

# **BREAKING THE GLASS CEILING: GENDER IMBALANCE IN SPANISH CORPORATE BOARDS\***

*ROMPIENDO EL TECHO DE CRISTAL: DESEQUILIBRIO DE GÉNERO  
EN LAS JUNTAS DIRECTIVAS ESPAÑOLAS*

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## **Abstract**

*Gender discrimination is one of the greatest challenges faced by modern society. This paper focuses on positive action measures and, particularly, gender quotas, as tools aimed at breaking the so-called glass ceiling, assessing how this kind of measures have crystalized in our legal order. It also reflects on the delicate balance between the principle of equality and positive action, a thorny issue that has been addressed by our courts of law amidst great controversy. Likewise, it analyzes the different measures and policies implemented at national and European level in breaking the glass ceiling measuring their success in fostering gender balance in corporate boards.*

## **Resumen**

La discriminación de género es uno de los grandes retos a los que se enfrenta nuestra sociedad. Este ensayo se centra en las medidas de acción positiva y, en particular, las cuotas de género, como instrumentos dirigidos a romper el llamado techo de cristal, analizando cómo este tipo de medidas han cristalizado en nuestro ordenamiento jurídico. También reflexiona sobre el difícil equilibrio entre el principio de igualdad y la acción positiva, espinosa cuestión que ha sido abordada por nuestros tribunales con gran controversia. Asimismo, analiza las distintas medidas y políticas implementadas a nivel nacional y europeo con el objetivo de romper el techo de cristal, midiendo el éxito de las mismas en promover la igualdad de género en los consejos de administración.

**Keywords:** *glass ceiling, positive action, formal equality, substantive equality, gender quotas, corporate boards.*

**Palabras clave:** *techo de cristal, acción positiva, igualdad formal, igualdad material, cuotas de género, consejos de administración.*

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## 1. Introduction.

When Adolfo Menéndez, Counsel of the law firm Ontier, remembered José María Cervelló, he recalled one of the most famous scenes of *To be or not be*, directed by Ernst Lubitsch and arguably one of the best comedies of all times (Serraler, M., 2008).

In the film, Greenberg, a Jewish member of the theater company resisting the Nazis, delivers a modified version of Shylock's monologue from William Shakespeare's *Merchant of Venice*, insisting that both Jews and Christians are humans (“*Aren't we human? Have we not eyes? (...) If you prick us with a pin, don't we bleed?*”).

In Mr. Menéndez's words, this speech perfectly summarizes José María Cervelló's vision of the world and advocacy, whilst constituting a chant for equality. In this regard, he recalls that Mr. Cervelló argued that large law firms, despite their status as companies, must never forget that their primary objective is to defend people's freedom.

Clara de Campoamor, Spanish politician and one of the most prominent figures of Spanish feminism, declared in the debate regarding women suffrage held in the Spanish National assembly in 1931 that “*freedom is learned by practicing it*”. And while we are no longer in 1931 and decades have passed since Clara de Campoamor's intervention, we, as a society, still encounter situations where women are *de facto* less equal than men, paraphrasing George Orwell's last words in *Animal Farm*. Hence, we, lawyers, in our duty to defend freedom, as Mr. Cervelló would say, must also put a spotlight on discriminatory situations that have to be addressed.

Gender discrimination is one of the biggest challenges our society is facing. This discrimination is particularly acute when it comes to the presence of women in top management positions where, despite slow improvements, women are still uncommonly under-represented. For instance, only 6.6% of the CEO's of the world's largest companies are female (Zillman, C., 2019).

In this paper we will focus on positive action and, in particular, gender quotas, as tools destined towards breaking the so-called glass ceiling. First, we shall analyze the origin of these measures and their compatibility with the principle of equality. We shall also assess how have this kind of measures crystalized in our legal orders. In addition, we shall examine if European and Spanish Courts have been inclined towards a soft flexible approach towards the establishment of positive action and, in particular, gender quotas, or if, on the contrary, they have abided for a restrictive interpretation of their application.

Next, we will analyze what kind of measures have been implemented by Spain in breaking the glass ceiling and whether they have been successful in fostering gender balance in Spanish corporate boards. We shall also examine the Commission's proposal in this regard, which has recently been strongly supported by the Spanish government. Last but not least, we shall consider if gender quotas are a necessary measure for achieving gender balance in Spanish corporate boards.

## **2. Positive Action As A Necessary Tool To Achieve Material Equality.**

### **21. The Glass ceiling: a metaphor that needs to be smashed.<sup>1</sup>**

The term *glass ceiling* was first coined 40 years ago by management consultant Marilyn Loden during a panel discussion about women's aspirations (Vargas, T., 2018). The term outlived her creator and is widely used in society to describe the situation that women and other minority groups often face while climbing the corporate ladder to enter management positions. Thus, it can be defined as an invisible barrier to advancement simply due to gender, race or sexual orientation (Wirth, L., 2001,). In contrast to recognized barriers to career progression such as insufficient education or lack of work experience, barriers stemming from the so-called glass ceiling are often invisible and deeply rooted in cultures, societies, organizations, individuals and psychology, often working collectively to impede the progression of women or other minorities to managerial positions (Hymowitz, C. et al, 1986).

As Hilary Clinton put it in her address to the Democratic National Convention in 2008 after being defeated by Barack Obama in the race for the Democratic nomination:

*“Although we weren't able to shatter that highest, hardest glass ceiling this time, thanks to you, it's got about 18 million cracks in it and the light is shining through like never before”.*

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<sup>1</sup> This phrase was used as the title of an article written by Zoe Williams published in the Guardian the 27<sup>th</sup> of August 2016.

Thus, it is necessary to first recognize the *de facto* inequality in the access and development of a professional career for women when compared to men. Sadly, it is a situation that has been inherited from decaying conceptions about the role of men and women in society. Moreover, it is true that, although our society is slowly succeeding in overcoming these conceptions, this is not happening as swiftly and effectively as desirable for the group being discriminated against.

It is at this moment when legal intervention is required and positive action comes into play, meaning the implementation of special measures used to assist minorities in overcoming the obstacles and discrimination faced in modern society and, particularly, in employment. As outlined throughout the present paper, positive action is embedded in the Spanish legal order as an essential tool to achieve material equality and has also been endorsed by national and European courts. Nonetheless, this was only possible after several antagonistic decisions regarding the compatibility of positive action with the principle of equality.

## **2.2 Formal v. substantive equality.**

While defining the concept of equality, lawmakers have traditionally distinguished between formal and substantive equality. Formal equality is the view that, for real justice to materialize, people must be treated equally at all times (Barret, G., 2003). Thus, any discrimination or privilege is unacceptable even whilst considering personal characteristics that have been a source of discrimination in the past and still are such as race, gender, religion or sexual orientation. In contrast, substantive equality addresses the need for implementing measures that lead to equitable outcomes and equal opportunities for groups of people which have traditionally been marginalized and alienated from the public sphere, such as women (Cusack, S., 2009). The Convention on the Elimination of All Forms of Discrimination Against Women (**CEDAW**)<sup>2</sup>, adopted in 1979, was the first legal instrument ever to recognize the necessity of states to adopt appropriate measures to eliminate discrimination against women. In other words, the CEDAW introduced the concept of substantive equality into international law.

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<sup>2</sup> UN General Assembly, Convention on the Elimination of All Forms of Discrimination Against Women, 18 December 1979, United Nations, Treaty Series, vol. 1249. Article 4.1 of the CEDAW envisages “*Adoption by States Parties of temporary special measures aimed at accelerating de facto equality between men and women shall not be considered discrimination as defined in the present Convention, but shall in no way entail as a consequence the maintenance of unequal or separate standards; these measures shall be discontinued when the objectives of equality of opportunity and treatment have been achieved*”.

Legal orders throughout the world have differed in their recognition of the principle of equality. Some have drawn on a more formalistic approach of equality, ignoring the presence of discrimination within society and, thus, discarding any measure fostering substantive equality as discriminatory. For instance, as analyzed below, in the EU the recognition by primary law of positive action did not take place until 1997. Until then the European Court of Justice (ECJ) was embroiled in a slow process of interpretation regarding the legitimacy of positive action under community law, which certainly sparked controversy. In contrast, other legal systems have envisaged a statutory recognition of positive action, as a necessary tool of public authorities to counter discrimination.

In this regard, the Spanish Constitution (CE)<sup>3</sup> while recognizing formal equality in Article 14 CE, sanctions the implementation of positive action measures by public authorities (*ex* Article 9.2 CE). Thus, the Spanish Constitutional Court has resorted to this provision when having to rule on the legality of positive action measures, giving rise to a much less contentious debate than in other member states.<sup>4</sup>

### 2.3. Concept of positive action.

The concept of positive action embodies a wide range of meanings and embraces measures of varying intensity. Within this broad concept, in 1986 Christopher Mcrudden identified five basic categories of positive action (Mcrudden, C., 1986):

- (i) *Gender mainstreaming*: the reorganization, development and evaluation of policy processes so that a gender equality perspective is incorporated in all policies at all levels and stages.
- (ii) *Inclusive policies*: measures which are implemented based on neutral criteria such as unemployment, living in poor, deprived areas etc. instead of giving preferential treatment to social groups defined by personal characteristics such as gender, ethnicity or sexual orientation.
- (iii) *Outreach programmes*: providing information, support and training to under-represented groups to encourage their participation and inclusion in society (for

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<sup>3</sup> Constitución Española. Boletín Oficial del Estado, 29 de diciembre de 1978, núm. 311, pp. 29313 a 29424.

<sup>4</sup> For instance, constitutional reforms were required to move from a formal towards a substantive conception of equality in France, Belgium or Italy. Particularly, in France, Constitutional Law N° 99-569 of 8 July 1999 introduced a fourth paragraph to Article 3 of the French Constitution declaring that “*the law shall favor equality among women and men to have access to electoral mandate and hold elective office*” after the Constitutional Court had quashed a new law imposing electoral gender quotas (Tushnet, M. et al, 2013, p. 310).

- instance, public authorities may provide information on how to access certain public services in different languages to target their use by different communities).
- (iv) *Preferential treatment*: granting unconditional or conditional preference to under-represented groups in areas such as education, employment etc. **Unconditional** meaning that automatic access is granted to the applicant based only on their belonging to a particular social group while **conditional** preference involves other characteristics being taken into account such as qualifications (emphasis added).
  - (v) *Redefining merit*: redefine the criteria used by employers or educational institutions in analyzing applicants in such a way as to ensure greater participation from under-represented groups. For example, by reconceptualizing and rearranging certain criteria such as the need for working very long hours to adapt to the necessities of many female applicants with childcare responsibilities.

It is clear that positive action measures are as numerous as the forms they can take. Quotas, action plans setting quantitative targets and timelines, mainstreaming of gender equality in policy and decision making, financial support in the form of subsidies, as well as training and non-financial support (*i.e.* flexible working hours, childcare facilities, etc.) are all different ways in which positive action can be implemented according to the European Commission.<sup>5</sup>

Throughout this paper, we will primarily focus on preferential treatment measures (in particular, quotas giving priority to women with regard to employment). We will analyze their compatibility with EU law and the statutory interpretation undertaken both by EU courts and Spanish courts in this regard.

#### 2.4 Historical background of positive action.

Positive action (or affirmative action, as it is known in the US) was first developed in the US as part of the struggle against racial discrimination in education. The crucial milestone can be found in *Brown v. Board of Education*<sup>6</sup>, in which the United States Supreme Court issued a unanimous decision declaring that racial segregation in national public schools was unconstitutional, since it violated the Fourteenth Amendment guaranteeing equal

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<sup>5</sup> See European Commission, 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* (1996) COM (96) 88, final, 9-19.

<sup>6</sup> *Brown v. Board of Education* (347 U.S. 483, 74 S. Ct. 686, 98 L. Ed. 873).

protection (Hasnas, J., 2002). As a result of this landmark case, the federal government started passing several *executive orders*<sup>7</sup> as positive action measures favoring African-American citizens.

Similarly, the approval of Title VII of the 1964 Civil Rights Act followed, forbidding discrimination on the basis of sex as well as race in hiring, promoting and firing. The Supreme Court recognized the legitimacy of implementing positive action plans in the private sector to remedy racial segregation in *United Steelworkers v. Weber*.<sup>8</sup> However, positive action was not considered legal with regard to gender until ten years later in *Johnson v. Transportation Agency*.<sup>9</sup> In said ruling, the Supreme Court upheld a voluntary affirmative action plan that authorized consideration of an employee's gender as a factor to be taken into account to determine promotion. The plan was introduced as a temporary measure by the Santa Clara County Transportation Agency in certain job classifications in which women were clearly underrepresented. The Agency Plan provided that in making promotions within this traditionally segregated job classifications, the Agency could consider gender as a factor when concerning a qualified applicant.

Diana Joyce and Paul E. Johnson applied for a position as road dispatcher to which both were equally qualified. Ms. Joyce was the first woman to ever apply for that position. In application of the Plan, the position was offered to Ms. Joyce. Mr. Johnson then sued the company on the grounds that the Plan was discriminatory under Title VII of the 1964 Civil Rights Act. The Supreme Court held that giving preference in promoting women in employment categories where women had been historically alienated and underrepresented complied with the law and was not considered discriminatory as long as the women promoted fulfilled the position's requirements (Ramos Martín, N., 2014).

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<sup>7</sup> First, Executive Order 10925 (March 1961) was passed under President Kennedy's Administration required government contractors to "take affirmative action to ensure that applicants are employed and that employees are treated during employment without regard to their race, creed, color, or national origin". Shortly after, Executive Order 11246 signed by President Lyndon B. Johnson on September 24, 1965, which established requirements for non-discriminatory practices in hiring and employment on the part of U.S. government contractors. In 1967, the former was amended to include sex in its scope.

<sup>8</sup> *United Steelworks v. Weber*, 443 U.S. 193 (1979). In said case, Brian Weber was employed as a laboratory assistant at a chemical plant owned by Kaiser Aluminum and Chemical Corp (**Kaiser**). Kaiser had, as part of a collective agreement with the United Steelworkers of America, implemented an affirmative action program within their training program under which half of the positions in the program were reserved to black employees, even though the company had more white employees. Weber, a white employee, applied for the program and was passed over for a position as none were available for him. Weber sued the company in 1974, arguing this was illegal racial discrimination that violated Title VII of the Civil Rights Act. However, the court ruled that since the training program sought to eliminate the pattern of racial segregation and discrimination in employment but did not expressly prohibit white employees from advancing in the company, it was consistent with the intent of Title VII.

<sup>9</sup> *Johnson v. Transportation Agency*, 480 U.S. 616 (1987).



As we will address in more detail further on this paper, the ECJ took a very similar stance to the US Supreme Court in the *Marschall* judgment, which presented a striking resemblance to the *Johnson* case. Accordingly, it is important to note that, even taking into account the great differences between both legal traditions, courts in both jurisdictions were ready to uphold positive actions within certain limits and along similar lines. Interestingly, it is worth mentioning that different historical origins explain why positive action stemmed from race discrimination in the United States while the focus in the EU pivoted around discrimination based on nationality or gender (Van Gerven, W., 2005).

### 3. Positive Action Measures In The European Union.

#### 3.1 Legal Framework.

At the European level, the Charter of Fundamental Rights of the European Union (CFR)<sup>10</sup> recognizes equality as one of its pillars giving name to its Third Chapter. Primarily, Article 21 enshrines the principle of *non-discrimination* and Article 23 the right of *equality between women and men*. After the adoption of the Treaty of Lisbon on 1 December 2009, the CFR came into direct effect granting legally binding status to its provisions (*ex* Article 6 of the Treaty on European Union (TEU<sup>11</sup>)).

In this regard, positive action measures have been traditionally considered as an exception to the principle of equal treatment and, thus, seen with distrust by many voices in Brussels. However, the approval and implementation of several initiatives has paved out the way for the development of positive action measures in the EU. In particular, Council Directive 76/207/EEC of 9 February 1976 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<sup>12</sup> (Directive 76/207/EEC) was of utmost importance as it required member states to “*put into effect (...) the principle of equal treatment for men and women as regards access to employment*”, while Article 2 (4) recognized the

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<sup>10</sup> Charter of Fundamental Rights of the European Union, OJ C 326, 26.10.2012, p. 391–407.

<sup>11</sup> Consolidated version of the Treaty on European Union, OJ C 326, 26.10.2012, p. 13–390.

<sup>12</sup> Council Directive 76/207/EEC of 9 February 1976 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, OJ L 39, 14.2.1976, p. 40–42.

possibility of member states to pursue positive action. In spite of this, a conservative application of the principle of equal treatment came as a barrier to the application of this provision - some national measures implemented were challenged before the ECJ, leading to contradictory decisions that cast doubts about their compatibility with EU law.

In 1984, a Council Recommendation on the Promotion of Positive Action for Women proposed that member states adopt a positive action policy “*to eliminate existing inequalities in working life and to promote a better balance between the sexes in employment*”.<sup>13</sup> However, said recommendation constituted a soft law instrument with no binding effect towards member states and, regrettably, few advancements were made.

It was not until the Treaty of Amsterdam<sup>14</sup>, 20 years later, that a new provision was introduced into Article 141(4) TEC (now Article 157 TFEU<sup>15</sup>) which declared that “*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*” (emphasis added). For the first time, a source of primary law recognized the legitimacy of pursuing substantive equality through positive action measures.

The Treaty of Amsterdam made the elimination of gender inequality and the promotion of gender equality a central policy goal and an obligation for member states. Thus, by admitting positive measures that both “*prevent and compensate the TEC [TFEU] combines a compensatory and proactive approach that goes beyond the initial Equal Treatment Directive on merely “removing existing obstacles”*” (De Vos, M., 2007, p. 22).

Through the approval of Directive 2002/73 amending Directive 76/207/CEE<sup>16</sup>, the old Article 2(4) was deleted in favor of a reference to the positive action provision in the TEC (now TFEU). The former provision was replaced by an obligation for the Commission to adopt and publish a report establishing a comparative assessment of positive measures implemented by the member states pursuant to Article 157 TFEU every three years, on the basis on information provided by the member states. Likewise, a new Article 2(8),

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<sup>13</sup> Council recommendation of 13 December 1984 on the promotion of positive action for women (84/635/EEC) OJ L 331, 19.12.1984, p. 34–35.

<sup>14</sup> Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts, OJ C 340, 10.11.1997, p. 1–144.

<sup>15</sup> Consolidated version of the Treaty on the Functioning of the European Union OJ C 326, 26.10.2012, p. 47–390.

<sup>16</sup> Directive 2002/73/EC of the European Parliament and of the Council of 23 September 2002 amending Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working condition, OJ L 269, 5.10.2002, p. 15–20.

now Article 3 of the so-called *Recast Directive*<sup>17</sup>, provides that “*Member States may maintain or adopt measures within the meaning of Article 141 (4) of the Treaty [157 TFEU] with a view to ensuring full equality in practice between men and women*”, extending said provision beyond its original scope.

### **3.2. The concept of positive action in the case law of the European Court of Justice.**

#### **3.2.1 Compatibility of gender quotas with EU law: Interpretation by the European Court of Justice.**

##### **i) The principle of strict interpretation: the *Kalanke* ruling.**

Regarding positive action (and more specifically, gender quotas), *Kalanke*<sup>18</sup> was the first landmark decision issued by the ECJ interpreting the 1976 Equal Treatment Directive. In the former, the Court had to assess a quota system introduced by a German regional law which favored women if the candidates opting for a particular position were in a tie break situation and, therefore, equally qualified. The ruling came as a shock as the Court declared national measures which give absolute and unconditional priority on a promotion to women as contrary to EU law (Numhauser-Hening, A., 2006, p.6). The Court admitted the validity of positive action measures destined to fight inequalities as long as these had a precise and limited purpose (for instance, measures to improve the ability of women to compete and develop a professional career).

Critics argued that the German system was way off giving absolute and unconditional priority to women and, thus, should not be declared as contrary to sections 1 and 4 of Article 2 of Directive 76/207/CEE. However, the fact that the German system involved (i) a soft rather than rigid quota (priority was given to women only if equally qualified); and (ii) was intended to overcome disadvantages faced by women and the perpetuation of past inequalities, as a result of which few women held senior posts, was insufficient for the Court to consider the rule as in line with Article 2(4) of said Directive.

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<sup>17</sup> Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation, OJ L 204, 26.7.2006, p. 23–36.

<sup>18</sup> Judgment of the ECJ of 17 October 1995, *Kalanke v. Bremen*, case C-450/93, ECLI:EU:C:1995:322.

The *Kalanke* decision caused enormous controversy as it created great uncertainty with regard to positive action, prompting a flood of criticism not only from academics or women's interest groups but also from the Commission itself. In the hope of clarifying the legal situation, the Commission approved a Communication<sup>19</sup> intended to soften the effect of the judgment, listing positive action measures that did comply with EU law (Sastre Ibarreche, R., 2004, p.15). In relation to quotas, the Commission, by referring to the US Supreme Court approach to positive action and to human rights law, expressly stated that the only type of quota system which is unlawful is one which is completely rigid and does not leave open any possibility to take account of individual circumstances (implying that a soft quota system, as envisaged in *Kalanke*, was lawful). In other words, member states and employers were given license to resort to all other forms of positive action, including soft quotas.

**ii) The *Marschall* ruling: the European Court of Justice's tipping point towards gender quotas.**

The reasoning applied by the Court was later softened in *Marschall*.<sup>20</sup> In this case, the ECJ noted that even when candidates are equally qualified for a job, male candidates are often chosen in preference to female candidates mostly due to stereotypes and prejudices referring to the role and capabilities of women in the workplace. In light of these issues, the Court asserted that, unlike in *Kalanke*, a national rule which “*provides for male candidates, who are equally as qualified as the female candidates, a guarantee that the candidatures will be the subject to an objective assessment which will take account of all criteria specific to the individual candidates*”, even as to override the priority given to female candidates “*where one or more of those criteria tilts the balance in favor of the male candidate*”, as compatible with EU law.<sup>21</sup> Thus, the ECJ distinguished the rule in *Kalanke* from the *Marschall* rule by reference to its saving clause (the male candidate could be exceptionally chosen, even if the female candidate was equally qualified, after taking into account all personal circumstances of all applicants). Hence, a softer quota

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<sup>19</sup> European Commission, 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* (1996) COM (96) 88, final, 9-19.

<sup>20</sup> Judgment of the ECJ of 11 November 1997, *Hellmut Marschall v Land Nordrhein-Westfalen*, case C-409/95, ECLI:EU:C:1997:533.

<sup>21</sup> *Ibid*, paragraph 33.

which allowed for individual consideration of circumstances would fall within the existing terms of Article 2(4) (Craig et al, P., 2015).

**iii) Treaty of Amsterdam.**

After the Treaty of Amsterdam, positive action was recognized for the first time in primary law. However, the rulings of the ECJ rendered after the enactment of this new regulation fell well short of the expectations generated, since the reasoning of the Court remained virtually unchanged.

The issue was once again addressed in the *Badeck* case, where the ECJ reaffirmed the compatibility of positive action with EU law as long as it did not automatically and unconditionally give priority to women when (i) women and men are equally qualified, and if (ii) the candidates are subject to an objective assessment which takes into account their specific personal circumstances.<sup>22</sup> Thus, a less restrictive approach was developed by the Court towards strict quota systems as it recognized that a national rule which gives priority to female candidates in promotion and training, in sectors in which women are under-represented, complied with EU law, provided that the candidates have equal qualifications and the objectives pursued by the rule were necessary for complying with the binding targets in the women's advancement plan.

Finally, in *Abrahamsson*<sup>23</sup> the Court was asked to consider a national rule which unlike previous cases, enabled preference to be given to the candidate of the under-represented sex who, although sufficiently qualified, was not as qualified as candidates of the opposite sex. The Court confirmed that the Swedish administrative practice according to which the rule of preference for the underrepresented sex is applied when the candidate possess *equivalent or substantially equivalent* merits complies with EU law. However, the Court warned that granting preference to female candidates who had sufficient but not equal qualifications was going too far and, therefore, contrary to EU law.

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<sup>22</sup> Judgment of the Court of Justice of 28 March 2000, *Badeck*, case C-158/97, ECLI:EU:C:2000:163.

<sup>23</sup> Judgment of the Court of Justice of 6 July 2000, *Abrahamsson*, case C-407/98, ECLI:EU:C:2000:367.

**iv) Conclusion.**

Given these considerations, quota systems will be compatible with EU law only if: (i) they are genuinely designed to reduce *de facto inequalities* and compensate for career disadvantages, and (ii) are based on transparent and objective criteria which can be reviewed. Thus, the ECJ has followed a conservative approach which limits the scope of quota systems and which member states, such as Spain, are bound to follow. Hence, any national measure imposing quota systems must comply with the ECJ's requirements.

**3.2.2 Positive action concerning the reconciliation of women's professional and personal life: the delicate balance between positive action and gender stereotyping.**

In addition to the abovementioned rulings dealing with the establishment of quotas (whether flexible or strict) in the hiring and training of women, the Court had also the opportunity to redefine the concept of positive action in relation to other measures destined to reconcile work and family life exclusively directed towards women. Notably, in *Lommers*<sup>24</sup>, *Briheche*<sup>25</sup>, *Roca Álvarez*<sup>26</sup> or *Maïstrellis*<sup>27</sup>, the Court considered positive action measures as contrary to the principle of equal treatment when said national rules benefitted women based primarily on their gender and past discrimination but those

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<sup>24</sup> Judgment of the Court of Justice of 19 March 2002, *Lommers*, case C-476/99, ECLI:EU:C:2002:183. In this case, the Court analyzed the legitimacy of a national rule that made available nursery places to female officials while male officials could only access these services in cases of urgency.

<sup>25</sup> Judgment of the Court of Justice of 19 June 2004, *Briheche*, case C-319/03, ECLI:EU:C:2004:574. In the former, the Court held that a provision under which an age limit for obtaining access to employment in the public sector is not applicable to certain categories of women (widows) but did apply to men in the same situation was contrary to Article 2(4) of Directive 76/207. In the same vein, the Court asserted that the measures could not be justified under Article 141(4) EC as they were considered disproportionate.

<sup>26</sup> Judgment of the Court of Justice of 30 September 2010, *Roca Álvarez*, ECLI:EU:C:2010:561. In the former, the national measure was considered contrary to EU law and its purpose of achieving substantive equality because it excluded husbands of self-employed women from the possibility of taking paternity leave. According to the Court, a measure of this kind would limit the self-employed activity of the mother, bearing the burden resulting from the birth of her child alone, without the child's father being able to ease that burden.

<sup>27</sup> Judgment of the Court of Justice of 16 July 2015, case C-222/14 *Maïstrellis*, ECLI:EU:C:2015:473. In the former, the Court considered a measure which prevented a male judge from taking paid parental leave if his wife is not employed, unless she was unable to take care of the child due to a serious injury or illness. The ECJ declared that such measure far from ensuring full equality in practice between men and women in working life, reinforced traditional gender roles, overburdening women with caretaking duties.

benefits were not applicable at all or in the same conditions to men because of their gender.

The milestone case which crystalized this approach was *France v. Commission*.<sup>28</sup> In this case, the Court considered special rights granted systematically to women in collective agreements were too general to be considered positive action.<sup>29</sup> Thus, the Court declared that the measures at stake would be discriminatory against non-beneficiaries (men) and risked perpetuating traditional gender roles, confining women into caretaking roles and men into breadwinning.

In all these cases, the Court shares the same reasoning: the national rules are considered as contravening the principle of equal treatment and, thus, the benefits aimed to favor women must also be applied to men facing the same circumstances.

As follows, it is interesting to observe the delicate balance stemmed from the ECJ's case law concerning positive action, pursuing gender equality but at the same time fighting traditional stereotypes which can hinder this aim.

## **4. Positive Action Measures in Spain.**

### **4.1 Legal framework.**

The principle of equality is enshrined in Article 14 CE which declares that:

*“Spaniards are equal before the law and may not in any way be discriminated against on account of birth, race, sex, religion, opinion or any other personal or social condition or circumstance.”*

The cited provision only recognizes formal equality as a neutral principle of non-discrimination. Besides, substantive equality is recognized in Article 9.2 CE as *“the responsibility of public authorities to promote conditions ensuring that freedom and equality of individuals and of the groups to which they belong are real and effective, to*

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<sup>28</sup> Judgment of the Court of Justice of 25 October 1988, *Commission v France*, case 312/86, ECLI:EU:C:1988.

<sup>29</sup> *Ibid*, para. 8. These special rights consisted, among others, in longer maternity leave, lower retirement age, subsidies in relation to childcare, days off when children are ill, etc.

*remove the obstacles preventing or hindering their full enjoyment, and to facilitate the participation of all citizens in political, economic, cultural and social life*” (emphasis added). In this vein, Article 9.2 CE serves to enrich and complete the content of Article 14 CE by aiming to achieve real and effective equality through the removal of any obstacle that might impede reaching that purpose. Hence, this has allowed the adoption of positive action by implementing measures that are required to correct situations of social inequality affecting underprivileged groups, which might be invisible from the prism of formal equality (Álvarez Conde, E. et al, 2016).

Equally, Article 9.2 CE served as the legal basis for the introduction and implementation of positive action, which has been gradually reinforced by the Spanish Constitutional Court, characterized for implementing a rather progressive approach towards the interpretation of this provision, a long time before Luxembourg, as indicated below (Gómez, G., 2008).

In addition to article 9.2 CE, Article 11 of Organic Law 3/2007 of 22 March 2007, on Effective Equality between men and women (**Law on Effective Equality**)<sup>30</sup> and Article 17 of the Workers’ Statute<sup>31</sup> recognize the possibility of implementing measures pursuing substantive equality between men and women. With the enactment of these provisions, Spain complied with the recognition of positive action made by EU primary law in Article 157 TFEU (Ballester, A., 2018).

Accordingly, positive action measures may be implemented both by public bodies and by private companies and can explicitly consist of the preferential treatment of women in hiring in those sectors in which they are under-represented (*i.e.* quotas). Despite quota systems being permitted, strict quotas are prohibited *ex* Article 17.4 of the Workers’ Statute. Henceforth, preferential treatment shall only be applied in situations of equal merits between male and female candidates. Under those circumstances, Spanish legislation complies with the interpretation made by the ECJ with regard to positive action and, specifically, concerning quota systems (as detailed in section 3.2, above).

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<sup>30</sup> The Law on Effective Equality is the most relevant piece of legislation on gender equality. Its approval represented a huge step forward for Spain on this matter, consolidating our country as one of the most advanced and progressive in this field. Before the Law on Effective Equality entered into force, the legislation on gender equality was scattered within different texts, while other basic principles on gender equality such as positive action were not expressly recognized in our legal order. Hence, said Law has had an enormous impact in Spain, as it clarified the content of the right of non-discrimination on the grounds of sex, establishing specific strategies to achieve substantive equality.

<sup>31</sup> Real Decreto Legislativo 2/2015, de 23 de octubre, por el que se aprueba el texto refundido de la Ley del Estatuto de los Trabajadores (BOE 24 de octubre de 2015).



Recently, the Spanish government has approved a package of measures aimed at guaranteeing substantive equality between men and women through Royal Decree 6/2019.<sup>32</sup> Royal Decree 6/2019 aims at fostering substantive equality in matters such as employment and occupation, complementing the Law on Effective Equality. Indeed, said regulation introduces substantial amendments in issues of vital importance for ensuring gender equality, such as equality plans, measures against the gender pay gap and parental permits. For instance, adapting the permission of breastfeeding to ensure it can be enjoyed by the father, in line with the doctrine of the ECJ set in *Roca Álvarez*, cited above; amending the so called maternity and paternity leave; creating a *birth permit*, and; setting a gradual transitional leveling of the former so that the duration of the leave will be equal for both parents by 2021).

#### 4.2 Spanish Courts' interpretation of positive action.

The Spanish Constitutional Court has had the opportunity to rule over the compatibility of positive action with the Spanish legal order in several occasions throughout the last decades.

In this regard, Article 14 has been interpreted from the perspective envisaged in Article 9.2 CE according to which actions favoring certain groups and minorities “*may be even required in a social and democratic state governed by the rule of law in order to give effectiveness to the highest values enshrined in the Constitution such as justice and equality, and to that effect public authorities are assigned with the promotion of conditions so that equality becomes real and effective*”. (Emphasis added). (The translation is ours).<sup>33</sup>

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<sup>32</sup> Real Decreto-ley 6/2019, de 1 de marzo, de medidas urgentes para garantía de la igualdad de trato y de oportunidades entre mujeres y hombres en el empleo y la ocupación, (BOE 7 de marzo de 2019).

<sup>33</sup> Judgment of the Constitutional Court 34/1981 of 19 November 1981 (Official State Bulletin nº 277, 19 November 1981) [“*puede incluso venir exigida en un Estado social y democrático de Derecho, para la efectividad de los valores que la Constitución consagra con el carácter de superiores del ordenamiento, como son la justicia y la igualdad (artículo 1), a cuyo efecto atribuye además a los Poderes Públicos el que promuevan las condiciones para que la igualdad sea real y efectiva*”]

#### 4.2.1 Compatibility of positive action measures with the Spanish Constitution.

The first ruling of the Constitutional Court concerning positive action was the so-called *Guarderías Infantiles* case.<sup>34</sup> The Court had to analyze if supplementary retribution offered to women having children under six years old in order to cover for childcare services, which was only offered to widowers, contravened Article 14 of the Spanish Constitution. The Court dismissed the appeal finding legitimate “*protective measures destined to categories of workers that are subject to particularly disadvantageous conditions for their access to employment or continuance in it (...) which could not be considered as to oppose the cited principle of equality but, rather, directed towards eliminating existing discriminatory situations*”. (The translation is ours).<sup>35</sup>

It is important to realize how the interpretation of the Constitutional Court in 1987 deviates from the formalistic approach of the concept of equality followed by the ECJ, reaching its decisive point in its much disputed *Kalanke* case, eight years later. In contrast to the ECJ’s reasoning in the *Kalanke* case, the Constitutional Court expressly referred to Article 4.1 CEDAW emphasizing the importance of pursuing substantial equality as a way to achieve *de facto* equality between men and women (paragraph 8 of the Judgment).

By the same token, the Constitutional Court already recognized in its Judgment 3/1993<sup>36</sup> (2 years before the ECJ’s controversial decision in *Kalanke*), that the unequal starting point for women can be corrected through positive action and, at the same time, through the elimination of protective, paternalistic measures of employed women which can act as a barrier to women’s access to employment opportunities on equal terms.<sup>37</sup>

However, even though we must recognize the reasoning followed by our Constitutional Court as progressive and even visionary (in clear conflict with the position followed by

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<sup>34</sup> Judgment of the Constitutional Court 128/1987, of 16 July 1987 (Official State Bulletin nº 191, 11 August 1987)

<sup>35</sup> [*las medidas protectoras de aquellas categorías de trabajadoras que están sometidas a condiciones especialmente desventajosas para su acceso al trabajo o permanencia en él... y que no podrían considerarse opuestas al citado principio de igualdad, sino, al contrario, dirigidas a eliminar situaciones de discriminación existentes*].

<sup>36</sup> Judgment of the Constitutional Court 3/1993, of 14 January 1993 (Official State Bulletin nº 37, 12 February 1993).

<sup>37</sup> For instance, during Franco’s regime many measures were approved which were later considered protective and negative for achieving gender equality, perpetuating the position of inferiority of women. Thus, this kind of measures were declared unconstitutional by the Constitutional Court in Judgments such as 207/1987 of 22 December (right of early retirement to air stewardesses for women between the ages of 35 and 40) or 317/1994, of 28 November (compensation offered to women for termination of their contract due to marriage).

the ECJ in its early case-law, applying an extremely formalistic concept of equality) there is also room for criticism.<sup>38</sup>

We must not forget that there are broadly two kind of positive action measures: (i) those which pursue improving the presence (or rather tackling the absence) of women in the labor market by fostering their professional career in equal terms to men<sup>39</sup>; (ii) those which foster, in terms of time and employment, a balance between family and professional responsibilities (in other words, organizing working time tailor-made for women's needs) (Martínez, F.R., 1996). The latter being the one that has received more attention from the Constitutional Court (such as in *Guarderías*, cited above, in its Judgment 109/1993<sup>40</sup>, or even in the recent Judgment 2/2019<sup>41</sup>, with a dissenting vote worth reading).

In my opinion, the Constitutional Court has shown on too many occasions a discriminatory bias, based on a stereotypical vision of women that has already been fully overcome at the European level in its judgment *France v. Commission*, reaching its ultimate expression in *Roca Alvarez*.

In the words of Sandra Fredman, Professor of Law at the University of Oxford:

*“Any measures giving advantages to a group defined according to gender runs the risk of over or under inclusiveness and may well perpetuate damaging stereotypes. (...) The risks referred to need to be balanced against the possible gains of such criteria in reducing gender disadvantage. It may well be that social security is too costly and administratively too complex to test each person on an individual basis.*

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<sup>38</sup> It is somehow bewildering and remarkable that the Spanish Constitutional Court followed this stance after forty years of a traditional dictatorship which had implemented policies to exclude women from the public sphere and the areas of decision making, confining their presence to an inferior and submissive role in the privacy of their household. This stance clearly demonstrates Spain's full transformation into a full democracy.

<sup>39</sup> For instance, the Bremen style quotas which were found to be contrary to the principle of equal treatment in *Kalanke*.

<sup>40</sup> For instance, in the cited Judgment, the Constitutional Court even asserted that artificial feeding of the baby was not comparable to breastfeeding and that “*even if feeding of the baby may be undertaken artificially by the father or a third person, this possibility is not equal nor can be confused what nature separated. There is, therefore, an element of differentiation between the father and mother*”. (The translation is ours). [En definitiva, aun cuando la lactancia pueda ser atendida artificialmente por el padre o un tercero esta posibilidad no llega a equiparar ni a confundir lo que la naturaleza separó. Existe pues un elemento de diferenciación entre el padre y la madre.]

<sup>41</sup> Judgment of the Constitutional Court 2/2019 of 14 January, in which the Constitutional Court dismissed an appeal filed by a father who had been denied the equalization of paternity and maternity leave. Said ruling counts with the dissenting vote of Judge Maria Luisa Balaguer Callejón, which asserts that there is clear indirect discrimination of women associated with maternity and that the legislator should eradicate it pursuant Article 9.2 CE.

*In that case, it may be more advantageous overall to define a group according to gender than not to offer the benefit at all. On the other hand, the perpetuation of a stereotype may be more damaging than the overall benefit. Thus, discriminatory criteria should not be rejected out of hand, but instead scrutinized closely to discover whether they perpetuate disadvantage, or go some way towards alleviating it”* (emphasis added) (Fredman, S., 1992, p.129).

#### **4.2.2 Compatibility of gender quotas with the Spanish Constitution.**

With regard to quotas, the Constitutional Court first examined its legitimacy in its Judgment 269/1994.<sup>42</sup> However, said ruling was reserved to people with disabilities and was not focused on gender. In this regard, the Constitutional Court dismissed the appeal affirming that measures destined to foster the employability of persons with disabilities did not contravene the principle of equality. On the contrary, they make equality possible and effective by the establishment of quotas. Thus, the Constitutional Court has not examined measures establishing gender quotas with regard to employment as such, but the principles embraced in said Judgment may be applicable analogically.

Additionally, the compatibility of election quotas with the principle of equality was considered by the Constitutional Court in its Judgment 12/2008.<sup>43</sup> The Law on Effective Equality introduced a new article to the Law 5/1985, of 19 June, regulating the general electoral system<sup>44</sup> (Article 44 bis) which established the need for a balanced presence of men and women in the lists of candidates of political parties presented for elections (candidates of each gender must represent at least 40% of the list of candidates and no more than 60%).

The Judgment considered if the law was unconstitutional due to a potential breach of, in particular, Articles 14 CE (equality before the law) and 23 CE (participation of citizens in public affairs). The Constitutional Court dismissed the appeal arguing that the CE explicitly grants not only formal equality (*ex* Article 14 CE) but also substantive equality

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<sup>42</sup> Judgment of the Constitutional Court 269/1994, of 3 October 1994 (Official State Bulletin n° 267, 8 November 1994).

<sup>43</sup> Judgment of the Constitutional Court 12/2008, of 29 January (Official State Bulletin n° 52 of 29 January 2008).

<sup>44</sup> Ley Orgánica 5/1985, de 19 de junio, del Régimen Electoral General (BOE núm. 147 de 20/06/1985).

(*ex Article 9.2 CE*).<sup>45</sup> Likewise, it argued that the Law on Effective Equality did not discriminate against men because it established minimum and maximum proportions for either gender in a manner which was reasonable and proportionate with the aim pursued.

More recently, the Superior Court of Justice of Las Palmas upheld the appeal made by a female candidate that had been excluded from a position in favor of a male candidate whereas the collective agreement expressly stated that between two candidates of different gender with equal qualifications, the tie-break preference should be given to the underrepresented sex (in particular, in said professional category, there were 41 male employees and 17 female).<sup>46</sup> In this regard, the Superior Court of Justice stated that, in order to get rid of indirect discrimination and achieve substantial equality, positive action measures should be applied to promote equal opportunities between men and women in the access to employment.

## 5. Gender imbalance in Spanish Corporate boards

After analyzing the compatibility of gender quotas with EU and Spanish law (provided that the measures comply with the aforementioned requirements), we will now examine what rules have been put in place by the Spanish government to improve gender balance in corporate boards. Secondly, we will carry out a comparative assessment with other large economies, especially European, to assess to what extent the measures undertaken in Spain have been successful in achieving gender balance in corporate boards, using statistics from reports and official sources. Last but not least, we will analyze the *Women on Boards* Directive, a Commission's proposal that has been left on hold for several years but has been given a new impetus which may lead to its approval sooner than we might expect.

Accordingly, I recently came across a publication that had been posted in a social network, LinkedIn that seems well-suited for the occasion. Ms. Eugenia Gay Rosell, Dean of the Barcelona Bar Association and one of the leading and most influential voices in Spain in the fight towards gender balance, while promoting certain courses aimed at training for female executives, posted the following message: "*Women still account for*

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<sup>45</sup> Thus, the Constitutional Court declared that no constitutional reform was needed to sustain election quotas due to the fact that Article 9.2 gave legal basis to this positive action measure. This contrasts sharply with what happened in France and Italy, where constitutional reform was needed in order to approve election quotas.

<sup>46</sup> Judgment of the Superior Court of Justice of las Palmas of 25 July 2017, appeal number 520/2017.

*less than 20% of the members of management boards. Let's turn things around and achieve parity!"*.<sup>47</sup> The message comes through loud and clear, and she is painfully right.

As portrayed by the recent report issued by Eurofund, *Women in Management: underrepresented or overstretched?*, “*despite years of gender equality legislation, men outnumber women in management positions by two to one*” (Eurofund, 2018, p. 24). Spain has made substantial progress in fostering gender balance, especially during the last decades but, unfortunately, it still lags behind its European counterparts.

### **5.1 Measures implemented by Spain to foster gender balance in corporate boards:**

Spain has adopted electoral, administrative and corporate board quotas to increase women's presence in the economic and political decision-making process (Lombardo, E., 2016). Positive action regarding gender balance in corporate boards was initially introduced in 2006 when the National Securities Markets Commission (**CNMV**, in its Spanish acronyms) issued a self-regulatory system: the Unified Code of Good Governance (also known as Conthe Code), which Spanish companies can voluntarily apply.<sup>48</sup>

Recommendation 15 of the Code required companies with few or no women in their management boards to explain the reasons for this situation while implementing measures to correct it, focusing in particular on the obstacles found by women in recruiting processes. Said recommendation was effectively soft law and had no binding effect on companies.

Meanwhile, the Spanish government, led by President José Luis Rodríguez Zapatero at the time, introduced further measures regarding corporate boards, inspired in a Norwegian law that had included quotas in management boards. These measures were included in the Law on Effective Equality, establishing an eight-year period for public and listed companies to achieve gender equality in their management boards –essentially, no gender could be represented below 40% or above 60%. Even though the measure was virtually conceived as a strict quota, no sanctions were introduced for non-compliant companies, thus, making the instrument ineffective. The only penalties included in this law were

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<sup>47</sup> Publication made by Ms. Eugenia Gay Rosell in her LinkedIn profile on 3 September 2019: “*Las mujeres en Consejos de Administración de Empresas no suponen ni un 20%. ¡Démosle la vuelta a la situación y logremos la paridad!*”. (The translation is ours).

<sup>48</sup> Comisión Nacional del Mercado de Valores, Código Unificado de Buen Gobierno para las empresas cotizadas españolas.

incentives to complying firms in the form of a preferential status in public tenders and a government equality award. Thus, the punitive measures that were set were extremely weak when compared to those established in other countries such as Belgium (suspension of Board members' compensation) or Norway (dissolution of the infringing company) (Verge, T. et al, 2015).

Equally, the measure faced strong resistance by the main party in the opposition, Partido Popular, which saw the implementation of quotas as a restriction to companies' freedom of enterprise and most trade associations, which argued that it was against the concept of meritocracy, hindering the country's efficiency and competitiveness. Moreover, a large majority of women in executive positions were strongly against the measure, which they believed could put their merits into question. However, as indicated, the measure was much more effective in generating controversy than in achieving gender balance.

Last October, the Vice-president of the Spanish government, Carmen Calvo, declared during a press conference that the Government intended to urgently approve serious punitive measures regarding the aforementioned quota system to ensure its effectiveness. However, no new developments have taken place in this regard since then (Villar, F., 2018).

Even if Ms. Calvo's words were only an empty pledge for soothing journalists, we must recall, however, that a strict quota system giving automatic and unconditional priority to women would be contrary to EU law in accordance with the ECJ's case law. Consequently, any quota system envisaged by the Spanish government to tackle gender imbalance in corporate boards must comply with the requirements indicated above.

## **5.2 Have the positive action measures implemented by Spain been successful in achieving gender balance in corporate boards?**

As indicated in *Women matter 2017: a way forward for Spain*, a report issued by McKinsey analyzing gender equality in companies' decision-making, Spanish women have low representation at every level of the decision-making process, especially at top positions. Spain has achieved enormous progress in recent decades, with women representing 19% of management boards and 11% of executive committees (to a large extent due to the fact that its starting point was very low).

As stated in the *Women in Work Index 2019* (WWI 2019), a report issued by PwC which measures female participation in work across the OECD<sup>49</sup> countries, “*over the longer term, the average female labor participation rate across OECD countries has increased from 62% to 69%. Chile and Spain have seen the largest improvements of 18 and 17 percentage points respectively since 2000*” (PwC, 2018, p.32). There is greater awareness amongst companies and strong support from the Spanish government (current and past administration) and different organizations. Despite this, change is very slow. Even if this positive trend was sustained in the following years, it will still take us between 10 to 20 years to reach the representation levels of the most advanced European countries.

For instance, the WWI 2019 stresses that Spain trails far behind other high-income economies in women’s integration into the labor market – strikingly Spain ranks 28<sup>th</sup> out of 32. The challenges for women appear from the beginning of their careers. For instance, whereas women represent 58% of all university graduates in Spain, they only account for 37% of the new hires in listed companies and large corporations. Likewise, women are usually promoted to management positions in support areas and not so much in account management areas, which makes more difficult their way into the top management posts (for example, 94% of the CEOs of companies listed in Ibx 35 come from positions in account management areas). For this reason, women forming part of Spanish management boards have 4 times less chances than men of becoming CEOs.

It is also worth noting that Spain is the only European country where gender quotas have been introduced with no sanctions for non-compliers. As indicated in the Explanatory Memorandum of the Women on Boards Directive, the most significant progress has been achieved in member states and other countries where binding measures had been introduced. For instance, from October 2010 to April 2016, Italy and France have had by far the largest increase of women on company boards (25.5% and 24.8%, respectively). Likewise, Norway increased the female share of board members from 18% in 2006, when the binding target was introduced, to 40% within only three years. In contrast, Spain has only increased 10.7% since 2010, below EU average and bearing in mind that its female share of board members was much lower than in those countries and, thus, said increase is relative if compared in absolute terms.

### **5.3 Commission’s Proposal: Women on Boards Directive.**

In November 2012, the Commission presented a proposal for an EU Directive promoting gender balance on corporate boards in European companies (**Women on Boards**

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<sup>49</sup> Organization for Economic Co-operation and Development.



**Directive).**<sup>50</sup> The overall goal of the proposal was to achieve a minimum representation of 40% of the under-represented sex of non-executive board members of companies listed on a stock exchange, excluding small and medium-sized enterprises (SMEs).<sup>51</sup> The proposal was expected to be temporary (until gender balance is effectively achieved)<sup>52</sup> and apply to approximately 5000 listed companies in the EU. The proposal only applies to non-executive directors in order to preserve the right balance between the necessity to increase the gender diversity of boards, on the one hand, and the need to comply with the principle of minimum intervention in the day-to-day management of companies on the other hand. Moreover, the Commission ascertains that “*Non-executive directors and supervisory boards have an essential role in appointing the highest level of management and shaping the company's human resources policy*” (European Commission, 2012, p.5). Thus, a stronger presence of the under-represented sex among non-executive directors will, therefore, boost gender diversity throughout the career ladder.

As mentioned, the proposal only focuses on publicly listed companies, due to their economic and symbolic importance for society, setting standards that shall be closely followed by the private sector. Equally, the application of the proposal to other companies would have caused great complexities due to the disparities in the different legal status of companies across the EU and the lack of transparency obligations to control enforcement.

Even though it received wide support from the European Parliament, the proposal has been met much resistance within the Council, as many member states believe that it does not comply with the principle of subsidiarity (Denmark, the Netherlands, Poland, Sweden, the United Kingdom), leaving the proposal in a deadlock situation. In its Resolution of 13 February 2019, the European Parliament urged the Council to unblock the Women on Boards Directive to “*address the considerable imbalance between women and men in economic decision-making at the highest level*”.<sup>53</sup>

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<sup>50</sup> Proposal for a Directive of the European Parliament and the Council on improving the gender balance among non-executive directors of companies listed on the stock exchanges and related measures, Brussels, 14 November 2012, COM (2012) 614 final.

<sup>51</sup> Article 3 of the Women on Boards Directive excluded from its scope of application listed companies which are SMEs, defined as companies with less than 250 employees and an annual worldwide turnover that does not exceed 50 million Euro or an annual balance sheet of less than 43 million euros.

<sup>52</sup> The proposal anticipated its expiration in 2028 and provided for an evaluation mechanism which would have started in 2017 (obviously, said target dates have been revised).

<sup>53</sup> European Parliament resolution of 13 February 2019 on experiencing a backlash in women's rights and gender equality in the EU (2018/2684 (RSP)), recital 36.

One of the most important aspects of The Women on Boards Directive is its requirement on companies to have a transparent recruitment procedure for non-executive directors. Lack of transparency and objective criteria to justify decisions in selection processes are the main loopholes in which gender bias can remain hidden. Likewise, companies which do not have a presence of the under-represented sex of at least 40% of non-executive directors shall be obliged to make appointments to those positions based on a comparative analysis of the qualifications of each candidate, applying pre-established, clear, neutrally formulated and unambiguous criteria. In the event of equal qualification, preference shall be given to the under-represented sex. However, the preference rule shall not apply if “*an objective assessment taking account of all criteria specific to the individual candidates tilts the balance in favor of the candidates of the other sex*”, in application of the *Marschall* doctrine. As expected, the proposal follows closely the case law of the ECJ on gender quotas, as indicated in section 3.2.1, above.

The proposal also establishes a presumption under which, if the under-represented gender candidate submits evidence before a court demonstrating that the candidates were equally qualified, the listed company shall have the burden of proof to prove that it did not breach the provisions of the Women on Boards Directive<sup>54</sup> in the selection process.

In addition, the Women on Boards Directive requires listed companies to provide and publish information on the gender composition of their boards on an annual basis. If a listed company does not meet the objectives laid down in the Women on Boards Directive, it shall also include the reasons for not reaching the objectives and a description of the measures which the company has adopted or intends to adopt in order to meet the objectives. Furthermore, it also obliges member states to lay down effective, appropriate and deterrent sanctions for companies breaching the aforementioned obligations.

As well as revising the proposed target dates and reporting deadlines, recent Presidencies of the Council of the European Union have committed to breaking the deadlock on the directive, but an agreement has not yet been reached. The Women on Boards Directive remained a priority gender equality file under the Romanian presidency (from 1 June to 30 June 2019) but no new developments have been made in this regard. It is interesting to note that Spain, one of Member States which was against said initiative under its prior administration, is now one of its biggest supporters.<sup>55</sup>

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<sup>54</sup> Technically, the companies will need to comply with the national rules transposing the Directive which will need to provide the same obligations or others which are more favorable towards ensuring a balanced representation of men and women, provided these provisions do not create unjustified discrimination (Article 7 of the Women on Boards Directive).

<sup>55</sup> As emphasized by Iratxe García, leader of the Group of the Progressive Alliance of Socialists and Democrats in the European Parliament, during the Gender debate that took place in the European Parliament last January.

## **6. Are Gender Quotas Necessary For Achieving Equality In Spanish Corporate Boards?**

After having undertaken a more theoretical approach towards gender quotas in the first sections of this paper (in essence, are gender quotas compatible with the concept of equality embedded in EU Law and the Spanish Constitution?), we shall now undertake a more practical reflection on a hypothetical implementation of gender quotas in Spanish corporate boards. Unlike other European countries, Spaniards advocate for the imposition gender quotas in corporate boards (57% are in favor of such measures) (Vilar, F., 2018). Even so, are gender quotas really necessary for achieving gender equality in Spanish corporate boards? Or, on the other hand, is the implementation of such measure discriminatory for men or even for other minorities that have also suffered past discrimination?

In economic terms, some liberals will argue that gender quotas constitute a grotesque attack against the freedom of enterprise, which will undoubtedly hinder productivity. However, there are many economic arguments to argue for the implementation of gender quotas. On one hand, women in Spain represent 58% of all university graduates clearly overcoming men in terms of qualifications. Moreover, if women had not entered the labor market as they did during the 90s, Spain's GDP in 2015 would have been 18% less. In addition, some studies show that if we increased female employment levels to that of Sweden, the Spanish economy would grow an astounding 16%, amounting to roughly 291,000 million Euros (McKinsey, 2017). In the same vein, the underutilization of the skills of highly qualified women represents a loss of economic growth potential. Making use of all available human resources is vital for countries to successfully compete in a global economy in advantage to rival economies. Likewise, the maintenance of men endogamy in corporate boards stifles debate, creativity and innovation. In essence, as women represent half of the population and, thus, half of the talent, the Spanish economy would benefit from boosting women's participation.

With regard to productivity, the effects on firm performance have depended greatly on the country in which they are implemented. However, results indicate that in countries with a less progressive gender culture, such as Southern countries (for instance, Italy or Spain), the effects stemming from gender quotas tend to boost firms' productivity and efficiency (Comi, S. et al, 2016). This has to do with the fact that gender stereotypes are more deeply rooted in those countries and, thus, gender quotas become an instrument to flag talent which remained unseen because of these cultural prejudices.

Most opponents to gender quotas use fear or ignorance to disregard such proposals. Ignorance in the fact that they consider this type of measure as an attack towards meritocracy. They fear pressure from quotas will promote unqualified female members to top management seats, or even potentially discriminate against male candidates. Similarly, many women holding executive positions argue that gender quotas will stigmatize women, who want to be added into the board because of their ability to contribute and not based on their gender. However, at least in the EU, these fears prove unfounded. As we have been observed throughout this paper, the ECJ has sought a delicate balance between formal equality and positive action, establishing that gender quotas shall only be compatible with EU law if *(i)* the measures concern a sector where women are under-represented; *(ii)* they can only give priority to equally qualified female candidates and *(iii)* they must include a saving clause, granting exceptions to the priority rule in certain justified cases (European Commission, 2012). Thus, under these conditions, meritocracy would hardly be undermined. On the contrary, implementing this type of measures will ensure transparency in the selection process of top management positions. Hence, appointments shall be largely based on objective and justified criteria and not on biased male-dominated cultural prejudices whereas female quotas shall only be implemented in tie-break situations.

There is no single recipe for succeeding in the battle for gender balance in corporate boards. For instance, in USA or UK, instead of public intervention, there have been significant advances in self-regulatory mechanisms establishing quotas within companies themselves. However, we believe that adopting a measure similar to the one present in the Commission's proposal shall be the most effective tool not only for breaking the glass ceiling of Spanish corporate boards but also for watering down stereotypes and changing peoples' opinions of women in leadership.

## **7. Conclusion.**

It is a truism that gender discrimination is one of the most daunting challenges faced by our society today, because of the scale of the problem, as it affects half of our society, and its depth, meaning that it is deeply rooted in our conscience, stemming from cultural and social prejudices that have been forming for thousands of years. As analyzed, our legislature and judicial system have slowly begun to embrace positive action as an effective tool to combat gender discrimination. Specifically, gender quotas have been declared as a legitimate instrument to tackle gender imbalance as long as they comply with certain requirements which safeguard the principles of equal treatment and meritocracy. Certainly, Courts have missed some unique opportunities to fully embrace a progressive approach towards substantive equality, better suited to modern times (for

instance, see the ruling of the Spanish Constitutional Court delivered last October, concerning parental leaves, cited).

In the same vein, several European countries have used this tool to foster gender balance in corporate boards, achieving enormous success in their strife towards gender parity. Spain, although achieving relative progress, has failed this purpose by implementing measures which are, allegorically, the chronicle of a death foretold. Thus, the current administration or, most probably, the new government that emerges from the increasingly likely elections, should take very seriously such a sensitive and pressing problem, bringing Spain in line with its European counterparts in terms of gender diversity in corporate boards. Such decision is not only necessary from a human rights standpoint, but will also ripe enormous economic benefits that will profit our society as a whole.

Cani Fernández, partner of Cuatrecasas and one of the most renowned competition law experts in Europe, made some interesting reflections in an interview to *El Confidencial* which are noteworthy. Ms. Fernández, was in the past strongly against gender quotas and considered such measure as offensive. However, years of experience in the legal profession and recognition (she is the first women to be recognized by Chambers for her contribution to the legal sector) have made her change her mind. In her view, “*if we are unable to find the talent we need in 50% of the population, we, who are the ones searching, have a problem*”. Hence, gender quotas, in her opinion, act as a “*torch guiding us to find the talent that is hidden*” (Zarzalejos, A. G., 2019).

## References.

Álvarez Conde, E. y Tur Ausina, R., *Derecho Constitucional*, Tecnos, Madrid, 2016, Sexta edición.

Ballester, A., Country Report on Gender Equality: How are EU rules transposed into national law, Spain 2018, *European network of legal experts in gender equality and non-discrimination*, Luxembourg, Publications Office of the European Union, 2018.

Barret, G., “Re-examining the Concept and Principle of Equality in EC Law Barrett, *Yearbook of European Law*, Oxford, Issue 22, n. 1, 2003, p. 117 - 153.

Bustos Bottai, R.: “Discriminación por razón de sexo y acciones positivas: Reflexiones a la luz de la jurisprudencia constitucional española y aproximación a la ley para la igualdad efectiva”, *Revista de Filosofía, Derecho y Política*, n.º 6, julio 2007, pp. 127-147.

Craig, P. and de Búrca, G., *EU Law: Text, Cases and Materials*, Oxford University Press, Oxford, 2015 (6<sup>th</sup> edition).

Comi, S., and others, “Where Women Make the Difference. The Effects of Corporate Board Gender-Quotas on Firms’ Performance Across”, Annual Congress of the European Economic Association, Geneva, 2016 (available at: [https://editorialexpress.com/cgi-bin/conference/download.cgi?db\\_name=ESPE2016&paper\\_id=685](https://editorialexpress.com/cgi-bin/conference/download.cgi?db_name=ESPE2016&paper_id=685); last consultation 01/9/19)

De Vos, M., *Beyond Formal Equality, Positive Action under Directives 2000/43/EC and 2000/78/EC*, European Commission, Directorate-General for Employment, Social Affairs and Equal Opportunities, Brussels, 2007.

Directorate-General for Justice and Consumers Directorate D — Equality and Union citizenship, *European Equality Law review, European network of legal experts in gender equality and non-discrimination*, Luxembourg, Publications Office of the European Union, 2018.

Eurofund, *Women in Management: underrepresented or overstretched?*, Publications Office of the European Union, Luxembourg, 2018.

Final report of Activities of the Group of Specialists on Mainstreaming, Gender Mainstreaming, Conceptual framework, methodology and presentation of good practices, Strasbourg, 1998 (available at: <https://www.unhcr.org/3c160b06a.pdf>; last consultation 01/9/19).

Fredman, S. “EC Discrimination Law: A Critique”, *Industrial Law Journal*, Vol. 21, No. 2, June 1992, p. 119-134.

Gómez Orfanel, G., “Acciones Positivas a favor de la mujer en España: doctrina, jurisprudencia y legislación”. *Anuario de Derechos Humanos. Nueva Época*. Vol. 9. 2008, págs. 379-402.

Hasnas, J., “Equal Opportunity, Affirmative Action, and the Anti-Discrimination Principle: The Philosophical Basis for the Legal Prohibition of Discrimination”, *Fordham Law Review*, Volume 71, Issue 2, n.3, 2002, p. 424-542.

Hymowitz, C. and Schelhardt, T.D., “The Glass-Ceiling: Why Women Can’t Seem to Break the Invisible Barrier that Blocks Them from Top Jobs”. *The Wall Street Journal*, 1986, 57, D1, D4-D5.

Loenen, T., Rethinking sex equality as a human right, *Netherlands Quarterly of Human Rights*, Volume 12, Issue 3, 1994, p. 253-270.

Lombardo, E., Gender Equality policies in Spain – update, 2016, Directorate General for Internal Policies p. 20. (available at [http://www.europarl.europa.eu/RegData/etudes/STUD/2016/583112/IPOL\\_STU\(2016\)583112\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2016/583112/IPOL_STU(2016)583112_EN.pdf); last consultation 08/09/19).

Martínez, F.R. “La discriminación positiva en mujeres (Comentario a propósito de la Sentencia del Tribunal de Justicia de la Comunidad de 17 de octubre de 1995, asunto Kalanke)”, *Revista Española de Derecho Constitucional*, Año 16. Núm. 47 Mayo-Agosto 1996, págs. 309-332.

Mcrudden, C., “Rethinking Positive Action” *Industrial Law Journal*, Volume 15, Issue 1, 1986, p. 219–243.

Muir, E., *EU Equality Law: The First Fundamental Rights of Policy of the EU*, Oxford Studies in European Law, Oxford, 2018.

Numhauser-Hening, A. *Women in Academia & Equality Law. Aiming High - Falling Short?* Kluwer law International, The Hague, 2006.

Peers, S., and Harvey, T., *The EU Charter of Fundamental Rights: A Commentary*, Hart Publishing, Oxford, 2014.

Proposal for a Directive of the European Parliament and the Council on improving the gender balance among non-executive directors of companies listed on the stock exchanges and related measures, Brussels, 14 November 2012, COM (2012) 614 final.

Ramos Martín, N., “Positive Action in EU Gender Equality Law: Promoting Women in Corporate Decision-Making Positions”, *Spanish Labor Law and Employment Relations Journal*, Vol. 3, No.1, 2014, p. 20-33.

Sastre Ibarreche, Rafael: “La acción positiva para las mujeres en el derecho comunitario”, *Revista General de Derecho del Trabajo y Seguridad Social*, núm. 6, 2004.

Serraller, M., “Obituario: José María Cervelló”, *Expansión*, 2 de septiembre de 2008, (disponible en <https://www.expansion.com/2008/09/02/juridico/1160395.html>; última consulta 01/09/2019).

Tushnet M. and others, *Routledge Handbook of Constitutional Law*, Routledge, Oxon, 2013.

Van Gerven, W., *The European Union: A polity of States and Peoples*, Hart Publishing, Oxford, 2005.

Vargas, T., “She coined the term ‘glass ceiling.’ She fears it will outlive her”, *Washington Post*, 1 March 2018, available at <https://www.washingtonpost.com/news/retropolis/wp/2018/03/01/she-coined-the-phrase-glass-ceiling-she-didnt-expect-it-to-outlive-her/>; last consultation 26/8/2019).

Women in Work Index 2019, PwC.

Women matter 2017: a way forward for Spain, Mckinsey&Company.

Verge, T. and Lombardo, E., “The differential approach to gender quotas in Spain: regulated politics and self-regulated corporate boards”, *EUI Working Papers*, 2015, (available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2610667](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2610667); last consultation 07/09/19).

Villar, F., “El Gobierno prepara cuotas obligatorias en los puestos directivos por la vía de urgencia” *Expansión*, 2 de octubre de 2018 (disponible en <https://www.expansion.com/economia/2018/10/02/5bb34489468aeb1c7b8b4646.html>; última consulta 04/09/19).

Williams, Z., “The glass ceiling: a metaphor that needs to be smashed”, *the Guardian*, 27 August 2016 (available at <https://www.theguardian.com/us-news/2016/jul/27/hillary-clinton-glass-ceiling-metaphor-that-needs-to-be-smashed>; last consultation 28/8/2019).

Wirth, L., *Breaking the Glass Ceiling – Woman in Management*, International Labor Office, Geneva, 2001.



Zarzalejos, A. G., “Cani Fernández: "En los despachos, hay un bache tremendo cuando tienes hijos””, *El Confidencial*, 8 de marzo de 2019 (disponible en [https://www.elconfidencial.com/empresas/2019-03-08/entrevista-cani-fernandez-cuatrecasas-feminismo\\_1868078/](https://www.elconfidencial.com/empresas/2019-03-08/entrevista-cani-fernandez-cuatrecasas-feminismo_1868078/); última consulta 10/09/19).

Zillman, C., “The Fortune 500 Has More Female CEOs Than Ever Before”, *Fortune*, 16 May 2019 (available at <https://fortune.com/2019/05/16/fortune-500-female-ceos/>; last consultation 10/09/19).