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Recent Collective Bargaining Articulation Reforms in France and Spain

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Abstract: Articulation of collective bargaining has been deeply modified both in Spain and in France in recent years. This study outlines and compares the decentralising process undergone by both countries in a context of broader changes in industrial relations in Europe. For decades, both the Spanish and French systems were based on the sectoral bargaining level, which provided a certain degree of equalization to working conditions within every sector, even though historical factors have led to differing evolutions of the two systems. The decentralising of collective bargaining in favour of the enterprise level began timidly in France in 1982 but the real legislative revolution in French collective bargaining occurred in 2004 and 2008. Today, enterprise collective agreements may "revoke" conditions established by a sectoral collective agreement. This is also the case in Spain, deriving from two more recent reforms (2011 and 2012), but, despite strong parallels between both countries, there are also clear differences regarding how these changes are being applied.

Keywords: collective bargaining, decentralising, compared law.

1. Introduction

Collective bargaining is a key instrument in defining working conditions in Europe. Institutions such as the International Labour Organisation (ILO) argue that collective bargaining not only provides a means of determining wages and working conditions, it also enables employers and workers to define the rules governing their relationship. Therefore, collective bargaining may be advantageous for both workers and employers. For workers, it ensures adequate wages and working conditions that may not be achieved through individual negotiation, providing them with a "collective voice". It also offers workers control over decisions regarding personnel and fair distribution of gains resulting from increases in technology and productivity. For employers, collective bargaining contributes to industrial peace, helping to stabilize industrial relations. Furthermore, employers may also address the need for change in order to facilitate modernisation and restructuring (ILO).

Moreover, collective agreements have been defined as key tenets of democracy and essential means by which workers may balance bargaining power in employment relations and negotiate improvements in working conditions (Hayter, 2011). However, power balancing is not homogeneous at all bargaining levels. Clearly, in most cases of enterprise and lower-level bargaining, the imbalance favours the employer. Therefore, the decentralization of collective bargaining has been a long-standing aspiration in certain sectors—an aspiration that has gained support due to the current economic crisis, which, according to the European Commission (2010), is an unprecedented challenge for European industrial relations systems. Hayter (2011) reported that collective bargaining is seen from certain sectors as an expense and an obstacle to the flexible adjustment of enterprises and the smooth functioning of labour markets. This has led to policy advice calling for the weakening of collective bargaining rights and the decentralization of collective bargaining. Similarly, in the Athens Manifesto, the European Trade Union

Confederation (ETUC, 2011) condemned the hostile attitudes of European institutions and many European governments towards wage indexation and centralized bargaining in general.

Nevertheless, at European and national levels, social partners accept that the development of bargaining at an enterprise level is, to a certain extent, useful for introducing new forms of internal flexibility that must be adopted in order for enterprises to adapt to changing economic realities. Collective agreements cover new issues such as restructuring, competitiveness and access to training, and are applicable to new categories of employees, for example agency workers (European Commission, 2006). The European Commission (2006) stated that these agreements are important tools to adjust legal principles to specific economic situations and particular circumstances of specific sectors.

This paper aims to compare the collective bargaining reform processes in two European countries: France and Spain. The final objective of both of these countries is similar—to decentralize collective bargaining and thereby increase the role of enterprise agreements. However, the two countries are conducting this process in very different ways that will undoubtedly lead to distinct outcomes. Over recent years, French collective labour law has gone through profound transformations, affecting collective bargaining regulations as well as related institutions such as worker representation in the enterprise and representativity. All of this reform has aimed to adapt legislation to the needs created by a final objective: to increase the centrality of enterprise collective agreements. This has been carried out by rearticulating sectoral and enterprise agreements and expanding the content of the same through the implementation of bargaining obligations for a number of issues. According to some authors, this evolution has been progressive and employers are not demanding crucial changes permitted by the new legislation in order to maintain a certain balance within the industrial relations system (Ray, 2008).

The case of Spain is significantly different. The decentralization of collective bargaining has been an on-going demand of employers, who have been particularly insistent over the past four years. This demand has been introduced extensively in collective bargaining reform which was passed in 2011, although some changes along this line had already been adopted in June of 2010. The most recent reform to date (February 2012) has followed along the same lines. It is clearly too early to fully evaluate the consequences of these changes but many of them are beginning to reveal themselves.

This study aims to provide clarification regarding the changes occurring in European systems of industrial relations by presenting two relevant examples.

2. Reforms in France: progressive reinforcement of collective bargaining at the enterprise level

In France, the number of reforms concerning collective bargaining has been so high over the last decade that already in 2004 Teyssié claimed that a completely new law on collective bargaining had emerged.

The reinforcement of collective bargaining against laws and regulations began in 1982, when the so-called Auroux laws[1] were passed. Not only did they create new spaces for collective bargaining, but they also introduced the first rules on decentralization after decades of a strongly centralized bargaining structure. Before 1982, only legal minima were contemplated, referred to in France as "social public order". This meant that collective agreements could only improve conditions regulated by the law, not worsen them. The Auroux laws introduced the "revocation" concept in France, implying that: (1) an agreement may establish worse conditions than those established by the law and (2) that a lower bargaining level agreement may establish worse conditions than those established at a higher level (e.g. an enterprise agreement as compared to a sectoral agreement). However, the possibilities of "revocation" provided by the Auroux laws were very limited and only affected a very specific issue: overtime.

During the 1980s and 1990s, regulations remained considerably stable, but over the last decade, changes have been quite profound. A Common Position on ways to strengthen collective bargaining

[1] Law of 4 August 1982 concerning employee rights in the enterprise; Law of 28 October 1982 on the development of personnel representation institutions; and in particular, Law of 13 November 1982 on collective bargaining and collective conflict solving.

was signed on July 16th of 2001 by the five trade unions recognized as representative at the intersectoral level and of the principal employer organisations. The Common Position requested additional space for collective bargaining and demanded complementarity between legislation and collective bargaining. Nevertheless, more serious reforms did not appear until 2004 and 2008.

2.1. Content expansion at the enterprise level and its articulation at the sectoral level

The first major reform in collective bargaining was introduced by Act No. 2004-391 of 4 May 2004 on lifelong vocational training and social dialogue. The final goal of the Act was to place enterprise agreements at the centre of the collective bargaining system (Souriac, 2005). The Act had three main objectives: to change rules on the conclusion of the agreements, to transform the articulation and to mitigate the effects of the lack of trade union representatives in enterprises[2].

In regards to articulation, there were three main novelties introduced by the Act of 4 May 2004:

— sectoral agreements could include provisions that were less favourable to workers as compared to those resulting from agreements with wider territorial or functional fields. Nevertheless these wider-scope agreements could prohibit such "revocations".
— enterprise agreements could contain provisions that were less favourable to workers as compared to those resulting from sectoral agreements. The Law also permitted negotiators at the sectoral level to impose bans on enterprise negotiators in regards to these "revocations". Additionally, in this case, some issues were legally excluded from the "revocations". These issues included minimum wages, professional classification and collective guarantees on complementary social protection and mutual funds for professional training.
— enterprise agreements could develop the application or they could "revoke" provisions included in the Labour Code. Until 2004, this power had been reserved to sectoral or broader-scope agreements.

The next (and, to date, the last) step was the passing of Law 2008-789 of 20 August 2008 on the reform of social democracy and working time. This Law was in line with the previous act, permitting "revocations" for a list of issues regarding working time. Like the Act of May 2004, "revocations", regarding less favourable conditions, could be established both by enterprise and sectoral agreements to those of higher level or wider application. However, there is a substantial difference in these laws: from 2008 on, the sectoral collective agreements can no longer ban "revocations" to their regulations concerning most aspects of working time resulting from enterprise or narrower-scope agreements. Certainly these rules affect limited issues, but, according to some authors, the foundations were created in order to broaden the scope of such provisions in the near future (Barthélemy and Cette, 2010).

While articulation has generated intense debate in France –as well as in other European countries–, the progressive consolidation of the enterprise as the central level of bargaining through mandatory content has not been as widely noticed. Legislature, however, has consistently attributed the regulation of numerous issues to enterprise agreements. These functions are not considered to be a possibility –always existing as a result of the parties' freedom of to negotiate– but rather, an obligation.

The Auroux Laws were pioneering in establishing bargaining obligations. They have been widely extended over the past three decades. However, it should be noted that bargaining obligations do not necessarily imply agreement obligations.

As for the frequency of bargaining, some regulations demand yearly negotiations on certain issues, while in other cases they may be tri-annual.

In order to understand the bargaining obligation dimension as a whole, it is necessary to briefly list the issues that must be negotiated at the enterprise level:

[2] It should be noted that in France, trade union representatives have traditionally been the subjects that negotiated at the enterprise level.

— effective wages, including the goal of eliminating any wage differences between men and women.
— working time and its distribution, including paid holidays.
— workplace preventive management.
— professional equality between men and women, particularly in regards to access to employment, training and professional advancement, working conditions in general and reconciliation between work and family life.
— exercising the freedom of expression within the enterprise.
— senior worker positions, specifically, parties must negotiate their access to jobs, maintenance of them and access to training. In this case there is not only a bargaining obligation but also a concluding obligation.
— professional insertion of disabled workers and, specifically, access to jobs, training, professional advancement, working conditions and disability sensitization of other workers.
— complementary social previsions if they are not negotiated at the sectoral level and wage saving systems.
— reconciliation between professional career and trade union activities.

Similarly, the parties are obliged to collectively examine the employment situation in the enterprise and, more specifically, the number of workers with low wages, the number of temporary and agency workers and annual or long-term job prevision in the enterprise.

In addition to bargaining obligations, the French Labour Code requires that enterprise agreements include the development of a large number of regulations, even though sectoral agreements may also intervene, which contributes to helping enterprise agreements gaining weight in the bargaining system. Furthermore, in many cases, enterprise agreements may "revoke" regulations established by the Code itself, decisively contributing to the deregulation of working conditions and to the individualisation of industrial relations, as a consequence of the limited bargaining capacity of trade union representatives, particularly in small enterprises. The Labour Code calls for the intervention of enterprise agreements in numerous issues related to working time and working time distribution (night work, overtime for full- and part-time workers, forewarning in the case of working time distribution modifications for part-time workers, modifications in daily rest, regulations on resting time corresponding to part-time workers, introduction of shift replacement teams, regulations on seasonal work, creation of a working/holiday time account, "revoking" of the general principle of two consecutive holidays per week for workers under 18, allowing workers under 18 to work on bank holidays, postponing paid holidays including to the following year). In addition, enterprise agreements may also intervene on other issues such as the regulation of trade union freedoms in the enterprise, certain disabled worker aspects, trial period regulations, indemnity reduction due to the termination of a temporary contract, and certain issues regarding training.

2.2. Accompanying reforms: representing and representativity at enterprise level

Two particularly problematic issues were found in regards to the planned decentralization of collective bargaining: on the one hand, worker representation within the enterprise and rules on conclusion of agreements and, on the other hand, serious defects affecting the fixing of representativity. Worker representation has a dual channel structure, as there are both elected representatives and trade union representatives. Nevertheless, collective bargaining at the enterprise level has always corresponded in large part to trade union representatives. However, the fact is that trade unions have a considerably limited presence in small and medium sized enterprises, so that the lack of a union opposing party to the employer is a frequent reality. The laws from 4 May 2004 and 20 August 2008 established subsidiary sets of rules allowing parties other than union representatives to negotiate at an enterprise level, thus ensure that there are parties capable of negotiation. Such parties include elected representatives and mandated employees.

In addition, the Act of 4 May 2004 introduced profound reforms on the validity of enterprise agreements. Previously, the signature of a single trade union irrespective of its representativity in the enterprise was sufficient to make an agreement applicable to all workers in the enterprise. This possibility

had been strongly questioned, as the legitimacy of the labour signing party to bind all workers was, in many cases, far from being accepted, particularly at the time when enterprise agreements "revocations" were accepted. In fact, the regulations from 2004 were not very demanding, as legitimation was negatively, not positively created: agreements didn't require a majority but rather, a lack of opposition from trade unions representing the majority of workers. These regulations were improved by the Law of 20 August 2008 requiring a certain supporting force to the agreement, although this force need not necessarily be the majority. The objective is to reinforce the questioned legitimacy of enterprise agreements due to a lack of representativity of the signing trade union or unions.

The second problem relates to rules on representativity. The representativity system was established in France in 1966 and had remained unchanged until 2008, despite multiple attempts at reforming it. Persisting doubts regarding the actual representativity of trade unions recognised as such were a long time burden to the development of collective bargaining. The 2008 reform turned the rules on determining representativity upside down: top to bottom legitimation became bottom to the top, i.e. from the enterprise to the national and intersectoral level. Prior to 2008, trade unions meeting certain undefined criteria (essentially to have sufficient members, receive enough fees, gain their independence, have a certain antiquity and be influential in their field) at the national and intersectoral level, were conferred representativity in every enterprise in the country. However, upon application of legislation from 2008, election results at every bargaining level are considered –as well as other criteria– in order to determine who is representative at that level. As a result of certain concrete regulations, the five trade unions recognised as representative in 2008, despite changes that have maintained their overall status, as well as two other unions, are likely to be recognised as representative[3]. Consequently, in the near future, few changes are anticipated, leading to the suspicion that new rules have been excessively tailor-made to the previously representative.

In any case, these reforms have been instrumental in adapting regulations to the ultimate goal of orienting the French legislative initiatives regarding collective labour law. This final objective consists of strengthening enterprise bargaining both by developing it but also, to the detriment of sectoral bargaining.

3. Reforms in Spain: an attempt to introduce accelerated changes

The present structure of collective bargaining in Spain is the result of a process in which historical factors are of great importance. These historical elements and the fact that regulations regarding the articulation of agreements are unnecessarily complicated, has led to an extremely complex system.

Collective bargaining as a system, as in other European countries, was created in the early 1980s, after the passing of the Workers' Statute (1980). The freedom of social actors to choose a bargaining unit was then recognized. However, this rule created conflicts, as more than one agreement could be applicable to a group of labour relationships. Thus rules had to be created in order to solve these conflicts. In this point, Spanish law differs significantly from French law. In France, such conflicts were traditionally solved by the favour principle. But in Spain, a general principle of chronological preference was adopted, so that the agreement to be applied was that which had been first signed, irrespective of the conditions contained in the different conflicting agreements. Nevertheless, lower-level agreements that improved the conditions of higher-level accords were always generally accepted.

These rules led to a certain degree of fossilization of bargaining units, as the chronological preference made it extremely difficult to create new units. In addition, bargaining units were frequently derived from labour regulations dating back to the Franco era, as those units covered a territorial and sectoral regulatory field that were previously covered by Francoist labour regulations (identification of sectors and subsectors on a provincial basis). Moreover, jurisprudence has always tended to protect previously-created units.

The structure of collective bargaining became even more complicated after a reform that occurred in 1994. This reform, as well as other subsequent ones (1997, 2011 and 2012), was introduced via a deplorable legislative technique, through the addition of new paragraphs to article 84 of the Workers' Stat-

[3] The Law of 20 August 2008 establishes a very long transitory period (generally until mid-2013 and in some cases until 2017) during which the reform is to be progressively applied. Consequently, the final picture of representativity is not yet apparent.

ute. These new paragraphs were in some cases contradictory –in their philosophy and sometimes even in their literality– to the previous regulations that remained unchanged. This technique, defined as *alluvial*, has been strongly criticized (Cruz Villalón, 2007). The aim of the reform, which was demanded by the Catalan and the Basque nationalist parties, was to enable the creation of industrial relations frameworks in autonomous regions, which was hindered by the "occupation" of bargaining units by national sectoral collective agreements. However, the new regulations permitted any agreement at the supra-enterprise level to affect a higher-level agreement. In fact, these regulations invigorated provincial sectoral agreements, which became the most common bargaining units until 2011, when said affecting agreements were limited to the regional (Autonomous Communities) level, so that provincial agreements could no longer regulate matters regulated by higher-level agreements.

At the same time, the 1994 reform introduced the possibility that an agreement at the enterprise level could establish that salaries set by the sectoral agreement were not to be applied if certain conditions regarding economic difficulties of the enterprise were met. Likewise, an agreement between worker representatives and employers could change working conditions established in the sectoral agreement. In this case, the verification of certain circumstances was also required.

These regulations remained essentially unchanged until the passing of a very significant reform in June 2011. In fact, the main employers' association had repeatedly demanded a relaxation of the norms on articulation of collective agreements in order to allow for a wider breadth in agreements at the enterprise level.

These demands were broadly incorporated into the Royal Legislative Decree 7/2011, of 15 June, on Collective Bargaining Reform. This decree, passed by the Spanish Government and subsequently approved by Parliament, introduced crucial changes in the articulation of collective bargaining. Article 84.2 of the Workers' Statute stipulated that the application of working condition regulations established in an enterprise agreement would have priority over those working condition regulations established at the sectoral level for certain issues, including:

- the amount of the basic salary and extra allowances; allowances related to the company's situation and results included.
- the payment or compensation for extra working hours and specific shift work payment.
- working time and working time distribution; regulations on shift work and annual holiday planning.
- enterprise adaptation to the professional classification of the worker system.
- enterprise adaptation to various aspects of the types of contract to be used.
- and measures employed to reconcile work, family and personal life.

Clearly, enterprise agreements can affect (e.g. regulate in less favourable terms for workers) sectoral agreements in terms of various areas. Sectoral agreements shall no longer establish the level at which working conditions are primarily negotiated. It is impossible to ignore the likely consequences of this change in terms of working conditions in Spain. Needless to say, these new regulations turn the priority-in-time rule as a plurality of agreements' solving rule into an empty clause.

Article 84.2 of 2011 allowed for the possibility that an agreement, at the national or regional (Autonomous Community) level, would not permit such "derogations". However, as these agreements had to be necessarily negotiated at the top levels by representative employer associations (which are those that had, for a long time, pressured for the reform) and representative trade unions, this appeared to be unlikely. It should be highlighted however, that the social partners maintained the possibility of articulate bargaining from the sectoral level. The Decree-Law 3/2012 of 10 February and Law 3/2012 of 8 July removed any possibility of social partners articulating bargaining by forcing them to accept the priority given to the enterprise level, in all cases. The 2012 reform also introduced very significant changes: to a large extent, it facilitated opt-outs and strongly limited applicability of collective agreements after their expiration and during renewal negotiations.

Reform implies a serious risk of collective bargaining atomization, as well as wage dispersal, making it difficult to maintain sectoral base wages and, consequentially, resulting in a generalized wage

decrease as has already been shown (ILO 2013). It enables different enterprises in the same sector to compete by worsening working conditions in general and wage conditions, specifically.

4. Conclusions

The study and comparison of the French and Spanish cases leads to numerous conclusions that should be considered.

First, the French and Spanish collective bargaining systems are not substantially different. For decades, both were based on the sectoral bargaining level, which provided a certain degree of equalization to working conditions within every sector. Until recently, enterprise collective agreements existed almost exclusively in large enterprises and aimed to improve wages and working conditions as stipulated by the sectoral agreement.

However, historical factors have led to differing evolutions of the two systems. In post-World War II France, the favour principle was enshrined as a "social public order" principle, admitting no exceptions and establishing that no lower-level agreement could contain less favourable conditions than those corresponding to higher-level agreements. This was fine-tuned by the gradual introduction of other possibilities, based on which enterprise agreements could "adapt" sectoral regulations to the needs of the enterprises.

And in Spain, the structure of collective bargaining has been strongly conditioned by forty years of Francoist dictatorship, during which time trade unions were banned and collective bargaining (in terms of article 4 of the ILO Convention number 98 on the Right to Organise and Collective Bargaining), did not exist. However, clandestine trade unions developed a certain activity within the compulsory labour structures of the State. This, as well as the territorial and sectoral structure of Francoist labour regulations, influenced the development of the collective bargaining structure during the 1980s. This structure was strongly modified, as of 1994, with the so-called sectoral decentralising of collective bargaining. The decentralization was very strong, but it essentially remained within the sectoral level, reaching the enterprise level in a limited fashion (only under certain circumstances –namely, economic difficulties of the enterprise–).

One very clear difference between France and Spain is evident in regards to the development of enterprise collective bargaining through the expansion of its content. French legislature has created a large number of the so-called "bargaining obligations", e.g. the identification of fields in which negotiating at enterprise level became compulsory on a regular time basis (1 to 3 years) over the past thirty years (but especially during the last decade). Although the results of bargaining obligations have been less satisfactory than expected, they have nevertheless contributed to the spread of the enterprise agreement content. However, in Spain no such bargaining obligations have been established and therefore, the contents of enterprise agreements remains extremely poor and is rarely innovative.

As for the decentralising of collective bargaining in favour of the enterprise level, this began timidly in France in 1982 with the Auroux laws, which allowed for "revocations" in a particular issue (overtime). However, the real legislative revolution in French collective bargaining occurred in 2004 and 2008, with the creation of two closely-linked reforms. As a result of these reforms, today, enterprise collective agreements may "revoke" conditions established by a sectoral collective agreement (only if the latter has not banned it, which is quite often the case). But for many issues regarding working time and working time distribution, this banning has no longer been possible, since 2008.

The Spanish reforms are much more recent (2011 and 2012). They enable enterprise agreements to "revoke" conditions established by sectoral agreements for a large number of issues (wages, working time and working time distribution, overtime, professional classification, etc.). Their results, though highly predictable, remain to be seen.

The evolution of both the Spanish and the French collective bargaining systems, and specifically, their very recent developments, are meaningful examples and are indicative of very profound reforms made in European industrial relations that will undoubtedly occur over the coming years. A very clear trend to re-individualise working relationships may be seen, which may easily lead to the loss of acquired rights and the worsening of working conditions throughout Europe.

Despite strong parallels between both countries, there are also clear differences regarding how these changes are being applied. In the French case, changes are being implemented slowly and the effects of each implemented change may be evaluated to some degree prior to introduction of the subsequent change. Furthermore, employers and their associations are being quite cautious in order to prevent system destabilization from occurring due to the forced change. In Spain, however, the instigators of these changes want them to be applied very rapidly, leading to potentially devastating effects on the bargaining system.

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Dismissals in times of crisis. Assessment of recent Spanish modifications*

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Abstract: Effects of the crisis on the Spanish economy have led to increased flexibility of working conditions and specifically, in requirements for dismissal and termination of work contracts. This flexibility has increased since 2010, with the onset of the crisis, and is currently even higher. Reforms have focused on direct and indirect cost reductions resulting from contract terminations, particularly from dismissals. Paradoxically, the main legal reforms that were agreed upon in the area of disciplinary dismissal did not attempt to reduce the number of dismissals, but to lower their cost. Thus, reforms focused on two principal elements: the elimination of procedural salaries and the reduction of compensation costs for unfair dismissal.

Keywords: dismissal, flexibility, procedural salaries, working conditions.

1. Introduction

Ever since the economic crisis began revealing its effects on Spain midway through 2007, these effects have been particularly visible in the field of industrial relations and, more specifically, in the area of work contract termination. The difficulties faced by companies in adapting to the crisis have led to an increased flexibility of both employee working conditions and the requirements required for their exit from the company, based on the framework of European objectives[1]. This flexibility has been particularly evident in the area of dismissals and work contract termination[2], in the context of broader labour reform[3].

Although legal reform has been a constant in the Spanish legal framework, the true reform process began in 2010, resulting in the current legal schizophrenia, characterised by an unstoppable (ansometimes unacceptable) succession of labour law reforms and counter-reforms that is incapable of

* The following abbreviations are used in this essay: ET (Texto Refundido de la Ley del estatuto de los trabajadores, aprobado por Real Decreto Legislativo 1/1995, de 24 de marzo (Spanish Statute of Workers Rights); LJS (Ley 36/2011, de 10 de octubre, reguladora de la jurisdicción social); RDL (Real Decreto Ley); RD (Real Decreto).

[1] For Montoya Melgar, A. (Comentario a la reforma laboral de 2012, Civitas Thomson-Reuters, Madrid, 2012, p. 10): "Our belonging to the European Union (and the undeniable sovereignty transfer that it implies) makes it impossible to follow, in this and other matters, a way that is not the one that the high European courts point to".

[2] In Spanish law, disciplinary dismissal implies the extinction of the employment contract only by the will of the employer, due to a severe failure to comply by the worker. The Spanish work legislation does not have a system of employment at will, but only casual dismissal, so that the employer has to locate the worker's infraction in one of the causes that are specifically covered in *Estatuto de los Trabajadores* (art. 54), and follow the formal requirements that are legally established (art. 55). The objective extinction of the work contract, however, is not determined by the worker's failure to comply, but by objective causes, those being caused by the worker in a non-guilty manner (sudden ineptitude, lack of adaptation in the work position…), by circumstances of the company (restructuring, externalization of the services, severity of the economic situation) or by mutual agreement.

[3] Desdentado Bonete, A. Introducción a un debate. Los despidos económicos en España, Lex Nova (Valladolid, 2011), p. 36.

halting the rise of unemployment and job insecurity. Over the past decade, the following reforms have been made in regards to collective dismissal:

— RDL 10/2010, 16 June, urgent measures for job market reform.
— Act 35/2010, 17 September, urgent measures for job market reform.
— Act 36/2011, 10 October, regulating social jurisdiction.
— RDL 3/2012, 10 February, urgent measures for job market reform.
— Act 3/2012, 6 July, urgent measures for job market reform.
— RDL 11/2013, 2 August, part time worker protection and other urgent measures in social and economic areas.

All of these reforms have included the constant elements of adaptability and cost reduction in individual and collective work contract termination. Both the causes permitting contract termination and the procedure to be followed for said termination have been made more flexible. A more precise definition of the causes of work contract termination has been offered, in order to avoid potential doubts in the interpretation and application and to reduce the involvement of labour courts which tended to protect workers in the application and interpretation of labour laws. On the other hand, termination ceased to serve as a solution for companies in crisis and legislators began to permit "preventive dismissals"[4], which attempt to anticipate a crisis situation in the company, even before it has occurred.

At the same time, these reforms attempt to reduce both direct and indirect costs caused by contract terminations, particularly in the case of dismissals. The reduction of direct costs has been achieved through a decrease in the amount of legal compensation established for redundancy or improper terminations. Indirect costs have been reduced through the elimination of procedural salaries, except in limited cases. These fees are calculated based upon the amount of time passing since the date of termination and the sentence declaring his termination to be improper or null, and they force companies to pay an amount that often exceeds the worker compensation fees.

In addition to the procedures for individual or multiple dismissals or terminations (art. 52.c ET), collective dismissals (art. 51 ET) are also included. These dismissals are determined by the number of workers affected over a certain time period, based on the total staff. The most recent work reforms have had a particularly large effect on the regulation of collective dismissals, with a dual purpose: first, to determine the definition of justifiable cause, so they can be objectively credited and to prevent the judicial body from making corporate strategy assessments. Second, the procedure followed in the case of collective dismissals has been made more flexible. Previously, agreements made during the negotiation phase between company and worker representatives requiring that the administrative authority permit the dismissal. But based upon the 2012 reforms, it is only required that both parties act in good faith, with the agreement no longer being an indispensable element for dismissals. Today, the authority is limited to supervising the collective dismissals negotiation procedure, issuing warnings or recommendations that do not stop the final decision of the employer. Even should this decision be appealed before labour courts, it may still be in effect as of the date determined by the employer.

Below is a brief (non-exhaustive) analysis of the main reforms that have taken place in regards to dismissal and termination of work contracts in the reforms of 2010, 2012 and 2013.

2. Disciplinary dismissal

One of the main problems of the legal regulation of the termination of work contracts in the Spanish system is the abuse occurring in regards to disciplinary dismissals. This is exclusively due to the worker's "serious and guilty" failure to fulfil duties of the work contract. Compensation, in the case of dismissals being declared as unfair, was much higher than in the case of work contract termination prior

[4] Martín Jiménez, R., Despido por causas objetivas y expedientes de regulación de empleo, in volume "La reforma laboral de 2010", Thomson-Aranzadi (Navarra, 2010), p. 555.

to the 2012 reforms: 45 days of salary per year of work in the case of unfair termination, as opposed to 20 days of salary per year in case of objective work contract termination. Thus, the use of disciplinary dismissal resulted in higher costs for companies, since compensation was higher than in the case of objective work contract termination and due to the procedural salaries that the worker had the right to collect as of the date of the dismissal until the sentence declaring its invalidity. Nevertheless, this situation had been resolved through the so called "express dismissal", allowing employers to avoid paying these procedural salaries when, from the onset, they acknowledge the unfairness of the dismissal and pay the corresponding compensation, thus avoiding legal proceedings.

This procedural simplification and the saving of economic costs led to the channelling of most individual work contract terminations through express dismissals, even those that were not caused by serious and guilty failure to fulfil contract duties but, rather, had economic, technical, organizational or production causes that were really objective terminations of the work contract. Even though compensation prescribed for express dismissals had higher employer costs, it avoided a relatively lengthy judicial process due to the inaccurate and imprecise definition of objective causes of work contract termination, making it difficult to prove the cause and, thus, the validity of the work contract termination.

Paradoxically, the principal legal reforms agreed upon in regards to disciplinary dismissal did not attempt to reduce the number of dismissals, but to lower their cost. Thus, the reforms focused on two main elements: the elimination of procedural salaries and the reduction of compensation costs for improper disciplinary dismissal.

A) Procedural salaries

In order to avoid abuses in this area, RDL 3/2012 –and its subsequent Act 3/2012– suppressed express dismissals by eliminating procedural salaries in dismissals declared by the courts to be improper, when employers opt to terminate work contracts. In other words, procedural salaries will only be paid under three situations: when the dismissal is declared null (Article 55.6 ET), when it is declared unfair and the employer opts for worker readmission (Article 56.2 ET), or when the worker is a workers' representative, both when opting for contract termination or for company reincorporation (Article 56.4 ET).

B) Reduction of the compensation for unfair dismissal

The goal of reducing costs derived from dismissals was also achieved through the lowering of the compensation paid by employers who make unfair dismissals. If said compensation was previously established at 45 days of pay per year of service, with a maximum of 42 months, Act 3/2012 lowered it to 33 days of salary per year of service, with a 24 month limit. The 45 days of pay per year compensation had been in enforcement since 1980[5]. On the other hand, the 33 days of pay per year compensation was only stated as an exception for the termination of a specific contract: the indefinite contracting encouragement contract, incorporated into Spanish legislation in 1997[6], which disappears with this reform. In contrast to what happened in previous reforms, in this case a new contractual mode with a lower compensation for dismissal is not created, but the decrease in compensation is applied generally to all work contracts[7].

Even when the Spanish system does not acknowledge at-will employment, but only dismissals justified exclusively by one of the causes indicated in the Article 54 ET[8], it is possible to lay off a worker

[5] Established this way in the Act 8/1980, 10th March, of the workers' statute.

[6] Added by Act 64/1997, 26th December, which regulates incentives in matters of Social Security and fiscal character for the encouragement of indefinite contracting and employment stability.

[7] Goerlich Peset, J.M. New perspectives in matters of compensation and other effects linked to the termination of the work contract, in "La reforma laboral de 2012: nuevas perspectivas para el Derecho del Trabajo", La Ley (Madrid, 2012), p.522.

[8] According to the referred Article 54 of ET, the following are causes of disciplinary dismissal: "1. The work contract can be terminated by decision of the employer, by a dismissal based on a serious and guilty incompliance by the worker. 2. The following are considered contractual incompliance: a) Repeated and unjustified absence from work or lack of punctuality. b) Indiscipline or disobedience at work. c) Verbal or physical offenses towards the employer or co-workers or their relatives that

without justifying any of these causes, in exchange for compensation due to unfair dismissal. After the 2012 reforms, this possibility remains but now has a lower employer cost, with decreased compensation being paid to employees.

Nevertheless, this rule only applies to those contracts signed after 12 February, 2012, the effective date of the 2012 reform. For contracts signed prior to this date, a compensation of 45 days of pay per year of service before that date and 33 days of pay per year after this date will apply.

3. Contract termination for objective causes

The scarce use of this contractual termination modality in favour of the excessive inclination towards the unfair disciplinary dismissal has resulted in an attempt to define and determine the causes producing these terminations. The purpose of this measure is to reduce the judicial role and to eliminate opportunity judgments made by judges. According to the preamble of RDL 3/2012 and its subsequent Act 3/2012, judges were to limit their decisions to determining whether or not the indicated causes exist, without considering the reasonability of the measure.

A) Redefinition of the causes

The 2010 reforms offer a new, more concrete and specific wording of the causes for termination, especially those of an economic, technical, organizational and productive nature, in order to provide increased certainty for both workers and employers, as well as for the jurisdictional organs in charge of determining the existence of these causes. Prior to these reforms, termination due to economic causes was believed to contribute to effectively "overcoming a negative economic situation". At the same time, technical, organizational and production causes required termination to contribute to "guaranteeing the viability of the company"

With the 2010 reform, the reference to "foreseen" losses was introduced, which meant no longer considering only the present economic situation, but also including both the current negative economic situation as well as future and foreseen situations[9].

The 2012 reforms modified the objective causes of termination, aiming to offer increased objectivity in their assessment and lowering the degree of judicial interpretation.

a) Economic, technical, organizational or production causes

This modification has been particularly intense in regards to the definition of "economic causes". Prior to the 2010 reform, the termination of a contract based on economic causes had to "contribute to overcome a negative economic situation" or "overcome difficulties that prevent the proper operation of the company". In the case in which said cause was not fully proven in trial, the agreed termination would be declared invalid.

After the 2010 reform, it is no longer required that the termination contribute to overcome a negative economic situation, when the data provided shows the existence of a negative economic situation. Consequently, it is sufficient for this situation to exist. Nevertheless, it does not define what is to be understood as a negative economic situation, as this does not only refer to economic losses occurring in the company over the past years. It also acknowledges the existence of "current or foreseen losses" as well as the "persistent decrease of the level of income that can affect the viability of the company".

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cohabit with them. d) The transgression of the contractual good will, as well as the abuse of trust in the labor. e) Continuous and voluntary lowering in the efficiency of normal or agreed word. f) Habitual inebriation or drug addiction if they negatively influence work. g) Racial, ethnic, religious, ethical, age, handicap or sexual orientation harassment, and sexual harassment towards the employer or co-workers.

[9] Gárate Castro, J. *Lecturas sobre el régimen jurídico del contrato de trabajo*, cit., pág. 252.

After the 2012[10] reforms, the requirement that the current or foreseen losses, or the persistent decrease in the company's income level, affect its "viability or ability to maintain the employment volume" has been eliminated. Similarly, it is no longer required that "the company has to credit the alleged results and justify that the reasonability of the decision of the termination to preserve or favour its competitive position in the market can be inferred from them"[11]. After the 2012 reforms, the existence of a "persistent decrease in the level of revenue or sales" is sufficient, and this is agreed to occur "after three consecutive terms"[12].

b) Absenteeism dismissals

After the labour reforms of 2012, the level of general staff absenteeism is no longer considered[13], as it considered complex interpretative problems, in favour of the use of individual worker absence control. In this way, Article 52.d), permits the termination of the contract "due to work absences, even if justified but intermittent, reaching 20% of the working days in two consecutive months and if the total of absences in the previous twelve months reaches 5% of the working days, or 25% in four, non-consecutive months over a 12-month period". The goal of this cause of termination is to combat absenteeism and to allow employers to get rid of workers that are repeatedly absent over short periods of time.

No longer considering the general level of staff absenteeism, which generated interpretation problems, thus simplifies the use of this cause of termination.

c) The lack of worker adaptation to modifications included in the work post

It only means a formal adaptation of Article 52.b) ET to the former reality[14]. In this way, the reforms introduced in Act 3/2012 specifically state the company's requirement to offer workers training, upon introducing modifications in their work post, prior to proceeding with contract termination. As an aside, the time dedicated to this worker training is considered to be work time, based on the 2012 reform.

d) Lack of budget assignments

The Act 3/2012 also added new wording to Article 52 e) ET in order to permit the termination of temporary work contracts that are directly funded by non-profit organizations to carry out specific plans and public programs, without stable economic resources and financed by the public administration, or annual out-of-budget plans resulting from external revenue with a final character, due to the insufficiency of the corresponding assignments for the maintenance of said contract. These measures may

[10] According to the new wording of Article 51.1 ET provided by RDL 3/2012 and Act 3/2012, it is understood that there are economic causes "when there is a negative economic situation, in cases such as the existence of current or foreseen losses, or the persistent decrease of the normal level of revenue or sales. In any case, it will be understood that the decrease is persistent if during three consecutive terms the level of normal revenue or sales of each term is lower to that registered for the same term the previous year".

[11] This way we surpass the reference to "always historic or past (in the best of the present cases) economic results" that, according to Martín Jiménez, R. (La reforma laboral de 2010, Thomson Reuters, Navarra, 2010, p. 566), characterized the configuration of economic circumstances in the 2010 reform.

[12] This reference prevents the merely occasional or short term negative situation from being considered a negative economic situation (Gárate Castro, J., *Lecturas sobre el régimen jurídico del contrato de trabajo*, cit., pág. 252). According to the author, even when the negative economic situation is persistent, the intensity of the decrease in revenue or sales is not irrelevant, being this a situation that should be looked into by the judicial body.

[13] According to the previous wording based on Article 52.d) ET of the 20th additional disposition of the Act 35/2010, the work contract may be terminated "due to work absences, even if justified but intermittent, reaching 20% of the working days in two consecutive months, or 25% in four non-consecutive months in a 12-month period, if the total absenteeism index of the workplace staff is over 5% in the same periods of time."

[14] As Blasco Pellicer, A. (La extinción del contrato de trabajo en la reforma laboral de 2012, Tirant lo Blanch, Valencia, 2012, p. 121), states "even if in the previous rule the employer was not legally forced to provide reconversion or professional advancement courses" he was not relieved of having to provide formation for the worker to adapt to the modifications, and "now, as it has been pointed out, formation becomes compulsory".

be applied to personnel with work contracts in public administration services, but not to civil servants, whose contracts are ruled by the state legislation[15].

B) Flexibility of formal requirements

The 2010 reforms reduced the period of prior notice for termination due to economic causes from 30 to 15 days. Nevertheless, the most important modification as far as the formal requisites are concerned is the disappearance of the invalidity of the termination of the objective dismissal due to formal causes. Based on the 2010 reform, as is the case with disciplinary dismissals, non-fulfilment of the formal requirements may lead to the unfairness, and not nullity, of the termination.

4. Collective dismissals

The regulation of collective dismissals in Spain has suffered several changes, especially as a result of the 2012 and 2013 reforms, which have affected both the causes and the procedures followed in determining the dismissal and how to appeal it. The relevance of these modifications has led them to be considered "the central nucleus of the reform in the area of contract termination"[16]. Still, the evolution of the regulation of the collective dismissal procedure has been particularly intense over recent years. The purpose of objectifying and meticulously specifying the meaning of each of the causes behind the collective dismissals, to reduce the courts' margin of manoeuvre, already appeared clearly in the reform that was introduced by RDL 10/2010 and the later Act 35/2010, even if it was later to be intensified with the 2012 reforms[17].

Along with the modification of Article 51 ET, introduced both by RDL 3/2012 and the Act 3/2012, RD 1483/2012, 29th October, was also published. It approves the ruling on procedures of collective dismissal, contract suspension and working time reduction[18].

Below are some of the main points related to the procedure and effects of collective dismissals:

Procedure:

Spanish regulation of collective dismissals, covered mainly in Article 51 ET, is in compliance with Directive 98/59/EC, 20th July, including Directive 75/129/EEC, 17th February, subsequently modified by Directive 92/56/EEC 24th June.

a) Disappearance of administrative authorization. One of the central aspects of the 2012 labour reform is the elimination of administrative authorization, ending the administrative procedure referred to as "*expediente de regulación de empleo*" (ERE, employment regulation dossier), which was considered to be slow, bureaucratic, interventionist and excessively lengthening the time of the dismissal process, making it ineffective[19]. Now this control is taken to court, through a procedure whose regulation offers multiple doubts (art. 124 LJS). With the 2010 reform, the labour authority maintained the ability to oversee the definitive content of the measures agreed upon in the consulting period and, consequently, the ability to

[15] Alfonso Mellado, C.L. Despido, suspensión contractual y reducción de jornada por motivos económicos y reorganizativos en la Administración Pública, Bomarzo, Albacete, 2013.

[16] Blasco Pellicer, A., *La extinción del contrato de trabajo*…, cit., p. 29. According to this author "In this way, both of the deficiencies of the traditional system of collective regulation of employment are acted on. Firstly, the deficient configuration of causes and their functioning acts as a measure of assessment of the company decision; and, in second place, it acts on a procedure that may be considered slow, bureaucratic, and that allowed for the certainty of goodwill, or lack of thereof, of the company measure to be elongated so much in time that, in many occasions, made it inefficient and distorting".

[17] For more information, see Gárate Castro, J., *Lecturas sobre el régimen jurídico del contrato de trabajo*, Netbiblo, A Coruña, 2012, p. 251.

[18] This, at the same time, is completed by RD 1484/2012, 29 October, on the economic contributions to be made by companies with benefits that carry out collective dismissals affecting workers of fifty years or more.

[19] Blasco Pellicer, A. Nuevas perspectivas en materia de despido colectivo: aspectos procedimentales, in "La reforma laboral de 2012: nuevas perspectivas para el Derecho del Trabajo", La Ley, (Madrid, 2012), p. 455.

permit or not allow the collective dismissal procedure[20]. After the 2010 reform, the requirement of prior administrative authorization was eliminated. The labour authority now has only a mediating role in the negotiation of the collective dismissal, and "will watch for the effectiveness of the consulting period, being able, if needed, to issue warnings and recommendations that will not result in any case in a standstill or the stoppage of the procedure" (art. 51.2 ET). Similarly, the labour authority may appeal the dismissal when detecting deceit, coercion or the unreasonable exercising of rights during the negotiation procedure.

b) Negotiating procedure. The collective dismissal decision must come after a period of consultation with the workers' representatives in the company, which should be in regards to a specific issue (art. 51.2 ET). Before 2010, the negotiation period between company and workers' representatives did not need to have a specific content, but only required that measures be taken to reduce the effects of the ERE. With the 2010 reform, it was established that the consulting period must consider "the causes that originate the expedient and the possibility of avoiding or reducing its effects, as well as with the measures that are needed to reduce its consequences on the affected workers, as are reassignment measures that could be taken through authorised reassignment companies or formative and professional recycling actions allowing for improved employment possibilities, and to enable the continuity and viability of the project" (Article 51.4 ET). After the 2010 reform, it is stated that the consulting with the legal workers' representatives "should be, at least, about the possibilities of avoiding or reducing collective dismissals and reducing their consequences by using social support measures, such as reassignment measures or formative and professional recycling actions for better employment possibilities" (Article 51.2 ET)[21].

In the same way, with the use of agreements in the consulting period we can set permanence priorities for people with family duties, people older than a certain age or handicapped workers, as well as for the legal or trade union representatives. In companies with more than 50 workers, collective dismissals must have plans of viability and reassignment of the workers.

The legislator of 2012 considers the period of negotiation with the workers' legal representatives to be a central aspect of collective dismissals, so special attention is given to the situation of the companies, moreover small and micro companies which have no legal representation. Thus, even if before 2010 the absence of legal representatives in the companies was not contemplated when dealing with the negotiation procedure during the consulting period, this was fixed after the 2010 reform, and remained in effect after the 2012 reforms. This final reform introduced, for companies with no legal representation considered the possibility of forming an "ad hoc" commission made up of 3 representatives elected among trade unions or the company workers.

c) Other aspects that have been recently modified include the following:

The viability of the ERES in the public sector for technical, organizational, production or economic (defined *ad hoc*) causes is acknowledged.

Companies with benefits and more than 100 workers that lay off workers over the age of 50 years old have to make an economic payment to the Public Treasury.

The responsibility of the *Fondo de Garantía Salarial* (FOGASA, salary Guarantee Fund) is limited to a part of the compensations when redundancies occur in small and medium companies having under 25 workers. For that it is also necessary for the redundancy to have been declared improper. On the other hand, FOGASA does not take any responsibility for compensation corresponding to dismissals that are declared improper in conciliation or by judicial sentence. This implies an increase in the cost of the dismissal for the company[22], as it will have to pay for the compensation in advance and later claim

[20] For Mercader Ugina, J.R. y de la Puebla Pinilla, A. (*Los procedimientos de despido colectivo, suspensión de contratos y reducción de jornada*, Tirant lo Blanch, Valencia, 2013, p.148): "we are, this way, facing an Administration that facilitates, in procedure, the adoption of a private decision with the assurance of the consulting period and the presentation of public and private documents that, eventually, would justify the decision. After that the question turns into a clearly judicial one, that is, precisely, the one that will have to assure the correct operation of this institution".

[21] To Mercader Ugina, J.R. y de la Puebla Pinilla, A., *Los procedimientos de despido colectivo, suspensión de contratos y reducción de jornada*, Tirant lo Blanch, Valencia, 2013, p. 143), "the consulting period has to take place under true will of dialogue, looking for the achievement of agreement in each and all circumstances affecting the proposed measure". For more, see STSJ Cataluña de 26 de junio de 2012.

[22] Sempere Navarro, A.V. y Martín Jiménez, R., "Claves de la reforma laboral de 2012", 2ª edición, Thomson-Aranzadi (Navarra, 2012), p. 257.

the corresponding part from FOGASA. In the same way, the compensation responsibility of FOGASA in case of the work contract for economic and similar causes is reduced from triple to double the amount of minimum wage (RDL 20/2012, art. 33.1 ET).

d) Disagreement solution: A new procedural modality for appealing collective dismissals is created (art. 124 LJS), at the same time that the addition in collective agreements of out-of-court procedures (conciliation, mediation or arbitration) is strengthened, in order to solve the disagreements that might come about during the consulting period, in an attempt to avoid the need to go to court.

If an agreement is come to during the consultation period, the employer will send a copy to the administrative authority, which may appeal the same if it considers that the agreement has been reached in error, deceit, coercion or abuse of rights, or when the entity administrating the compensation for unemployment informs them that the agreement may attempt to wrongfully obtain compensation. (Article 51.6 ET).

If an agreement is not reached during the period of consultation, the employer will communicate the final decision of collective dismissal to the labour authority and the workers' representatives, stating, among other things, the identity of the affected workers, the time the dismissal will take place and other social support measures that could be agreed on. This company communication may be appealed via a special procedural modality of collective dismissal regulated by Article 124 LJS[23], if contested by the workers' representatives; through the office process regulated by Articles 148 and following LJS, if contested by the labour authority; or through the process of individual work contract termination when, in the absence of an appeal by the previous two, it is presented by the affected workers in order to appeal their own dismissals (Articles 120-123 LJS).

[23] Maneiro Vázquez, Y. La nueva modalidad procesal de despido colectivo tras la reforma laboral de 2012, Actualidad Laboral, nº 3, 2013.

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

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

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

1. Introduction

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

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positive action in EU law specifically in the case law of the Court of Justice of the European Union –hereinafter, CJEU–. In addition, the interpretative value of case law is discussed, along with clashes with the national context. Attention is paid to the controversial *Kalanke* ruling[1] which was clarified and relaxed in *Marschall.*[2] Other landmark cases such as *Badeck*,[3] *Abrahamsson*[4]*, Lommers*[5]*, Briheche,*[6] *Commission versus Greece*[7]*, and Roca Álvarez*[8] –questioning the scope of EU provisions on positive action measures– are also assessed.

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

2. Different perspectives of the equality principle

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

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

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

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

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

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

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

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

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

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

[8] C-104/09 [2010].

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

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

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

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

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

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

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

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

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

3. Historical background and conceptual framework

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

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

In the U.S., positive action was first developed in regards to the fight against racial discrimination in education (Brest, 2000).[15] In *Brown*[16], for the first time, the Supreme Court proclaimed the illegality of racial segregation in education. This decision was a turnover in U.S. Supreme Court case law and in U.S. federal policy. As a result of this judgment, the federal government passed several Executive Orders[17] that suggested the need to adopt affirmative action measures in favour of Afro-American citizens. Then, Title VII of the Civil Rights Act 1964[18], while prohibiting the racial and sexual discrimination (section 703 a), recognised the admissibility of imposing positive action plans (706 g). The legitimacy of this type of measures, in the private sector and on a voluntary basis, was recognised in the *Griggs*[19] Supreme Court judgment. Since then, public bodies and private companies have used these plans with the goal of eradicating racial segregation. From the field of racial equality, these measures have been extended to also combat sexual segregation. *Johnson*[20] is the most relevant case, in which affirmative action measures in favour of female workers were considered to be legal. In

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

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

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

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

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

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

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

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

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

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

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

[21] *Lommers,* n. 6 supra.

Both types of measures, the equal opportunities policies and the positive action measures *strictu sensu* –preferential treatment–, have been considered by the CJEU for inclusion in the 'measures providing for specific advantages in order to make it easier for the under-represented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers'. Nevertheless, when addressing the legitimacy of equal opportunities policies that restrict advantageous treatment to female workers regarding entitlement to child-care leave, breastfeeding leave, extension of period of services per child, CJEU case law has evolved from a more permissive policy to a stricter scrutiny of the justifications behind the exclusion of male workers from the entitlement to these rights.[22]

4. Positive action measures in European Union Law

4. 1. The EU regulation of positive action measures

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

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

The acknowledgement of the legitimacy of pursuing substantive equality by secondary legislation has recently been reflected in primary EU law. Article 157 TFEU declares: "With a view to ensuring full equality in practice between men and women in working life, the principle of equal treatment shall not prevent any Member State from maintaining or adopting measures providing for specific advantages in order to make it easier for the under-represented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers." The use of the neutral expression 'under-represented sex' may be criticized as the article failed to refer to women as the historically disadvantaged group,

[22] Briheche, n. 6 supra, Commisssion v. Greece, n. 7 supra, and Roca Álvarez, n. 8 supra.
[23] O.J. L 039, 14/02/1976 0040 - 0042.
[24] O.J. L 204, 26/07/2006 0023 - 0036.
[25] O.J. L 331, 19/12/1984 0034 - 0035.

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

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

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

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

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

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

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

[27] Kalanke, n. 1 supra.

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

After the uncertainty regarding the legitimacy of quota systems and other positive action measures in favour of women in employment created by the *Kalanke* ruling, the European Commission approved a Communication[28] intended to soften the effect of that judgment by proposing an amendment to Directive 76/207/EEC to reflect the legal situation after *Kalanke* and to clarify that despite rigid quotas, other positive action measures were authorized by EU law.

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

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

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

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

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

[30] Badeck, n. 3 supra.

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

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

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

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

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

[31] Abrahamsson, n. 4 supra.

[32] Lommers, n. 5 supra.

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

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

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

Since 2010, the European Commission has adopted several new initiatives to promote gender equality for women and men such as the Women's Charter and the Strategy for equality between women and men 2010-2015.[37] These actions aim to give a new impulse to promoting more women in decision-making positions. For instance, the Commission monitors progress made towards achieving the 25% female target in top-level decision-making positions in academia, where studies have shown that women have lower promotion probabilities than men (Groeneveld, Tijdens, and Van Kleef, 2012).

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

This initiative dealing with enhanced equality for women and men in decision making at an enterprise level is also supported by the European Parliament in its resolutions of 6 July 2011[39] and 13 March 2012.[40]

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

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

[33] Case184/83, Hofmann v Barmer Ersatzkasse, [1984] ECR I-03047.

[34] Briheche*,* n. 6 supra.

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

[36] Roca Álvarez, n. 8 supra.

[37] COM(2010) 491 final.

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

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

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

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

Furthermore, the proposed Directive establishes a rule for sharing the burden of proof that is similar to the formula used by existing anti-discrimination and equal treatment Directives. It provides that, when an unsuccessful candidate of the under-represented sex establishes before a court "facts from which it may be presumed that that candidate was equally qualified as the appointed candidate of the other sex", then, it is up to the company to prove that it did not violate the rules established by the Directive for the selection of non-executive directors.

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

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

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

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

5. Conclusions

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

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

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

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

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

[41] Lommers, n. 5 supra.

[42] Briheche, n. 6 supra.

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

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

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