

## EXAMPEL FOR LEGAL REASONING CASE STUDY (2.2)

*Antonio Álvarez del Cuvillo, University of Cádiz*

Due to the nature of the proposed methodology, it is not possible to provide a detailed example of each of the seven steps of the practical case, as it would take up too much space. However, we will present a simplified example here that serves as an illustration of the application of these guidelines in the classroom.

### 1. FACTS OF THE CASE

Public university hiring rules establish a highly detailed scoring system to compete for the position of Full Professor. However, it is also stated that in case candidates have exactly the same merits, preference will be given to the candidate belonging to the underrepresented gender in the corresponding field of knowledge.

In the Physics Department of that university, there are several male full professors and no women. For the acquisition of a new position, Mr. Guido Malzani and Ms. Fatima Ansari both receive the maximum score (50 points). Ultimately, the position is attributed to Ms. Fatima Ansari because she is a woman, as this is the underrepresented gender.

Mr. Malzani challenges the decision, arguing that this preference is unfair. Does he have a valid claim from the perspective of European Union law?

### 2. STEPS TO DEAL WITH THE CASE STUDY

#### Step 1

In the first step, students have to identify a general and abstract legal issue based on the specific facts presented in the case. In the last paragraph, it is stated that Mr. Malzani considers the preference to be 'unfair,' but that is too ambiguous. On the other hand, the final question is very illustrative, but by itself, it does not allow for the identification of an abstract issue that would require reference to legislation and case law for its resolution. For example, the legal problem cannot be 'determining whether Mr. Malzani is right in his claims.' This wording is still too closely tied to the specific case and cannot be understood without reading the case statement. Therefore, students can be asked to exercise identifying the relevant facts of the case and transforming them into an abstract problem.

For instance, it could be stated: 'The legal issue to be resolved consists of determining whether a public university's hiring policy, which gives preference to the underrepresented gender when selecting a professor, is in accordance with European Union law when there

are two candidates who have exactly the same score in a highly complex scoring system.

## Step 2

In the second step, students must identify, through the study of theory and the search for legislation, that this legal problem refers to the application of the principle of equal treatment based on sex, specifically the so-called "positive action."

Thus, the initial problem statement could be further refined by incorporating a reference to the principle of equal treatment: "The legal issue to be resolved consists of determining whether a hiring policy of a public university, which gives preference to the underrepresented sex when selecting a professor, aligns with the principle of equal treatment based on sex under European Union law when there are two candidates who have exactly the same score in a highly complex scoring system."

If the students have a low level of understanding, a session could be dedicated to teaching them how to search for relevant legislation and understand the interrelationship between different sources of law.

In this way, it can be noted that the principle of equal treatment based on sex is recognized in the following regulations:

Articles 21 and 23 of the Charter of Fundamental Rights of the European Union.

Articles 2 and 3.3 of the Treaty on European Union.

Articles 10, 19, and 157 of the Treaty on the Functioning of the European Union.

Directive 2006/54/EC.

Furthermore, the possibility of adopting positive action measures is expressly recognized in Article 23, second paragraph, of the Charter of Fundamental Rights of the European Union, Article 157.4 of the Treaty on the Functioning of the European Union, and Article 3 of Directive 2006/54/EC.

## Step 3

To address this step, it would be necessary to assume that the case to be resolved is 'simple', given that European Union regulations expressly allow positive action measures to support the labor integration of the underrepresented sex. Therefore, the practice could be focused on working on the structure of the text and the writing style.

For example, a simple structure could be proposed, consisting of:

1) Introduction

- 2) Reasoning/Justification
- 3) Conclusion

The introduction would involve presenting the abstract legal issue that has been identified in the previous steps. The reasoning/justification requires invoking the relevant regulations applicable to the case and summarizing their content, establishing a logical connection between the legal issue and the facts of the case. Finally, the conclusion could involve connecting the resolution of the abstract legal issue with the question posed in the case.

Therefore, an example of a resolution could be as follows:

“The legal issue to be resolved consists of determining whether a hiring policy of a public university, which gives preference to the underrepresented sex when selecting a professor, aligns with the principle of equal treatment based on sex under European Union law when there are two candidates who have exactly the same score in a highly complex scoring system.

The possibility of adopting positive action is expressly recognized in European Union law. Article 3 of Directive 2006/54/EC allows for the adoption of measures aimed at ensuring full equality between men and women in the workplace, referring to art. 141 (4), currently 157 (4) of the Treaty on the Functioning of the European Union. This provision states that the principle of equal treatment is compatible with the adoption of measures providing specific advantages in favor of the underrepresented sex. Similarly, Article 23, second paragraph, of the Charter of Fundamental Rights of the European Union establishes that the principle of equality shall not prevent the maintenance of specific advantages for the underrepresented sex.

Therefore, Mr. Malzani's claim is unfounded from the perspective of European Union law.

#### Step 4

Despite what was discussed in step 3, the scenario in question is not actually a straightforward case. While European Union regulations do permit positive action measures, they do not explicitly address their limitations. It is evident that the aforementioned rules do not endorse any and all types of measures. This issue can be further explored in the classroom by considering more extreme cases, such as situations where a significantly less qualified individual or someone who does not meet even the minimum qualifications is selected solely based on their gender. This leads us to the notion that the principle of equality implies a reasonable relationship of proportionality, making measures of positive action that are deemed "disproportionate" inadmissible.

Building on this foundation, students can endeavor to construct arguments both "for" and "against" the legality of the measure in question. For example, one could argue against the measure, stating that excluding a qualified individual from employment solely on the basis of their gender is disproportionate, even if the objective is to achieve genuine equality between men and women. Conversely, from a different perspective, it could be asserted that in this case, the measure is proportionate, as the preference is only applied when two candidates have exactly the same score.

In order to delve deeper into crafting arguments, familiarity with the case law of the European Court of Justice concerning positive action is necessary. Consequently, the teacher could consider combining steps 4 and 5 or altering their order. This exemplifies how the proposed structure should be tailored to the requirements of each specific situation.

### Step 5

If students have a low level, a session could be dedicated to learning how to use the search engine for case law of the European Court of Justice to find relevant judgments.

Subsequently, specific judgements could be analyzed, such as the cases *Kalanke*, C-450/93 of 17 October 1995, *Marschall*, C-409/95 of 11 November 1997, *Badeck*, C-158/97 of 28 March 2000, and *Abrahamson*, C-407/98 of 6 July 2000. If students have a low level, the structure of these judgments could be examined, as well as strategies and techniques for quickly finding the most relevant information within them.

From there, the general doctrine of the European Court of Justice can be derived, according to which positive action measures cannot attribute an absolute or unconditional preference to women. Instead, all applications must be subjected to an objective procedure where the specific personal situations of all candidates can be taken into consideration.

In this context, the arguments constructed by the students should be related to the studied case law. For example, it could be argued that in this case, there is an absolute or unconditional measure, because the preference is automatically applied when the scores are equal. On the other hand, from a different perspective, it could be claimed that in this case, the existence of a highly detailed scoring system allows for an objective analysis of each candidate's personal characteristics, so the preference is only applied in the rare case of an exact tie in scores.

### Step 6

After thoroughly studying the topic, students should choose a solution and construct the

basic structure of an argumentation that supports the position they want to defend, as an outline.

In a case like this, we can start with the outline seen in step 3 (Introduction / Reasoning / Conclusion), but expanding the 'Reasoning' section. A longer and more complex case could encompass different legal issues that would need to be identified and resolved separately. Once again, the introduction can present the abstract legal problem, and the conclusion can directly answer the question posed in the case.

Regarding the reasoning, students should consider how to organize the arguments they have identified to make the text clear, precise, and persuasive. They should be able to explain the reasons why they have chosen a specific order to present the arguments. Moreover, it is common for them to incorporate counterarguments to the position they intend to defend in order to refute them.

Here is an outline for an argumentation in favor of the legitimacy of the measure (of course, it could also be argued that it is illegitimate):

- Introduction: Legal problem
- Legislation: Positive action measures are possible
- Limits → Proportionality
- General doctrine of the ECJ
- It might be thought of as an unconditional preference, as in the Kalanke case
- BUT the scoring system is highly detailed → Allows for consideration of all candidates' characteristics → Similar to the Marschall and Badeck cases
- Conclusion: Respond to the case's question → The measure is legitimate

## Step 7

In the final step, students should focus on refining the actual wording of their text, aiming to enhance elements such as clarity, linguistic accuracy, precision, appropriate usage of technical terminology, style, effective incorporation of discourse connectors, style, and more. The instructor could provide guidance on common expressive errors, or alternatively, students could engage in peer review to correct and improve each other's writing.

### 3. EXAMPLE SOLUTION

*Here is an example of how the response to the practical case could be formulated, following the outline provided earlier. However, please note that since English is not the authors' native language, this example should not be regarded as a demonstration of "perfect" writing.*

“The legal issue to be resolved consists of determining whether a hiring policy of a public university, which gives preference to the underrepresented sex when selecting a professor, aligns with the principle of equal treatment based on sex under European Union law when there are two candidates who have exactly the same score in a highly complex scoring system.

The possibility of adopting positive action is expressly recognized in European Union law. Article 3 of Directive 2006/54/EC allows for the adoption of measures aimed at ensuring full equality between men and women in the workplace, referring to art. 141 (4), currently 157 (4) of the Treaty on the Functioning of the European Union. This provision states that the principle of equal treatment is compatible with the adoption of measures providing specific advantages in favor of the underrepresented sex. Similarly, Article 23, second paragraph, of the Charter of Fundamental Rights of the European Union establishes that the principle of equality shall not prevent the maintenance of specific advantages for the underrepresented sex.

However, this does not imply that all imaginable positive action measures are admissible. Differential treatment aimed at achieving the legitimate goal of real gender equality is acceptable as long as it does not result in disproportionate effects, ensuring that individuals are not instrumentalized to achieve a social end. In this case, undoubtedly, Mr. Malzani suffers a detriment by being excluded from the hiring process, so it would be necessary to analyze whether this is proportionate.

In this regard, the case law of the European Court of Justice should be taken into account, such as the judgments in the Kalanke case, C-450/93 of 17 October 1995, Marschall case, C-409/95 of 11 November 1997, Badeck case, C-158/97 of 28 March 2000, and Abrahamson case, C-407/98 of 6 July 2000. From these judgments, it can be deduced that positive action measures cannot give an automatic or unconditional preference to women. Instead, all applications must undergo an objective procedure where the specific personal situations of all candidates can be taken into consideration.

In this case, one could contend that a preference favoring women is automatically or unconditionally established, as it is consistently applied in situations of a tie, similar to the circumstances addressed in the Kalanke judgment. However, it should be noted that this tie occurs after applying a highly detailed scoring system where a maximum of 50 points can be achieved. Although the case statement does not provide further information about the scoring system, we assume that it would allow for the objective consideration of each candidate's particular circumstances. If that is the case, the scenario would be more similar to those examined in the Marschall and Badeck judgments.

Therefore, in my opinion, Mr. Malzani's claim is unfounded from the perspective of European Union law, as long as the scoring system is sufficiently detailed to have taken his specific circumstances into consideration.

