Positive Action Measures in European Union Equality Law.

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I. Introduction.

In general terms, positive action comprises all sort of measures aimed to help minorities or social disfavoured groups to overcome decades of past societal discrimination. The adoption of these measures has always been controversial due to the fact that, by setting up a system that benefits women and minorities in the access to employment, training or promotion, the normal outcome of a positive action measure is that an individual belonging to the traditionally privileged group (white male) is penalized by losing his chance to enter a job or obtain a promotion. The debate is established in the following terms: proponents of affirmative action argue that because of prior discrimination in employment, women and minorities are handicapped when they try to enter employment in certain sectors, get a promotion or retain a job. Therefore, as a remedy for the effects of prior discrimination, public and private employers ought to give some sort of preferred treatment to those disadvantaged groups regarding entrance to jobs, promotion and retention of employment. Opponents do not deny that there has been sexual and racial discrimination in the past, but argue that the individual who must lose his chance of entrance to a particular job is penalized unfairly because he bears the burden of redressing grievances made by the whole society.

The basis for listing the groups whose societal injury is thought to be so serious as to entitled them to preferential treatment at the expense of individuals belonging to other groups is another point of concern. Moreover, the raking of groups entitled to preferential treatment should be submitted to permanent political and/or judicial scrutiny and updated. Therefore, as these affirmative action policies began to have the desired effect, the categories of people classified as disadvantaged group would change. Furthermore, problems arise in connexion with the idea of preference itself. In this sense, it has been argued that positive action programmes may only reinforce common stereotypes holding that certain groups are unable to achieve success only on the basis of their individual capacities.
This paper presents a study of the concept of positive action in European Community law. The aim is twofold. First, a description of the conceptual development of positive action, in the context of the general theory on equality, will be presented. Second, an assessment of the normative solutions provided by the European Community (hereinafter EC) legal order regarding positive action measures will be offered. In this context, attention shall also be paid to the European Court of Justice (hereinafter ECJ) case law in order to analyse the judicial development of this legal concept. Finally, in the final part of this paper a main problem will be discussed: How to overcome the drawbacks of the compensatory theory that has traditionally backed up the adoption of positive action measures?

II. Different aspect of the equality principle.

Equality is an abstract and complex concept, currently in development at EU level. Equality is above all a relative concept in the sense that any equality judgment implies a comparison between two predetermined elements. From the legal point of view, the concept of equality presents multiple aspects. Formal equality or equality of treatment is the most primary manifestation of it. This idea of formal equality is intrinsically linked to the interdiction of discrimination and it is resumed in the Aristotelian maxim: “the equal should be treated equal and the unequal in an unequal way”.\(^1\) Despite the apparent simplicity of this aphorism, complications arise when trying to determine in each particular case what situations are equal or unequal to others. The examination of the similarity of two situations implies a judgment establishing which differences are relevant and which are not. In this context, the differences based on several pre-determined factors as: sex, religion, race and nationality, \textit{inter alia}, have been traditionally considered discriminatory, save evidence on the contrary. Discrimination is, then, a key-concept in the definition of equality and refers to any systematic detrimental treatment of an individual or a group based on its personal or social circumstances or conditions.

In the context of formal equality, a distinction between direct and indirect discrimination needs to be drawn.\(^2\) Direct discrimination means a different and unfavourable treatment that contravenes the legal order because it is directly based on certain personal or social circumstances of the individual. In a case of direct discrimination, it is irrelevant if there is


\(^2\) The origin of this distinction can be found in the US legal concept of “disparate impact”. See, \textit{inter alia}: United Papermakers & Papermakers v. United States, 397 U.S. 919 (1970); Grigs v. Duke Power Co., 401 U.S. 424 (1971) and Washington v. Davis, 406 U.S. 229 (1976). In EC law, the distinction between direct and indirect discrimination was first drawn up by the ECJ and later reproduced by the legislation.
intention to discriminate or not and justifications to the discriminatory conduct are not permitted. Conversely, the notion of indirect discrimination refers to practices or measures that, being formally neutral, have unequal consequences for the different social groups, producing an adverse impact on one or more of them. Then, the concept of indirect discrimination underlines the fact that a person belongs to a disadvantaged group and reflects the supra-individual dimension of the discriminatory phenomenon. Hence, the comparison in indirect discrimination cases is not established among individuals but among groups distinguished by their common features, leading to a delimitation of generic factors or motives of discrimination. In contrast with direct discrimination, indirect discrimination cases allow objective justifications for the difference in treatment.

It is worth noting that, the explained formal conception of equality has an essential deficit: Its inaccuracy to overcome the social inequalities strongly embedded in the society. It is commonly accepted that the achievement of equality requires, first of all, a legal framework protecting against discrimination, conceived as a repressive tool aimed to punish discriminatory acts with sanctions. This type of remedy responds to the idea of formal equality and it has the legal consequence of the re-establishment of equality via declaring the nullity of the discriminatory act and its effects. The problem that poses this sort of re-active protection method is that it is not absolutely efficient in order to overcome the deep-rooted discriminatory trends in society. It can be useful to repair the effects of actual discriminatory treatments but it does not eradicate the tendency to discriminate and it is useless in combating collective discriminatory phenomena different from indirect discrimination cases. In relationship with this issue, it can be argued that, in order to counteract the shortages of the traditional anti-discrimination regulatory framework to correct structural disparities, new mechanisms to remove persistent social inequalities are needed. In this context, promotional activities in favour of disadvantaged groups “so-called” real or substantive equality measures come into play.

Positive action measures give a respond to the collective dimension of discrimination because they rely on the ideal of substantive equality of the groups that compose the society. In order for these measures to be applicable, a discriminatory treatment is presumed for the mere fact of being member of a disadvantaged social group instead of considering the unjustified different treatment in relative terms through the establishment of a comparison in a case-by-

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4 See Case 127/92, *Enderby/Frenchay Health Authority and Secretary of State for Health*, [1993], p. I-5535.
case basis. Consequently, the notion of genuine equality implies that the anti-discrimination protection has a positive (promotion) as well as a negative (prohibition) content. Thus, along with remedies designed to tackle discriminatory behaviours, levelling measures are introduced to eliminate the situations of social disadvantage at the origin of the discriminatory treatment. The main obstacle for the applicability of these proactive measures is that, considered in isolation, they are in breach of the general prohibition of discrimination. Hence, positive action measures actually contravene the principle of equality in its formal dimension because they establish distinctions based on the traditionally forbidden factors of differentiation. However, it is worth noting that the adoption of this sort of “unequal treatment” is justified by the compelling state purpose of achieving real equality of opportunities of all social groups and individuals.

In sum, positive action measures are addressed to marginal or disadvantaged social groups and they aim to eradicate the social component of discrimination through the adoption of promotional activities different from the mere sanction of discriminatory acts. In this paper, we will try to prove the hypothesis that the positive dimension of the anti-discrimination protection can be observed, even when restrictively shaped, in the EC legislation and case law.⁵

### III. Historical background and conceptual framework.

A revision of the concept of positive action from the historical point of view should begin by paying due attention to the United States of America (hereinafter U.S.) legal order because the very first examples of affirmative action measures are found there. Lately, this legal concept was reproduced by other Anglo-Saxon common law systems and, eventually, it influenced the EC law approach to the principle of substantive equality.⁶

In the U.S., positive action was first developed in relationship with the fight against racial discrimination in education. In the case *Brown*,⁷ the Supreme Court proclaimed the illegality of racial segregation in education for the first time. This decision was a turn over in U.S.

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Supreme Court case law and in U.S. federal policy. As a result of this judgment, the federal government passed several Executive Orders\(^8\) that pointed out the need for adopting affirmative action measures in favour of Afro-American citizens. Then, Title VII of the Civil Rights Act 1964,\(^9\) while prohibiting racial and sexual discrimination (section 703 a), recognised the admissibility of imposing positive action plans (706 g). The legitimacy of this type of measures, in the private sector and on a voluntary basis, was recognised in the Supreme Court judgment *Griggs*.\(^{10}\) Since then, public bodies and private companies have used positive action programmes with the aim of eradicating racial segregation. Lately, positive action measures have been extended to the promotion of sex equality. Since the relevant case *Johnson*,\(^{11}\) the use of positive action measures in favour of female groups has been accepted. In this case, the possibility of giving preference to women in promotion in sexually segregated categories where women were under-represented was considered in accordance to law, providing that the women getting the promotion fulfilled the requirements of the post.

It is worth noting that, the U.S. Supreme Court rulings concerning affirmative action measures rely on both distributive and compensative grounds. On the one hand, from a distributive perspective, it is considered that the aim of positive action policies is to eliminate the racial and sexual barriers that hamper the achievement of equality of opportunities for racial minorities and women and obstruct the sound integration of all the groups in the workplace. Consequently, the main objective of positive action measures is to foster the normal composition of the labour force that would follow from the removal of deep-rooted social discriminatory conducts. Therefore, for an affirmative action measure to be justified it would be enough to prove the existence of an imbalance originated by the segregation of certain groups of workers, without the need of showing a present discriminatory conduct. On the other hand, the compensatory values that inspired positive action measures are reflected in the remedies granted to victims of present discrimination. Positive action measures are, then, configured as a collective remedy, designed to compensate for generalized detrimental treatment and aimed to eradicate systematic discrimination. Nevertheless, the U.S. Supreme Court has stated: “societal discrimination, without more, is too amorphous a basis for

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\(^8\) See Executive Order No 11246 ratified in 1965 and develop by the Revised Order No 4 (EO 11375 included sex also in its scope in 1968.


imposing affirmative action measures.”12 Instead, it was determined that affirmative action was only valid if it was crafted to remedy past or present discrimination by the employer. According to the relevant case law, although the employer need not point to any contemporaneous findings of actual discrimination, he must point to evidence sufficient to establish a firm basis for believing that remedial action is required, and that a statistical imbalance sufficient for a *prima facie* discrimination case against the employer would satisfy this firm basis requirement. Then, the implementation of a voluntary affirmative action plan would be considered appropriate to remedy apparent prior employment discrimination.13

As it has been already mentioned, the aim pursued by the introduction of positive action policies is to come to an end with positions of subordination of social groups and situations of disadvantage that are considered unacceptable from the social-democratic Estate perspective.14 Turning back to the EU legal system, it is worth remembering that, according to the Copenhagen criteria,15 all European Union Member States are obliged to guarantee the respect for fundamental rights and the protection of minorities in their territories as a condition for acquiring and maintaining EU membership. Consequently, all EU Member States are obliged to guarantee the due respect to the right to equality and to fight against all forms of social discrimination in their territory. However, even when affirmative action measures are admitted by EU legislation and their use is generalized in several EU Member States, among the academics and the judiciary there is neither an agreement about the types of legitimate measures, nor a clear and unitary definition of the concept of positive action.16

The concept of positive action measures in favour of women, from the normative point of view, has been broadly interpreted, comprising a wide range of measures, including public and private employment benefits and allowances, improvements in working conditions, or affirmative action measures in strict sense. This last measures imply a preferential treatment in the access to jobs and promotions or in retention of employment. Among the academy some voices argue that only this last group of measures should be denominated “positive

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15 The EU membership criteria were laid down at the June 1993 European Council in Copenhagen, Denmark, from which they take their name.
16 Different expressions are being used indistinctly to refer to that concept: affirmative action, positive discrimination and positive action. See Biurrun Abad, F. J. *et alter*, Cuestiones Laborales de Derecho Social Comunitario, Aranzadi, Pamplona, pp. 178-180.
action.”17 The rest of measures against sex discrimination in employment are, then, considered as “protecting action” or “equal opportunities policies.” This last category would comprise the legal framework for protection of pregnancy and maternity related situations but also some benefits addressed only to women. These equal opportunities policies are oriented to the elimination of the typical motives of female labour segregation and discrimination without questioning the distribution of caring and domestic tasks in the household or the patriarchal structure of the society. From the point of view of genuine equality, these are imperfect measures, in the sense that they tend to perpetuate the existing unequal division of social tasks between men and women. For example, this is the case of subsidised nursery places made available only for the children of female workers, while they are denied to the ones of male workers.18 In relationship with this kind of measures, it has been argued that, even when designed to stimulate equal opportunities for women, they might contribute to perpetuate the traditional division of social roles between men and women because they accept the traditional position of women in society as a care provider without questioning the legitimacy of the overall social structure.19 They have been defined as “archaic” positive action measures due to the fact that they are not promoting a rupture with the currently prevailing division of working and family tasks.20 The functioning of these measures does not confront the gendered imbalanced distribution of paid and unpaid work. On the contrary, they are only intended to support the position of female workers in their attempt to adjust to the male breadwinner pattern. In my opinion, these measures are necessary in an initial stage in order to achieve equality of opportunities but they are not suitable to accomplish the more demanding aim of substantive or genuine equality between men and women. Therefore, in a second stage, more radical measures that attack the gendered division of social roles are needed in order to reach a more egalitarian society. These more radical measures, the positive action measures in strict sense (quotas and objectives), use more drastic means, i.e., conceding priority in access to employment, promotion, or continuity in the undertaking to workers who belong to the under-represented group (female workers in the case at issue), with the objective of increasing their labour market participation.

17 Sierra Hernáiz, E., Acción positiva y empleo de la mujer, CES, Madrid, 1999.
18 See Case C-476/99, H. Lommer v Minister van Landbouw, Natuurbeheer en Visserij, [2002] ECR p. I-02891, where a policy of these characteristics was considered in compliance with EC law.
Both types of measures, the equal opportunities policies (promotion of female employment) and the positive action measures *strictu sensu* (preferential treatment), have been considered by the ECJ as included in the “measures providing for specific advantages in order to make it easier for the under-represented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers”, as defined in Community law.

**IV. Positive action measures in Community Law.**

**IV. 1. European Community regulation on positive action.**

In order to explore the scope of the notion of positive action in EC law it is necessary to examine, first, the EC regulation on the field and, second, the interpretation given by the ECJ case law to the relevant Community provisions.

In EC law, positive action measures are considered an exception to the principle of equal treatment for men and women. This is the approach given to them in several provisions, namely, in former Article 2(4) of Council Directive 76/207/ECC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion and working conditions; 21 Article 2(8) of the same Directive as amended by Directive 2002/73/EC22; and Article 141(4) of the European Community Treaty (hereinafter ECT). These provisions have permitted derogations from the concept of formal equality and have opened the way for national measures in the form of positive action in favour of women in order to promote equal opportunities for men and women by removing existing inequalities that affect the opportunities of women in employment and vocational training.

Even though in current EC law there are several provisions dealing with positive action measures, it is worth noting that, for more than two decades, the only Community normative provision concerning positive action was the aforementioned Article 2(4) of the equal treatment Directive. This provision was accompanied by a so-called “soft law” act: Council Recommendation 84/635/EEC of 13 December 1984 on the promotion of positive action for women. 23 According to the third recital in the preamble of that recommendation: “existing legal provisions on equal treatment, which are designed to afford rights to individuals, are inadequate for the elimination of all existing inequalities unless parallel action is taken by governments, both sides of industry and other bodies concerned, to counteract the prejudicial...

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effects on women in employment which arise from social attitudes, behaviour and structures.” In this document, the Council encouraged Member States 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, in order: (a) to eliminate or counteract the prejudicial effects on women in employment or seeking employment which arise from existing attitudes, behaviour and structures based on the idea of a traditional division of roles in society between men and women; (b) to encourage the participation of women in various occupations in those sectors of working life where they are at present under-represented, particularly in the sectors of the future, and at higher levels of responsibility in order to achieve better use of all human resources.” The fact that, for a very long period, this non-binding recommendation has been the only Community text developing the specific use of positive action measures, in tandem with the diluted and imprecise character of the measures to be adopted according to it, reflects the profound divergences in the approach of Member States to positive action measures, especially those of them that imply preferential treatment in access to employment and promotion.

As it has been already mentioned, the first version of Council Directive 76/207/ECC included a reference to positive action measures. Former Article 2(4) of Council Directive 76/207/ECC provided that the directive was to be without prejudice to measures to promote equal opportunity for men and women, in particular by removing existing inequalities. This acknowledgement of the legitimacy of pursuing substantive equality by secondary legislation has lately reflected also in primary EC law. Thus, Article 141 ECT, reformed by the Treaty of Amsterdam, includes in new paragraph 4, a declaration in this sense: “With a view to ensuring full equality in practice between men and women in working life, the principle of equal treatment shall not prevent any Member State from maintaining or adopting measures providing for specific advantages in order to make it easier for the under-represented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers.” This provision can be criticized in several ways. On the first place, the use of the neutral expression “under-represented sex”, instead of mentioning women as the historically disadvantaged group, forced the approval of Declaration number 28, annexed to the Final Act of the Treaty of Amsterdam, to clarify that point.24 On the second place, the term “specific

24 This Declaration clarifies what should be understood by “underrepresented sex”, for the moment being: “when adopting measures referred to in Article 141(4) of the Treaty establishing the European Community, Member States should, in the first instance, aim at improving the situation of women in working life.”
advantages” allows the inclusion in the scope of Article 141(4) ECT of a wide variety of measures, not only preferential treatments. Another further matter of concern is that the national courts are entrusted with determining the admissibility of the positive action measure in each particular case without clear legislative guidance.

The current secondary legislation provision on that topic, Article 2(8) Directive 76/207/ECC as amended by Directive 2002/73/EC, makes a remission on positive action measures to the wording of Article 141(4) ECT. Later in the text, Article 8(a) of the same Directive establishes a duty on Member States to communicate to the Commission, every four years, the texts of laws, regulations and administrative provisions of any measures adopted pursuant to Article 141(4) of the Treaty, as well as reports on these measures and their implementation. On the basis of that information, the Commission will adopt and publish every four years a report establishing a comparative assessment of any national measures aimed to overcome the infra-representation of women in working life. Moreover, Article 8 (a) of consolidated Directive 76/207/ECC reinforces positive action policies by imposing an obligation on the Member States to design one or more institutions responsible of the promotion, analysis, support, and follow up of equal treatment measures aimed to eliminate sex discrimination. The fact that the promotion of equal treatment between men and women is mentioned as one of the tasks of these institutions is a step forward in legitimating the adoption of this type of measures. Both Article 2(8) and Article 8(a) of Directive 76/207/ECC have been reproduced in identical terms in the recently approved recast Directive on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation.

In relationship with the adoption of positive action measures in favour of other groups different from women, the legitimacy of that type of policies has been recognized in two secondary law texts, adopted on the basis of Article 13 ECT. This last provision constitutes the legal basis for the EU to adopt legislative measures to combat discrimination. Both Council Directive 2000/43/EC, of 27 November 2000, implementing the principle of equal treatment on grounds of racial and ethnic origin (Article 5) and Council Directive 2000/78/EC, establishing a general framework for equal treatment in employment and occupation.

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25 As amended by Directive 2002/73/EC.
occupation (Article 7) set up, as an exception to the prohibition to discriminate, the possibility of maintaining and adopting measures intended to prevent or compensate for existing inequalities.

Finally, Article III-108 of the Treaty establishing a Constitution for the European Union, reproduces, with some minor deviations, the wording of Article 141(4) ECT and maintains the possibility of adopting positive action measures in favour of the under-represented sex. Unfortunately, this is the only reference to positive action measures that can be found in the Constitutional text. Therefore, concerning substantive equality, the analysis of this text shows a rather disappointing outcome: the absence of a general recognition of the legitimacy of positive action measures to improve the situation of all disadvantaged groups.

**IV.2. The concept of positive action in the case law of the European Court of Justice.**

Once listed the legal provisions dealing with positive action measures, it is worth to devote the next section to the analysis of the ECJ case law interpreting them and developing the concept of positive action. Regarding this issue it is particularly relevant to draw conclusions concerning the limits for the maintenance or adoption of affirmative action measures in favour of female workers. This analysis starts with the controversial ruling of the ECJ in Kalanke, afterwards clarified in Marschall. In both cases, the Luxemburg Court had to decide if some positive action measures adopted with the aim of improving women professional situation were compatible with the principle of equality between men and women.

As it has been mentioned above, former Article 2(4) of Council Directive 76/207/EEC provided that the directive was to be without prejudice to measures that promote equal opportunity for men and women, in particular by removing existing inequalities which affect women's opportunities. In the very debated Kalanke case, the ECJ established that in so far

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this provision constituted an exception to the principle of equality it had to be interpreted strictly and was specifically and exclusively designed to allow measures which, although apparently giving rise to discrimination on grounds of sex, were in fact intended to eliminate or reduce actual instances of inequality between men and women which could exist in the reality of social life. It thus permitted national measures relating to access to employment, including promotion, which gave a specific advantage to women with a view to improving their ability to compete on the labour market and to pursue a career on an equal footing with men. However, in Kalanke the ECJ ruled that Council Directive 76/207/EEC precluded national rules that gave automatic priority on a promotion to women, in sectors where there were fewer women than men at the level of the relevant post. The Court considered that a national rule which guaranteed women absolute and unconditional priority for appointment or promotion was not a measure allowed by Community law, since it went beyond promoting equal opportunities and substituted for it the result “equality of representation” which was only to be arrived at by providing such equality.

After the uncertainty about the legitimacy of quota systems and other positive action measures in favour of women in employment created by the Kalanke ruling, the European Commission approved a Communication34 that intended to soften the effect of that judgment, proposing an amendment to Directive 76/207/EEC to reflect the legal situation after Kalanke and clarify precisely that despite rigid quotas other positive action measures were authorized by Community law.

Later on, the position of the ECJ regarding positive action measures was softened35 in Marschall.36 In this case the Court notes that, even where candidates are equally qualified for

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34 Communication from the Commission to the European Parliament and the Council on the interpretation of the judgment of the Court of Justice on 17 October 1995 in Case C-450/93, Kalanke v Freie Hansestadt Bremen, COM/96/0088 FINAL.

35 This is the opinion sustained by Banard, C. y Hervey, “Softening the approach to quotas: positive action after Marschall”, JSWL, 20, (1998), p. 333.

a job, male candidates tend to be promoted in preference to female candidates particularly because of prejudices and stereotypes concerning the role and capacities of women in working life, so that the mere fact that a male candidate and a female candidate are equally qualified does not mean that they have the same chances. In the light of these considerations, the Court holds, in Marschall, that, unlike the rules at issue in Kalanke, a national rule which contains a saving clause does not exceed the limits of the exception in Article 2(4) of the Directive if, in each individual case, it provides for male candidates who are as qualified as the female candidates a guarantee that the candidatures will be the subject of an objective assessment which will take account of all criteria specific to the individual candidates and will override the priority accorded to female candidates where one or more of those criteria tilt the balance in favour of a male candidate. Finally, in terms of criteria tilting the balance in favour of a male candidate, the Court observes that such criteria should “not be such as to discriminate against female candidates.”

This restrictive approach to positive action measures that imply a strict quota system was reinforced by the ECJ’s decision in Badeck. In this case, the ECJ argues that national rules establishing a priority for female candidates in promotion, access to temporary posts and training places in sectors where women are under-represented, providing that they have equal qualifications and when this rule has been proved necessary for ensuring compliance with the objectives of the women's advancement plan, are consistent with community law.

The domestic regulation at issue in Badeck assured that all qualified women would be short-listed for an interview as well as encouraged the presence of women in employees’ representative bodies and administrative and supervisory bodies. The ECJ observed that all these rules were valid only if no reasons of greater legal weight were opposed and providing that candidatures were the subject of an objective assessment which took account of the

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The ECJ has pointed out that the use of several criteria like civil state, «breadwinner status», or seniority in the company (when it is not relevant to perform the tasks of the post) constitutes indirect discrimination on grounds of sex. On the interpretation by the ECJ of this criteria see: Barnard, C., EC employment Law, 2 ed., Oxford University Press, Oxford/New York, 2000, p. 249 and Charpertier, L., «The European Court of Justice and the rhetoric of affirmative action», EJL, 4, (1998), p. 167.

specific personal situations of all candidates, as it was the case. From the point of view of the European Court of Justice, the national legislation at issue opted for what was generally known as a “flexible result quota”. This system provided for an assessment of the candidates' suitability, capability and professional performance (qualifications) with respect to the requirements of the post to be filled or the office to be conferred. Accordingly, the ECJ estimated that the priority rule introduced by the national rules at issue was not absolute and unconditional because the selection criteria in the case, although formulated in terms which were neutral as regards sex and thus capable of benefiting men too, in general favoured women. Therefore, in the ECJ’s opinion, the national rules at issue were manifestly intended to lead to an equality, which was substantive rather than formal, by reducing the inequalities that could occur in practice in social life.

It is clear that the ECJ’s ruling in Badeck consolidates the line of reasoning initiated in Kalanke and Marschall. However, the argumentation of the Court in Badeck also widens the scope of applicability of positive action measures. In Badeck, the Court reiterates the necessity for positive action measures to include a flexibility clause in order to prevent an intolerable discriminatory treatment of male workers. In addition, the requirement of an objective assessment of the candidatures that takes into account the specific personal situations of all candidates persists. However, advancements are introduced in relationship with a measure that establishes a preferential access of women to training positions in the public sector. According to Badeck, the principle of equal treatment between men and women set up in Directive 76/207/EEC does not preclude a national rule for the public service which, in trained occupations in which women are under-represented and for which the State does not have a monopoly of training, allocates at least half the training places to women. The Court considers that this rule is intended to eliminate the causes of women's reduced opportunities of access to employment and careers, and moreover consists of measures regarding vocational orientation and training authorised by Directive 76/207/EEC. The Court

39 The German legislation at issue in Badeck established that when qualifications were assessed, capabilities and experience which had been acquired by looking after children or persons requiring care in the domestic sector (family work) were to be taken into account, in so far as they were of importance for the suitability, performance and capability of applicants. Seniority, age and the date of last promotion might be taken into account only in so far as they were of importance for the suitability, performance and capability of applicants. The family status or income of the partner might 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 should not have a negative effect on assessment in service and not adversely affect progress in employment.

40 The Court also took into account that the legislation previewed an obligation to give a preferential treatment over women to some groups of people, namely: former employees who had left the service because of family work, persons who for reasons of family work worked on a part-time basis and now wished to shift to full-time employment, temporary voluntary soldiers, seriously disabled persons and long-term unemployed people.
takes into account that an overall view of the training offer reveals that no male candidate is definitively excluded from training. Thus, it is considered that the provision at issue merely improves the chances of female candidates in the public sector. Surprisingly, the ECJ is accepting here a rigid quota for the access to training positions, as long as it is not leading to an absolute rigidity.

Furthermore, the ECJ, following the Advocate General’s opinion, considers that Directive 76/207/EEC does not preclude a national rule which guarantees, where male and female candidates have equal qualifications, that women who are qualified are called to interview, in sectors in which they are under-represented, as the provision at issue in the main proceedings does not imply an attempt to achieve a final result - appointment or promotion - but affords women who are qualified additional opportunities to facilitate their entry into working life and their career. Next, the ECJ stresses the need of “an objective assessment of the candidatures”, pointing out that the domestic provision also provides that a preliminary examination of the candidatures must be made and that only qualified candidates who satisfy all the conditions required or laid down are to be called to an interview.

Finally, the ECJ concludes that it is according with Community law a national rule that recommends that, when appointments are made to employees' representative bodies and administrative and supervisory bodies, at least half the members must be women. The Court estimates that, since the provision is not mandatory and not compulsory but only programmatic, it permits, to some extent, other criteria to be taken into account.

It can be stated, then, that the German regional legislation assessed in the Badeck offers an extensive catalogue of the positive action measures in favour of women that are considered in consistency with the principle of equal treatment and equal opportunities for women and men.

In relation with the entry into force of the new substantive equality provision contained in the Treaty of Amsterdam (Article 141 ECT)\(^4\), it is important to mention the case Abrahamsson.\(^4\)

In this decision the ECJ rules that Directive 76/207/EEC and Article 141(4) ECT preclude national legislation under which a candidate for a post who belongs to the under-represented sex and possesses sufficient qualifications for that post must be chosen in preference to a candidate of the opposite sex who would otherwise have been appointed, even when the different between the respective merits of the candidates is not so great to lead to a breach of

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\(^4\) This provision entered into force, along with the rest of amendments introduced by the Treaty of Amsterdam, in May 1999.

\(^4\) Case C-407/98, Katarina Abrahamsson and Leif Anderson v Elisabet Fogelqvist, cit.
the requirement of objectivity in making appointments. The opinion of the Court is that such a method of selection is not permitted by Community law since the selection of a candidate from among those who are sufficiently qualified is ultimately based on the mere fact of belonging to the under-represented sex, and this is so even if the merits of the candidate so selected are inferior to those of a candidate of the opposite sex. Further on, it is considered that even though Article 141(4) ECT allows the 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 cannot be inferred from this that it allows a selection method which appears to be disproportionate to the aim pursued. According to the ECJ’s opinion, the disproportionate nature of a positive action measure of this kind persists even when it is intended to apply only to a restricted number of high-level posts.

Notwithstanding the fact that the ECJ’s ruling in Abrahamsson is mainly reiterating its previous doctrine in Kalanke and Marschall, the importance of this case is that it is the first time the ECJ has to deal with interpreting the scope and meaning of paragraph 4 of Article 141 ECT. What is more, it is also the first time the Court of Justice makes explicit reference to the regard due to the proportionality principle in relationship with positive action measures. Among the academia some were hoping that the ECJ would overrule his previous case law and, once the new Treaty provision would be in force most of the restrictions to the use of positive action measures would disappear, as Article 141(4) does not mention any of the limits set out in previous ECJ’s case law.43 However, the ECJ took a more conservative approach and continued in the line of Kalanke and Marschall.

Another case about the interpretation of the derogation to the right of equal treatment between men and women established in Article 141(1) ECT and Directive 76/207/EEC, referred in preliminary ruling to the ECJ, is Lommers.44 Here, the ECJ dealt with subsidised nursery places made available by the Dutch Ministry of agriculture to its staff. The Ministry, aiming to tackle extensive under-representation of women within it and in a context characterised by a proven insufficiency of proper, affordable care facilities, reserved places in subsidised nurseries only for children of female officials, whilst male officials had access to them only in cases of emergency, to be determined by the employer. That being so, the Dutch Ministry’s

44 Case C-476/99, H. Lommers v Minister van Landbouw, Natuurbeheer en Visserij, cit.
measure was considered to form part of the restricted concept of equality of opportunities in so far as women were not reserved places of employment but only enjoyment of certain working conditions designed to facilitate their pursuit of, and progression in, their career.

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, the Court reminded the due regard that must be had to the principle of proportionality, which required that derogations must remain within the limits of what is appropriate and necessary in order to achieve the aim in view and that the principle of equal treatment be reconciled as far as possible with the requirements of the aim thus pursued. The Court noted that the Dutch Ministry measure could a priori help to perpetuate a traditional division of roles between men and women, arguing that, the promotion of equality of opportunity between men and women pursued by the introduction of a measure benefiting working mothers could also be achieved if its scope would be extended to include working fathers. However, the Court finally concluded that the measure at issue felt within the scope of the positive action exception contained in the Directive 76/207/EEC, taken into account the insufficiency of supply in the number of nursery places available under the measure at issue, the fact that nursery services were not a public monopoly and were available on the market and the possibility for the employer to grant requests from male officials in cases of emergency. In sum, the Dutch Ministry measure was considered to be in accordance with the principle of proportionality in so far as the exception in favour of male officials would be construed as allowing those of them who took care of their children by themselves to have access to the nursery places on the same conditions as female officials. Moreover, in relation to those male officials, the Court sustained that the argument that women were more likely to interrupt their career in order to take care of their young children no longer had the same relevance.

The ECJ ruling in Lommers introduces a new trend in relationship with the ECJ’s interpretation of the equality principle, namely, a more moderate approach to the concept of positive action strongly based on the compliance with the principle of proportionality. This decision implies also a shift in the case law of the European Court of Justice about social measures adopted by the Member States in order to improve the situation of women in the labour market. In Lommers, the ECJ overruled his previous settled case law in Hofmann.45 In this last case, the ECJ ruled that Directive 76/207/EEC left discretion to Member States concerning the social measures they adopt in order to offset the disadvantages, which women,

by comparison with men, suffer with regard to the retention of employment. Such measures were considered closely linked to the general system of social protection in the various Member States. Therefore, Member States were supposed to enjoy a reasonable margin of discretion as regards both the nature of the protective measures and the detailed arrangements for their implementation. That margin has been reduced by the ECJ’s decision in *Lommers*. From now onwards, taking into account that the argument that women interrupt their careers more often that men to take care of children is not so strong any longer from the ECJ’s point of view, this kind of measures needs to be conformed with the principle of proportionality.

Finally, the last case where the ECJ has confronted the interpretation of the Community provisions regarding positive action measures in favour of female workers is the case *Briheche*. In this case, the ECJ has dealt with a preliminary question raised by a French Court concerning the compatibility with Community law of a national provision that reserves the exemption from the age limit (45) for obtaining access to public-sector employment to widows who have not remarried, excluding widowers who have not remarried. The ECJ states that this national provision formally contravenes the prohibition of discrimination on grounds of sex under Community law. Nevertheless, the Court of Justice assesses if such a provision might be in accordance with the Community rules that allow exceptions to the equal treatment rule for men and women to measures aimed to achieve substantive equality by reducing de facto inequalities which may arise in society and, thus, to prevent or compensate for disadvantages in the professional career of women. In its reasoning, the ECJ comes back to its previous settled case law and considers that a provision as the one at issue could be covered by that exception. With that purpose in mind, the ECJ investigates if, when applying the national provision the due regard has been paid to the principle of proportionality, which requires that derogations to fundamental rights must remain within the limits of what is appropriate and necessary in order to achieve the aim in view and that the principle of equal treatment be reconciled as far as possible with the requirements of the aim thus pursued. The ECJ concludes that the provision at issue automatically and unconditionally gives priority to the candidatures of certain categories of women, reserving to them the benefit of the exemption from the age limit for obtaining access to public-sector employment and excluding men in the same situation. From that assessment, it follows that such a provision is not allowed under Directive 76/207/EEC and Article 141(4) ECT.

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In Briheche, the ECJ seems to advocate for the inclusion of a “saving clause” that allows that cases like the one of Mr. Briheche would be included in the scope of the exemption to the age limit for obtaining access to public sector employment instead than imposing an elimination of the measure aimed to privilege widows.

V. Critical analysis and conclusion.

From the overview of the European Court of Justice case law about positive action measures in favour of female workers, it can be inferred that the interpretation given to the concept of positive action is very rigid. The notion of positive action has not been the object of a solid legal argumentation and the ECJ’s approach to this concept relies heavily on undetermined expressions as: rigid result quota, flexible result quota and saving clause allowing an objective assessment of the individual case. These terms arise some legal uncertainty about the use of positive action measures because they have been established by the ECJ as parameters of legitimacy without previously defining their real significance. Instead of using such “obscure” terminology, the ECJ should emphasize the necessity of paying the due respect to the proportionality principle when applying affirmative action measures. The simple maxim: “A positive action measure in favour of disadvantaged groups can be adopted in order to achieve substantive equality, providing that its applicability respects the principles of rationality and proportionality” resumes the requirements imposed to these measures for their compliance with EC law. Fortunately, this last clearer formula can be deducted from the ECJ’s most recent decisions in the cases Lommers\(^{47}\) and Briheche\(^{48}\), where the Court of Justice focuses on the observance of the proportionality principle as the key element for the validation of positive action measures.

One of the main findings of this essay is that in EC law the formal concept of equality prevails over the substantive one. Accordingly, from the observation of the EC legislative framework, it can be deducted that positive action measures in favour of disadvantaged groups have been admitted only on a very restricted basis. Notwithstanding the relevance of the multiple advancements in the legislative field regarding positive action, the fact that the sort of preferential treatment allowed by Community law provisions is considered an exception to the equal treatment rule rather than an intrinsic requirement of the equality notion hinders the progress in this area. From the examination of those legal provisions, it can

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\(^{47}\) Case C-476/99, \textit{H. Lommers v Minister van Landbouw, Natuurbeheer en Visserij, Netherlands}, cit.

\(^{48}\) Case C-319/03, \textit{Serge Briheche v Ministre de l'Intérieur, Ministre de l'Éducation nationale and Ministre de la Justice}, cit.
be inferred that in EC law equality of opportunities is considered equivalent to substantive equality. In relationship with this assumption, it can be argued that the association of both facets of the equality principle represents a misconception of the real meaning of substantive equality. Equal opportunities policies lead to situations where some groups are assisted to achieve access to education, training, social advantages and employment but they are not granted equal results in relationship with their individual capacities. These policies have been traditionally based on the compensatory theory, sustained by those who defend that positive action measures serve to erase the effects of past discrimination. In relationship with this matter, a more accurate approach is required: to consider positive action as a useful instrument to prevent social exclusion of minorities. In this sense, preferential treatment actions would be informed by dignity, restitution and redistribution as values linked to equality. From this point of view, a positive action measure, rather than an exception to the equality principle, should be considered the corollary of the Member States’ obligation to promote real equality among their citizens, from an individual as well as from a collective perspective, by the way of removing the obstacles that hinder their full participation in political, economical and social life. In this sense, positive action measures would be regarded as an effective tool to assure social peace and to achieve social justice and economic welfare by providing real equality among the individuals that compose a society.

This paper has focused on the analyses of positive action measures in favour of female workers. It is worth noting that the EC law approach to this kind of measures bears some resemblances with the one of the U.S. Supreme Court. As it has been mentioned above, in the U.S. case the idea of affirmative action was originally shaped in relationship with racial segregation and only later applied to measures intended to improve the situation of female workers regarding their professional lives. In the EC case the opposite development can be observed. Initially, the use of affirmative action measures was only admitted in the field of gender equality and other distinctive characteristics, in particular race, were not contemplated. This was the obvious consequence of the absence of a legal basis to enact legislation in order to fight other grounds of discriminations different from sex. After the introduction of that legal basis by the Treaty of Amsterdam, the situation has considerably improved and EC law

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50 A similar mandate to the public authorities to act in order to achieve substantive equality among all the groups that compose the society can be found in Article 9.2 of the Spanish Constitution of 1978.
currently allows the adoption of preferential treatment measures in favour of a wide range of disadvantaged groups. Nevertheless, in relationship with the introduction and development of the legislative provisions regarding positive action some questions arise: Could female workers be considered a homogenous social group traditionally affected by discrimination and labour market segregation? Despite the legally recognized legitimacy of preferential treatment measures in favour of disadvantaged groups and minorities, are these measures likely to be encouraged by the social policies of the Member States? What's more, will the EU population support them or are they likely to be unpopular measures? The length of this paper is too short to try to give an answer to all these questions. However, they are posed here in order to stimulate further debate on the topic.

In order to conclude, it is worth pointing out that, when applying positive action measures at any level, attention should be paid to the emerging clash of rights between the individual right to equal treatment and the collective right to substantive equality. Due to this tension between the pursuing of substantive equality and the respect to legitimate individual rights and expectations, the boundaries of positive action policies need to be precisely determined. On the first place, this kind of policies should only be adopted when there is a homogenous group of people subject to a generalized disadvantaged treatment. On the second place, the instrumental and temporary character of the positive action measure should be born in mind. In other words, once the social imbalance or the unfavourable situation is corrected, the use of the preferential treatment measure is no longer justified. Finally, any kind of affirmative action measure must comply with the proportionality principle.52 Hence, this measure should be necessary and appropriate to overcome the situation of discriminatory disadvantage and should be used only when there are no other alternative means less harmful for the rights or interests of other individuals potentially affected.

52 The proportionality test was set up for the very first time by the ECJ judgment of 13 May 1986, Case 170/84, *Bilka*, [1986] ECR p. I-01607 and consolidated in further case law, see *inter alia*: Case C-273/97, *Angela Maria Sirdar v The Army Board and Secretary of State for Defence*, [1999] ECR p. I-7403 and Case C- 285/98, *Tanja Kreil v Bundesrepublik Deutschland*, [2000] ECR p. I-69. In accordance with this test: It has to be determined if the different treatment is objectively justified, for that it is necessary that the employer shows that the measures are related to a real need on the part of the undertaking, are appropriate with a view to achieving the objectives pursued and are necessary to that end.