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Affirmative action in the United States versus positive action in the European Union : comparative analysis

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Defining affirmative/ positive action on the basis of the model of equality applied

The concept of affirmative/ positive action is without question a very controversial issue, which can be evidenced by persistent debates as to its merits both in legal and political circles. It is widely known that affirmative action originated in the United States in a reaction to the deep racial divisions caused by the centuries of systemic discrimination of Black Americans. Therefore the response to such structurally ingrained racial discrimination had to be adequately strong, as it was clear that the situation can be ameliorated only through bold, systemic measures[1]. However, not surprisingly, affirmative action plans became immediately confronted with the principles of equal treatment and non-discrimination, therefore it did not take long before they appeared in front of the Supreme Court of the United States.

But before I turn to the concept of affirmative/positive action or legal grounds and case-law relating to this area, I consider it useful to point out that the perception of this concept differs significantly depending on what approach to equality we take. There are several ways how to differentiate between the models of equality, but for the purposes of this article I will follow the structure used by Olivier De Schutter[2]. Firstly, we can distinguish the concept of formal equality, which basically amounts to a right not to be discriminated against. However, equal treatment by definition does not im-

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[1] M.A. Drumbl, J.D.R. Craig, *Affirmative Action in Question: A Coherent Theory for Section 15(2)*, "Review of Constitutional Studies" 1997, no. 1(4), p. 86–87.

pose an obligation to ensure a proportionate representation of the different segments of the population. Secondly, the prohibition of discrimination may extend to a model of equality which involves the prohibition of disparate impact discrimination (also known as indirect discrimination). In this case, measures which disproportionately and negatively impact on already underrepresented groups should be revised, unless they are found to pursue a legitimate aim by appropriate and necessary means. Only then we arrive to a third model, that of affirmative equality, whose aim is to improve the representation of certain groups in the areas or at the levels where they are underrepresented. Only under this model we go beyond the situation where discriminatory rules, policies or practices are "merely" outlawed, and moreover seek a fair share of social goods among the diverse groups composing society[3].

This distinction is closely connected with the aim of the respective body of law. It needs to be answered whether it mainly seeks to protect all individuals from being discriminated against, or whether it rather seeks to ensure an equal representation of the diverse social groups in different sectors of society, which may finally lead to a roughly equal distribution of all social goods among those groups[4]. In other words, there is an alternative between formal and substantive equality. Moreover, with regard to employment, for instance, choice has to be made also between insisting on equal treatment in the recruitment process, so that the chances of all are equal (equality of opportunities) and insisting on equal treatment in the allocation of jobs, so that all groups are roughly represented in each sector (equality of results)[5]. Last but not least, the above mentioned models of equality differ in the visibility or invisibility of the "suspect" characteristics of individuals, which may give rise to discriminatory treatment. According to De Schutter, the choice to take these traits into account may be justified by the desire to move from a negative approach to equality to a positive approach. The negative approach is to be understood as a prohibition to commit acts of discrimination, whereas the positive approach should be seen as an obligation to affirmatively promote equality, which can be done in various forms through different measures[6].

Defining affirmative/positive action itself is not easy, especially taking into account that even in the United States, i.e. the cradle of the concept, there exists no uniform definition of affirmative action. However, through

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[2] O. De Schutter, *Three Models of Equality and European Anti-discrimination Law*, "Northern Ireland Legal Quarterly" 2006, no 1(57).

[3] Ibidem, p. 4.

[4] Ibidem, p. 1.

[5] Ibidem, p. 2.

[6] Ibidem, pp. 2–3.

almost forty years of actions by the Congress, the courts, and numerous presidents, it has generally come to be understood as "voluntary and mandatory efforts undertaken by the federal, state, and local governments, private employers, and schools to combat discrimination and to promote equal opportunity in education and employment for all"[7]. Or in other words, it can be said that in the United States the term affirmative action designates "a special kind of antidiscrimination policies, which involves preferential treatment of persons belonging to disadvantaged groups or women in hiring, admissions to universities or government contracting"[8].

Likewise, the European Union also does not have one official definition of positive action, however it can be derived e.g. from the original Equal Treatment Directive[9] that "the concept of positive action embraces all measures which aim to counter the effects of past discrimination, to eliminate existing discrimination and to promote equality of opportunity"[10]. Alternatively, the term positive action defines "proportionate measures undertaken with the purpose of achieving full and effective equality in practice for members of groups that are socially or economically disadvantaged, or otherwise face the consequences of past or present discrimination or disadvantage"[11].

Furthermore, positive action comes in many forms. From the legal point of view, a main distinction lies between forms of positive action which do not pose a risk of discrimination against the members of the group which the action does not benefit, and the forms which do create such a risk[12]. In general, the term positive action includes programs designed to counteract the effects of past discrimination and to ensure equal opportunities, such as recruitment policies which ensure that job advertisements reach potential ethnic minority candidates (e.g. advertising in mother-tongue publications of particular minority groups)[13]. According to De Schutter, "such measures,

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[7] L. Jennings, *Comparison of Affirmative Action in the European Union and United States*, "Multiculturalism Paper" May 2005, p. 1, at <http://www.tolerance.cz/courses/multiculturalism/essays/laureen.doc>.

[8] J. Ringelheim, *Diversity and Equality: An Ambiguous Relationship. Reflections on the US Case Law on Affirmative Action in Higher Education*, "European Diversity and Autonomy Papers" 2006, no 4, p. 2, at <http://www.eurac.edu/en/research/institutes/imr/activities/Bookseries/edap/Documents/2006_edap04.pdf>.

[9] Council Directive 76/207/EEC of 9.02.1976 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.

[10] L. Jennings, op. cit., p. 1.

[11] European Commission, *International Perspectives on Positive Action Measures – A Comparative Analysis in the European Union, Canada, the United States and South Africa*, 2009, p. 6, at <http://ec.europa.eu/social/main.jsp?catId=738&langId=en&pubId=180&furtherPubs=yes>.

[12] O. De Schutter, op. cit., p. 33.

[13] European Network Against Racism, *Fact Sheet 35 – Positive Action*, 2008, p. 5, at <http://cms.horus.be/files/99935/MediaArchive/pdf/FS35%20-%20Positive%20action.pdf>.

although they demonstrate a willingness to go beyond a non-discrimination policy in order to achieve a better balance within the workforce, are not forms of »preferential treatment« which may be construed as a derogation from the requirement of formal equality"[14]. However, the practice of quotas or set-asides, whether rigid[15] or flexible[16], or taking into account group membership as part of diversity plans by setting certain targets to be achieved, may be seen as constituting such a derogation[17]. It is this most controversial method used which became equated with the term "affirmative action", more commonly used in the United States, and which evokes rather negative connotations ("reverse" or "positive" discrimination). Nevertheless, as well as positive action in the European Union, affirmative action in the United States utilizes a range of methods and is not limited to quotas[18].

Indeed, the objective pursued under the model of affirmative equality may be inconsistent with the objective of non-discrimination. That is because affirmative equality takes into account cases where the application of neutral rules or procedures does not fulfill the objective of ensuring a fair distribution of social goods among different groups of the population. Then the full realization of equality requires further steps, which may imply treating differently individuals due to their membership in certain groups defined by "suspect" characteristics they present[19]. Critics of this concept, as for instance American scholar Morris Abram, argue that it is a mistake to abandon the merit principle in favor of a system which allocates social goods according to personal characteristics such as race. In Abram's view, the laws simply cannot be interpreted to support both color-blindness for some citizens and color-consciousness for others as the two approaches are mutually exclusive[20]. On the contrary, other authors argue that equal treatment of those with differential levels of advantage can cement and reinforce inequality. Therefore they consider it necessary that the conceptual understanding of equality and non-discrimination moves to recognize structural or institutional forms of discrimination, which are usually not covered by traditional prohibitions and require more proactive tools including positive action[21].

Affirmative/ positive action is especially brought into the discussion because of the fact that it can place the burden on the State, rather than the

[14] O. De Schutter, op. cit., p. 33.

[15] The reservation of a specified percentage of places to the members of underrepresented groups.

[16] Preferential treatment of a candidate belonging to the under-represented category where the competing candidates are equally qualified.

[17] O. De Schutter, op. cit., p. 33.

[18] European Network Against Racism, *Fact Sheet 35...*, p. 5.

[19] O. De Schutter, op. cit., p. 4.

[20] M.A. Drumbl, J.D.R. Craig, op. cit., pp. 86–87.

[21] European Network Against Racism, *Fact Sheet 35...*, p. 2.

individual to take a proactive approach and prevent discrimination ("forward-looking" rationale)[22]. Under this model affirmative action serves as a tool to promote diversity or proportionate representation, both in sectors and at levels where it is suitable that all the sub-groups of the community are fairly represented. This rationale is currently followed e.g. by the U.S. Supreme Court. However, with regard to its (in)compatibility with the requirements of the principle of equal treatment affirmative action policies may be introduced in another two ways. "Backward-looking" rationale considers affirmative action to be a compensatory measure, which is designed to overcome the legacy of some past discrimination. An example of this approach includes e.g. the original concept of American affirmative action which reacted to the legacy of slavery. The last rationale focuses on the present and takes into account (un)conscious prejudice or stereotypes which work to the disadvantage of the members of a certain group[23]. Recent judgments of the European Court of Justice[24] show that it is predominantly this model which is used within the EU to establish "equality in fact".

Last but not least, perception of affirmative action either as a means to achieve equal treatment, which complements the requirement of formal equality as non-discrimination, or as a mere derogation to that principle further relates to the level of scrutiny applied in particular cases. However, whether a strict or a looser form of scrutiny will be used may also depend on the more or less suspect character of the trait on which the affirmative action policy is based. Therefore race or ethnic origin may be considered highly suspect criteria while sex may be considered less suspect[25]. The same applies to the area of application of the affirmative action measures (e.g. public or private employment). The respective legislation or courts may naturally take different standpoints regarding this issue, which will be addressed in subsequent parts.

Legal basis for affirmative action in the U.S. and related Supreme Court case-law

As it was already mentioned above, affirmative action originated in the United States in the era of the Civil Rights Movement. The first affirmative action program was introduced by President John F. Kennedy in 1961. Executive Order 10925 required certain federal contractors to take "affirmative action" in order to ensure that individuals were not discriminated against

[22] Ibidem.

[23] O. De Schutter, op. cit., pp. 33–34.

[24] This abbreviation of the current name Court of Justice of the European Union will be used in the text, together with others (ECJ or the Court).

with regard to race, creed, color, or national origin. This action was followed four years later by President Lyndon B. Johnson, whose Executive Order 11246 required federal contractors with contracts of $ 50,000 or more to initiate affirmative action programs in order to recruit and hire minority employees[26]. In 1967 President Johnson expanded the Executive Order which from then on included also affirmative action requirements to benefit women[27].

Since these beginnings the legal system of the United States has grown to contain a wide variety of affirmative action provisions not only at federal, but also at state and local level. Further, distinction has to be made between the involuntary or court-ordered affirmative action plans and the voluntary ones as they are subject to similar but different criteria. Also the level of scrutiny required by the courts differs based on whether the affirmative action plans are applied in the public or private sector (strict versus intermediate scrutiny). Similarly, private entities are "merely" subject to statutory restrictions (e.g. 1964 Civil Rights Act), while public entities fall also under the scope of the Fourteenth Amendment of the U.S. Constitution (Equal Protection Clause). The major role in the development of the affirmative action can be without a doubt ascribed to the courts, especially to the U.S. Supreme Court, even though many doubts and uncertainties regarding the limits of the affirmative action programs still remain[28]. I will now introduce the relevant case-law of the Court relating to specific areas and summarize the current development of the affirmative action in the United States.

In the United States, affirmative action became a widely debated issue especially with regard to some forms of so called "benign discrimination" in university admissions. The field of university admissions firstly involves the general constitutional scrutiny under the Equal Protection Clause, which reads that "no State shall [...] deny to any person within its jurisdiction the equal protection of the laws". And secondly, it involves Title VI of the 1964 Civil Rights Act, which prohibits discrimination on the basis of race, color and national origin in programs and activities receiving federal assistance[29].

There are two major Supreme Court decisions relating to this area. In *Bakke*[30] (1978) the Court rejected an admissions procedure that reserved a quota of seats in each entering class for disadvantaged minority students. This 5–4 decision has been widely debated for decades nevertheless it has

[25] O. De Schutter, op. cit., p. 34.

[26] M.A. Drumbl, J.D.R. Craig, op. cit., pp. 86–87.

[27] M. Sykes, *The Origins of Affirmative Action*, "National NOW Times" 1995, at <http://www.now.org/nnt/08-95/affirmhs.html>.

[28] M. De Vos, *Beyond Formal Equality – Positive Action under Directives 2000/43/EC and 2000/78/EC,* 2007, p. 62, at <http://ec.europa.eu/social/BlobServlet?docId=1679&langId=en>.

[29] Ibidem.

[30] *Regents of the University of California v. Bakke*, 438 U.S. 265, 1978.

eventually become to be believed that the Supreme Court chose to submit any racial or ethnic classification, regardless of its "benign" purpose, to strict scrutiny. Under this level of scrutiny only those affirmative action programs that correspond to a "compelling governmental interest" and whose measures are "narrowly tailored" to further that interest are allowed[31]. However, in *Bakke* Justice Powell held that even though there generally exists the right of universities "to select those students who will contribute the most to the »robust exchange of ideas«" (a diverse student body), which constitutes a countervailing constitutional interest, the program established in this case was not a necessary means to that end[32].

After decades of uncertainty in academia and the courts about the diversity argument and the level of scrutiny applied, the Supreme Court maintained the ruling in *Bakke* and further clarified it in the cases of *Grutter*[33] and *Gratz*[34] in 2003. The Court faced the issue in which it had to decide to what extent could the University of Michigan Law School constitutionally use race to ensure a "critical mass" of underrepresented minority students. Initially, the Court subjected both cases to strict scrutiny and distinguished the school's plan from actual quotas. Further it held that in higher education diversity presents a compelling interest and that in order to achieve the educational benefits that flow from a diverse student body race can be used as one of a number of factors. The Court also held the required compelling interest is not limited to the correction of prior discrimination by the same institution[35].

The present stance of the U.S. Supreme Court is, therefore, that diversity does constitute a compelling state interest justifying race-conscious admission programs in higher education institutions[36]. To summarize the means that are regarded as narrowly tailored in this field of application of the affirmative action programs, it is clear that first, racial quotas are by definition unconstitutional. Second, admissions or transfer policies that assign a fixed number of points based solely on race are conclusively unconstitutional. And third, multiple-tier admissions or transfer policies based on race are presumptively unconstitutional. However, "beyond these rather rudimentary points of law, the field remains wide open"[37].

Another field where affirmative action plans can be applied is private sector employment. The essential federal statute governing the area of employment discrimination is Title VII of the 1964 Civil Rights Act. According

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[31] M. De Vos, op. cit., p. 62.
[32] J. Ringelheim, op. cit.
[33] *Grutter v. Bollinger,* 539 U.S. 306, 2003.
[34] *Gratz v. Bollinger*, 539 U.S. 244, 2003.
[35] M. De Vos, op. cit., pp. 62–63.
[36] J. Ringelheim, op. cit., p. 5.
[37] M. De Vos, op. cit., p. 63.

to its provisions, it is i.a. unlawful "to discriminate against any individual [...] because of such individual's race, color, religion, sex, or national origin". Based on both phraseology and drafting history of this piece of legislature, neutrality from the employer, so called "color-blindness", is required under Title VII. Nevertheless, starting with *Weber*[38] (1979), the Supreme Court admitted that Title VII's prohibition of racial discrimination does not condemn all private, voluntary, race-conscious action plans[39].

Moreover, the level of scrutiny required by the Courts in cases of such plans is only of an intermediary nature. That essentially means that racial classification that serves an "important governmental interest" with "substantially related" measures is condoned by the Court. Furthermore, the Court held in *Johnson v. Transportation Agency*[40] (1987) that an employer need not point to his own prior discriminatory practices, but only to a "conspicuous imbalance in traditionally segregated job categories". In this sphere of application it is believed that the essential purpose of affirmative action is to break down old patterns of segregation and hierarchy. Nevertheless, affirmative action should not "unnecessarily trammel the interests of the white employees" (*Weber*). Therefore the absence of an absolute bar or rigid quotas, eventually the temporary duration of affirmative action or its periodic review are elements taken into account by the courts in their decision making process[41].

With regard to the provisions pointing towards neutrality and the fact that there is no provision endorsing positive action, the flexibility of the American courts towards affirmative action is, according to De Vos, quite remarkable. Especially since the Weber test was eventually extended beyond the historical issue of race, for example in gender cases. However, it should be reminded that the Weber test applies only to voluntary affirmative action plans in private sector employment. As it was already mentioned the scope for court ordered affirmative action is much narrower and the Equal Protection Clause imposes stricter scrutiny for affirmative action in public sector employment[42]. This is of course in line with the general strict scrutiny applicable to government affirmative action, which will be discussed in subsequent section.

The field of government programs is the last area in which affirmative action programs are used in the United States. After hesitations in several Supreme Court decisions, it is now clear that all affirmative action plans which are enacted through government, irrespective of its level (local, state

[38] *United Steelworkers of America v. Weber*, 443 U.S. 193, 1979.
[39] M. De Vos, op. cit., p. 63.
[40] *Johnson v. Transportation Agency of Santa Clara County, California*, 480 U.S. 616, 1987.
[41] M. De Vos, op. cit., p. 63.
[42] Ibidem.

or federal) and the position in which it functions (as a contractor, regulator or public employer), are subjected to strict scrutiny whenever they entail some form of "benign discrimination", especially race bias. Therefore, as in the case of university admissions, a compelling government interest to which the disputed affirmative action must be narrowly tailored is required[43].

However, there is a difference in respect of the conditions under which the common standard of scrutiny is met. In case of affirmative action in university admissions, the scrutiny generally recognizes the unique role played by universities in fostering the free exchange of ideas and accepts the so called diversity argument. On the other hand, affirmative action by government will have to be narrowly tailored to the realities of the specific government program, which e.g. entails express findings of past or persisting government or social discrimination in the field for which the affirmative action is designed. Therefore it is not clear whether the purpose of diversity can be considered sufficient to constitute a compelling interest also in case of government affirmative action[44].

Legal basis for positive action in the European Union and related ECJ case-law

As was already mentioned above, within the European Union the term most frequently used to describe measures designed to compensate for present and past disadvantages caused by discrimination is positive action. Even though the term itself does not appear in any of the EU legally binding documents[45], it is clear that the EU decided to take more pro-active approach to equality as the ultimate goal of positive action measures is now to achieve full equality in practice (see e.g. Article 157 (4) TFEU, former Article 141(4) TEC)[46]. However first mention of this concept can be found in the Equal Treatment Directive from 1976[47], which stated in Article 2 (4) that the Directive "shall be without prejudice to measures to promote equal opportunity for men and women, in particular by removing existing inequalities which affect women's opportunities". Since then the EU anti-discrimination goals could be achieved also by positive action, which operates as derogation from the principle of equality.

[43] Ibidem, p. 63.

[44] Ibidem, pp. 63–64.

[45] However, the term was used e.g. in Council Recommendation 84/635/EEC of 13.12.1984 on the promotion of positive action for women.

[46] European Roma Information Office, *Positive Action – Guide book for Roma Activists*, 2008, p. 9, at <http://www.erionet.org/site/basic100139.html>.

[47] Council Directive 76/207/EEC of 9.02.1976 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.

Originally, the European Community had powers to act only in relation to sex equality and nationality discrimination. However since 1997, with the adoption of Article 13 of the Treaty of Amsterdam (now Article 19 TFEU), it can further operate in the field of discrimination on the grounds of sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation. After the Treaty of Amsterdam came into force in 1999, several directives that include positive action provisions have been enacted in the area of anti-discrimination. Among these are the Racial Equality Directive[48] and the Employment Equality Directive[49], both from 2000, the recast Equal Treatment Directive[50] (2006) and the 2004 Directive implementing the principle of equal treatment between men and women in the access to and supply of goods and services[51]. Provisions which relate to positive action generally provide that "with a view to ensuring full equality in practice, the principle of equal treatment shall not prevent any Member State from maintaining or adopting specific measures to prevent or compensate for disadvantages linked to [a protected ground]"[52]. Despite the new prohibited grounds of discrimination the case-law of the European Court of Justice on the question of positive action has so far arisen only in the context of equal treatment between men and women. Still, as it will be shown below, the case-law is not fully consistent[53].

The above mentioned Directives' provisions essentially copy Article 157 (4) TFEU (former Article 141(4) TEC), which is currently the only Treaty provision which covers the area of positive action measures. It provides that "with a view to ensuring full equality in practice between men and women in working life, the principle of equal treatment shall not prevent any Member State from maintaining or adopting measures providing for specific advantages in order to make it easier for the underrepresented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers". Even though these provisions only encourage, but do not require Member States to take positive action measures, they allow more room for their application than Article 2 (4) of the original Equal Treatment Directive. Nevertheless, not even Article 157 (4) TFEU (former Article 141(4) TEC) has yet been used by the ECJ to widen that scope[54].

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[48] Council Directive 2000/43/EC of 29.06.2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin.

[49] Council Directive 2000/78/EC of 27.11.2000 establishing a general framework for equal treatment in employment and occupation.

[50] Directive 2006/54/EC of the European Parliament and of the Council of 5.07.2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast).

[51] Council Directive 2004/113/EC of 13.12.2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services.

[52] European Network Against Racism, *Fact Sheet 35...*, p. 6.

[53] O. De Schutter, op. cit., p. 35.

[54] M. De Vos, op. cit., p. 68.

First judgment on the issue of positive action with regard to the principle of equal treatment for men and women was delivered by the European Court of Justice in 1995. The *Kalanke*[55] case dealt with Bremen law provision which stated that women who have the same qualifications as men applying for the same post are to be given priority in sectors where they are underrepresented, both in case of appointment and promotion. However, the ECJ came to the conclusion that such automatic preference goes beyond promoting equal opportunities and oversteps the limits of the exception in Article 2 (4) of the Equal Treatment Directive. It further stated that because the Bremen law sought to achieve equal representation of men and women in all grades and levels within a department, it substituted the equality of opportunity by the equality of results, which is not covered by the scope of this article[56].

Two years later, the Court distinguished *Kalanke* in its second positive action case, *Marshall*[57]. The basis for this was a "savings clause" (in German "Öffnungsklausel"), which formed a part of the challenged provision and which provided that women are to be given priority in promotion unless specific individual circumstances do not tilt the balance in a male candidate's favor. Conditions that had to be otherwise met included the fact that there are fewer women than men in the particular higher grade post and that they are of equal suitability, competence and professional performance[58]. Findings from these two judgments were confirmed by the Court in the 2000 case of *Badeck and others*[59]. However, the Court added several specifications to the criteria. Absolute preference is therefore not considered discriminatory when it is based on an "actual fact" such as the proportion of men and women among persons with certain qualification. Also when the preferential treatment of women regards the access to certain opportunities (e.g. vocational training, calls to job interviews), it will be considered with less severity, i.e. even when absolute, such preferential treatment will not amount to prohibited discrimination[60].

Nevertheless, positive action that might equal to some form of reverse or positive discrimination is still regarded as an exception to the principle of formal equality in sex discrimination law. The scope of this exception has been established by the European Court of Justice through its standard test of proportionality. Nowadays, the following guidelines can be drawn from the

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[55] Case C-450/93, *Kalanke v Freie Hansestadt Bremen* [1995] ECR I-3051.

[56] O. De Schutter, op. cit., pp. 35–36.

[57] Case C-409/95, *Marshall v Land Nordrhein-Westfalen*, 1997, ECR I-6363.

[58] This has been further confirmed e.g. in *Abrahamsson*, Case C-407/98, *Abrahamsson and Anderson v Fogelqvist*, 2000, ECR I-5539.

[59] Case C-158/97, *Badeck and others*, 2000, ECR I-1875.

[60] Ibidem, p. 44.

existing ECJ case-law. First, any preferential treatment should serve a legitimate aim and present a measure that is appropriate and necessary in order to achieve that aim. Second, measures including group characteristics that result in individual positive discrimination may be justified if they have the correct aim, which makes the requirement for individual harm redundant. Third, positive action measures should rely on objective and transparent criteria and objectively serve the stated aim. Last, as was already stated above, selection is not proportional when the preferential treatment is automatic and unconditional and does not objectively assess all personal circumstances of all the candidates[61].

Indeed, the required legitimate aim may vary with regard to the context and the groups concerned. As far as the employment of women is concerned, the aim should be "to eliminate and correct the causes of reduced opportunities of access to employment and careers and to improve the ability of the underrepresented sex to compete on the labor market and pursue a career on an equal footing, thus remedying a proven imbalance between the sexes"[62]. However, it is not clear from the Court's case-law what level of imbalance is required to justify preferential treatment or if and how the effectiveness and cost/benefit impact of such treatment should be assessed[63]. Moreover, the ECJ has not yet considered the whole range of possible positive action measures[64] or the case when the Member States would be required to adopt such measures in order to implement the principle of equal treatment[65].

Concluding remarks on affirmative/positive action in the U.S. and in the EU

In comparing affirmative/positive action in the United States and in the European Union, it becomes apparent that even thought the genesis of affirmative action occurred in the U.S., this is also where its implementation has stirred the most controversy[66]. Since the affirmative action is not expressly covered either by the constitution or, to a great extent, by statutory law, it is therefore highly scrutinized, especially in the public sector and government contracting. In contrast, the issue with positive action in the EU is not whether it actually is allowed under the concept of formal equality at all but

[61] M. De Vos, op. cit., p. 68.
[62] Ibidem.
[63] Ibidem.
[64] European Network Against Racism, *Fact Sheet 35*...
[65] O. De Schutter, op. cit., p. 46.
[66] M.A. Drumbl, J.D.R. Craig, op. cit., p. 108.

rather what kinds of positive action measures fall within the scope of respective EU law provisions. On the other hand, distinction between equality of opportunities and equality of results as known in the sphere of the EU law has not developed in the American jurisprudence. Therefore permissible affirmative action in the United States can be as well broader than in the European Union, because programs conferring actual jobs or contracts on members of disadvantaged groups are allowed in the U.S. as remedial measures[67].

In the United States, case-law developed by the Supreme Court in the area of affirmative action relates almost exclusively to one prohibited ground of discrimination and that is race. Except in case of private employment the scrutiny required by the Court with regard to affirmative action programs is strict, therefore only the measures that correspond to a compelling state interest and that are narrowly tailored to that end meet this requirement. However, the compelling state interest criteria are not always easy to satisfy. For instance, in case of university admissions the only argument that is currently accepted by the Supreme Court is the diversity argument. Other justifications for affirmative action measures in this area, i.a. remedying the effects of past social discrimination, ensuring distributive justice for certain disadvantaged groups in the present (*Bakke*), or providing role models for members of disadvantaged minorities (*Wygant v. Jackson Board of Education*[68]), were progressively invalidated by the Supreme Court[69]. In this sense the U.S. affirmative action concept is narrower as the ECJ appears to prefer a deferential approach to affirmative action programs that promote equality of opportunity[70].

The European Court of Justice developed its case-law on positive action solely in the area of equal treatment between men and women, especially with regard to Article 2 (4) of the original Equal Treatment Directive. Therefore positive action measures designed to level the playing field for women in the area of employment, specifically in hiring or promotion opportunities were the measures most frequently subjected to the ECJ proportionality test. In consequence, typical example from this area would present a positive action plan which aims to increase the number of women in the company's senior management team. First it would have to be objectively shown that there is a low number of women in the team, second that the measure chosen will actually lead to a higher number of women, and finally that the measure is proportionate to that aim and that it does not involve absolute or automatic preferences[71].

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[67] Ibidem, p. 113.
[68] *Wygant v. Jackson Board of Education*, 476 U.S. 267, 1986.
[69] J. Ringelheim, op. cit., p. 5.
[70] M.A. Drumbl, J.D.R. Craig, op. cit., p. 113.
[71] European Network Against Racism, *Fact Sheet 35...*, p. 7.

However, the extent to which the approach taken in the field of gender may or will be applied to the other grounds of discrimination remains uncertain. Some views suggest that "the state of the law delineating the scope for positive action in gender can and should [...] serve as a point of departure for interpreting the positive action provisions in the Race and Framework Directives"[72]. On the other hand, it can as well be assumed that the increase in protected grounds and in material scope of the EU equality law will lead to more and various acceptable aims for positive action, i.e. that the flexible nature of the proportionality test will produce more leniency towards positive action in the future judgments of the ECJ[73]. Some point to the existence of quotas for disabled people in many European countries and also to the fact that preferential treatment is less controversial when there is strong evidence of severe inequality (compare e.g. the legacy of racial segregation in the U.S. with the entrenched inequalities faced by the Roma in Europe today)[74]. Alternatively, with regard to the fact that positive action is required under international human rights law related to racial discrimination and minority rights, "it may even be easier to justify certain affirmative action measures benefiting racial or ethnic minorities than it has been to justify similar measures adopted in order to promote the professional integration of women"[75].

Moreover, it has yet to be shown whether the case-law developed by the ECJ in the field of employment may or will be applied also to other domains, e.g. in the access to and supply of goods and services[76]. However, as De Schutter points out, the use of positive action measures that may be acceptable in a particular sphere may nevertheless be excluded in another sphere because of the need to ensure the allocation of another scarce social good. Therefore, for instance, a positive action plan acceptable at the recruitment stage could be less acceptable in the layoff procedures (see e.g. the U.S. case *Wygant v. Jackson Board of Education*). It follows that it is extremely difficult to establish admissibility criteria of affirmative/positive action that can claim general validity. That is true not only with regard to different level of scrutiny based on the prohibited ground of discrimination in question, but also with regard to different criteria applied in particular sphere (e.g. employment or education). Moreover, general criteria would be all the more difficult to identify in the situations where social goods are often distributed according to a combination of criteria (e.g. in the allocation of scholarships or social housing)[77].

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[72] M. De Vos, op. cit., p. 68.
[73] Ibidem.
[74] European Network Against Racism, *Fact Sheet 35...*, p. 7–8.
[75] O. De Schutter, op. cit., p. 48–49.
[76] Ibidem, p. 49.
[77] Ibidem, p. 50–51.

In respect of the future development of the U.S. Supreme Court case-law, both professionals and laymen impatiently await further judgments as some States have passed laws or constitutional amendments banning affirmative action within their respective territories in almost every field (e.g. California, Washington, Florida or Michigan). It will be especially interesting with regard to the university admissions in Michigan as the law was passed in 2006, i.e. after the widely known *Grutter* and *Gratz* decisions. On the other hand, many propose that the U.S. affirmative action should return to its simpler roots. However whether this will exclude application of affirmative action in "new" spheres or "new" prohibited grounds of discrimination or whether the Court will take a different, more pro-active standpoint, remains an open question.

In case of the European Court of Justice we await whether it will continue to accept positive action measures only in situations where "actual inequalities" are shown to exist, or whether it will redefine the criteria which are usually relied upon in order to allocate social goods, depending on the nature of these goods. Because as De Schutter suggests, "just like »qualifications« may be redefined to take into account the experience which may have been acquired by looking after children [...] or the specific »female life experience«, they may be rethought in order to take into account the specific value, both in private business and in the public sector, of including more minorities, in order to be more responsive to the needs of the clients or of the public"[78]. However, major shift from equality of opportunities to equality of results is probably more than can be expected.

Streszczenie

Akcja afirmatywna w Stanach Zjednoczonych kontra pozytywne działania w Unii Europejskiej – analiza porównawcza

Słowa kluczowe: akcja afirmatywna, równe traktowanie, dyskryminacja, równe traktowanie.

Koncepcja akcji afirmatywnej powstała w 1961 r., aby promować równe prawa mniejszości w wielu dziedzinach, szczególnie zatrudnienia i edukacji. Podstawę do tych działań można znaleźć m.in. w amerykańskiej ustawie o prawach obywatelskich z 1964 r., jednak ich zakres został określony głównie przez Sąd Najwyższy Stanów Zjednoczonych. W Unii Europejskiej termin „pozytywne działania" pojawia się przy definiowaniu środków proporcjonalnych, podjętych w celu osiągnięcia pełnej i rzeczywistej równości grup, które są społecznie i ekonomicznie upośledzone. Podczas gdy większość pozytyw-

[78] Ibidem, p. 54.

nych planów działania w Stanach Zjednoczonych wiąże się z prawami mniejszości rasowych, pozytywne działania w Unii Europejskiej przede wszystkim odnoszą się do równych praw kobiet. Zarówno w Ameryce, jak i Europie działania pozytywne/ potwierdzające należą do tematów dyskusyjnych. Autorka artykułu podjęła próbę porównania pozytywnych działań w USA i UE, zwłaszcza w odniesieniu do orzecznictwa Sądu Najwyższego Stanów Zjednoczonych i Trybunału Sprawiedliwości Unii Europejskiej.