.be/sites/default/files/derde_balans_26.11.2018.pdf.

787 France, Law No. 2011-103 of 27 January 2011 *relative à la représentation équilibrée des femmes et des hommes au sein des conseils d'administration et de surveillance et à l'égalité professionnelle*.

788 http://www.datapressepremium.com/rmdiff/2010544/EtudeObservatoireSkemaDeLaFeminisationDesEntreprisesVF2.pdf.

789 http://www.haut-conseil-egalite.gouv.fr/IMG/pdf/parite-court-ang_nov-2018-135x210-v2.pdf.

790 Bender, Anne-Françoise, Dang, Rey and Scotto, Marie-José (2016) 'Les profils des femmes membres des conseils d'administration en France', *Travail, genre et sociétés*, 2016/1 No. 35, pp. 67 to 85.

791 https://www.challenges.fr/femmes/exclusif-les-resultats-du-premier-barometre-de-la-parite-ethics-boards_588217.

792 EIGE: European Institute for Gender Equality https://eige.europa.eu.

793 https://www.althingi.is/altext/erindi/149/149-738.pdf.

794 See German Women Lawyers' Association, Statement of 7 October 2014, https://www.djb.de/verein/Kom-u-AS/K1/st14-17/, and the Berlin declaration by seventeen women's organisations, available under https://www.djb.de/st-pm/pm/pm18-04/.

795 German Institute for Economic Research (DIW), *Women Executives Barometer 2018*, available under https://www.diw.de/sixcms/detail.php?id=diw_01.c.574761.en.

progress concerning executive boards. The main reason is that the decision about the members of the executive boards is made in supervisory board committees, which are dominated by men.[796] In March 2017, there were more male executive board members with the name of Thomas and Michael than the total number of female executive board members.[797] By the end of 2017, 68.5 % of the 200 largest companies in Germany had no female members on their executive boards.[798] In February 2019, only 8.8 % of the executive board members of the 160 most important DAX-companies were female, and 53 of them set themselves a zero women's target quota for leading management positions.[799] Out of 1 747 companies, obliged to set themselves target gender quotas, 757 companies set themselves a zero target quota and 664 none at all.[800] Out of all MDax-listed companies, 75 % set themselves a 0 % gender quota regarding their executive boards for the first period until 30 June 2017.[801] In 2018, the Federal Ministry for Family, Senior Citizens, Women and Youth announced that there would be an annual monitoring report on the development of women's and men's representation on boards and in management positions of the private and public sectors as well as an annual equality index with regard to the highest federal administrative bodies published by the Federal Statistics Office on 31 December of every year.[802] Unfortunately, the monitoring report as well as the equality index for 2018 are missing and nowhere to be found. The new Federal Minister for Family, Senior Citizens, Women and Youth expressed her disappointment with the broad failure of private companies to set sufficient target quotas (beyond 0 %) and announced that amendments to the existing legal obligations would force the companies to give an explanation for their target quotas and that serious consideration was being given to the idea of sanctions.[803]

The findings are stark. When we consider the evidence in this section together with the earlier assessments of effectiveness of positive action in employment more broadly, it becomes evident that over half of the national legal experts could not identify any sanction regime governing either general positive action in employment or gender-balancing on company boards (**Bulgaria**, **Croatia**, **Cyprus**, **Czech Republic**, **Estonia**, **Hungary**, **Latvia**, **Lithuania**, **Luxembourg**, **Malta**, **Netherlands**, **Poland, Romania**, **Slovakia**, **Slovenia**, **Spain**, **United Kingdom**). Only **Sweden** was described as having sanctions where active measures other than those regarding company boards was concerned. In the majority of the remaining states, the national legal expert identified sanctions only regarding measures concerning gender-balancing company boards (**Belgium**, **Denmark**, **Finland**, **Germany**, **Iceland**, **Ireland**, **Italy**, **Norway** and **Portugal**). In most cases, these sanctions involved the imposition of fines, the invalidity of the company decision appointing boards that did not meet the required quota, or both.

It would be a reasonable hypothesis that the relative lack of take-up of positive action, and the relative lack of success in delivering change as a result of positive action that is initiated, would be influenced by whether or not there were effective mechanisms of regulation, including some use of appropriate sanctions, accompanying the policy: the more a positive action policy relies on voluntarism, the less likely it will be introduced and the less likely it will be effectively implemented. This hypothesis appears to be borne out by our survey. It is hardly surprising that there is a clear correlation between those states that

796 See https://www.manager-magazin.de/unternehmen/karriere/immer-noch-kaum-frauen-in-den-vorstaenden-a-1261613.html.

797 Allbright Foundation (2017), 'Ein ewiger Thomas-Kreislauf?', https://static1.squarespace.com/static/5c7e8528f4755a0bedc3f8f1/t/5cda985836d36b00013b5cfa/1557829765572/Allbright-Bericht-2017-Thomas.pdf.

798 German Institute for Economic Research (DIW), *Women Executives Barometer 2018*, available under https://www.diw.de/sixcms/detail.php?id=diw_01.c.574761.en.

799 See https://www.manager-magazin.de/unternehmen/karriere/immer-noch-kaum-frauen-in-den-vorstaenden-a-1261613.html.

800 See https://www.manager-magazin.de/unternehmen/karriere/immer-noch-kaum-frauen-in-den-vorstaenden-a-1261613.html.

801 See http://www.spiegel.de/karriere/frauenquote-in-mdax-unternehmen-keine-weiblichen-vorstaende-a-1135060.html.

802 See https://www.bmfsfj.de/bmfsfj/themen/gleichstellung/frauen-und-arbeitswelt/quote-oeffentlicher-dienst/quote-fuer-mehr-frauen-in-fuehrungspositionen--oeffentlicher-dienst/116016.

803 See https://www.manager-magazin.de/unternehmen/karriere/immer-noch-kaum-frauen-in-den-vorstaenden-a-1261613.html.

have reported a change in composition of the workforce or company boards, or both, and the presence of sanctions, however remote.

10.8 Conclusion

In this chapter, we considered the impact of the EU's positive action strategy on the development of positive action at the national level, but in arriving at a conclusion derived from this chapter on impact, two caveats must be entered. First, there is a degree of uncertainty as to what changes in practice are the ultimate goals that positive action is supposed to contribute to achieving. The purpose that positive action is supposed to serve, significantly affects how its success should be measured. We are conscious in arriving at our conclusions on the effect of EU positive action law and policy that we must be cautious for a second significant reason: assessing what have been the effects in practice of EU interventions, would require a different methodological approach to provide harder evidence on which more definitive conclusions could be based. With these caveats, however, we offer some preliminary conclusions based on the responses of our national legal experts.

In drawing conclusions from the evidence presented, it is useful to draw a distinction between legal change and change in practice (or between law-on-the-books and law-in-action, as this distinction is sometimes described). We conclude that, in the main, the EU's positive action strategy has been influential in three principal respects. The EU has put positive action on the national political and legal agenda of certain states, to an extent that would have been unlikely without the EU's inspiration or the incentives it created to encourage a debate on these issues, and this has led to the concept of positive action being introduced into national legislation (although it goes by different terms in different states). Secondly, it has been successful in encouraging experimentation on the types of positive action that national legislation and policy has identified as positive action measures, such that a taxonomy of such measures demonstrates a wide variety of different approaches. Thirdly, it has encouraged a conception of positive action as a legal exception to the prohibition on discrimination in national law.

Beyond this, the effects of EU positive action law and policy appear to be more mixed. We find that, in the main, states have little or no information to offer on what change has occurred as a result of positive action measures. On the basis of the little information that is available, however, the voluntarist model of positive action, which is dominant at the national level across the EU, does not appear to have resulted in significant change 'on the ground'. In the main, structures have not been embedded at the national level that have brought about material change in the labour market that have benefitted women. Where change on the ground has occurred, it largely derives from developments that are specific to the country concerned.

In attempting to identify what elements in EU gender equality law and policy, in which positive action is situated, have contributed to this state of affairs, we emphasised the dominance of the anti-discrimination model of gender equality, whose very success appears to have successfully supplanted the broader aim of gender equality. We also identified a further, unintended, consequence of the dominance of the EU approach to gender equality: the virtual exclusion of CEDAW from European positive action discourse, except in a very few states. This is important, given that CEDAW would have presented an alternative model to that of the EU, had it flourished. In brief, with the possible exception of the recent initiative concerning gender balancing of company boards, which has been, comparatively, rather more successful, we suggest that the EU strategy has failed to present a sufficiently robust and effective counterbalance to national economic and political constraints on the adoption of positive action measures.

11 Towards a European model of positive action for gender equality: a new strategy

If the previous chapter has identified the problems, what are the solutions? In this chapter, the report considers possible recommendations for a revised EU strategy. The European Union is faced with three significant choices in thinking about future policy on gender-based positive action in employment. The first is, what it is that the EU wants to achieve. What is the aim or goal of policy in the area of gender-based 'equal treatment'? The second is what an effective strategy for positive action would look like at the state level. The third is what role EU institutions should play in securing the adoption of this strategy by the Member States (and indirectly in the EEA).

11.1 What is the EU aiming to achieve by positive action?

What is it that the EU wants to achieve? What is the aim or goal of positive action? The problem with asking these basic theoretical questions is that there is a danger that policy makers are sucked into a never-ending debate on complex issues of political theory and ethics. We can identify something like four or five separate justifications that have emerged from the Members States as to what they think positive action under EU law is aiming to achieve.

11.1.1 Compensating for past discrimination

Positive action is seen by some as compensation for discrimination that was carried out by the institution or employer who now wishes to engage in compensatory affirmative action, or where the past discrimination is more societal. In **Croatia**, the Gender Equality Act explicitly states that one of the aims of special measures in the Gender Equality Act is to 'ensure the rights of those persons who were previously denied them'.[804] In **Spain**, compensation for past discrimination carried out by others in society is mentioned as a justification for positive action by the Constitutional Court.[805] In **Sweden**, this argument is put forward for example in Government Report 2016:332 on equal proportion of men and women in company boards. In **Lithuania**, the law requires that the legislator would relate the positive action to past discrimination, but no other conditions are provided. In **Finland**, however, compensation for past wrongs is not a strong motivation. In **France**, the reasons for the focus on equality of collective bargaining agreements in the public and private sectors refer to past discrimination linked to the perception of certain jobs (security, engineering) or cultures (the military) as being male or female due to societal stereotypes. This logic is very widespread and explains parallel efforts on sexism in the private and public sector linking positive action as a way of addressing a hostile environment.[806] The French experience in the pension context, described earlier, provides a warning, however. Action simply to redress past discrimination in the form of compensation should not be considered positive action, which implies not simply looking to the past, but also providing for action in the future – attempting to ensure, for example, that what happened in the past should not be repeated in the future. Positive action is not simply compensation.

11.1.2 Egalitarian and redistributive arguments

Edwards has identified positive (or as he termed it 'affirmative') action as 'one means of effecting some redistribution of resources to minority groups in order to improve their general standing in society and their quality of life and, in the process, of enhancing distributive justice.'[807] Whether or not this rationale is explicitly identified as a basis for positive action will often depend on how far positive action is seen as contributing to, or going against the grain of, other aspects of the country's social policies. Redistributive

804 Croatia, Gender Equality Act, Article 9(1).
805 For example, Judgment 173/2013, of 10 October 2013.
806 France, Law No. 2018-703 of August 3 2018 on sexual violence and sexism, (Loi du 3 août 2018 *renforçant la lutte contre les violences sexuelles et sexistes*), https://www.legifrance.gouv.fr/eli/loi/2018/8/3/JUSD1805895L/jo/texte.
807 Edwards, J. (1995) *When Race Counts: The Morality of Racial Preference in Britain and America* Routledge, p. 29.

arguments have had a strong appeal in **Finland**, for example, but not in **Germany**, apparently. In **Croatia**, the egalitarian/redistributive argument is also used as a rationale for special measures, since their aim under the Gender Equality Act is to 'enable persons of a specific sex to gain an equal participation in public life' and to 'remove existing inequalities'. Examples may be found in the Gender Equality Act itself, because it prescribes that when making appointments to offices in the state, regional and local bodies, legal entities with public authorities, diplomatic offices, as well as to committees representing Croatia at international level, due account has to be taken of gender-balanced representation.[808] In the **Netherlands**, this justification is mentioned by the equality body in its two important opinions on positive action.[809] According to these opinions, positive action is allowed only in order to remove or reduce disadvantages, so as to bring women in an equal position compared to men. A condition for the application of positive action within a company or organisation is that women are *de facto* in a disadvantaged position. In **Austria**, overall gender equality legislation is largely based on the egalitarian principle. In **France**, the redistributive argument applies where positive action is one method of effecting some redistribution of resources to a disadvantaged group in order to improve their general standing in society and their quality of life and, in the process, of enhancing distributive justice. In **Sweden**, this justification is mentioned in the preparatory works, in relation to the adoption of the possibility for employers to take to positive action. Government Bill Prop, 2007/2008:95 states: 'It is reasonable that the possibility of seeking to compensate for the disadvantages women can face in the labour market [through positive action proper] continues to be open'. In **Poland**, the argument of 'reducing actual inequalities' was also used in the regulation on positive action in the Labour Code.[810]

11.1.3 Substantive equality

Some jurisdictions identify the aim pursued in more specific terms than just 'equality', and have determined that they should aim to achieve 'substantive equality.' In **Italy**, the Italian Constitution incorporates the principle of substantive equality, which is seen to justify the adoption of positive action.[811] Indeed, the main arguments in favour of positive action in Italy go as follows. Substantive equality 'is grounded on the attribution of relevance to the differences existing between categories of persons, which are grounded on their belonging to different gender or ethnic or race or social groups, in order to remove all the adverse consequences (inequalities) caused by the differences taken into consideration'.[812] The application of substantive equality, therefore, reinstates equal opportunities between categories of persons. Equal opportunities, in other words, are the final end of substantive equality. Substantive equality implies the elimination of the adverse consequences coming from the differences existing between groups rather than of the differences themselves; substantive equality, as a consequence, demands the adoption of measures in favour of the disadvantaged group, such as positive action. In **Greece**, Article 116(2) of the Constitution proclaims positive action as a means to achieve substantive equality. According to its explanatory report, Act 4604/2019 aims to establish substantive equality given that 'in societies with a long patriarchal tradition, as the Greek one, the female sex has been undervalued and put in the margin in comparison to the evidently bigger economic and political power of the male sex in the public and the private life'.

The **German** expert helpfully provides an introduction to innovative commentaries in German (written by female scholars), which provide an insight into the thinking behind some of these initiatives.[813] With a state obligation to enforce equality in practice, it is made clear that the prohibition of discrimination

808 Croatia, Gender Equality Act, Article 12(4) and (5).
809 Opinion 2011-198, www.mensenrechten.nl. See also *JAR* 2012/78 with a comment by E. Cremers-Hartman. And opinion 2012-195, www.mensenrechten.nl. See also *JAR* 2013/41 with a comment by E. Cremers-Hartman.
810 Poland, Labour Code, Article 18 [3b] (3).
811 Italy, Constitution, Article 3(2).
812 Ballestrero, M.V. (1992) 'A proposito di eguaglianza e diritto del lavoro', *Lavoro e Diritto* p. 578.
813 For conflicting positions in the English language scholarship, see Fredman, S., (2016) 'Substantive equality revisited', *International Journal of Constitutional Law*, vol. 14, pp. 712-738; MacKinnon, C.A. (2016), 'Substantive equality revisited: A reply to Sandra Fredman', *International Journal of Constitutional Law*, vol. 14, pp. 739-746; Fredman, S. (2016), 'Substantive equality revisited: A rejoinder to Catharine MacKinnon' *International Journal of Constitutional Law*, vol. 14, pp. 747-751.

on the grounds of sex does not only aim at formal equal treatment, but always also at the elimination of actual disadvantages, that is, it contains a state duty to guarantee equality in freedom as well as an individual right of women not to suffer disadvantages solely because of their sex.[814] The omission of discrimination by the state itself represents only a part of the state's constitutional duties,[815] the elimination of actual disadvantages existing in daily social reality requires active Government action.[816] The widespread discussion about equality of opportunities or results is not very effective, since the elimination of disadvantages such as structural discrimination and harmful gender role stereotypes can require different measures by the state depending on the context.[817] Notwithstanding the symmetrical wording of the duty, the direction of protection is asymmetrical in view of historically developed structural inequalities and current hierarchical gender relations.[818] An anti-patriarchal prohibition of domination[819] and a prohibition of hierarchy[820] in favour of women is needed. Consequently, the state is also obliged to take positive action measures to promote women, but this in turn must not reproduce or reinforce gender stereotypes and the detrimental effects on third parties need to be justified.[821]

11.1.4 Diversity and economic efficiency

A diversity rationale has gained considerable currency as a result of being embraced by human resource managers in several jurisdictions as the appropriate basis on which they manage personnel. Unlike the previous arguments, arguments for positive action based on diversity are based substantially on the benefits that a diverse workforce or boardroom are considered to produce for the organisation and the economy, rather than for reasons of justice, or in order to benefit the individuals from the targeted group. The diversity argument is, therefore, essentially a business (or efficiency) case for positive action. Several supposed benefits have been identified:[822] that there is an underutilised pool of talent, particularly educated women, that positive action measures can help identify and engage; that the financial performance of large organisations correlates with greater gender diversity at senior levels, producing higher returns on equity; that more diverse firms are more likely than less diverse firms to be innovative, leading to expansion in their market share and the capture of new markets, leading to an increase in sales; and that a diversity strategy may be significant in producing an increased female retention rate among employees, reducing training and replacement costs. The justifications the Commission has given for its proposal on gender-balanced boards emphasises this type of economic, market rationale much more than fundamental rights or justice-based reasoning.

Jurisdictions differ, however, on why and whether diversity is supposed to be a value. In some jurisdictions it appears to play an important role. In **France**, positive action is justified as promoting the inclusion of individuals representing more than one gender, national origin, colour, religion, sexual orientation, etc. because it is for the benefit of the organisation to have a plurality of different approaches and viewpoints.

814 Baer, S. & Markard, N. (2018) in: v. Mangoldt/Klein/Starck (Begr.), Grundgesetz. Kommentar, 7. Aufl., 2018, Art. 3 Abs. 2 Rn. 355; U. Sacksofsky, in: D. C. Umbach/T. Clemens (Hrsg.), Grundgesetz. Mitarbeiterkommentar, Bd. I, 2002, Art. 3 II, III 1 Rn. 349, 353.

815 Baer S. & Markard, N (2018) in: v. Mangoldt/Klein/Starck (Begr.), Grundgesetz. Kommentar, 7. Aufl., 2018, Art. 3 Abs. 2 Rn. 364.

816 Sacksofsky, U. (2002) in: D. C. Umbach/T. Clemens (Hrsg.), *Grundgesetz. Mitarbeiterkommentar*, Bd. I, 2002, Art. 3 II, III 1 Rn. 354.

817 Baer S. & Markard, N (2018) in: v. Mangoldt/Klein/Starck (Begr.), Grundgesetz. Kommentar, 7. Aufl., 2018, Art. 3 Abs. 2 Rn. 367ff; U. Sacksofsky, in: D. C. Umbach/T. Clemens (Hrsg.), Grundgesetz. Mitarbeiterkommentar, Bd. I, 2002, Art. 3 II, III 1 Rn. 350ff.

818 Baer S. & Markard, N (2018) in: v. Mangoldt/Klein/Starck (Begr.), Grundgesetz. Kommentar, 7. Aufl., 2018, Art. 3 Abs. 2 Rn. 360ff; U. Sacksofsky, in: D. C. Umbach/T. Clemens (Hrsg.), Grundgesetz. Mitarbeiterkommentar, Bd. I, 2002, Art. 3 II, III 1 Rn. 333.

819 Sacksofsky, U. (1996) Das Grundrecht auf Gleichberechtigung. Eine rechtsdogmatische Untersuchung zu Artikel 3 Absatz 2 des Grundgesetzes, 2. Aufl. 1996.

820 Baer, S. (1995) *Würde oder Gleichheit? Zur angemessenen grundrechtlichen Konzeption von Recht gegen Diskriminierung am Beispiel sexueller Belästigung am Arbeitsplatz in der Bundesrepublik Deutschland und den USA*, 1995.

821 Baer S. & Markard, N (2018) in: v. Mangoldt/Klein/Starck (Begr.), Grundgesetz. Kommentar, 7. Aufl., 2018, Art. 3 Abs. 2 Rn. 372ff; similar but more restrictive Nußberger, A. (2018) in: M. Sachs (Hrsg.), Grundgesetz. Kommentar, 8. Aufl. 2018, Art. 3 Rn. 286: 'ultima ratio'; dissenting Sacksofsky, U. (2002) in: D. C. Umbach/T. Clemens (Hrsg.), Grundgesetz. Mitarbeiterkommentar, Bd. I, 2002, Art. 3 II, III 1 Rn. 365ff, stating that there is no collision of different constitutional norms which needs justification but that Article §(2)(2) of the Basic Law. is to be applied with priority according to the principle of the more specific law.

822 E.g. Smedley, T. (2014) 'The evidence is growing: there really is a business case for diversity', *Financial Times*, 15 May 2014, https://www.ft.com/content/4f4b3c8e-d521-11e3-9187-00144feabdc0.

The diversity argument is more likely to be used for parity in executive boards[823] or to embrace all sorts of grounds for inclusiveness.[824] In **Sweden**, this argument is used frequently in public debate, but to a lesser extent in the legislative context. The Government's webpage informing the public about activities within the framework of the gender equality policy states: 'Gender balance in positions of power is basically a matter of justice, but also a matter of taking advantage of women's and men's skills and potential, contributing to economic development. Therefore, the proportion of women in leading positions in both business and public sector and management needs to increase'.[825] In **Great Britain**, the sense of the national legal expert is that the 'diversity argument' is now the most prevalent argument advanced for positive action**.** But relatively few other jurisdictions show many signs of adopting this approach other than sporadically. In **Finland**, the diversity argument has also been strong, but diversity has traditionally referred to historical ethnic groups and language groups. In **Malta**, the brochure published by the National Commission for the Promotion of Equality in order to promote the equality mark certification refers to this justification.[826] In **Austria**, some legal measures also stress diversity aspects (such as the relatively new provisions for gender equality on supervisory company boards). In **Ireland**, the diversity argument has also been used in respect of the representation of women in the senior ranks of the civil service and the teaching staff of universities. In **Estonia**, the Human Rights Centre had a project to implement the 'Diverse Workplace' label model (2017-2018).[827]

11.1.5 Supporting traditional roles?

There is, however, a recurring difficulty that has not, yet, been fully resolved. Positive action is sometimes developed, according to Cottrell and Ghai, 'to maintain the cultural values and institutions of community'. In **Hungary**, a justification for positive action (in the Hungarian terminology: 'preferential treatment') is the intention to support women in performing their traditional family roles (as mothers and care providers). An example is the early retirement option for women after 40 years of service (the option is based on special eligibility criteria, i.e. all time periods covered by any kind of child-related social security benefits are recognised as service).[828] This measure is not only controversial because it recognises care work in the family as service only in the case of women (thus does not encourage men to take a larger share), but because it encourages women, implicitly, to perform even more care work, provided for free (grandparental care, care for senior family members). In **France**, in the *Griesmar*[829] and *Leone* cases,[830] the Council of State justified its special bonuses for pension rights as compensating disadvantages that women suffer during their working lives, in particular, the reduction in benefits accrued by women during their career because of childbearing and the rearing of children that traditionally was assumed by women more than men,[831] a position that has been regarded sceptically by the CJEU. We saw earlier that, in **France**, a 2017 case of the French Court of Cassation decided that a collective agreement may provide for half day's leave only for women, which would be seen by some as questionable and counter-productive because of the risk of perpetuating stereotypes.

In future policy, it will be important for EU institutions not only to make clear what aims positive action may legitimately pursue, but also what aims positive action may *not* legitimately pursue.

823 Sénac, R. (2012) *L'invention de la diversité*, Paris PUF.
824 Charte de la diversité, Institut Montaigne, http://www.rsenews.com/public/dossier_social/charte-diversite.php?rub=2.
825 https://www.regeringen.se/regeringens-politik/jamstalldhet/en-jamn-fordelning-av-makt-och-inflytande---regeringens-insatser/.
826 https://ncpe.gov.mt/en/Documents/The_Equality_Mark/Equality_Mark_Information_Document_2019.pdf.
827 https://humanrights.ee/en/activities/to-implement-the-diverse-workplace-label-model/.
828 Hungary, Article 1 of Act CLXX of 2010 modified Article 18(2) of Act LXXXI of 1997 on social security pensions (*1997. évi LXXXI. törvény a társadalombiztosítási nyugellátásról*).
829 Judgment of 29 November 2001, *Griesmar* C-306/99, ECLI:EU:C:2001:648.
830 Judgment of 17 July 2014, *Leone and Leone*, C-173/13EU:C:2014:2090.
831 CE Ass. 27 March 2015, M. Quintanel n° 372426.

11.2 A model of European positive action for women in employment

The second major policy choice is what specific role the EU wants positive action to play in achieving appropriate policy aims at the national level. This choice differs from the issue we consider in a moment, which focuses on what role the EU should take on in ensuring that states adopt this preferred policy. Here we focus on the issue of how positive action by employers in Member States is going to achieve the aims of policy articulated in the previous section.

In order to widen the range of choices that a revised positive action strategy might usefully draw on, we can identify several different approaches to achieving the goals of equality and non-discrimination adopted in past decades in the states surveyed. The first approach is a policy of neo-liberal de-regulation or non-regulation, an approach that has sometimes been termed *laissez-faire*, or what we have termed voluntarism, where market mechanisms purport to address gender inequality; a variation on this approach is to attempt to persuade employers that it is in their self-interest to increase gender equality, drawing on elements of corporate social responsibility. In the previous chapter, we identified several features of the current EU regulatory approach, in particular self-regulation or voluntarism at the national level, and it was suggested that this has not been successful. Assuming that conclusion is correct, what might an alternative regulatory approach involve that might be more successful? Voluntarism has not produced effective change. Purely market-based mechanisms appear to have little success.

A second approach is to rely on collective bargaining to bring about the necessary change, where trade unions act on behalf of women to secure concessions by employers in the area of gender equality. Except in the context of **Austria**, **Belgium**, **France**, **Germany** and **Spain**, there is little discussion of the positive role of collective bargaining, and trade unions are seldom mentioned (only in reports from **Finland**, **France**, **Italy**, **Portugal**). The annual comparative country reports of the European network of legal experts in gender equality and non-discrimination support the conclusion that trade unions and collective bargaining are underutilised mechanisms for promoting gender equality.[832] Where national experts have reported on the effectiveness of collective bargaining by trade unions, whilst some progress appears to have been made by trade unions in securing gains through negotiating positive action agreements with employers (**France**), in general, little material progress has been identified (**Belgium**, **Finland**, **France**, **Spain**).

The third approach involves what can be called an employment rights model of regulation, in which individuals are given rights to enforce equality in an adjudicatory context, such as courts or tribunals. This is the approach adopted in order to address sex discrimination in the workplace. We have discussed the problems associated with this approach being used to pursue positive action seeking to bring about material changes in workplace composition in the previous chapter, and that assessment need not be repeated here. Suffice it to say that in most states, individual rights have proven unable to provide an effective tool to secure structural change through the adoption of positive action.

A fourth model, which can be termed 'command and control regulation', involves enforcement by government ministries or equality bodies, in which requirements are set and enforced in ways that would be similar to requirements imposed on companies in other areas of their business, such as health and safety of workers, food product safety, data protection, etc., including the application of sanctions for non-compliance with substantive and procedural requirements. When this has been attempted at the national level, the results appear to have been mixed. National experts frequently report how equality bodies, Ombuds and Government ministries are seen as ineffective (e.g. **Romania**), not least because

832 All the publications of the European network of legal experts in gender equality and non-discrimination, available at: https://www.equalitylaw.eu/.

they are under-resourced (e.g. **Finland**). The Commission Recommendation on equality bodies also recognises the problem of public enforcement by equality bodies.[833]

None of these regulatory models (voluntarism, collective bargaining, individual rights, command and control) *by themselves* finds any real favour in the accounts provided by the national legal experts. So, if not these, what approach to regulation might be adopted? Is some *combination* of these different instruments possible that would lead to more effective action? At this point, it will be useful to revisit the approach adopted at the national level, and now by the Commission, in attempting to secure gender balancing of company boards. We have considered the details of these in the previous chapters, but standing back from the detail, we can identify several features that together point to an alternative regulatory approach, one that appears to stand a better chance of successful change. As importantly, each of the elements in this regulatory approach builds on what has already been developed at the national level, or at the European level.

11.2.1 Purpose of positive action

Whilst we have seen that we can distinguish between these different justifications in theory, in practice most jurisdictions tend to use a combination of justifications, and sometimes these may well differ over time with one justification becoming fashionable but then being replaced by another. Given this pluralism of aims in space and time, EU policy has primarily involved seeking as much of an overlapping consensus as possible among these different positions, resulting in somewhat vaguely articulated policy aims. The overlapping consensus would appear to be that the EU's aim should be to eradicate discrimination, but also to go beyond that and attempt to seek greater equality in the labour market. In practice, this has meant reducing gender segregation, lessening pay differentials, addressing work-life balance issues, and increasing the proportion of women in positions of power and responsibility in the public and private sector. These are not ends in themselves, but means by which three principal goals can be better achieved: (i) women will have access to increased material resources, helping to secure their independence and autonomy, and thus their dignity as human persons; (ii) women will have access to work opportunities which are themselves part of a flourishing life of living as an individual and consequently provide more than simply material benefits to that individual; and (iii) greater equality for women will lead to increased economic and other benefits for all, including men, such as greater productivity, efficiency and growth. This pluralism of aims has important implications for positive action. EU policy should in future reflect how positive action may be appropriate in advancing this range of possible legitimate aims. This report suggests that the appropriate role of gender-based positive action in employment is to primarily to address 'underrepresentation'. It would thus be formally symmetrical, although in practice it would primarily address the underrepresentation of women. This would not be the only function of positive action, but it would become the main function, with important implications for issues of equal pay, given the extent to which unequal pay is often related to job segregation. Whether a similar approach should be taken to positive action in areas other than gender, for example in the context of ethnic inequality or disability, is an important question, but not one that this report considers.

11.2.2 Positive obligations

Central to this alternative strategy is the suggestion that legal regulation has an important role to play vis-à-vis positive action.[834] A positive duty to promote gender equality should become a legal obligation,

833 Commission Recommendation (EU) 2018/951 of 22 June 2018 on standards for equality bodies, OJ L 167 of 4 July 2018, p. 28, which recognises the importance of equality bodies for the enforcement of equality legislation.

834 See also, among others, Fredman, S. (2009) *Making Equality Effective: The role of proactive measures*, European Commission 2009; Fredman, S. (2005), 'Changing the norm: Positive duties in equal treatment legislation' 12 *Maastricht Journal of European and Comparative Law* 369.

both on Member States and on employers,[835] if it is not one already.[836] Positive action would be one means to give substance to this positive duty. There would be a switch from only negative to positive obligations, an emphasis on what companies must do (promote equality) rather than simply what they must not do (prevent discrimination). This regulatory approach views the prohibition of discrimination as one element in what it means to have a coherent gender equality strategy, but only as one element. The existing anti-discrimination *acquis* would remain largely intact, but equal treatment would come to embrace more than just a rhetorical commitment to equality, and incorporate a positive obligation to seek greater equality in practice.

This is not a novel approach, either at the level of the EU, or the Member States. This approach to equality has already emerged in EU law, of course. Thus, we have seen that Articles 2 and 3(2) EC (now Article 3 TEU and Article 8 TFEU) impose the objective of promoting equality between men and women in the Union, with the latter providing that '[i]n all the activities referred to in this Article, the Union shall aim to eliminate inequalities, and to provide equality, between men and women.' Advocate General Stix-Hackl in *Dory* has interpreted this as imposing an obligation on the Union actively to promote equality between men and women.[837] Article 157(4) TFEU links positive action to 'ensuring full equality in practice between men and women in working life.' Article 23 of the EU Charter of Fundamental Rights provides: 'Equality between women and men must be ensured in all areas, including employment, work and pay.' In the proposed directive on company boards, a positive obligations approach is adopted. Member States are required 'to ensure that listed companies aim to attain, by 31 December 2022, the objective that members of the under-represented sex hold at least 40 % of non-executive director positions or the objective that members of the under-represented sex hold at least 33 % of all director positions, including both executive and non-executive directors.' A positive obligations approach is also consistent with the general EU approach to issues of discrimination and equality in internal market law and policy. EU internal market law is built on the combined application of negative and positive obligations: the prohibition of discrimination on grounds of nationality is combined with positive measures to eradicate other obstacles and ensure equal market access; there is no presumption that the prohibition of discrimination in itself would secure these goals.

In the Member States, too, there is good evidence that a positive obligations approach has already attracted considerable support. In western European states, a positive duty approach to equality is growing in popularity. In **Austria**, the Federal Constitution provides: 'The federal state, the regions and the communities acknowledge the principle of de-facto equality of man and woman. Measures aimed at the promotion of de facto equality between women and men in particular such which are aimed at the elimination of existing inequalities are admissible.'[838] In 2008, the Federal Constitution was amended further by a paragraph under which the federal state, the regions and the communities are required to aim to achieve de-facto equality between women and men when preparing their budgets. In **France**, the Constitution was amended after the Constitutional Council decision discussed above prohibiting positive action for women in the context of political representation. It now states that 'statutes shall promote equal access by women and men to elective offices and posts as well as to professional and social positions'.[839] In **Greece**, the new Article 116(2) provides: 'The State shall take measures to eliminate inequalities which exist in practice, in particular those detrimental to women' and to take positive measures for the

835 See, e.g. presentation by the chair of Equinet, Evelyn Collins, *A Vision for 2020,* to the Equinet Conference Taking action for Gender Equality, 23 March 2015.

836 Sophia Koukoulis-Spiliotopoulos has argued that the promotion of gender equality is already a positive obligation of the Member States. She suggests that the 'positive obligation' imposed on EU institutions by Arts. 3(3) TEU (former 2 TEU) and 8 TFEU (former 3(2) TEC) to 'promote gender equality' includes taking positive action and it is incumbent on the Member States as well *via* their duty of loyal cooperation. Koukoulis-Spiliotopoulos, S. (2005), 'The amended equal treatment Directive (2002/73): an expression of constitutional principles /fundamental rights' 12(4) *Maastricht Journal of European and Comparative Law*, (2005), at 335; Koukoulis-Spiliotopoulos, S. (2008), 'The Lisbon Treaty and the Charter of Fundamental Rights: maintaining and developing the *acquis* in gender equality', *EGELR* 1/2008, at 21-22.

837 *Alexander Dory v Bundesrepublik Deutschland*, Case C-186/01, ECLI:EU:C:2002:718, paragraphs 102-105.

838 Austria, Federal Constitution, Article 7.

839 France, Constitution, Article 1.

promotion of gender equality. The jurisprudence of the Council of State stresses this obligation of the legislature and the administration in all areas. In **Germany**, in addition to the general equality provisions in the Basic Law, Article 3(2)(2) provides that the State must 'promote the actual implementation of equal rights for women and men and take steps to eliminate disadvantages that now exist'. In **Italy**, the second paragraph of Article 3 provides the basis of the definition of substantive equality. It states that 'It shall be the responsibility of the Republic to remove all obstacles of an economic and social nature which, by limiting the freedom and equality of citizens, hinder the full development of the human person and the effective participation of all workers in the country's political, economic and social organization'. The **Spanish** Constitution establishes the public authorities' duty to promote conditions favouring the achievement of equal rights for individuals and groups, while using the concept of real and effective equality.[840] In **Sweden**, the constitution now provides: 'Public institutions shall work to ensure that all persons shall be able to achieve participation and equality in society'.[841]

A positive obligations approach to equality (broadly defined) is not uncontroversial. There is a noticeable difference emerging between the former socialist countries of central Europe, and the states of western Europe. It seems relatively clear that the former are considerably less likely to adopt the positive duty conception of equality than the latter. The explanation for this difference seems to lie in the adoption of (and the disillusionment with) the substantive conception of equality that was adopted by the former socialist states. Thus, in **Hungary**, for example, prior to the political changes of the early 1990s, equality was promulgated as a notion of 'social equality', overtly declaring its compensatory character on behalf of past 'oppressed' classes. It was carried out through a system of open discrimination, privileges and quotas on class and political grounds. Women were also put into positions based on quota considerations (determined by the governing Socialist party) in the field of political decision making, and were also entitled to certain employment privileges under the label of 'balancing their de facto inequality by legal inequality'. This system frequently promoted less qualified (or non-qualified) persons to educational or job opportunities and deeply discredited the idea of 'substantive equality' and positive measures.

11.2.3 Specificity: the role of targets and timetables

Were such a positive obligation to be developed in the private sector as well as the public sector, as is recommended here, what method of regulation is best adopted to secure compliance with this positive duty? It is suggested, based on the limited experience in the Member States, that a diverse mixture of sticks and carrots would be likely to prove most effective. But some elements of such a regulatory regime are already clear. It would require a centralised mechanism within Member States to negotiate with individual economic actors how the goal can best be met within their organisation, with sanctions for non-compliance functioning as an insurance policy against an unwillingness to cooperate. It would also require considerably more enhanced transparency and reporting requirements on the composition of individual workplaces than currently exists. A shift to a more complete regulatory system should be accomplished as suggested in particular by the legal experts from **Liechtenstein** and **Luxembourg**.

Key to this would be a much greater specificity of what results are required, particularly at the level of individual public and private bodies, including employers. In addition, then, to a positive obligation, a second element should be introduced – a much clearer end-point must be identified for specific companies, most often as a statistical target that needs to be achieved. The scope of what the positive obligation requires is thus articulated in some detail, but an initial starting point is often the requirement to reduce 'underrepresentation'. An obligation of result would replace the process-led approach of the previous strategy. The proposed directive on company boards adopts this approach, as we have seen, setting out targets and timetables for larger companies, that are clear and precise. To repeat: Member States are required 'to ensure that listed companies aim to attain, by 31 December 2022, the objective that members of the under-represented sex hold at least 40 % of non-executive director positions or

840 Spain, Constitution, Article 9.2.
841 Sweden, Constitution, Article 2(4).

the objective that members of the under-represented sex hold at least 33 % of all director positions, including both executive and non-executive directors.'

This approach is also illustrated in the quota provisions adopted by some Member States in the context of gender balancing company boards, but it is not confined to that context. In **Croatia**, for example, the Act on State Judiciary Council,[842] the Judiciary Act[843] and the Civil Servants Act[844] contain provisions which amount to positive action for advancing the employment of ethnic minorities. When appointing judges or employing court servants and clerks, as well as civil servants, due account has to be taken of the share of ethnic minorities.[845] In **France**, for example, the recent law on reducing the gender wage gap in 2018 was linked to developing specific indicators of wage disparities according to sex and age and the introduction of effective financial sanctions are directly motivated by a quantitative perception of the need to redistribute the economic effect of disadvantage on income and quality of life of a specific gendered group.[846] In the **Netherlands**, in order to increase the number of female professors a subsidy of EUR 5 million in 2017 was granted by the Ministry of Education and Culture for the appointment of 100 female full professors by universities, under the condition that the women concerned would get permanent positions as full professors.

Coupled with this, there should, thirdly, be a much more precise timeframe identified by which that firm-level numerical target is to be achieved, based on what appears to be achievable with good-faith efforts by the company. Again, this is reflected in several of the national company boards' requirements, but also more broadly. In **Croatia**, for example, the basic strategic documents for the elimination of discrimination against women and establishment of true gender equality in practice are periodically drawn up by the Office for Gender Equality and adopted by the Croatian Parliament. Generally, all national policies so far have established key priority areas for action and prescribed the tasks of the competent institutions and bodies *as well as time limits for their implementation*.[847]

11.2.4 Range of positive action measures available

We have seen that there is a considerable range of different positive action measures that states have experimented in using. But few, if any, states appear to engage with all of these, and reports from national experts indicate a significant degree of unfamiliarity with several. There is an opportunity to bring these different measures to the attention of states, and it is suggested that a successful positive action strategy would set out a full menu of measures available, with the advantages and potential disadvantages of each.

These include measures that are conscious of the group dimensions of inequality, but without engaging in direct preferential treatment of members of the targeted group: measures such as the collection of statistics by way of monitoring the participation of women and men in employment; indirectly inclusionary

842 Croatia, *Zakon o Državnom sudbenom vijeću*, NN nos. 116/2010, 57/2011, 130/2011, 13/2013, 28/2013, 82/2015 and 67/2018.
843 Croatia, *Zakon o sudovima*, NN nos. 28/2013, 133/2015, 82/15, 82/2016 and 67/2018.
844 Croatia, *Zakon o državnim službenicima*, NN nos. 92/2005, 107/2007, 27/2008, 34/2011, 49/2011, 150/2011, 34/2012, 49/2012, 37/2013, 38/2013, 138/2015 and 61/2017.
845 See Croatia, Act on State Judiciary Council, Article 50; Judiciary Act, Article 108(4); and Public Servants Act, Article 42(2).
846 France, Law No. 2018-771 of September 5, 2018: The decree No. 2019-15 8 January 2019 which implements it describes the procedure to sanction the company if the 3-year time limit is not respected: an agent from the labour inspector corps sends a report to the regional director (Art. D. 1142-9.). The director informs the company it is considering the financial sanction within the next two months after the report and the director can take into account justifications for the non-compliance and correction of the wage disparity (economic hardship, company restructuring or merger, bankruptcy (Art. D. 1142-11). The director has two choices: impose a sanction of the equivalent of 1 % of the earnings and company profits from the past calendar year based on revenues from activities (social security contribution base Art. D. 1142-13) or award extra time to comply within a year maximum. Public authorities enforce the rules which avoids the constraints of judicial adjudication.
847 E.g. within the task 'Strengthen women entrepreneurship', one of the activities is to increase the funds within the appropriate programmes and budgets earmarked for financing women entrepreneurship.

measures, such as Government assistance targeted at all those returning to work, for example, result in women benefiting disproportionately because they are disproportionately represented in the targeted group. Beyond these, we have identified measures that involve a degree of preference in favour of members of the underrepresented group, but fall short of involving preferences at the point of selection for a job, such as advertising by employers, Government bodies or others, which specifically targets the gender group that is considered underrepresented in a particular type of employment, or special training offered by employers, Government bodies or others, also specifically targets the gender that is considered underrepresented in a particular type of employment that is non-traditional for that group; or measures adopted by the employer to encourage the underrepresented group to remain in employment by providing facilities to lessen particular disadvantages, e.g. providing women with children preferential access to child-care facilities, thus encouraging them to take up employment in these firms.

More controversial, we have identified measures that involve the use of preferential treatment of members of the targeted group at the point of selection, such as tie-break policies that prefer an individual from the underrepresented group where he or she is equally well qualified to a candidate from the overrepresented group; and measures that involve preferential treatment for members of the underrepresented group, where the candidate may be less well qualified than another candidate, but still qualified for the job, distinguishing between preferences for a particular candidate from the underrepresented group where the preferred candidate is less well qualified, from where there is a general quota in favour of candidates from the underrepresented group. Finally, we identified measures where employers change traditional criteria for employment or promotion in such a way that the new criteria are more likely to favour candidates from the underrepresented group, modifying traditional 'merit' in favour of increasing participation.

11.2.5 Merit and preferences

Fifthly, whilst use of the broad range of possible measures should be encouraged therefore, a modest degree of preferential treatment should be required of employers who are unable to achieve the goals set in other ways, but with the constraint that such preferences should be symmetrical (redressing the underrepresentation of men as well as women), and respect the merit principle at least to the extent of allowing preferences only between candidates who are broadly equivalently qualified. This approach is consistent with the jurisprudence of the CJEU and the EFTA Court.

It is also the approach adopted in the Commission's proposed directive on company boards. On the one hand, listed companies on whose boards members of the underrepresented sex hold less than 40 % of the non-executive positions, must make the appointments to these positions on the basis of a comparative analysis of the qualifications of each candidate, by applying pre-established, clear, neutrally-formulated and unambiguous criteria. On the other hand, Member States are required to ensure that, when choosing between candidates who are equally qualified in terms of suitability, competence and professional performance, the companies concerned must give priority to the candidate of the underrepresented sex, unless an objective assessment taking account of all criteria specific to the individual candidates tilts the balance in favour of the candidate of the other sex.

We have seen numerous examples of this in the context of how the issue of company boards has been dealt with at the national level also, but (again) this approach is not confined to that context. In **Greece**, for example, specific legal provisions provide for quotas for the participation of the underrepresented sex in service councils and boards in the public sector and in research councils or committees. This has promoted the participation of women in decision-making councils, boards and committees, and (reportedly) without controversy, probably because they are symmetrical in their targeting of the beneficiary group (quota of one for the underrepresented sex).

11.2.6 Reflexivity

Whilst suggesting the need for goals to be identified and timetables to be set, we have not so far considered who should be responsible for doing so. The reader may have assumed that, since the proposal is to move to a much more developed regulatory approach for positive action, the responsibility would fall on a national authority, but that is not what is proposed here. To do so would be to adopt command and control regulation, an approach which in this context would bring with it significant difficulties. In order to understand why, we need to take into account a critical difference between the company boards' strategy, and a strategy aimed at addressing gender underrepresentation in employment more broadly. This is because of the uncertainty of how 'underrepresentation' may be determined in the employment context generally. In **France**, the new agreement on equality in employment between men and women in the public sector, signed on 20 November 2018, illustrates the point. A monitoring committee presided by the Secretary of State of public accounts, Olivier Dussopt, held a first meeting on 29 January 2019 with public employers. The second prong of this agreement concerns equal access to professions and responsibilities for balanced representation in high management positions to head public administrations or territorial institutions. In this context, however, the idea of underrepresentation specifically takes into consideration the pool of available women candidates for recruitment and promotion.[848] This is likely to vary from time to time, from place to place, and from occupation to occupation. How can this be handled best at the firm level?

In this type of situation, the role of regulation should be to require employers and other economic actors to reflect on how best to achieve the result specified ('reduce underrepresentation'). It is a regulatory approach which views 'reflexivity' as a critical element in introducing change. The type of positive action that employers would adopt would be determined by such reflexivity, and would not be confined by any arbitrary limits. According to Karen Yeung, reflexive regulation, 'ascribe[s] a critical role to deliberative, participatory procedures as a means for securing regulatory objectives.'[849] The benefits that should derive from this approach are that it encourages each organisation to engage in its own assessment of the problem, but to deliberate with others in reconsidering whether this is adequate and how far its assessment needs to be reconstructed in light of that deliberation. In doing so it encourages the organisation to 'own' the solutions that it devises, encourages mutual learning within and between organisations, encourages each organisation to deliberate on the solutions that are best for it and thus accepts that pluralistic solutions are desirable, and it encourages the involvement of different stakeholders to agree to the definition of the problem and the best method of solving it in ways that stimulate consensus, thus increasing social harmony. But the critical point is this: it should be more successful in bringing about the regulatory goals than other competing systems of regulation. A reflexive approach involves no contradiction and is consistent with arguing against an undue emphasis on subsidiarity and voluntarism, since a reflexive approach is designed to operate by reference to central structuring regulatory norms, as described below.

Identifying how law can most successfully use procedural requirements as stimuli to get organisations to buy into equality at the kind of profound level that results in equality becoming an endogenous rather than an exogenous value in that organisation is work in progress, but there is now sufficient information available from the states surveyed to be able to construct a basic set of requirements.[850] Such a strategy is emerging in the context of the need to address pay inequity, and somewhat more fully formed, in the context of the Commission's proposal on the need to secure increased gender equality on boards of companies. The one somewhat more optimistic result of this study is the fact that even in proposing this strategy the Commission appears to be producing results at the national level that have not been reported before. The question is whether there is sufficient political will to ensure that the early lessons

848 https://www.fonction-publique.gouv.fr/files/files/publications/politiques_emploi_public/20181130-accord-egalite-pro.pdf.
849 Yeung, K. (2004) *Securing Compliance: A Principled Approach,* Oxford: Hart Publishing, p. 171.
850 See also McCrudden, C. (2007), 'Equality Legislation and Reflexive Regulation: a Response to the Discrimination Law Review's Consultative Paper', 36 *Industrial Law Journal* 255-266.

of this experiment in shifting the strategy will be learned more widely, leading to a more substantial change in the overall gender equality strategy, within which positive action is placed.

So, in addition to a positive duty, the establishment of the need for specific goals, a timetable for the accomplishment of these goals, identifying the full range of positive action measures available, and a limited use of preferences, we come to the sixth element in the new strategy: giving firms a degree of flexibility as to how best to achieve the goals set in the time required. We have seen that under the Commission's draft company boards directive, a 'comply-or-explain duty' applies: companies not complying with the 40 % target would be required to apply the procedural rules and explain what measures they have taken in order to reach the target. In addition, Member States must take the necessary measures to ensure that where a candidate of the underrepresented sex establishes facts from which it may be presumed that he or she was equally qualified as compared with the candidate of the other sex selected for appointment or election, it is for the listed company to prove that there has been no breach of the priority rule. In other words, there will be a default standard which companies will be required to meet, but a degree of flexibility in how to meet it. The proposal also allows for flexibility in the sense that, if Member States are able to demonstrate an equally effective approach, its requirements do not apply. We have seen that several states have also adopted a 'comply or explain' approach (**Austria**, **Bulgaria**, **Denmark**, **Finland**, **Poland**).

In several Member States, the approach has been adopted of requiring employers to produce and publish equality plans, but builds in an opportunity for reflexivity, allowing organisations to shape their own approach to promoting gender quality within their own organisations. In **Hungary**, budgetary organs and legal entities in state majority ownership employing more than 50 employees are obliged to adopt an equal opportunity plan[851] (the aim of these plans is to eliminate disadvantages of certain groups, such as ethnic minorities, the disabled, single parents, parents with multiple children and employees over 50 years of age). The failure to adopt a plan is sanctioned by the Equal Treatment Authority (Egyenlő Bánásmód Hatóság),[852] however the content and the impact of the plan is not assessed. In **Croatia**, state administration bodies and legal entities with public authorities are obliged to adopt action plans every four years, with a view to promoting and establishing gender equality,[853] but the content of such action plans and the mechanisms for their implementation are not specified. In **Portugal**, the Labour Code states that collective agreements should establish 'measures that contribute to the effective implementation of equality and the non-discrimination principle'.[854] According to this requirement, equality plans and concrete measures for the promotion of equality (on several grounds, including sex) at professional or company level can be defined by collective agreements directly. These measures can include positive action and preferential treatment. In **Denmark**, the regulation on women on boards requires public as well as private companies to issue a policy for women and to set target goals. In each of these cases, the requirement simply to produce an equality plan is insufficient in itself, but it could usefully become part of a broader strategy, one in which employers can demonstrate the results of their internal strategising as how best to meet the targets established.

11.2.7 Scoping

We have seen that there is a significant difference between states in how comprehensive regulatory requirements have been established, in particular as to which companies are subject to this regulation. States seldom simply apply positive action obligations to all employers irrespective of status or size. States differ as to whether requirements more appropriately apply to companies that have some significant element of public ownership, involvement or benefit, or to companies that are listed on a stock market, or to companies of a particular size (with both annual turnover and/or number of employees

851 Hungary, Act CXXV of 2003 on Equal Treatment and the Promotion of the Equality of Opportunities (*2003. évi CXXV. törvény az egyenlő bánásmódról és az esélyegyenlőség előmozdításáról*) Article 63(4).
852 Hungary, Act CXXV of 2003, Article 63(4).
853 Croatia, Gender Equality Act Article 11(1).
854 Portugal, Labour Code, Article 492(2)(d).

being used as criteria for inclusion). The approach taken in the Commission's company boards proposal is one way of limiting the scope of the regulatory approach adopted. We have seen that a combination of these various criteria has been proposed: the requirements would apply to listed companies, but not to small and medium-sized enterprises, i.e. companies that employ fewer than 250 persons and have an annual turnover not exceeding EUR 50 million or an annual balance sheet total not exceeding EUR 43 million.

The seventh element of the revised strategy is to target selected employers only. There is a significant difference between states in how comprehensive regulatory requirements have been established, in particular as to which companies are subject to this regulation. There appear to be at least five considerations that should be taken into account in deciding which employers to include in any positive action regulation: first, the importance of the firm in terms of the number of employees affected, because the larger the firm in terms of the number of employees, the greater the impact if that firm changes its composition and reduces the underrepresentation of women; secondly, the ability of the firm to internalise the regulatory requirements, with the larger the firm in terms of annual turnover, the more likely the firm will be able to comply effectively, for example by having a well-resourced human resources department; thirdly, the extent to which the firm is a market-leader, that is how far change in the firm will be likely to lead to emulation by other firms in that firm's market (whether change in the (regulated) firm lead to change in other (non-regulated) firms); fourthly, the fair sharing of burdens among employers – special duties create special burdens and an advantage for competitors that are not subject to these special burdens, and so the more inclusive the coverage of employers, the better it is from the perspective of achieving a fair balance of burdens; and fifthly, a large majority of workers in the EU are employed by SMEs – if the goal is to tackle underrepresentation, any policy limited only to large firms will struggle to address sectorial segregation, and so limiting action to large firms therefore risks not achieving the goal of tackling underrepresentation.

11.2.8 Regulation

As these examples demonstrate, where such a requirement has been introduced, a requirement simply to produce an equality plan may lead only to a higher administrative burden, without producing changes in practice. Establishing a bureaucracy is not an end in itself, and we should be sceptical of simple window dressing. However, the question is whether something like an 'equality plan' mechanism can be envisaged that stimulates more than cosmetic compliance, and this report suggests that this is possible, as part of the proposed broader strategy. The approach adopted in **Northern Ireland** to address decades-long inequalities between the ethno-religious communities there, under the Fair Employment and Treatment Order is a possible model,[855] which has been shown to be highly successful in practice.[856]

The Northern Ireland legislation imposes on all regulated employers, both public and private, a duty to conduct annual monitoring of the composition of their workforces, and these are published annually by the principal legal enforcement agency (now, the Equality Commission for Northern Ireland). This publication identifies individual regulated employers by name, together with their workforce composition.

855 McCrudden, C. (1992) 'Affirmative Action and Fair Participation: Interpreting the Fair Employment Act 1989', 21 *Industrial Law Journal* 170. The Northern Ireland model is already well known at the European level, see Equinet, the European Network of Equality Bodies (2014), *Positive Action Measures*, Chapter 6.

856 McCrudden, C. (2004) 'Legal Regulation of Affirmative Action in Northern Ireland: An Empirical Assessment,' 24 *Oxford Journal of Legal Studies* 363 (with Robert Ford, and Anthony Heath); McCrudden, C. (2015), 'L'action positive est-elle efficace? Une évaluation empirique du programme pour l'équité dans l'emploi en Irlande du Nord,' in Julie Ringelheim, Ginette Herman and Andrea Rea, *Politiques antidiscriminatoires,* de Boeck, (with R. Muttarak, H. Hamill, A. Heath); McCrudden, C. (2004), 'The Impact of Affirmative Action Agreements', in Bob Osborne and Ian Shuttleworth, *Fair Employment in Northern Ireland: A Generation On* Blackstaff, Chapter 7 (with Robert Ford, and Anthony Heath); McCrudden, C. (2013), 'Does Affirmative Action Work? Evidence from the Operation of Fair Employment Legislation in Northern Ireland', *Sociology* 2013, pp. 1-20 (with Raya Muttarak, Heather Hamill, and Anthony Heath); McCrudden, C. (2010), 'Affirmative Action without Quotas in Northern Ireland', *Equal Rights Review*, 4, p. 7 (with Raya Muttarak, Heather Hamill, and Anthony Heath).

Regulated employers are also placed under a duty to carry out regular reviews of the composition of their workforce in order to determine whether there is 'fair participation' of both communities, taking into account the availability of suitably qualified personnel in the relevant geographical area. Employers are required to undertake remedial action where 'fair participation' has not been achieved. The major tool available under the legislation to the Equality Commission is its powers to select regulated employers for investigation and, where deemed necessary, to establish 'affirmative action' agreements to improve the representation of the underrepresented group. Such agreements are of two kinds: legally binding agreements and 'voluntary agreements', and the Commission has discretion to choose which type of agreement is more likely to achieve compliance and redress underrepresentation. Such agreements typically contain affirmative action measures that the employer agrees to, or is required to take, such as the use of targeted advertising to members of the underrepresented group, and statements in advertisements particularly welcoming applications from them. In some cases, particular numerical goals are specified which employers agree to, or are required to commit to, together with a timetable by which these numerical targets are to be achieved.

Reflexivity is a key component of the proposed strategy, but it should not be confused with traditional self-regulation or voluntarism, in that a moderate degree of compulsion will be involved, not only in establishing a positive equality obligation, and in requiring the establishment of enforceable goals and timetables, but also in specifying two further elements. To a degree, what is the most effective mode of regulation will depend on national context, but several minimum conditions can be identified, based on the experience of the Member States examined previously.

Whilst flexibility is encouraged, firms would be required to identify for themselves what goals are appropriate and how they envisage that the targets will be achieved, usually in the form of a published equality plan, but these plans would be subject to review by an independent monitoring body, which would have the power to require the firm to revise these if the methodology adopted by the firm in assessing underrepresentation, and the potential for redressing this over time, was not adequate. Any independent monitoring body would, however, need to be adequately resourced in order to carry out this additional task.

There would be a need not only to introduce *ex ante* monitoring, but also *ex post* monitoring – an eighth element in the revised strategy. Significant transparency would be required from the firm as to its progress in meeting the goals set, by imposing reporting requirements and governmental mechanisms that are adequately equipped to monitor progress on the basis of this reporting. The Commission's draft company boards directive proposes imposing a reporting duty whereby Member States must require listed companies to provide information on the gender representation on their boards to the competent authorities on an annual basis. Where they fail to meet these targets, they must provide the reasons for this and describe the measures taken or to be taken in order to meet the targets. Member States must ensure effective, dissuasive and proportionate enforcement measures for infringements of the procedural and reporting obligations.

We have seen that one of the significant differences between strategies concerning positive action in employment generally, as opposed to company boards, is the presence of enforcement in the latter context and not in the former. This leads to a ninth element in the proposed strategy: a set of incentives and sanctions should be put in place to ensure company compliance, whether in the form of awards recognising firms' achievements beyond what was required, or penalties where the goals have not been met. We have examined the form in which sanctions may be proposed in the previous chapter, but we have said less about incentives. Both Greece and Malta are currently experimenting with incentives. In **Malta**, since 2010, an equality mark certification is awarded by the National Commission for the Promotion of Equality (NCPE) to employers who prove that they value gender equality.[857] Employers have

857 https://ncpe.gov.mt/en/Pages/The_Equality_Mark/The_Equality_Mark.aspx.

to prove that they go beyond the law in the measures that they offer to their workers. This certification is going to be revamped and relaunched through a project co-funded by EU funds.

A much more elaborate scheme has been introduced in **Greece**. As concerns the private sector, Act 4604/2019 provides for the first time a new public policy for equality mark awards. More specifically, equality marks are awarded by the General Secretariat for Equality[858] to enterprises in the public and private sector that excel in the implementation of policies aiming at the equal treatment of and equal opportunities for working women and men.[859] The open-ended list of criteria to be taken into account includes: equal pay for work of equal value; balanced participation of women and men in managerial positions or in professional and scientific committees within the enterprise; equality in professional promotion; compliance with labour law provisions on maternity protection; adoption of equality plans or other innovative measures in order to enhance substantive gender equality; and use of advertising for the promotion of the products or the services of the enterprise in a way which contributes to the prevention of gender based violence and discourages violence against women and sexism. The procedure, the conditions and the length of the validity of the equality mark are to be determined by decision of the Minister of Internal Affairs following a proposal of the General Secretariat for Equality. The undertakings to which the equality mark is awarded are obliged to submit an annual report on the actions they have taken to realise substantive gender equality. These enterprises are monitored and evaluated by the General Secretariat for Equality as to whether they continue to apply policies aimed at gender equality and equal opportunities between women and men; if not, the equality mark is taken away. The General Secretariat for Equality publishes each year the list of the undertakings that have been awarded the equality mark and posts it on its website.

11.3 The role of the EU institutions

This chapter has recommended that a new strategy should be developed which builds on the experience of positive action across Europe at the level of the Member States. We have not, so far, considered the role of the EU in developing, promoting, or requiring such a strategy. The final part of this chapter considers the role of the EU institutions in this revised strategy.

11.3.1 Subsidiarity revisited

The hitherto accepted view within the EU Council appears to have been that the pursuit of women's equality (other than the eradication of discrimination, and very broad standard setting) is best handled at the national level. This should be replaced with a view that women's equality is too important to be left primarily to the Member States, that the 'experiment' of doing so has produced a plethora of information but patchy results, and that it is now past time for the Member States to approve a coordinated approach at the EU level. The Member States acting in the Council step on the brakes systematically (the most recent example is regarding the company boards proposal), but efforts should now be made to persuade Member States that it is time to accord EU institutions the powers required to produce, and ensure compliance with, a more sustainable policy for gender equality in the labour market, one in which positive action plays its proper role.

Women's equality is not only important in human rights terms, and as a matter of justice, but also in economic terms. We examined earlier the economic or business case for positive action: that individual bodies risk losing out economically if they do not adopt positive action to increase the diversity of their workforce. There is also a significant economic reason for more systematic action being taken at the European level to increase the take-up of positive action. The considerable gap that currently exists between Member States in their approaches to gender equality and positive action now threatens to

858 The General Secretariat for Equality was established by Act 1558/1985 OJ A 137A, Article 27 as a public entity competent for the planning, the implementation and the control of the application of equality policies in all areas.

859 Greece, Act 4604/2019, Articles 2(12) and 21.

grow into significant regulatory divergence, threatening the coherence of the single market. This issue would merit more empirical investigation as it is potentially the best way to meet subsidiarity concerns, but it lies beyond the scope of this report. In any event, we may recall that the origins of the original equal pay provision in the Treaty of Rome (Article 119 EEC) lay in the concern of those Member States that had already introduced equal pay for women not to be undercut by those states which had not, and thus it was agreed that the EU (or the EEC, as it then was) should act to prevent a race to the bottom by requiring all Member States to accept this policy.

In 2019, a similar situation may have arisen, where some states that have introduced positive action could well be undercut by states that have not, or at least it would be reasonable to fear that this could be the case. The full extent of this regulatory divergence, both between states and within states, is problematic not only because a potentially effective tool to promote gender equality remains under exploited. It is also problematic because it may deter states and employers from embarking on the more systematic use of positive action measures, even when they consider it to be in the interests of the state or the company to do so, because the costs of doing so will often be unknown. Uncertainty breeds risk aversion. One potential risk is that a state or a company will fear that it will end up losing out to another less responsible state or corporation, even if objectively the introduction of positive action would be economically beneficial for the employer concerned and the society as a whole, at least in a medium and long-term perspective.

11.3.2 Action by the European Commission

A new policy should be clear-eyed about the difficulties. It is clear that there is considerable reluctance at the level of the Member States to cede more power or competence to the EU institutions in the social field more generally (the proposal on company boards and the discussions on the recent agreement on the work-life balance directive are still unresolved), and so any strategy developed by the EU institutions must take this resistance into account. There are, therefore, actions the Commission may take on its own initiative, like introducing a new interpretative communication, revising and republishing its previous positive action guidance, which is now out of date and out of print, and adopt positions in CJEU cases that are sympathetic to the strategy proposed. For other things, like the adoption (though not the proposal) of new legislation, the agreement of Member States is necessary, an issue we turn to consider below.

We can begin with the 'softer' options, focusing initially on the role of non-legally binding instruments at the disposal of the Commission, such as recommendations, interpretative communications, and guides. As the expert from **Croatia** observes, there is a distinct need for public awareness to be raised as to what constitutes positive action, what its limits are, how it may be implemented, what its importance is, and what effect it might have on achieving true gender equality in practice. The Commission is in a unique position to engage in this awareness raising across the EU. In many states, as we have seen, positive action has simply never been the focus of political and decision-making bodies; as the expert from **Poland** suggests, a particular focus of awareness raising should be decision makers such as parliamentarians, Government ministers and managers of enterprises, and that public social campaigns in the media, including social media, should be utilised. The use of such campaigns has seldom been fully explored, especially concerning employment.

Many substantive issues remain unsettled and uncertain, such as those relating to mechanisms for supervision of the application of positive action measures, or responsibility for deciding whether those measures should be terminated or modified where their aim is fulfilled, or it is shown that they are ineffective in practice. As we noted in Chapter 6, the relationship between positive action and equal pay is particularly neglected, and potentially problematic, as the expert from **Finland** reported, as is the relationship between positive action and emerging concepts such as intersectionality and trans* equality, as observed by the expert from **Ireland**. More generally, there still appears to be uncertainty as to how

far public procurement may be used to deliver positive action without breaching Directive 2014/24/EU[860] and other EU directives relating to public procurement. It is clear, also, that the CJEU's approach is not as well known as it should be at the national level. National experts in several states have pointed to the lack of appreciation of the Court's jurisprudence, for example, and so the Commission could usefully assist by extensively revising its earlier guidance on the permissible scope of lawful positive action under EU law,[861] and giving it more weight by upgrading it in the form of an interpretative communication, in a way that enables national courts and national policy makers to more easily comprehend the Court's extensive and sophisticated, if quite intricate, case law. In this context, it would be important for the Commission to say what positive action is not; in particular, that it does not provide cover for the introduction of national policies built on stereotypical assumptions.

Beyond clarifying specific issues such as these in revised guidance, it is suggested that the Commission should issue a recommendation that would set out systematically a detailed strategy for gender equality, incorporating positive action, which the Commission recommends should be adopted at the national level. Such a recommendation should go further than the existing Recommendation 84/635. It would follow the approach adopted in the previous section, covering each of the eight elements identified above:

1) the goals that positive action seeks to achieve;
2) the need for positive obligations;
3) the role of numerical targets and timetables;
4) the need to use the full range of available positive action measures;
5) the inter-relationship of the merit principle and preferences;
6) the importance of reflexivity by employers in terms of how to meet targets;
7) the criteria for appropriate scoping of which firms should be covered by regulatory requirements;
8) the regulatory context of these requirements, including the use of equality plans; and the need for monitoring and enforcement by an independent national authority, together with effective, dissuasive and proportionate enforcement measures for infringements of the procedural and reporting obligations.

These elements of an effective positive action strategy would be the form of a set of recommendations, not legal obligations under EU law. The recommendation could be adopted by the Commission; if there is sufficient confidence that a strong strategy would be adopted, it could be adopted by the Council following proposal by the Commission.

11.3.3 Action by the CJEU

We have seen that, both for the purposes of fairness and for purposes of securing the political legitimacy of positive action involving preferences, there should be limits to what should be permissible positive action. In this context, it is important for the Commission to be open about the trade-offs that adopting a policy that incorporates a greater role for preferences would bring. The right strategy to win legitimacy for positive action is not to deny these trade-offs but to show that the interest in equality outweighs legitimate concerns. These concerns include the potential impact on particular groups of men (and not necessarily the currently most advantaged), and the limits that would be introduced on private employers' freedom to organise and run their businesses. Positive action involves a modest degree of redistribution and regulation, which need to be justified and appropriately limited. Indeed, given that experience teaches that positive action is a potential Pandora's Box, allowing volatile politicians to introduce measures that are intentionally or unintentionally contrary to women's equality under the guise of positive action, such constraints are particularly necessary because positive action can be used to disadvantage women themselves. The constraints that the CJEU currently adopts are, broadly, those that should be endorsed

860 Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC, OJ L 94, 28.3.2014.
861 European Commission, Positive Action – Equal Opportunities for Women in Employment.

by any new policy. In the main, despite the criticism of the Court, its general approach is worthy of support, based as it is on a broadly proportionality-based assessment. In that context, the Court could usefully revisit what constitutes justifiable objectives that positive action can legitimately pursue, and make clear that there is a range of legitimate objectives. Ideally, it should make it clear that, in the framework of the EU's own broadly Aristotelian understanding of equality, positive action is an aspect of equality rather than an exception to it.

As we have seen, there are two potential problems with positive action that it tackles successfully: stereotyping, and third-party costs. The problem of stereotyping is that positive action, in the guise of assisting women to overcome barriers, may simply reinforce existing ones. There is substantial experience, for example, of how previous 'protective legislation' has, in some Member States, morphed into positive action. The CJEU should be pressed to clarify further when positive action slides into stereotyping, as opposed to merely recognising the reality of women's lived experience. The problem with third-party costs is that positive action, with the best of intentions, may end up disproportionately disadvantaging men. Again, in broad terms, the approach the CJEU takes of requiring that the preferred party is as qualified as the person who loses out, is justified.

However, there is a distinct need for greater clarity concerning various elements in the general approach adopted by the CJEU: what 'qualifications' means in this context, and how strict the need is for the qualifications to be 'equal'. As the legal expert from **Germany** has pointed out, a strict requirement of 'equal qualifications' would permit very little preferential treatment. The Commission has an important role in this context in drawing the attention of the Court to the realities of the situation on the ground, and urging clarification. Similarly, the Court could be asked to clarify, in a suitable case, how far a symmetrical approach to positive action is, in fact, the only approach that the Court will permit, or whether an asymmetrical approach is sometimes permitted. More generally, it is suggested that the Commission should be anxious when it intervenes in cases to adopt positions that would be more likely than not to further the type of positive action strategy recommended earlier. In short, the Commission may wish to consider a more strategic use of litigation opportunities to advance positive action even in the absence of a new directive.

11.3.4 A new directive

We turn, finally, to what is likely to be the most contentious issue: whether the Commission should propose a new directive on positive action, in which the strategy identified earlier would be incorporated as a legal requirement on the Member States under EU law.[862] A new directive would turn the elements of the suggested recommendation into EU legal obligations on Member States: the need for positive obligations, the role of targets and timetables, the inter-relationship of the merit principle and preferences, the importance of reflexivity by employers in terms of how to meet targets, which firms should be covered by regulatory requirements, and the context of these requirements, including the use of equality plans, and the need for monitoring and enforcement by an independent national authority. A directive could also address issues mentioned as still to be addressed by the Court. It is suggested above that preferences might be permitted where two candidates (one male, one female) are 'broadly equivalently qualified', but there is little guidance available from the Member States so far as to what exactly this means in practice. A new directive would have the important role of clarifying how to deal with the issue of equal

862 Equinet, the European Network of Equality Bodies has also recommended further EU legislation on positive action, see Equinet, (2015) *The Persistence of Discrimination, Harassment and Inequality for Women. The Work of Equality Bodies informing a new European Commission Strategy for Gender Equality.* At p. 4, it recommends: 'Measures in equal treatment legislation that require equality action plans on the ground of gender by employers and service providers; that strengthen and support positive action on the ground of gender by employers and service providers; and that require public bodies to have due regard to gender equality in carrying out their functions.' For an earlier examination of a directive imposing a positive action obligation, see Tobler, C. (2006) 'Substantive Equality and Positive Action in EC Sex Equality Law: Can the EC oblige the Member States to Provide for Positive Action Measures?', in Judy Fudge (ed), *Equality as a Social Right: Towards a Concept of Substantive Equality in Comparative and International Law,* Onati International Institute for the Sociology of Law.

qualifications, perhaps by adopting 'substantially' equal qualifications, as well as addressing more fully the difficult issues of third-party costs and gender stereotyping in the context of positive action.

The nearest that the EU has got to such an instrument (apart from its proposal on gender-balancing on company boards) was the non-binding Council Recommendation 84/635/EEC of 13 December 1984. Whilst useful as a standard-setting instrument, it is out of date, and its reliance on voluntarism has not worked. Our proposal is that the Commission should develop such a draft directive, for four main reasons. First, one of the most serious problems facing positive action is how to make decision makers (at all levels of management) recognise the need for such measures and how to generate the political will to introduce and apply them. The relative success of the EU's anti-discrimination strategy, in which directives are used to require Member States to introduce legislation at the national level, shows the potential that directives have in the context of controversial social policies. Had the EU adopted the same strategy in the anti-discrimination context as it has hitherto in the positive action context, it would have failed. It is our considered view that such a directive would be within the competence of the EU. Article 157(3) TFEU provides the legal basis for any binding measures aimed at ensuring the application of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation, including positive action.

Secondly, the Commission's proposed directive on gender balance on company boards has been important even without adoption, contributing to a much more intense debate at the national level on this issue than would have been the case if a directive had not been proposed. The fact of the possibility of mandatory legislation has had an impact. It would be unsurprising if – indeed it is likely that – a draft directive on positive action would concentrate the minds of Member States in ways that a softer initiative would not.

Thirdly, an interesting approach to the question of how to provide the necessary coordination at the EU level with an appropriate degree of subsidiarity at the level of the Member States is currently being considered in the context of the negotiation of the company boards draft directive: Member States would be able to suspend the directive's procedural requirements, if they can demonstrate that they have already taken equally effective measures or attained progress coming close to the quantitative objectives set in the directive. The proposed directive defines several scenarios which would be considered legally to guarantee 'equal effectiveness', but these are not meant to be exhaustive. A similar approach might well be useful in the context of a directive on positive action.

Fourthly, it is not for this report to engage in speculation as to what would or would not be feasible politically, especially in light of the appointment of the new Commission (the advent of the *#MeToo* and equivalent movements adds another new factor into the political mix). The Commission should at least set out the direction of travel that is seen to be desirable (and place the responsibility for not achieving more equitable results squarely on the shoulders of the Member States). The first step is at least to name the problem and identify the preferred way forward, rather than giving the impression that the current strategy just needs one more push for it to be successful.

11.4 Conclusion

More can be done to further clarify the idea of positive action itself, and some additional tools for understanding the concept can be adopted, in part by providing examples of positive action measures in different fields, and drawing on the relevant scholarly and policy literature, but this report has adopted a rather more ambitious approach, not just reiterating the same pattern of findings of previous reports,[863] and urging greater attention to be laid to the existing EU policy agenda, but seeking to move beyond this

863 De Vos, M., (2007) *Beyond Formal Equality: Positive Action under Directives 2000/43/EC and 2000/78/EC* Brussels, European Commission; Selanec, G., and L. Senden, L., (European Network of Legal Experts in the Field of Gender Equality) (2010) *Positive Action Measures to Ensure Full Equality in Practice between Men and Women, including on Company Boards*, European Commission; Selanec, G. and Senden, L. (2011), *Gender Quotas and Other Positive Action Measures to Ensure Full Equality in Practice between Men and Women The transposition of EU provisions on positive action and gender quotas in employment, in*

(somewhat) dismal narrative. Bluntly, it is pointless only to highlight once again the deficiencies of the delivery of positive action at national level, without addressing what can be done about it. The reasons for this limited exploitation of the freedom that the EU provides to engage in positive action initiatives differs from state to state. In some cases, Governments pander to populist resistance. In others, positive action is conceived of in highly negative terms. In others, it is poorly understood. The overall result is little positive action in practice. EU strategies attempting to bring to bear influence have not been successful in changing the domestic pressures against positive action. However, we have also seen that the Commission's initiative on gender balancing of company boards, and some experience at the national level, have taken a slightly different approach, and would appear to have been somewhat more likely to result in change. Any new strategy should consider seriously what lessons might be learned from these recent developments that might point a way forward for EU gender equality policy more broadly.

The EU has often sought, rightly, to define itself in terms of its values. One of those values is the value of equality between men and women – equality not just in theory, not just as a rhetorical flourish, but as a lived reality. The failure to live up to these values contributes to cynicism about the European project. If half the population of Europe feels effectively cut adrift from the benefits of European integration, that is not just unjust – it is dangerous. The massive support for women's equality that is apparent from consistent Eurobarometer polls should not be squandered.[864] Living up to its values is not only a matter of internal policy concern, important though that is. It is also a matter of what face is presented externally, to the rest of the world. It is a consistent theme in commentaries on the European approach to positive action that its Member States fall short of the international standards contained in CEDAW. The regular criticism of EU states by the CEDAW Committee for their failure to use the positive action tools available to produce real change should now be seen as a real cause for concern for the European Union, calling for concerted Union action. In a world where the EU is a voice of sanity in supporting the rules-based international system, this shortfall on one of the most basic requirements of a civilized society is troubling, but it can be addressed. This report has attempted to set out a revised EU strategy, one that is based on actions already underway in Member States, and thus constitutes a truly European model of positive action.

access to and supply of goods and services, and in decision-making and political bodies in 33 European countries, European Network of Legal Experts in the Field of Gender Equality.

864 European Commission (2017) *Special Eurobarometer 464: Gender Equality 2017*, Summary (June 2017), at p. 10: 'Respondents were asked their opinion about the importance of promoting gender equality in society, the economy and for them personally. More than nine in ten (91%) think that promoting gender equality is important to ensure a fair and democratic society, and the majority totally agree with the statement (54%). Almost nine in ten (87%) think promoting gender equality is important for companies and for the economy, with 46% totally agreeing and 41% tending to agree. Finally, 84% think gender equality is important for them personally, with 47% totally agreeing with the statement.'

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