

#Women4Business

NEWS:

Women's Forum & Clifford Chance Legal guide

A very practical legal framework for affirmative
action policies and data protection



EU legal framework for affirmative action

POSITIVE DISCRIMINATION AND AFFIRMATIVE ACTION

Companies are able (and should be encouraged) to implement affirmative action policies. However, they must ensure their actions do not amount to discrimination.

Equality and non-discrimination are fundamental principles of EU law, and any form of discrimination (including **positive discrimination**) is thus generally unlawful. However, measures providing for specific advantages aimed at improving conditions for underrepresented groups (so-called **affirmative action**) are typically legal and are often encouraged under EU and national laws.

In the absence of specific legal provisions, companies looking to implement a gender responsive procurement policy need to self-assess the legality of envisaged measures, to avoid the risk of conducting unlawful discrimination on the basis of gender. It is therefore important to draw a line between **unlawful positive discrimination** and **lawful affirmative action**.

Striking the right balance is not an easy task and has generally been left to the courts to determine. As such, very little formal guidance is available, and most of the issues that have arisen to date relate to conditions of employment rather than supply chain diversity. Whilst some red flags can be identified, most measures will need to be carefully assessed by each company and their legal teams.

As a general rule, mechanisms that automatically give preference to female candidates over male candidates will be unlawful. However, favouring a female candidate over a male candidate will generally be legal where (i) both candidates are equally qualified and (ii) even if the stated goal is to favour female candidates, there is scope to fully, objectively and individually assess the application of the male candidate.



Positive discrimination: practices or policies systematically favouring members of a disadvantaged or under-represented group that share a protected characteristic, in order to address inequality.



Affirmative action: action taken with a view to achieving full and effective equality in practice by alleviating disadvantages experienced by people with a protected characteristic, reducing their under-representation and meeting their particular needs.

Designing and implementing affirmative action policies

GUIDANCE FOR SUPPLIER DIVERSITY AND GENDER-INCLUSIVE SOURCING

Overall, with the support of legal, companies are generally allowed to consider gender diversity in their procurement policy as long as it is not an overriding criteria and all suppliers, including non-diverse ones, are able to compete fairly.

When designing and implementing best practices to drive gender diversity in their supply chains businesses should take the following considerations:

- **Automatic selection/award:** does the measure favour women-led businesses over others, with no scope for other criteria? If so, it will generally be unlawful.
- **Ability to compete:** does the measure simply increase the ability of underrepresented groups to compete fairly and equally? If so, it will generally be lawful.

If the proposed measure does not fall into one of the categories mentioned above, a more detailed self-assessment with the legal team against the following criteria will be required:

- **Legitimate aim:** does the measure address (a) a disadvantage suffered by persons who share a protected characteristic, (b) specific needs of persons who share a protected characteristic, or (c) disproportionately low participation in an activity by persons who share a protected characteristic? For example, promotion of gender equality as a legitimate aim has previously been recognised under EU law.
- **Proportionate means:** is the proposed action appropriate to achieve the aim (i.e., would it be possible to achieve the same aim through other means that are less likely to result in the unfavourable treatment of others)? As a general rule, systematically selecting women-led businesses (even if other assessment criteria tilt the balance in favour of another business) will be disproportionate.

Designing and implementing affirmative action policies

SELF-ASSESSMENT GUIDANCE: DO'S AND DON'TS

Do	Don't
<ul style="list-style-type: none">• Develop internal corporate policies setting out the company's values in terms of supplier diversity and provide guidance on how to integrate these into day-to-day business. For example, this may include setting supplier diversity targets (but not outright quotas for supplier diversity).• Indicate that businesses who compete for procurement are selected on the basis of objective criteria which allow a full competitive assessment of the offers received. This may include gender responsive criteria but clarifying that these will not be the dominant factor of any assessment.• Take steps to remove barriers that prevent women entrepreneurs from accessing complex global supply chains (e.g. by increasing access to information, streamlining the application process, adjusting contract sizes, etc.).• Identify and remove procurement criteria which may hinder access to the supply chain for women owned/led businesses (e.g. conditions relating to the duration of a company's existence, minimum amount of income, payment structure, bundling of contracts, and any other factors which tend to exclude smaller/less established businesses).• Encourage supplier development (e.g. by establishing outreach programmes to ensure that women entrepreneurs have access to corporate decision makers, business mentoring, accessing databases and networks supporting gender diversity)	<ul style="list-style-type: none">• Implement an procurement policy which excludes the over-represented group (i.e. men-led businesses).• Award business solely based on the ownership status of candidate suppliers.• Systematically select women owned/led businesses even over better qualified alternatives.• Set outright quotas of suppliers for women entrepreneurs, without indicating that companies will be selected on the basis of objective criteria.

EU legal framework for data protection

TRANSPARENCY AND PERSONAL DATA

Companies with supplier diversity policies are allowed to request and collect data about gender and gender identity, but the right controls must be in place.

It goes without saying that data collection about gender and gender identity is an absolutely essential tool for any organisation that wants to work with partners and suppliers that take affirmative action seriously.

Data protection law isn't designed to stop you collecting the data you are seeking for affirmative action, provided appropriate controls are in force. In some countries, the legal framework to collect this data is supportive and there are well-tested means to do so. However, **transparency and optionality** are key, as well as understanding what personal data you are collecting and why.

You will come up against some legal distinctions requiring you to make sure that the way you ask questions and collect personal data complies not only with the law but cultural nuances, and requirements beyond data protection (like employment law). It is important to understand these from the outset.

Data protection rules typically apply to 'personal data'. That will include names, contact details, gender and gender identity of your supplier's management and owners. Personal data is information that can be used to identify someone **directly or indirectly**. In practice, that means you may be handling personal data even where it is not immediately obvious.



Personal data: information relating to individuals who can be identified or who are identifiable: (i) **directly** from the information in question; or (ii) **indirectly** from that information (including that information in combination with other information).

Transparency and optionality: these aspects should be carefully considered to ensure the privacy of individuals is respected and maximise engagement.

Making data protection work

GUIDANCE FOR SUPPLIER DIVERSITY AND GENDER-INCLUSIVE SOURCING

Consider these steps when designing and implementing practices to drive gender diversity in your supply chain:

- **Legal assessment:** you will need to engage with your legal team to assess the legality of the proposed affirmative action measures from a data protection perspective. Engaging with your legal team early in the process is important to align with your organisational approach to privacy.
- **No surprises:** nothing should come as a surprise. Have you considered how and who will communicate how personal data collected will be used? In general, any communication should be clear and issued before you collect any personal data.
- **Minimise personal data requests:** you should not collect more personal data than is necessary.
- **Conduct consent analysis:** If you deem consent is needed (which will depend on the types of data you collect), make an informed decision about where and how it is obtained – this may vary depending on countries involved, including where the activity involves non-EU countries.
- **Phased approach:** you should think carefully about the different phases in the lifecycle of data – collecting, storing, securing, using and disposing. At each stage, consider what controls over data you have and who has access to it. You should also communicate your policies to your suppliers.
- **Combining efforts:** some organisations rely on third parties to ‘certify’ that suppliers are women owned/led, by providing aggregated statistics.
- **Ensure appropriate governance:** you should consider whether appropriate individuals are designated to monitor compliance of the data collection programme – monitor this regularly.

Designing and implementing affirmative action policies

SELF-ASSESSMENT GUIDANCE: DO'S AND DON'TS

Do	Don't
<ul style="list-style-type: none">• Recognise varying rules: personal data protections will differ by country, and may implicate employment + discrimination laws.• Recognise re-identification possibility: 'anonymous' and statistical data can become personal if capable of being linked back to an individual.• Document your legal analysis: a data protection impact assessment (DPIA) demonstrates accountability. Involve your legal team, as appropriate.• Apply data protection principles: what do your notices say? Where do you tell suppliers how the data will be used? Have you informed your suppliers of what you intend to do with their data, and how you will store it?• Tailor questions: maximise meaningful responses, whilst recognising cultural and legal sensitivities globally. To ensure suppliers are comfortable with your policies, consider making the questions voluntary.• Review your approach: conduct regular audits of your questions to ensure they minimise risk and are up to date with your corporate policies.	<ul style="list-style-type: none">• Assume a statistic = anonymised data: it minimises risk but will not necessarily carve out the activity from data protection rules. Can you or supplier pseudonymise or aggregate data sets?• Apply a 'multi-use' approach to the data: specify clearly why you're asking the question, and how the statistics will be used. Would the supplier or their owners be surprised?• Proceed without legal/compliance buy-in: present legal information to help data team make an informed decision + align with internal risk positions.

If you would like to have more information,
Be part of our Daring Circles Business team
And take part in the Inclusive Sourcing Journey - a
new digital tool to assess the maturity of your
supplier diversity and inclusive sourcing practices

THANK YOU

Find out more and join the
Inclusive Sourcing Journey [HERE](#)