



# Positive Action in and beyond the Gender Acquis



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## CJEU & Discrimination

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

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## 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.”

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## The Gender Acquis

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## The Acquis in Gender



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- 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

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## Positive Discrimination as an Exception



### Legitimate aim:

- May vary with the ground, but is codified for gender
- Objective contents
- Diversity per se is suspect

### Effective:

- Proven and genuine imbalance – How much? Where? Gradual reduction or just temporary?
- How effective? Perverse effects?

### Necessary:

- Alternatives? Cost/benefit? Narrowly tailored?

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## Alternative 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.

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## Alternative Pathway 2

### Effective Equality Rights = Substantive



#### 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.**

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## Alternative 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'

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## Alternative 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.

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## Alternative Pathway 4

### Substantive = Generous



#### 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.”

#### Rosenblatt (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.

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## Alternative Pathway 4

### Substantive = Generous



#### 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

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## On Ice, but not (yet) Dead, and Alive in MS




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Member States shall ensure that **listed companies** in whose **boards** members of the under-represented sex hold **less than 40 per cent of the non-executive director positions** make the appointments to those positions on the basis of a *comparative analysis of the qualifications of each candidate, by applying pre-established, clear, neutrally formulated and unambiguous criteria*, in order to **attain the said percentage** [...] in case of listed companies which are public undertakings.

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## Board Gender Balance Directive



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- Priority shall be given to the candidate of the under-represented sex if that candidate is **equally qualified as a candidate of the other sex in terms of suitability, competence and professional performance**, unless an objective assessment taking account of all criteria specific to the individual candidates tilts the balance in favour of the candidate of the other sex
  - Obligation to disclose qualification criteria upon request
  - Presumption of target violation if presumption of equal qualification

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## Legality



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- Objective contents of objectively addressing occupational difficulties: self-fulfilling prophesy or more?
  - Aim?
    - META: Functioning of the internal market
    - MACRO: Loss of economic growth potential
    - MICRO: Corporate governance and financial performance of the company
    - RESULT: achieve effective gender equality
  - *Effective? Proportionate? / Necessary?*

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## In Conclusion



- 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
  - The acquis on gender quota may well be outdated in either form or substance

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**Thank you**

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