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## Positive Action beyond the Gender Acquis

PATHWAYS TO SUBSTANTIVE FORMAL EQUALITY



## CJEU & Discrimination



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*'the application of different rules to comparable situations  
or the application of the same rule to different situations'*

## Positive Action/Discrimination = Exception



- Art. 157(4) TFEU & amended and recast Equal Treatment Directive:
  - “With a view of ensuring **full equality in practice** between men and women in working life, **the principle of equal treatment shall not prevent** any Member State from maintaining or adopting **measures** providing for **specific advantages** in order to make it **easier** for the under-represented sex **to pursue a vocational activity** or **to prevent or compensate for disadvantages in professional careers.**”
  
- Art. 5 D2000/43 and Art. 7.1 D2000/78:
  - “With a view of 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 any of the grounds.”

## The Acquis



- Formal equality is the **rule**, positive discrimination the narrow **exception**
  
- Objectively address occupational difficulties of the favoured group
- Clear and unambiguous criteria
- Proven and genuine group imbalance
- Appropriate and necessary – proportionality & thus intrinsically temporary
- No automatic quotas – ‘saving clause’
  
- Overall, EU/CJEU emphasis is on formal neutrality BUT there is a lot of positive action that does not run afoul of neutrality: comparator requirement

## Pathway 1

### Effective Non-Discrimination = Substantive



#### Sotgiu (152-73) 1974 – Concept of indirect discrimination

- The rules regarding equality of treatment, (...) forbid not only overt discrimination by reason of nationality but also all covert forms of discrimination which, by the application of other criteria of differentiation, **lead in fact to the same result**.
- **This interpretation, which is necessary to ensure the effective working of one of the fundamental principles of the Community, is explicitly recognized by the fifth recital of the preamble to Regulation No 1612/68 which requires that equality of treatment of workers shall be ensured 'in fact and in law'.**
- It may therefore be that criteria such as place of origin or residence of a worker may, according to circumstances, **be tantamount, as regards their practical effect, to discrimination on the grounds of nationality**, such as is prohibited by the Treaty and the Regulation.

## Pathway 1

### Effective Non-Discrimination = Substantive



#### O'Flynn (C-237/94) 1996 – Concept of indirect discrimination

- 'a provision of national law must be regarded as indirectly discriminatory **if it is intrinsically able to affect migrant workers** more than national workers and if there is a consequent **risk that it will place the former at a particular disadvantage**. **It is not necessary in this respect to find that the provision in question does in practice affect a substantially higher proportion of migrant workers**. It is sufficient that it is liable to have such an effect'.

## Pathway 1

### Effective Non-Discrimination = Substantive



#### Feryn (C-54/07) 2008 – Concept of direct discrimination

- The aim of (directive 2000/43),(...) is 'to foster conditions for a socially inclusive labour market'.
- The objective of fostering conditions for a socially inclusive labour market would be hard to achieve if the scope of Directive 2000/43 were to be limited to only those cases in which an unsuccessful candidate for a post, considering himself to be the victim of direct discrimination, brought legal proceedings against the employer.
- The fact that an employer declares publicly that it will not recruit employees of a certain ethnic or racial origin, something which is clearly likely to strongly dissuade certain candidates from submitting their candidature and, accordingly, to hinder their access to the labour market, constitutes direct discrimination (...).

## Pathway 1

### Effective Non-Discrimination = Substantive



#### Coleman (C-303/06) 2008 – Concept of direct discrimination

- '(...) Directive 2000/78 (...) seeks to lay down, as regards employment and occupation, a general framework for combating discrimination (...) – including, in particular, disability – with a view to putting into effect in the Member States the principle of equal treatment. It (...) also has the objective of creating within the Community a level playing field as regards equality in employment and occupation.
- (...) those objectives, (...) would be undermined if an employee (...) cannot rely on the prohibition of direct discrimination laid down by Article 2(2)(a) of that directive where it has been established that he has been treated less favourably than another employee is, has been or would be treated in a comparable situation, on the grounds of his child's disability, and this is the case even though that employee is not himself disabled.

## Pathway 2

### Effective Equality Rights = Substantive

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#### Ursula Sass (C-284/02) 2004 – Pregnancy related rights

- Having regard to the principle of equal treatment, (...) the directive allows national provisions which guarantee women specific rights on account of pregnancy and maternity. (...)
- the exercise of rights granted to a woman under that Article cannot be made subject to unfavourable treatment regarding conditions to be fulfilled in order for her to attain a higher grade in the professional hierarchy. From that point of view, (the directive) is intended to bring about equality in substance rather than in form.

## Pathway 2

### Effective Equality Rights = Substantive

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#### Jette Ring (C-335/11) 2013 – Disability discrimination

- It does not appear that Directive 2000/78 is intended to cover only disabilities that are congenital or result from accidents, to the exclusion of those caused by illness. It would run counter to the very aim of the directive, which is to implement equal treatment, to define its scope by reference to the origin of the disability.
- It must therefore be concluded that if a curable or incurable illness entails a limitation which results in particular from physical, mental or psychological impairments which in interaction with various barriers may hinder the full and effective participation of the person concerned in professional life (...) such an illness can be covered by the concept of 'disability' (...).

## Pathway 3

### Implicit Accommodation Duty

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**Indirect discrimination** justified if it:

- 'is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary'

## Pathway 3

### Implicit Accommodation Duty

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**G4S (C-157/15) 2017 – Indirect religious discrimination**

- In the present case, so far as concerns the refusal of a worker such as Ms Achbita to give up wearing an Islamic headscarf when carrying out her professional duties for G4S customers, **it is for the referring court to ascertain whether, taking into account the inherent constraints to which the undertaking is subject, and without G4S being required to take on an additional burden, it would have been possible for G4S, faced with such a refusal, to offer her a post not involving any visual contact with those customers, instead of dismissing her.** It is for the referring court, having regard to all the material in the file, to take into account the interests involved in the case and to limit the restrictions on the freedoms concerned to what is strictly necessary.

## Pathway 4

### Substantive = Generous

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#### Art. 6 D2000/78 – Positive action/discrimination on grounds of age

- “Notwithstanding (...) differences of treatment on grounds of age shall not constitute discrimination, if, within the context of national law, they are objectively and reasonably justified by a legitimate aim, including legitimate employment policy, labour market and vocational training objectives, and if the means of achieving that aim are appropriate and necessary.”

#### Rosenbladt (C-45/09) 2010

- (...) it does not appear unreasonable for the authorities of a Member State to take the view that a measure such as the authorisation of clauses on automatic termination of employment contracts on the ground that an employee has reached the age at which he is eligible for a retirement pension may be appropriate and necessary in order to achieve legitimate aims in the context of national employment policy.

## Pathway 4

### Substantive = Generous

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#### Art. 4.2 D2000/43 – Religion

- Religion can be used as an occupational requirement ‘(...) in the case of occupational activities within churches and other public or private organisations the ethos of which is based on religion or belief, (...) where, by reason of the nature of these activities or of the context in which they are carried out, a person's religion or belief constitute a genuine, legitimate and justified occupational requirement (...)’

#### Egenberger (C-414/16) 2018

- ‘balance between the right of autonomy of churches and other organisations whose ethos is based on religion or belief, (...) and, (...) the right of workers (...) not to be discriminated against on grounds of religion or belief (...)’. Consequently, EU non-discrimination law must, except in very exceptional cases, refrain from assessing whether the actual ethos of the church or organisation concerned is legitimate

## In conclusion



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- EU-law is mixing formal and substantive equality in its sources and concepts
  - EU-law interpretation of formal equality is embracing substantive equality goals organically
  - No binary divide between formal equality of opportunity and substantive equality of outcomes
  - There is more substantive PA in formal non-discrimination than meets the eye



**Thank you**

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