Quotas and other positive action measures to ensure full equality in standardized and non-standardized employment and education:

Automatic preferences as a means of eliminating gender stereotypes in education, training, labour market and economic and political decision-making.

1. Aim of the workshop:

The aim of this workshop is to discuss recent developments in human rights law, EU-law and national laws and policies with a view to the use of positive action as a measure to achieve full equality (substantive equality) in standardized and non-standardized employment, education and public services and goods. For this purpose we suggest a narrow conception of the term positive action, namely measures that entail different types of preferential treatment for members of a socially disadvantaged group. In the light of recent contestations within and between international human rights law, EU-law and national law concerning the content and extent of the strict scrutiny test developed by the ECJ court in the 1990’s we suggest a focus on the use of automatic preferences in relation to standardized and non-standardized employment and education. (Public services and goods represent a number of challenges but due to time limits we suggest to leave this areas out). We propose a discussion of recent trends in ECJ case law, UN approach to special measures according to various UN-bodies (CEDAW, CERD, CRPD), EU Parliament initiatives concerning use of positive action to combat gender stereotypes in education, labour market as well as trends in national case law, legislation and policy initiatives.

2. Background:

Positive action is a measure embedded in international conventions providing protection against discrimination on the basis of sex, race, disability and other grounds (CEDAW, CERD, CRPD). Positive action has been part of EU sex equality law since its inception. It is embedded in Equal Treatment Directive 2(4) 76/207, the Recast Directive 2006/54, Directive 2004/113 (Goods and services) and Art 157(4) TFEU. Positive action is also found in EU equality directive not related to sex. Directive 2000/43 (Race equality ) and Directive 2000/78 (General Framework) entail positive action provisions. Positive action is embedded in national discrimination legislation providing protection against discrimination on the grounds of sex, ethnicity, disability etc.

Today positive action is seen as an instrument for promoting real equality rather than an exception of the equal treatment principle. Yet the ECJ has through a number of cases adopted a comprehensive framework of scrutiny of positive action measures. In the Kalanke case the court applied a strict scrutiny test, excluding “automatic” measures or absolute preferences in standardized employment. The ECJ court’s positive action doctrine, was further developed in the Marschall case where it found preferential treatment entailing a savings clause acceptable. The Lommers case, the Abrahamsson case and the Badeck case narrowed the scope of positive action in the field of standardized employment. In the light of the ECJ court jurisprudence it is held that laws and policies that give preference to the underrepresented sex that satisfy a minimum qualification criteria or that are equally qualified is acceptable. Whether and to what extent the strict scrutiny test is absolute is contested. With reference to the Badeck case proponents of a flexible approach argue
that automatic preferences approach is not excluded in situations where no person from the other sex is absolutely excluded from employment or training. Whether the strict scrutiny rule is restricted to standardized employment is not clear. In the light of the Badeck case and the Lommers case it has been argued that whether the court will apply a lower level scrutiny test or not will depend on the type of benefits distributed through preferential treatment. Proponents of this view has also referred to the jurisprudence of the CEDAW Committee in the light of the The Danosa case C-232/09 Dita Danosa v.LKB Lizings SIA. Where ECJ found that the executive board members fall within the scope of the term employee for the purpose of the former Art 39 ECT and the Art 10 of the Pregnant Workers Directive, it has been argued that automatic preferences are excluded in both standardized and non-standardized employment.

The European Parliament’s resolution of 12 March 2013 on eliminating gender stereotypes in the EU (2012/2116) suggest that “softer measures” such as training and awareness raising is preferred in favour of positive action and binding quotas to combat gender stereotypes. Yet the European Parliament in the Text adopted 12 March reaffirmed the Commissions’ desire to establish binding quotas for women in posts of responsibility in the largest listed companies.

In Report of 6 December 2012 on eliminating gender stereotypes in the EU (2012/2116 (INI) From the Committee on Women’s Rights and Gender Equality the Committee’s motion suggested adopting quotas as a means of eliminating gender stereotypes:

“42: Calls on the Commission to promote gender quotas in occupations that are traditionally considered as male or female, since stereotypes also come from the scarcity of women or men in certain positions; notes that the presence of more women in traditionally male occupations and vice-versa will therefore weaken the prevalence of such stereotypes and that a balanced workforce would lead to enhanced productivity.

50. Recalls that, in 2010, only 10% of the members of management boards in Europe were women; supports the Commissions’ desire to establish binding quotas for women in posts of responsibility in the largest listed companies.

51. Lays emphasis on the need for such quotas to be binding as this is the only way of guaranteeing their efficacy; proposes that an equality fund be established, into which monies collected under resultant penalties would be paid for use in measures to promote and protect women.”

A much narrower approach to use preferential treatment as a means of eliminating gender stereotypes was, however adopted by the European Parliament. Only the following suggestion was adopted Tuesday 12 march 2013 Strasbourg:

45. Recalls that, in 2010, only 10% of the members of management boards in Europe were women; supports the Commissions’ desire to establish binding quotas for women in posts of responsibility in the largest listed companies.

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3. Discussion

The relationship between ECJ’s positive action approach, the jurisprudence of the human rights treaty bodies, national legislation and national case law (in this conference we will focus on the Nordic countries) call for closer scrutiny.

3.1 Standardized employment

What understanding of the ECJ’s doctrine on positive action/Europe Parliament’s views on positive action as a means of eliminating gender stereotypes has been adopted in national laws, policies and case law and how is it related to the general recommendations and concluding comments of the CEDAW Committee.

Marschall Case C-409-95

Judgement of the EFTA Court 24 January 2003 in Case E-1/02. Reservation of academic positions for women in Norway. Restrictive approach

Norge – Likestillings- og diskrimineringsnemnda sak nr. 23/2009

3.2 Unstandardized employment/Management Boards

What understanding of the ECJ’s doctrine has informed national laws and policies concerning the establishment of binding quotas for women on executive boards. Does it see executive board membership as employment or a different type of position and benefit? What influence does international human rights law have, for example the general recommendations and concluding comments to state reports by the CEDAW Committee?

Badeck Case C-158-97 Judgement of the ECJ in Case C-232/09, Danosa.

3.3 Education

What understanding of the ECJ’s doctrine has informed national laws, policies and case law concerning different forms of quotas to achieve gender balance in education

In the light of the Badeck case and the Lommers case it has been argued that whether the court will apply a lower level scrutiny test or not will depend on the type of benefits distributed through preferential treatment

Recent cases from Sweden taking a restrictive approach to positive action. Svea Hovrett (Appeal Court) Case T3552-09. Högsta domstolen (Supreme Court) Case T400-06

The Norwegian Equality Commission (likestillingsutvalget) proposes the introduction of gender points in higher education to promote gender balance in education and employment.